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Can Hashtags be Registered as Trademark?

■ Mohit Wadhwa



Today, social media platforms have emerged as one of the most powerful marketing channels for brand owners, and hashtags have become a popular and effective marketing tool. Hashtags (#), which started with Twitter as a way to follow conversations on a particular topic are now being used in every social media platform. Today, the increasing use of hashtags has made it an important tool for driving interactions between consumers and the brands on social media. This has attracted many brand owners and companies, and have rushed to get the hashtags trademarked in an attempt to stake their claim over it.

Before we move on to discuss whether hashtags can be trademarked under the Trade Mark Acts, it is important to understand what is a hashtag. A hashtag is a phrase or a word that is preceded by the hash (#) sign, which is categorized the content of the accompanying text. Hashtags are now used mostly in social media to facilitate searches using keywords. In addition, the use of hashtags is making it easy for users to search trending topics on social media. These hashtags have also allowed businesses and brands to promote their services and products, engage with their audience, and share news.

POWER OF HASHTAGS

The question why are brands/companies rushing to get hashtags trademarked? Here are some of the advantages that hashtags can offer -

- Firstly, it makes online searches faster as

well as easier. The users are immediately led to the relevant conversation or topics of their interest. This helps the promoter to get relevant participants, which helps in converting these into actual sales and add on to the ROI (Return on Investment).

- Secondly, hashtags can be used as a tool in Viral Marketing, which is an advertising strategy wherein a controversial topic or issue is presented in a very exciting or interesting way such that thousands of others will immediately share and repost the information.

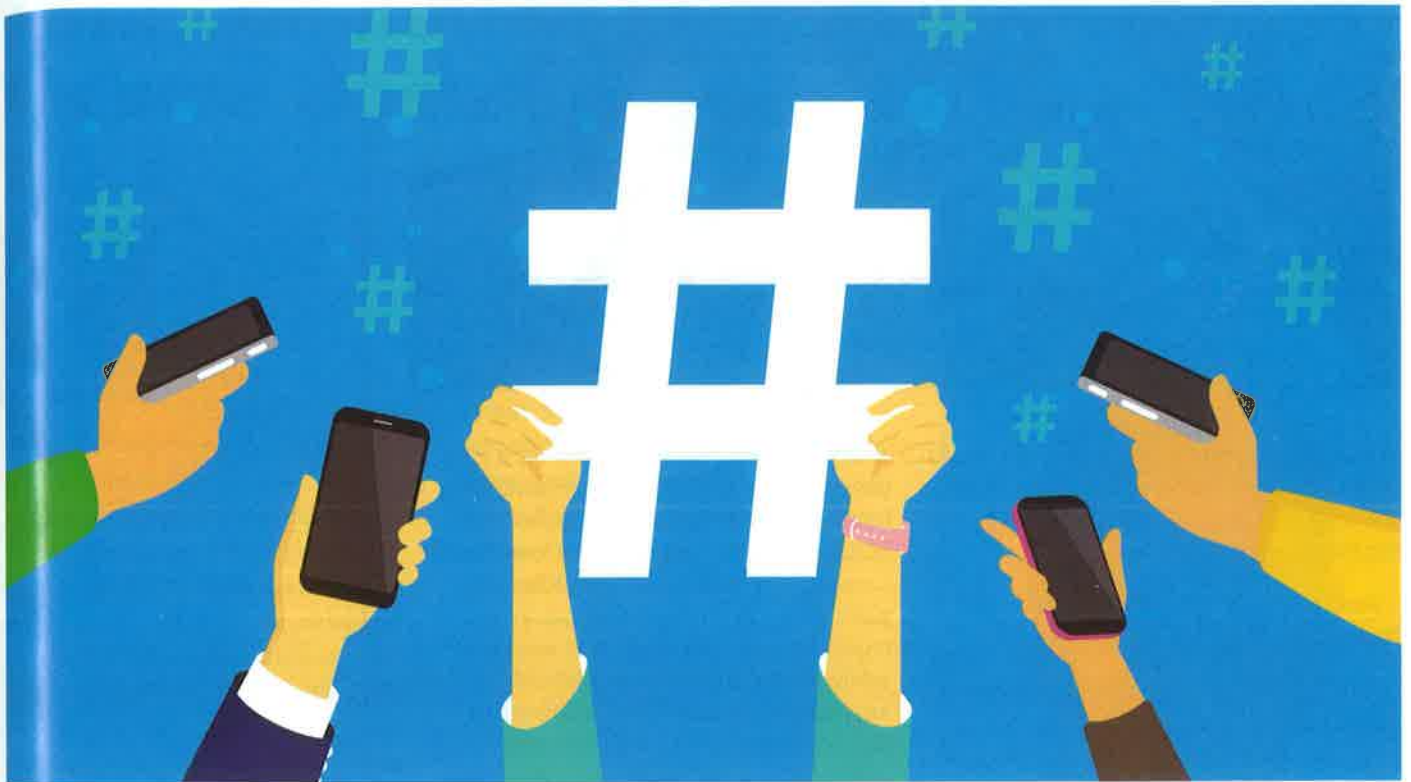
- Thirdly, it is often used by brands and companies to introduce a new product, launch a new campaign, get feedback from previous offers or spread the word about an upcoming event. This helps in better promotion of their products and services.

