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Tagmarks

Alexandra J. Roberts*

Hashtags are trending, and not just on social media. By 2016, producers had federally registered hundreds of hashtags as trademarks and asserted exclusive rights in thousands of others. But by failing to pay close attention to context and consumer perception, the USPTO may have overlooked issues that render many hashtag trademarks (“tagmarks”) unregistrable. This Article provides a history and taxonomy of hashtags and explores the protectability problems that plague tagmarks. Rather than sweeping generalizations about their status, tagmarks require nuanced analysis that takes into account their use, distinctiveness, and history in order to more accurately determine whether and when they merit protection as marks. To strike a better balance among the competing trademark concerns of consumer protection, producer reward, and speech, the USPTO should revise its examining procedures to mandate that every tagmark be categorized as “primarily merely a hashtag” until an applicant can establish that its mark actually functions as a source-indicator.

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INTRODUCTION

From Kentucky Fried Chicken’s #HowDoYouKFC campaign to viral fundraiser #IceBucketChallenge to Instagram phenomenon #TBT, hashtags¹ as trademarks—I call them “tagmarks”²—are having a moment. Given the amount of resources that brands invest in marketing via social media, and specifically in

Meeting Scholarship Symposium, the 2016 USPTO Chief Economist’s Visiting Speaker Series, and the 2017 St. John’s Intellectual Property Colloquium.

1. A hashtag is a string of characters preceded by a hash symbol (#)—such as #BlackLivesMatter or #selfie—traditionally used on social media to tag and link content. See Rebecca Hiscott, *The Beginner’s Guide to the Hashtag*, MASHABLE (Oct. 8, 2013), <http://mashable.com/2013/10/08/what-is-hashtag/#IgdqnGIJOkqP> [<https://perma.cc/N5WV-PSWC>]. Part I provides a taxonomy of hashtags and discusses the roles they play online and off.

2. Alexandra J. Roberts, *Your Favorite Hashtag Might Secretly Be a Registered Trademark*, BUZZFEED (Feb. 7, 2016, 5:10 PM), <http://www.buzzfeed.com/alexandrajr/your-favorite-hashtag-might-secretly-be-a-register-245se> [<https://perma.cc/6TRT-YDPN>]; Alexandra J. Roberts, *Hashtags Are Not Trademarks—Eksouzian v. Albanese*, TECH. & MARKETING L. BLOG (Aug. 26, 2015), <http://blog.ericgoldman.org/archives/2015/08/hashtags-are-not-trademarks-eksouzian-v-albanese-guest-blog-post-2.htm> [<https://perma.cc/A4UC-3KUA>].

choosing and using hashtags,³ it's not surprising that some players have begun to seek federal trademark registration⁴ for their hashtags. By the end of 2015, companies had successfully registered more than two hundred tagmarks,⁵ and sought protection for over a thousand others; the United States Patent and Trademark Office (USPTO) granted more tagmark registrations in that year than it did in every previous year combined.⁶ But can a hashtag really be a trademark? This Article argues that because consumers are primed to perceive a hashtag primarily as a tool for search, organization, or self-expression on social media, any trademark meaning that might attach to a hashtag is necessarily a secondary meaning.⁷ As such, even tagmarks comprising suggestive or arbitrary terms will

3. See Denise Lee Yohn, *Use Hashtags to Generate Greater Brand Engagement*, FORBES BLOG (Feb. 18, 2015, 5:10 AM), <http://www.forbes.com/sites/deniseyohn/2015/02/18/use-hashtags-to-generate-greater-brand-engagement> [<https://perma.cc/8Z79-DVTR>].

4. Most of the two hundred tagmarks registered as of 2015 appear in the Principal Register, the primary register of trademarks in the United States. See App. A & note 5. Federal registration on the Principal Register confers a number of benefits, including presumptions of validity and ownership. 15 U.S.C. §§ 1111, 1121, 1057(b) (2012); see INT'L TRADEMARK ASS'N (INTA), FACT SHEET: SELECTING AND REGISTERING A TRADEMARK (Apr. 2015), <http://www.inta.org/TrademarkBasics/FactSheets/Pages/PrincipalvsSupplementalRegister.aspx> [<https://perma.cc/B8D9-9QKN>].

5. From the first registered tagmark in 2012 through the end of 2015, 170 tagmarks and twenty-three design marks incorporating hashtags were registered on the Principal Register and twenty-one word and design marks on the Supplemental Register. Of those, 147 of the applications were use-based (§ 1A), sixty-one were originally filed based on an intent to use under § 1B, and only six were filed under § 44(d) (based on an earlier filed foreign application), § 44(e) (ownership of a registration of the mark in the applicant's country of origin), or § 66 (extension of protection of a "Madrid system" registration). To identify the relevant pool of marks, we searched using "Trademark Electronic Search System" (TESS), the USPTO's online trademark search database. The free-form search for *#* and LIVE [LD] and 'RD > '19800000' resulted in all live, registered marks since 1980 with the hash symbol. We then narrowed the pool of marks by identifying only those that look like hashtags—marks that start with a # (including those followed by a space or other character) or marks that have a # in the middle in a way that reads like a hashtag. Marks that appeared to use the # symbol as a number sign, a pound sign (as for telephonic use), or as part of a set of punctuation marks indicating expletives were omitted consistent with Trademark Manual of Examining Procedure (TMPEP) § 1202.18 (2015) ("If the hash symbol immediately precedes numbers in a mark (#29 JONES, THE #1 APP, # TWELVE, etc.), or is used merely as the pound or number symbol in a mark (e.g., ICHIBAN#), such marks should not necessarily be construed as hashtag marks. This determination should be made on a case-by-case basis."). While TMPEP § 1202.18 groups those marks that contain the word "hashtag" with those that contain the hash symbol, this paper focuses on the latter category and omits the former category of marks from its review.

6. Using the criteria described in note 5, we determined the number of tagmark registrations per year is as follows: 2010: 2; 2011: 2; 2012: 7; 2013: 15; 2014: 65; 2015: 109.

