

# **COPYRIGHT FOR HASHTAGS: FACT OR FICTION**

Ritika Ranka and Jiss Alphonsa Joy\*

## **Abstract**

*All of us have said these words to our closed ones several times; 'In a world of algorithms, hashtags and followers, know the true importance of Human connections.' This may not seem too relevant here but the statement clearly captures the feeling that hashtags and its viral usage is indeed an important part of our lives. Which brings us to another important question, as to whether there is a need to regulate hashtags and if yes, how? The authors have tried to answer these questions through this article leaving it to the readers to decide and interpret and categorise hashtags as part of Intellectual Property Rights. Hashtags, these days have become insanely popular for commercial purpose as well as for providing a social message. The trend of hashtags has finally emerged in India owing to large scale participation by the general public to support a cause or message. This makes it an issue of concern as to who gets a right over this symbol and the wordplay created with it. This article tries to analyse the question of whether hashtags are intellectual property and if so, how exactly they will be considered as intellectual property. The article also discusses the current intellectual property laws that are applied in India and its comparative analysis with the United States of America to address the issue of hashtags with special reference to the United States Patent and Trademark Office (USPTO). The authors have also tried to look into the outlook that is presented by the World Intellectual Property Organisation (WIPO) when it comes to the registration of hashtags as trademarks. The article finally concludes with the discussion on hashtags as intellectual property in India as a matter of fact and not fiction by providing an appropriate conclusion to enable the readers to understand what follows and research further.*

## Introduction

Hashtags are a word or a phrase that follows the symbol hash (#) and are a popular social media tool that is used in order to identify a post easily.<sup>1</sup> Hashtags are primarily used in social media platforms like Facebook, Instagram and Twitter. It is a kind of metadata, i.e. a set of data that describes and gives information about other data. So, what it basically does is to form a link between all related data in a particular social media platform. A specific hashtag, for example, #sunrise will link all the pictures that have the same hashtag on Instagram, which makes it easy for the user to search all the pictures of the sunrise on Instagram. The use of hashtags has increased manifold over the past decade. The use of hashtags has also increased as it effectively makes the post more attractive in the eyes of others. Such usage has also attracted the practice of use of hashtags as an advertising tool by many.

### i) Under what category of Intellectual Property will hashtags fall under?

The question of what amounts to Intellectual Property is constantly evolving. With the constant evolution technology and the seemingly never-ending advancements, the question of what exactly can be included as an intellectual property comes to the forefront. The question of what kind of an intellectual property hashtag will be under is to be found out through an analysis of different kinds of intellectual property rights.<sup>2</sup> Intellectual property can be divided into three.<sup>3</sup> They are: Copyrights, Patents, and Trademarks. The first kind of Intellectual Property that we will analyse is copyrights. Black's Law Dictionary defines copyright as the right in the literary property as recognized and sanctioned by law. It is an intangible right provided to the author or creator of certain literary or artistic work whereby he is entrusted with the singular and exclusive right of publishing and distributing copies of it for a specific period of time.

Section 14 of the Copyrights Act, 1957 defines copyright. The Section provides the right of copyright over literary, dramatic or musical work, artistic work, cinematograph film, and in case

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\* Students, 4th Year B.A.LL.B. (Hons.), The National University of Advanced Legal Studies, Email Id: Kochi, ritikaranka98@gmail.com, alphonsa.jiss@gmail.com

<sup>1</sup> Claire Jones, *Hashtag Trademarks: What Can be Protected?* WIPO (Oct 2017), [https://www.wipo.int/wipo\\_magazine/en/2017/05/article\\_0009.html](https://www.wipo.int/wipo_magazine/en/2017/05/article_0009.html).

<sup>2</sup> Kashish Khattar, *Can A Hashtag be Protected under Trademark law?* IPLEADERS (May 31, 2018), <https://blog.ipleaders.in/hashtag-trademark-law/>.