- Fourthly, it helps in driving business awareness. When a business uses a distinctive or custom hashtag, it helps people to remember their business and use the hashtag in their posts while referring to a particular brand or business. This without any doubt helps in creating awareness about the brand/business.

Owing to the several benefits of using hashtags, brands/businesses are showing interest in registering hashtags as a trademark. In the past 10 years, since the emergence of hashtags as an online marketing tool, interest in registering hashtag phrases or words as a trademark has escalated. As per recent¹ research by Clarivate Analytics (formerly Thomson Reuters CompuMark), the number of applications has spiked up by 64% in 2016 as compared to the number of applications in 2010, which was just 7.



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Furthermore, in recent years, about 2,200 applications to register hashtags as trademark had been filled globally.

In the year 2013, the United States Patent and Trademark Office (USPTO) had recognized words and phrases containing the hash symbol (#) or the term “hashtag” and allowed companies and brands to register such words and phrases as trademark “only if it functions as an identifier of the source of the applicant’s goods or services.”²

From the above, it is pretty much clear that words or phrases with #hashtags can be registered as a trademark in the US, but the question here is whether words or phrases containing hashtags can be registered in India?

HASH TAGS AS TRADEMARKS UNDER INDIAN TRADEMARK LAW

The primary question here is whether

hashtags can be registered as a trademark or not under the Indian Trade Marks Act, 1999.

Let us first analyse what is meant by a “mark” under the Trade Marks Act, 1999. Under section 2(m) of the Act –

“Mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof”

As per the above-mentioned definition, hashtags do qualify as a mark but in order to qualify as a trademark, it has to fulfill the required criteria mentioned in the definition of “trademark” under section 2 (zb) of the Indian Trade Marks Act, 1999, which states –

“Trade mark means a mark capable of being represented graphically and which

is capable of distinguishing the goods or services of one person from those of others and may include the shape of goods or their packaging and combination of colours”

For a mark to be qualified as a trademark, it has to meet the two conditions mentioned below:

1. Capable of being represented graphically;
2. Capable of distinguishing goods and services of one person from another.

When it comes to registering hashtags as a trademark, the first condition is easily met as hashtags are a combination of words and numeral, which can be graphically represented. However, the second condition is the final test for hashtags to qualify as a trademark and requires proper analysis of whether it is



distinctive and unique. Only when the words or phrases preceded by a hash symbol fulfills the second criteria, it can qualify to be registered as a trademark.

Furthermore, section 9 (1) of the Indian Trade Marks Act, 1999 states-

"The trademarks -which are devoid of any distinctive character, that is to say, not capable of distinguishing goods or services of one person from those of another -shall not be registered"

After considering Section 9 (1), it can be said that distinctiveness is one of the most important factors to get a mark registered as a trademark. Therefore, only those hashtags that are distinctive in nature can only be registered as a trademark under the Indian Trademark Act, 1999. But what does this distinctiveness mean?

THE ACT CLASSIFIES DISTINCTIVENESS INTO TWO CATEGORIES;

1. Inherent Distinctiveness
2. Acquired Distinctiveness

This classification makes it easier to identify whether the hashtag that a brand or a company or an individual wants to trademark qualifies for it or not. The hashtag that they want to register should be either inherently distinctive in nature because of being a newly invented word or

should be such, which is known for a long period of time and people start identifying its source solely through the hashtag.

Furthermore, it is imperative to know that if a common or generic word or phrase preceded by the hash symbol cannot be registered as a trademark. This is because, solely by putting the hash symbol (#) before any word or phrase will not attribute to its distinctiveness and hence, cannot be registered as a trademark under the Trade Marks Act, 1999.

Despite the increase in the number of applications for registering hashtags as a trademark, many still argue on whether hashtags should be registered as a trademark or not. Some are of the opinion that registering hashtags is actually not necessary because they do not have longer shelf-life and the trending topics die out within a short span of time. Whereas, some are of the opinion that it should be trademarked as it helps businesses and brands to market their goods and services in social media, create brand awareness as well as it helps in creating a monopoly in the market. This debate will go on forever. But the question here isn't whether it should be registered as a trademark or not. It is about whether hashtags can be registered as a trademark or not. And, the answer is YES! Provided it meets all the pre-requisites of a trademark. [W](#)



Mohit is currently working with Singh & Singh Law Firm as a Senior Associate and his practice areas include Trademark Prosecution & Opposition, and Cancellation Action before Intellectual Property Appellate Board & Copyright Prosecution. He also has a keen interest in Contract & Sports Law.

https://www.wipo.int/wipo_magazine/en/2017/05/article_0009.html, <https://medium.com/@adamcolefreedman/can-you-trademark-a-hashtag-4c38ee3ac755>