7. Federal trademark law treats some categories of trademarks as inherently distinctive: it assumes that consumers will automatically perceive those types of marks as source indicators from their very first use with goods or services. It classifies other types of marks—specifically, marks that are descriptive for the goods or services with which they are used—as not inherently distinctive, but capable of becoming distinctive to consumers over time, based on use and familiarity. Because consumers are presumed to perceive those marks initially as merely describing some characteristic or feature of the goods or services at issue, and only later to understand them as trademarks, the marks' eventual resonance as trademarks is known as "secondary meaning" or "acquired distinctiveness." I argue that, just as consumers will initially perceive a descriptive phrase as merely describing goods and only later as a trademark, so will consumers initially perceive a tagmark as initially serving only a hashtag function.

not inherently serve as trademarks and should only be protectable and registrable upon a strong showing of secondary meaning.

A trademark is a source indicator: it communicates to consumers the source of goods,⁸ or simply the idea that goods bearing the mark share a common source, and consumers relying on that mark can expect consistency. The USPTO examines applications⁹ in part to ensure that registered terms and phrases are used as trademarks and actually function as trademarks.¹⁰ However, a careful review suggests that some or all of those two hundred registered trademarks¹¹ ought to have been refused registration.¹² In 2013, the USPTO amended its guide for examiners, the Trademark Manual of Examining Procedure (TMEP), to specify that the inclusion of a hash symbol (#) at the front of a mark does not render the mark more distinctive¹³ than it would be without it.¹⁴ Yet the TMEP ignores the possibility that the opposite is true—that the addition of a hash symbol not only fails to elevate a descriptive or generic term or phrase into an inherently distinctive mark, but also has the potential to render an otherwise

Over time though, consumers' perception may expand to encompass a secondary meaning for those hashtags as they come to view them as trademarks.

8. Under an earlier view of trademarks, "source" was understood technically, to mean the identity of the individual or company who manufactures, sells, or provides the goods or services and stands behind them. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:8 (4th ed. 2014). The modern view construes source indication more broadly: "What [courts] mean by such expression is that the purchaser of goods bearing a given label believes that what he buys emanated from the source, whatever its name or place, from which goods bearing that label have always been derived." *Manhattan Shirt Co. v. Samoff-Irving Hat Stores*, 164 A. 246, 250 (1933).

9. For a detailed explication of the examination and registration process, see Melissa Wasserman, *What Administrative Law Can Teach the Trademark System*, 93 WASH. U. L. REV. 1511 (2016).

10. A trademark is any text or symbol used in connection with goods or services to indicate source or distinguish a user's products from those of its competitors. 15 U.S.C. § 1052 (2012); 74 AM. JUR. 2D TRADEMARKS & TRADENAMES § 1 (2012); 1 MCCARTHY, *supra* note 8, § 3:9.

11. This Article uses "trademarks" and "marks" as shorthand encompassing both trademarks and service marks. "Word marks" refers specifically to terms or phrases that serve as trademarks or service marks, rather than symbols, images, trade dress, or other matter protectable under trademark law.

12. The most relevant bases for refusing registration under the Lanham (Trademark) Act are discussed extensively *infra* in Part II. Note that the trademark examination process is not an adversarial one. Third-party opposition is possible during a limited window after an application is examined and the mark is published. 15 U.S.C. § 1051; TMEP § 1503.01; *see also* Barton Beebe, *Is the Trademark Office a Rubber Stamp?*, 48 HOUS. L. REV. 751, 762, 773 (2011); Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867 (2017).

13. Distinctiveness refers to a trademark's ability to distinguish a mark owner's products from those of competitors, i.e., to signal to consumers that a word or phrase is being used as a trademark. Word marks are typically categorized as inherently distinctive (likely to be perceived as a trademark from the very first use), capable of acquiring distinctiveness (protectable only upon a showing that the word or phrase has become distinctive), or generic (not protectable as a trademark). *See* *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9–10 (2d Cir. 1976). Distinctiveness is discussed at length in Part II *infra*.

14. TMEP § 1202.18 ("The addition of . . . the hash symbol (#) to an otherwise unregistrable mark typically cannot render it registrable. . . . [I]f a mark consists of the hash symbol . . . combined with wording that is merely descriptive or generic for the goods or services, the entire mark must be refused as merely descriptive or generic.").

protectable mark unprotectable by converting it from a viable trademark into a mere hashtag. In addition, it ignores the ways in which tagmark use often differs from nonhashtag trademark use, making traditional principles less applicable. A review of the file wrappers¹⁵ for registered tagmarks reveals that USPTO attorneys are not applying uniform principles in evaluating the use, distinctiveness, and registrability of those marks.¹⁶ It is little wonder given that tagmarks pose a new set of challenges and span a broad range of contexts and uses.¹⁷ In the wake of several federal district court cases, practitioners call the legal status of tagmarks “murky”¹⁸ and predict more battles to come.¹⁹ Courts are just beginning to provide some guidance, but their insight is limited and inconsistent; one recently opined that a hashtag use was not an actionable trademark use,²⁰ while another acknowledged that using a hashtag could deceive consumers in violation of the Lanham Act.²¹

Although the TMEP guidelines—ignore the hash symbol and evaluate the text as one would any other mark—seem reasonable, their drafters failed to pay adequate attention to the manner in which hashtags are actually used and the ways in which the hash symbol shapes consumer perception and undermines the tagmark’s ability to function as a mark. First, registration is barred for matter²²

15. A trademark file wrapper contains its prosecution history, including initial application, office actions and responses, specimens, USPTO correspondence, and registration and post-registration papers. MPEP § 719 (9th ed. 2015).

16. Given that it has a “large number of low-ranking officials making hundreds of thousands of decisions each year, [the USPTO] must have mechanisms to ensure consistency in its determinations across decision makers.” Wasserman, *supra* note 9, at 1540.

17. Of course, tagmarks are not unique in this respect—trademark protection and registration for vanity phone numbers and domain names as well as trademark disputes over social media user handles raise many of the same issues. See TMEP § 1209.03(m); Lisa Dame, *Confusingly Dissimilar Applications of Trademark Law to Vanity Telephone Numbers*, 46 CATH. U. L. REV. 1199, 1200–03 (1997).