<sup>3</sup> CORNISH, LEWLYN & APLIN, *INTELLECTUAL PROPERTY: PATENT, COPYRIGHTS, TRADEMARKS & ALLIED RIGHTS* (8<sup>th</sup> ed. 2013).

of sound recording. A proper perusal of the Section 14 and the definition that is given above makes it crystal-clear that hashtags will not fall under copyrights. The second group of Intellectual property that needs to be analysed is 'Patents'. Patents refer to a grant of some privilege, property or authority made by the Government or the Sovereign of a country to one or more individuals. The instrument by which such grant is made is known as Patents. Section 2(m) of the Patent Act of 1970 defines what a patent is. So, a patent put plainly can be understood as an invention which is the combination of capital and labour with intellect to create something new and useful. This invention becomes the inventor's exclusive property when a patent is granted. The patentee's exclusive proprietary right over the invention is an intellectual property right. So, for a patent to be granted, there needs to be an invention. In the case of hashtags, no invention is taking place. So clearly hashtags do not come under Patents.

The third group of intellectual property is a trademark. Article 15(1) of the TRIPs agreement defines trademark. It says that any sign or combination of signs capable of distinguishing one goods or services from those of other entities may constitute a trademark. According to Section 2(1) (zb) of the Trade Marks Act of 1999, a trademark is defined as a label capable of being graphically depicted and competent of identifying one person's goods or services from others, including the nature, branding and colour variant of goods. A hashtag is a hash symbol that is followed by a word or a phrase. The criteria that need to fulfil for something to be considered a trademark is given above. The features that constitute hashtags can be fit into these criteria. The analysis as to how exactly hashtags are Intellectual property under trademarks will be discussed in detail further ahead in this article.

### **The Analysis of Trade Marks Act, 1999 with Relation to Hashtags**

The Trade Marks Act, 1999 was enacted in view of developments in trade and trade practices, increased industrialization, the need to foster investment flows and technology transfer, the need to simplify and harmonize trade mark management systems and to give effect to important judicial decisions. The Trade Marks Act, 1999 is a statute which is very extensive and elaborate. In the Act, the term 'Mark' is defined under Section 2(1) (m). It states that, Mark includes a product, a brand, a heading, a logo, a stamp, a sign, a phrase, a symbol, a number, a merchandise type, a manufacturing process or a colour or any variation thereof.

In a subsequent Section 2(1) (zb), the term ‘Trademark’ is defined as follows, A trademark is defined as a label capable of being graphically depicted and competent of identifying one person's goods or services from others, including the nature, branding and colour variant of goods. Both the terms are well defined and increase the ambit of what can be considered as a trademark. So here let’s examine exactly how hashtags will come under the title of trademarks. The term ‘Mark’ in its definition includes word or numeral, or a combination of the word and numerals. Hashtag clearly fulfils the criteria to qualify as a Mark. When it comes to the definition of ‘Trademark’ on the other hand, the definition can be split into two parts for better understanding. The first part of the definition says that for something to be constituted as a trademark, it should be competent for graphic representation. The second part of the definition says that the mark should be capable of distinguishing the goods or services of a person from another, i.e. it should lead to identification. The first part of the definition is easily satisfied by hashtags, i.e. a graphical representation of hashtags can be made. The second part of the definition, which states that the mark should enable the goods to be identified is the tricky bit. Hashtags are common in the present world. Rarely so something is posted in a social media platform without the use of hashtags as it is considered as essential by the millennials if they want their post to gather more attention and positive remarks.<sup>4</sup> Moreover, the time period for which a certain hashtag is used is often short. In India, for instance, the trademark is granted for a period of 10 years. But the question comes in why to trademark a hashtag if only it is going to last for a small period. According to the second part of the definition, the mark should enable the customer to identify the source. So, if a hashtag enables a customer to identify the source, then it will fulfil the second part of the definition and can be given the tag of the trademark. And when the question of shelf life of the hashtag is put forward, if a certain hashtag enables the customer to identify the source, then such a hashtag will remain in usage with the continued existence of the social media platform. Another aspect that needs to be looked into before hashtags can be taken into consideration for trademarks is whether such a hashtag is distinctive. The factor that contributes to identifying a trademark is its distinctiveness. So, it can be understood that distinctiveness is a contributory factor if the hashtag must be recognized as a trademark under the second part of the definition.

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<sup>4</sup> Himanshu Sharma, *India: Trending In IP: #Hashtags*, MONDAQ (April 7, 2017), <http://www.mondaq.com/india/x/583710/Trademark/Trending+In+IP+Hashtags>.

Additionally, the Trade Mark Act states that,<sup>5</sup> Trademarks which do not have any unique identity, i.e. which may not differentiate between goods or services of one person with those of another, shall not be registered. Here, the usage of ‘shall not’ must be noted. This will amount to be an absolute prohibition on the registration of a trademark if it cannot be distinctive. So, if it can be shown that a hashtag is distinctive, then it can be registered under the Trade Marks Act, 1999.