18. Natalie S. Lederman, *#Hashingitout: Is It Worth Registering a Hashtag?*, LEXOLOGY (Jan. 9, 2015), <http://www.lexology.com/library/detail.aspx?g=2c83a67a-aac6-4bd9-8170-41b661a8c6d9> [<https://perma.cc/B6VM-C876>] (citing Linda Goldstein, *Outside Voices: Top 3 Legal Issues Facing Marketers In 2015*, WALL STREET J. BLOG (Dec. 31, 2014, 10:06 AM), <http://blogs.wsj.com/cmo/2014/12/31/outside-voices-top-3-legal-issues-facing-marketers-in-2015> [<https://perma.cc/N3R5-62XA>]); see also John Glenday, *Coca-Cola Moves to Trademark #Cokecanpics and #Smilewithacoke Hashtags*, DRUM (Jan. 9, 2015, 9:08 AM), <http://www.thedrum.com/news/2015/01/09/coca-cola-moves-trademark-cokecanpics-and-smilewithacoke-hashtags> [<https://perma.cc/S8RQ-WTD5>] (noting that the legal status of tagmarks is “something of a grey area”).

19. Carolyn S. Toto & Kimberly Buffington, *Hashtags, Trademarks and One #ProudMama*, LEXOLOGY (Dec. 29, 2015), <http://www.lexology.com/library/detail.aspx?g=9e8e663c-1457-432f-810a-84ff6e3e0ae7> [<https://perma.cc/ZR33-Z69E>].

20. *Eksouzian v. Albanese*, No. CV 13-00728-PSG-MAN, 2015 WL 4720478, at *8 (C.D. Cal. Aug. 7, 2015).

21. *Fraternity Collection, LLC v. Fagnoli*, No. 3:13-CV-664-CWR-FKB, 2015 WL 1486375, at *4 (S.D. Miss. Mar. 31, 2015).

22. “Matter” in the Lanham Act refers to anything—words, logos, packaging, product configuration, etc.—that functions as a trademark.

that is considered functional.²³ When tagmarks are used online and hyperlinked to other data, they operate as indexing devices, not (or not only) source indicators. Second, the traditional test for distinctiveness places word marks in one of several categories and treats those that are deemed fanciful, arbitrary, or suggestive as inherently source-indicating—it assumes consumers will perceive those terms as trademarks from their earliest uses.²⁴ A closer look at tagmarks reveals that most would be categorized as technically suggestive but are, in fact, highly unlikely to be viewed by consumers as inherently distinguishing the tagmark owner's products from the products of his or her competitors. In other words, despite what *Abercrombie* and its progeny mandate,²⁵ most tagmarks are suggestive without being inherently distinctive. Third, to be protectable, a term or phrase must be used in commerce *as a mark* in connection with specific goods or services;²⁶ tagmarks are often used merely as descriptive slogans, organizational tags, or invitations to join a discussion on social media. They should therefore be refused protection based on their failure to function as marks. Fourth, a service mark must be used or displayed in the sale or advertising of services to garner protection, but tagmarks are more likely than other service marks to fail to meet this standard. Fifth, the Lanham Act bars registration of a trademark that creates a false association with a group or individual²⁷ or a likelihood of consumer confusion with another mark.²⁸ Hashtags are often fan-created, and a number of tagmark applicants have sought protection for marks that reference known teams, people, groups, or brands, and thus run afoul of section 2(a), 2(c), or 2(d) prohibitions. Finally, trademark law prohibits the registration of common slogans and other words and phrases incapable of identifying a single source in the minds of consumers.²⁹ Many hashtags arise organically in concert with social movements or in response to current events, and they reflect the multiplicity of meanings given to them by hundreds or thousands of users.

23. 15 U.S.C. § 1052(e)(5) (2012); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995). The functionality bar is discussed *infra* in Part II.

24. Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2130–32 (2004).

25. *Abercrombie & Fitch Co. v. Hunting World, Inc.* famously set forth five categories of trademarks: fanciful, arbitrary, and suggestive marks are all classified as inherently distinctive; descriptive terms or phrases are not inherently distinctive, but are capable of acquiring distinctiveness based on use and thus becoming protectable trademarks; generic terms are neither inherently distinctive nor capable of acquiring distinctiveness, so they cannot become protectable trademarks. *See id.* That schema is known as the *Abercrombie taxonomy*, *Abercrombie spectrum*, or *Abercrombie inverted pyramid*, and it continues to shape trademark distinctiveness, strength, and protectability assessments to this day.

26. 15 U.S.C. § 1127 (2012); *see also* GARY D. KRUGMAN, TRADEMARK TRIAL AND APPEAL BOARD PRACTICE AND PROCEDURE § 2:97 (Jan. 2017 Update); 1 MCCARTHY, *supra* note 8, § 3:3.

27. 15 U.S.C. § 1052(a).

28. § 1052(d).

29. *See* TMEP § 1213.05(b)(i).

A history and taxonomy of hashtags is crucial background for considering tagmarks' quality³⁰ and the conditions under which they function as source indicators; this Article provides one in Part I. But the problems in granting trademark protection for hashtags also transcend those categories, as will be evident in Part II. The most fundamental challenge in protecting tagmarks, their use and consequent ability or inability to function as distinctive source indicators and not merely hashtags based on that use, is explored in Part II. Part II also highlights the limitations of the traditional *Abercrombie* categories for trademark distinctiveness and the importance of context in assessing protectability. Part III considers how the doctrines in Part II map on to the different categories of hashtags and explores their ramifications for stakeholders, including producers, marketers, consumers, citizens, journalists, lawmakers, and the USPTO. Part III thus advocates that the USPTO and courts categorically treat every tagmark as "primarily merely a hashtag,"³¹ requiring technical use and secondary meaning for trademark protection. It also takes a step back to highlight how tagmarks, as a new form of identifier, provide a case study in the way that trademark meaning is created. In so doing, it demonstrates the need for trademark law to evolve in order to keep pace with changing business practices and consumer perceptions. Part IV concludes.

I.

A TAXONOMY OF HASHTAGS

A number of doctrines provide bases for refusing to register tagmarks as trademarks, including functionality, distinctiveness, use as a mark, use with services, false association, and ability to indicate a single source. These potential pitfalls do not apply equally across tagmark types. Tagmarks range from those physically affixed to goods to those used solely on social media. A taxonomy of hashtags is a necessary starting point in understanding where hashtags come from, how they are used, and how tagmarks differ from traditional marks. The following Section provides a brief history of hashtags and divides them into four categories: producer-selected, marketer-deployed, consumer-generated, or citizen-created. This taxonomy lays the groundwork for an analysis of tagmarks and the particular protectability hurdles to which they are most prone.

A hashtag is a string of characters comprising a hash symbol and a sequence of letters, whether an acronym, a word, or a phrase.³² It adds a label to a comment, image, video, or any other type of content, enabling users to search

30. See Beebe, *supra* note 12, at 752 n.1 (adopting the idea of "quality" from patent scholarship and defining trademark quality as "the reliability of registration status as an indication of actual trademark validity"); see also Tushnet, *supra* note 12, at 869 ("Improperly granted registrations are harmful even from the perspective of the greatest trademark expansionists.").

31. This proposal echoes language found elsewhere in the Lanham Act, specifically in those sections requiring secondary meaning for registration of a mark that is "merely descriptive," "primarily merely a surname," or "primarily geographically descriptive." 15 U.S.C. § 1052(e)(1)-(2), (4).

32. See TMEP § 1202.18 ("Hashtag Marks"). Hashtags can also include numbers.

for other posts containing the same uniform sequence of characters by clicking on the tag or typing it into a search box.³³ While Twitter divulges only that hashtags were “created on Twitter,”³⁴ the invention of the hashtag is often credited to developer Chris Messina, who first proposed to Twitter that users employ the # symbol to group Tweets on the same topic and make conversations easier to follow.³⁵ After Twitter rejected the idea, Messina pitched it to citizen journalists covering forest fires in San Diego; #SanDiegoFire took off,³⁶ and so did hashtags. They are now supported on myriad social networking sites, including Facebook, Instagram, Pinterest, Vine, Flickr, Google+, YouTube, Kickstarter, Delicious, and Tumblr.³⁷

Non-social media platforms also support hashtags. Auction site eBay employs “smart hashtags” that populate when users share items from eBay on social media.³⁸ Amazon recently rolled out #AmazonCart, enabling customers to automatically purchase items on Amazon by using a hashtag on Twitter.³⁹ Marketers use hashtags across and beyond social media platforms to launch campaigns, share information, generate discussion, engage customers, and increase loyalty. Consumers, in turn, use hashtags to engage with producers and other consumers, offer feedback, praise or criticize products, express themselves, and promote their content. Journalists and the public use hashtags to disseminate news, engage in activism, tag content relating to a particular topic, and append additional commentary. Hashtag use continues to shift and expand, both online

33. Jana Herwig, *Liminality and Communitas in Social Media: The Case of Twitter*, Internet: Critical Internet Research 10.0 (Oct. 7–10, 2009) (conference paper, Milwaukee).

34. *Using Hashtags on Twitter*, TWITTER HELP CENTER, <https://support.twitter.com/articles/49309#> [<https://perma.cc/97K8-Y5ML>] (last visited Feb. 24, 2017); see also Jeff Huang, Katherine Thornton & Efthimis N. Efthimiadis, *Conversational Tagging in Twitter* (July 2010) (conference paper, University of Washington), http://jeffhuang.com/Final_TwitterTagging_HT10.pdf [<https://perma.cc/3AGH-WEST>] (“One year after Twitter went live, members of the community, without involvement or support from Twitter administrators, began tagging their Tweets.”).

35. Liz Gannes, *The Short and Illustrious History of Twitter #Hashtags*, GIGAOM (Apr. 30, 2010, 4:44 PM), <https://gigaom.com/2010/04/30/the-short-and-illustrious-history-of-twitter-hashtags> [<https://perma.cc/J7LS-5AT6>]; Rebecca Hiscott, *The Beginner’s Guide to the Hashtag*, MASHABLE (Oct. 8, 2013), <http://mashable.com/2013/10/08/what-is-hashtag> [<https://perma.cc/42SE-UW75>]; Elana Zak, *How Twitter’s Hashtag Came to Be*, WALL STREET J. (Oct. 3, 2013, 5:54 PM), <http://blogs.wsj.com/digits/2013/10/03/how-twitters-hashtag-came-to-be> [<https://perma.cc/2WAF-AMVP>].

36. See, e.g., Hiscott, *supra* note 35.

37. Michael Patterson, *How to Use Hashtags on Every Social Media Network*, SPROUTSOCIAL (Aug. 15, 2014), <http://sproutsocial.com/insights/how-to-use-hashtags> [<https://perma.cc/TY6U-6DFY>]. For basic introductions to the hashtag and the roles it plays on some of the major social media sites, see Hiscott, *supra* note 35.

38. Michelle Kung, *eBay Launches Smart Hashtags for Social*, EBAY (Mar. 5, 2014), <https://www.ebayinc.com/stories/news/ebay-launches-smart-hashtags-social> [<https://perma.cc/5AVT-6XJ7>].