### **The United States Patent and Trademark Office (USPTO)**

According to the USPTO,<sup>6</sup> a trademark is a name, expression, emblem or design that defines and distinguishes the source of a product from that of another product. So, in order for a hashtag to be registered in the United States, it should be a source identifier and also distinctive. The registration of hashtags is now a common practice in the United States of America. But the criteria, as stated above, must be strictly satisfied. The decision of which hashtags need to be granted trademark will be decided on a case by case basis. In the US, the process to get a trademark registered lasts up to a period of 8 months. So, before applying for a trademark for a hashtag, the shelf life of that will have to be investigated as normally hashtags don’t have long term validity.<sup>7</sup> An important judgment that was given out in the US in relation to hashtags was *Eksouzian v Albanese*.<sup>8</sup> This decision created uncertainty as to whether hashtags registered has any enforceable value. In this case, the Court held that the use of a certain hashtag by one of the parties did not amount to a breach of the settlement agreement “*because hashtags are merely descriptive instruments, not standardized or otherwise identifiers, in and of themselves*”. The Court faced criticisms because it failed to consider whether a hashtag may function as a source identifier within the USPTO standard. The decision rendered by the Court in this matter has led to confusion as to the function of the hashtag as a trademark and the validity of it.

### **World Intellectual Property Organization (WIPO) ON HASHTAGS**

The WIPO, in an article published on its official website, mentioned that according to recent research, there had been a substantial increase in the applications for trademark-specific

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<sup>5</sup> Trade Marks Act, 1999, § 9, No. 47, Acts of Parliament, 1999 (India).

<sup>6</sup> *Trademark, Patent, or Copyrights?*, USPTO <https://www.uspto.gov/trademarks-getting-started/trademark-basics>.

<sup>7</sup> Carrie L. Kiedrowski & Charlotte K. Murphy, *Are Hashtags Capable of Trademark Protection under U.S. Law?* (Feb 1, 2016), INTA, <https://www.inta.org/INTABulletin/Pages/AreHashtagsCapableofTMProtectionunderUSLaw.aspx>.

<sup>8</sup> *Eksouzian v. Albanese*, CV 13-00728-PSG-MAN, 2015 U.S. Dist.

hashtags over the past decade. In the year 2010, the number of such applications was seven, and in the year 2016, the number of such applications was around 2200. So, it can be noted that within a short span of 6 years, the number of trade-mark-specific hashtags has increased drastically. The WIPO has attributed to this drastic increase in the application to the extensive usage of hashtags on the various social media platforms. The fact that hashtags play a specific role in promoting interest and reactions to a product or service cannot be overlooked. The usage of the symbol by a large population which mainly comprises of the younger generation, which forms a significant portion of the current market has also contributed to the rise in the trademark-specific hashtags. Such a symbol would facilitate the younger generation who are constant social media users to identify a certain product or service with the assistance of these hashtags. So, hashtags are a very important marketing tool in today's world.

## **Conclusion**

The authors would like to point out that the usage of hashtags as a marketing tool by certain enterprises is a good idea to boost sales as it gives the product or service lots of coverage in various social media platform. The trademarking of certain hashtags to ensure that they only point to a certain product or service seems necessary in some situations since the role played them in promotion is quite large. But the question on how to ensure that only those hashtags should be trademarked comes with a plethora of other questions. Numerous factors need to be considered when an application is presented for trademarking a hashtag. This will include the distinctiveness of the hashtag, the source-identifying capability, the shelf life of the hashtag etc. Hashtags have a short life commonly. So, if at all a hashtag needs to be registered also comes into question. In answering this question, a thorough investigation must be conducted. For example, Nike put up its tagline as its hashtag, i.e. #justdoit. The tagline has been used by Nike since 1988. So, the use of such a tagline as its hashtag has made it unique, and such a hashtag clearly points out to Nike. Since this phrase has been used by Nike for a long time, it can be reasonably presumed that it will keep using it in the future as well. So, clearly, that phrase is not going anywhere. And this guarantees a long shelf life to that hashtag. So, all these factors must be kept in mind before a hashtag is registered as a trademark, and it being a trademark has to be protected under the law both nationally and internationally.