39. Donna Tam, *Why Amazon Wants You to Use Twitter Hashtags to Shop*, CNET (May 6, 2014, 6:15 PM), <http://www.cnet.com/news/why-amazon-wants-you-to-use-twitter-hashtags-to-shop> [<https://perma.cc/3RJS-3QL3>].

and offline. Online, hashtags are used in an increasingly broad range of ways.⁴⁰ Offline, hashtags have begun to appear everywhere from magazines, billboards, and television shows⁴¹ to buildings, product packaging,⁴² college acceptance letters,⁴³ bathing suits,⁴⁴ and the 25-yard-line of a football stadium.⁴⁵

Marketers are increasingly turning to social media to advertise to and engage with consumers directly. The hashtag, initially a way for social media users to group content and filter conversations,⁴⁶ dominates Twitter—97 percent of the top one hundred brands that posted a tweet in the fourth quarter of 2014 included a hashtag.⁴⁷ Hashtags play an increasingly important role on other platforms, including Facebook and Instagram. Corporations have begun staffing

40. See *id.*; Vyvyan Evans, *#Language: Evolution in the Digital Age*, *GUARDIAN* (June 26, 2015, 2:32 PM), http://www.theguardian.com/media-network/2015/jun/26/hashtag-language-evolution-digital-age?CMP=share_btn_tw [<https://perma.cc/9FXV-4C55>] (discussing the changing meaning of hashtags as reflected by children under thirteen, who used hashtags to add emphasis or signal commentary within the context of short stories they submitted to a radio competition). Evans, a linguist, argues that the hashtag is “a symbolic, rather than an iconic” sign, and, as such, is “more readily open to change.” *Id.*

41. Showrunners for ABC Family’s drama “Pretty Little Liars” are particularly adept at incorporating hashtags into the show itself, prompting the show’s loyal viewers to make liberal use of their second screens during and after each episode. See @PLLTVSeries Twitter account, <https://twitter.com/PLLTVSeries> [<https://perma.cc/7RBF-TCE9>] (last visited Mar. 3, 2017); see also, e.g., Kimberly Eller, *ABC Family’s Pretty Little Liars Has Mastered the Social Media Game*, *CAPSTRAT*, <https://www.capstrat.com/posts/abc-familys-pretty-little-liars-has-mastered-social-media-game> [<https://perma.cc/J9PL-4MXM>] (last visited Feb. 24, 2017) (“‘Pretty Little Liars’ was the most-tweeted cable TV show in 2012. When the show returned in 2013, it accounted for more than 52% of all Twitter activity that day, with a total of 1.4 million mentions. Many of these mentions can be attributed to the show’s use of onscreen hashtags. During dramatic scenes each week, a unique hashtag pops up, encouraging viewers to get on Twitter and discuss what is going on in the show.”).

42. See, e.g., the specimen for #TANLIFE, which shows the tagmark featured prominently on a bottle of tanning lotion. Specimen, #TANLIFE, Registration No. 4,753,382, <http://tsdr.uspto.gov/documentviewer?caseId=sn86367137&docId=SPE20150311165209#docIndex=5&page=1> [<https://perma.cc/PTM2-VF4Y>].

43. “Indiana University . . . has tried to find a way to make the gratification of the big [college acceptance] envelope a bit more instant. On the back of a wavy-patterned crimson envelope, the one that might be torn open in a fit of Hoosier hysteria, there is a message printed in large, white type. ‘#IUsaidYes.’” Jon Blau, *IU Engaging Students, Others Where They Live: On Social Media*, IUB BLOOMINGTON NEWSROOM (Nov. 4, 2013), <http://news.indiana.edu/releases/iub/iu-in-the-news/dnb-11-04-2013.shtml> [<https://perma.cc/RHK9-798M>].

44. Meghan Blalock, *J.Crew Launches Custom #Hashtag Swimwear*, *STYLECASTER* (May 14, 2014), <http://stylecaster.com/j-crew-launches-hashtag-swim-wear/#ixzz3wHWymDlo> [<https://perma.cc/PK3Z-7BDA>].

45. Mississippi State was the first school to print hashtags on the football field, displaying #HAILSTATE and #SNOWBOWL12 in its end zone in 2011. Later, N.C. State added #GOPACK to the 50-yard line, Arkansas printed #GOHOGS on its 25-yard line, and Michigan’s 25-yard line at one point read #GOBLUE. The NCAA later banned on-field hashtags. Mike Flacy, *NCAA Bans Twitter Hashtags from Being Displayed on the Football Field*, *DIGITAL TRENDS* (May 2, 2013, 1:00 AM), <http://www.digitaltrends.com/social-media/ncaa-bans-twitter-hashtag-on-field> [<https://perma.cc/U8US-UFPE>].

46. “The use of hashtags became mainstream after October 2007, when citizen journalists used them to give updates about a series of forest fires in San Diego.” Zak, *supra* note 35; TWITTER HELP CENTER, *supra* note 34.

47. Yohn, *supra* note 3.

employees or hiring outside agencies solely to create hashtags and track their usage.⁴⁸ Once those corporations begin using the hashtags, many apply to register them as trademarks. At the same time that user-generated content proliferates on social media, producers seek to capitalize on hashtagged words and phrases that the public creates, popularizes, and imbues with meaning.

Producers encounter no shortage of advice about how best to employ hashtags to generate brand goodwill and increase sales. The internet is replete with blog posts like “Six Tips for a Killer Hashtag Marketing Campaign”⁴⁹ and “10 Useful Hashtag Tools For Social Media Marketing.”⁵⁰ Advertising experts recommend hashtag campaigns because millennials trust user-generated content 50 percent more than they trust other forms of media and roughly three-quarters of purchasing decisions are influenced by consumers’ social networks.⁵¹ Companies are encouraged to make consumer-generated content work for them: “One of the most valuable outcomes of a hashtag campaign is the hundreds of thousands of powerful, authentic photos and messages that it generates, not to mention the valuable consumer data that can be collected.”⁵² Mashable suggests using hashtags “to generate buzz around a marketing campaign.”⁵³ A book on marketing counsels producers on how to use hashtags to strategically hijack, or “newsjack,” current events.⁵⁴

48. *Id.*

49. Louise Julig, *Six Tips for a Killer Hashtag Marketing Campaign*, SOC. MEDIA EXAMINER (Nov. 11, 2013), <http://www.socialmediaexaminer.com/six-tips-killer-hashtag-campaign> [<https://perma.cc/VV8N-8LES>].

50. *10 Useful Hashtag Tools For Social Media Marketing*, PROLOGIC WEB DESIGN BLOG, <http://prologicwebdesign.com/blog/10-hashtag-tools-social-media-marketing> [<https://perma.cc/XR8B-UGKL>] (last visited Feb. 23, 2017).

51. Sam Laird, *First Football Endzone Hashtag Touches Down in Mississippi*, MASHABLE (Nov. 22, 2011), <http://mashable.com/2011/11/22/football-twitter-hashtag> [<https://perma.cc/2EXM-Y5BK>]; Debbie Rosenbaum, *Hashtag UGC and Rights Requests: The Next Generation of Content Marketing*, THISMOMENT CONTENT MARKETING BLOG (Oct. 20, 2014), <http://www.thismoment.com/content-marketing-blog/hashtag-ugc-rights-requests> [<https://perma.cc/N5WR-4EML>].

52. Nicole Fallon, *#Hashtagging 101: 4 Guidelines for Small Businesses*, BUS. NEWS DAILY (July 8, 2014, 2:06 PM), <http://www.businessnewsdaily.com/6742-hashtagging-best-practices.html> [<https://perma.cc/R2U8-TPNP>].

53. Stephanie Buck, *5 Ways Your Business Should Use Twitter Hashtags*, MASHABLE (Sept. 9, 2012), <http://mashable.com/2012/09/09/twitter-hashtags-small-business> [<https://perma.cc/3U54-L2QU>].

54. DAVID MEERMAN SCOTT, *THE NEW RULES OF MARKETING & PR: HOW TO USE SOCIAL MEDIA, ONLINE VIDEO, MOBILE APPLICATIONS, BLOGS, NEWS RELEASES, AND VIRAL MARKETING TO REACH BUYERS DIRECTLY* 347, 348 (4th ed. 2013). According to Scott, “Newsjacking is the art and science of injecting your ideas into a breaking news story so you and your ideas get noticed.” David Meerman Scott, *Newsjacking*, <http://www.newsjacking.com> [<https://perma.cc/J2VN-82X8>] (last visited Feb. 24, 2017).

Yet marketers acknowledge that when it comes to hashtag marketing, they cede a good deal of control over campaigns to consumers.⁵⁵ As such, trends in online marketing and hashtag use are both influential in, and emblematic of, a broader evolution in how trademarks work. A great deal has been written on the expressive functions of trademark use, including how consumers use brands and marks to forge and express their identities, communicate ideas, and signal group membership, reputation, affiliation, or status.⁵⁶ Those expressive uses rarely render a trademark unprotectable, although they may have ramifications for enforcement. Deborah Gerhardt notes that “[c]onsumers contributed to trademark value long before social networking on the Internet became ubiquitous,” but consumer investment exploded with the rise of social media marketing.⁵⁷ Consumer participation is also easier to track. According to Gerhardt, “[b]rand owners no longer work alone to craft the story of a trademark. Instead, modern brand narratives are written in collaboration with consumer communities.”⁵⁸ The CEO of hashtag-related startup CrowdChat describes hashtags as “the new, universally accessible conversation fabric” and believes that “[u]nder each hashtag is an inherent social network.”⁵⁹ Viral hashtags spread quickly: on the day that a grand jury found no probable cause to indict the police officer who killed Michael Brown, 3.5 million tweets were tagged #Ferguson.⁶⁰

55. See Anupam Chander & Uyên P. Lê, *Free Speech*, 100 IOWA L. REV. 501, 547–48 (2015) (“The hashtag [is] a democratizer of speech, allowing anyone to have her thoughts echoed around the world. . . . No one can un-hashtag someone else’s speech. The hashtag is free and open.”).

56. See, e.g., Mark Bartholomew, *Advertising and Social Identity*, 58 BUFF. L. REV. 931 (2010); Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 400–01 (1990); Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491, 1505 (2012) (“Trademarks are repositories of meaning that consumers use to construct a sense of personal identity and reputation.”); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1727–28 (1999); Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 750 (2010) (“[P]eople routinely use brands and brand claims to establish their own identities and social positioning, and are understood as doing so by their audiences.”).

57. Gerhardt, *supra* note 56, at 1499.

58. *Id.* at 1491; see also Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683, 685 (2007) (“[F]alse advertising law assumes a model in which authorship is singular or several, not massively composite. In the environment of peer production, by contrast, all are capable of mass communication and authorship is frequently cumulative as users remix and mash up information provided by others.”); Litman, *supra* note 56, at 1733 (“The value of persuasive trade symbols . . . results from mutual investment by producers and consumers.”).

59. Robert Hof, *The Hashtag Is the Social Network: CrowdChat Launches Group Conversations for Business*, FORBES BLOG (June 11, 2014, 6:00 AM), <http://www.forbes.com/sites/roberthof/2014/06/11/the-hashtag-is-the-social-network-crowdchat-launches-group-conversations-for-business> [https://perma.cc/3JXV-A2KL].

60. Kerry Flynn, *Twitter #LoveWins Heart Emoji Vanishes After Hashtag Hits 11M Mentions Over Pride Weekend*, INT’L BUS. TIMES (June 29, 2015, 12:12 PM), <http://www.ibtimes.com/twitter-lovewins-heart-emoji-vanishes-after-hashtag-hits-11m-mentions-over-pride-1988103> [https://perma.cc/5AHQ-DJBQ].

In the first three days after the Supreme Court's gay marriage decision in *Obergefell*,⁶¹ over eleven million tweets employed the hashtag #LoveWins.⁶²

But social media users don't just use hashtags to link content, engage with marketers, and talk about products,⁶³ they also use hashtags as expressive tools. The hashtag "gives the writer the opportunity to comment on his own emotional state, to sarcastically undercut his own tweet, to construct an extra layer of irony, to offer a flash of evocative imagery, or to deliver metaphors with striking economy."⁶⁴ Linguists note the tension between corporate, mass media, and "indie" uses.⁶⁵ Scholars catalogue hashtags used for "micro-memes" that appear in social media users' newsfeeds or on a sidebar list of trending topics and prompt them to compose, tag, and share comments that they otherwise never would have written, resulting in "an asynchronous, massively multi-person conversation."⁶⁶ Education expert Benjamin Gleason considers how hashtags can be used for learning by exploring the "information neighborhood" created by tagged tweets.⁶⁷ *New York Times Magazine* points out that while some hashtags are appended to tens of thousands of tweets, others will only be used once.⁶⁸ Researchers mine hashtags for insight not only about linguistic patterns, consumer behavior, and superficial trends, but also about issues as disparate as drug interactions⁶⁹ and political polarization predictive of violence.⁷⁰

61. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

62. Flynn, *supra* note 60; #Lovewins search results, INSTAGRAM, <https://www.instagram.com/explore/tags/lovewins> [<https://perma.cc/Y9WG-68AU>] (last visited Feb. 26, 2017).

63. See, e.g., Allison Shapp, Variation in the Use of Twitter Hashtags (Spring 2014) (qualifying paper, New York University), http://www.nyu.edu/projects/shapp/Shapp_QP2_Hashtags_Final.pdf [<https://perma.cc/UW9R-YMAK>] (labeling hashtags used to organize content "tags" and those used for nontagging expressive functions "commentary hashtags").

64. Julia Turner, #InPraiseOfTheHashtag, N.Y. TIMES MAG. (Nov. 2, 2012), <http://www.nytimes.com/2012/11/04/magazine/in-praise-of-the-hashtag.html> [<https://perma.cc/6W6G-2U7K>].

65. See generally Ruth Page, *The linguistics of self-branding and micro-celebrity in Twitter: The role of hashtags*, DISCOURSE & COMMUNICATION (2012) <http://journals.sagepub.com/doi/pdf/10.1177/175048131243744> [<https://perma.cc/E6YQ-ZL6J>].

66. Huang et al., *supra* note 34 (describing the paper as "the first large-scale analysis of Twitter hashtags and introduction of the notions of conversational tagging and micro-memes"); see also Shapp, *supra* note 63, at 6.

67. See generally Benjamin Gleason, #Occupy Wall Street: Exploring Informal Learning About a Social Movement on Twitter, 57 AM. BEHAV. SCIENTIST 969 (2013).

68. Turner, *supra* note 64.

69. Joshua E. Brown, *New Role for Twitter: Early Warning System for Bad Drug Interactions*, PHYS.ORG (June 29, 2015), <http://phys.org/news/2015-06-role-twitter-early-bad-drug.html#jCp> [<https://perma.cc/G8Q3-ENYZ>] (mining hashtags can reveal "potentially dangerous drug interactions and unknown side-effects—before they show up in medical databases").

70. See Hal Hodson, *Twitter Hashtags Predict Rising Tension in Egypt*, NEW SCIENTIST (Aug. 21, 2013), <https://www.newscientist.com/article/mg21929315-500-twitter-hashtags-predict-rising-tension-in-egypt> [<https://perma.cc/7492-HCSC>]. For some examples of the range of research that relies on data mined from Twitter, including but not limited to hashtags, see Danah Boyd, *Bibliography of Research on Twitter and Microblogging*, <http://www.danah.org/researchBibs/twitter.php> [<https://perma.cc/GY54-6GUD>] (last visited Feb. 24, 2017).

A. *Producer-selected Hashtags*

This category includes hashtag versions of existing product trademarks and primary house marks, typically formed by placing a hash symbol at the front of a distinctive brand name. Footwear and apparel brand NIKE becomes #Nike and Major League Baseball team the Boston Red Sox becomes #RedSox.⁷¹ In these cases, the hashtag is equivalent to the registered mark, and is likely perceived that way by consumers. Most hashtags in this category serve as trademarks first and hashtags later, usually well after they have acquired commercial strength.

Producers rarely seek to register these hashtags as marks,⁷² perhaps because they intuitively understand that such hashtags are no different from their existing marks—as the TMEP rule articulates, the hashtag phrase #RedSox doesn't vary much from the already protected RED SOX. A review of the two hundred tagmarks registered through 2015 reveals that few, if any, of the marks meet this description—just about every hashtag based on a famous brand name, from #Nike to #Apple to #BurgerKing to #Google, is absent from the tagmarks registered.⁷³

Strategies vary, though, and some companies opt to register tagmark versions of already registered text marks. Bank PNC successfully registered VIRTUALWALLET in 2009⁷⁴ and VIRTUAL WALLET in 2010,⁷⁵ both for banking services, and then applied to register the hashtag #VirtualWallet—once again, for banking services—in 2015.⁷⁶ However, PNC abandoned the application in 2016. Famous Smoke Shop in Pennsylvania, owner of several FAMOUS-formative marks with use in commerce dating back to 1978, recently registered #Famous for cigars and smokers' articles⁷⁷ in the same class as its earlier registrations.

This category of producer-selected hashtags, where the hashtag is essentially the mark with a hash symbol attached to the front of it, also encompasses producers' desired trademarks that have not yet acquired commercial strength. In many cases, these terms or phrases are merely descriptive or generic. For example, the Nashville musician who seeks to register #Country for entertainment services,⁷⁸ the startup that hoped for the exclusive

71. See, e.g., search results on Twitter, Facebook, Instagram, and other social media sites for “#Nike” and “#RedSox.”

72. A review of all registered tagmarks revealed no registrations for unambiguously famous marks like #Nike or #OliveGarden in this category, although owners of some nonfamous strong marks have applied to register them as tagmarks. See TMEP § 1202.18.

73. See App. A, listing all tagmarks registered with the USPTO as of Dec. 31, 2015.

74. VIRTUALWALLET, Registration No. 3,712,784.

75. VIRTUAL WALLET, Registration No. 3,785,310.

76. U.S. Trademark Application Serial No. 86/616,569 (filed May 1, 2015) (abandoned May 31, 2016).

77. #FAMOUS, Registration No. 4,838,259; see also Registration Nos. 2,169,279; 2,169,280; 2,506,513.

78. U.S. Trademark Application Serial No. 86/673,296 (filed June 24, 2015); see also TUCKER MUSIC, <http://www.tuckermusic.net> [<https://perma.cc/W9XM-UQUOD>] (last visited Feb. 24, 2017).

right to use #Donate for electronic payment services,⁷⁹ and the company that applied to register #SelfieCookie for cookies bearing selfies⁸⁰ are likely to meet the same fate as the music and food festival producer who sought to register #Fest for those services⁸¹—refusal based on mere descriptiveness. In the latter case, the examining attorney bolstered her refusal with a slew of examples showing the widespread use of the hashtag by others on Facebook, Instagram, Tumblr, and Twitter.⁸²

B. Marketer-deployed Hashtags

Marketer-deployed hashtags serve as slogans or denote marketing campaigns. They are designed by trademark owners or their advertising agencies to disseminate information about brands, goods, or services, and to foster discussion among consumers on social media. While some of these hashtags exist first as stand-alone text marks,⁸³ most begin as online hashtags or are deployed simultaneously online and offline. This category also includes hashtags selected by producers or marketers that incorporate existing marks or serve as nicknames for those marks. Examples are #OreoSnackHacks, #HowDoYouKFC, #CaughtOnDropcam, and #McDStories, where OREO, KFC, and DROPCAM are registered trademarks (for cookies, restaurant services, and wireless video cameras respectively), and “McD” is an acknowledged nickname for registered trademark MCDONALD’S.⁸⁴

Producers are unlikely to seek a separate registration for the hashtag that contains their already protected mark, but strategies vary here too. Some register these tagmarks for different classes of goods or services or take advantage of the ability to apply for the tagmark based on an intent to use it in the future. Madewell, an apparel company established in 1937 and recently revitalized by J.Crew, has numerous federal registrations for MADEWELL covering clothing, accessories,⁸⁵ entertainment services,⁸⁶ online retail services, and gift cards.⁸⁷ The company began using the hashtag #EverydayMadewell on Twitter and

79. U.S. Trademark Application Serial No. 86/627,513 (filed May 12, 2015).

80. U.S. Trademark Application Serial No. 86/860,438 (filed Dec. 29, 2015).

81. U.S. Trademark Application Serial No. 86/214,655 (filed Mar. 7, 2014).

82. *Id.*

83. “Text mark” refers to traditional word marks, as distinct from hashtag or domain name marks.

84. Since 2014, MCD itself is a registered trademark of McDonald’s, but it covers only software (Registration No. 4,543,601). In the context of the #McDStories hashtag, the reference is likely to the trademark MCDONALD’S, registered (and famous) for restaurant services for over fifty years. MCDONALD’S, Registration No. 0,743,572.

85. MADEWELL, Registration Nos. 4,128,967, 3,957,991, 3,878,162, 0,968,685.

86. MADEWELL, Registration No. 4,205,559.

87. MADEWELL, Registration No. 3,878,162.

Facebook around January 2015⁸⁸ and applied to register it for online retail stores and entertainment services five months later.⁸⁹ Fast-food chain Kentucky Fried Chicken, also known as KFC, applied to register #HowDoYouKFC based on an intent to use it in commerce in the future and then perfected the application once the tagmark was in use.⁹⁰ The Lean In Foundation, after applying to register LEAN IN for printed matter, online business education services, and apparel in 2012,⁹¹ applied to register #LeanInTogether for those same goods and services in 2015.⁹² The National Academy of Recording Arts & Sciences applied to add #GrammyGlam to its cadre of GRAMMY-related registered marks.⁹³ Walmart applied to register WALMART ELVES⁹⁴ in 2013 and #WalmartElves a year later;⁹⁵ the company ultimately abandoned the latter application, perhaps because disgruntled employees coopted the hashtag and used it to complain about low wages and communicate regarding worker strikes.⁹⁶

This category also includes hashtags that don't reference existing brands explicitly but instead function more like traditional slogans or delineate discrete campaigns or collaborations. Examples include: #BeTheGirl for a partnership between BodyLab and Jennifer Lopez,⁹⁷ #MakeItCount for a Nike fitness campaign encouraging users to post photographs,⁹⁸ #VoteForJoy for a Starbucks campaign that asked customers to vote for their favorite drink and then offered

88. A search for “#everydaymadewell” on Twitter reveals the oldest eight or so tweets using the hashtag were tweeted by the company itself from the handle @madewell, not counting retweets; after that, consumers began using the hashtag. See #everydaymadewell search results, TWITTER, <https://twitter.com/search?q=%23everydaymadewell&src=typd> [<https://perma.cc/A3ZN-7X8R>] (last visited Feb. 27, 2017). A search for the same hashtag on Facebook shows a similar pattern. See #everydaymadewell search results, FACEBOOK, <https://www.facebook.com/search/top/?q=%23everydaymadewell> [<https://perma.cc/9LYD-HXLC>] (last visited Feb. 27, 2017).

89. Registration No. 4,895,377. Note too the company's registration for MADEWELL.COM for online retail store services, Registration No. 3,924,264.

90. #HOWDOYOUKFC, Registration No. 4,523,521.

91. U.S. Trademark Application Serial Nos. 85/749,394, 85/749,364, 85/749,356 (filed Oct. 9, 2012).

92. U.S. Trademark Application Serial No. 86/587,122 (filed Apr. 3, 2015).

93. U.S. Trademark Application Serial No. 85/791,498 (filed Nov. 30, 2012) (abandoned).

94. U.S. Trademark Application Serial No. 85/850,358 (filed Feb. 14, 2013).

95. U.S. Trademark Application Serial No. 86/180,128 (filed Jan. 30, 2014) (abandoned).

96. See, e.g., #WalmartElves Statement of Autonomy, ELVES ON STRIKE, <http://elvesonstrike.tumblr.com/solidarityautonomy> [<https://perma.cc/5ZQK-JY9S>] (“[T]he #WalmartElves are a movement that supports #WalmartStrikers . . . We fight for a living wage for all workers. . . .”); see also Lorraine Murphy, ‘Renegade Elves’ Fight for Better Wages at Walmart, DAILY DOT (Nov. 29, 2013), <http://www.dailydot.com/news/free-walmart-elves-protest> [<https://perma.cc/5TMD-VDJW>].

97. U.S. Trademark Application Serial No. 86/529,197 (filed Feb. 9, 2015) (for cosmetics and dietary supplements).

98. Julie Blakley, *6 Cross-Platform Hashtag Marketing Campaigns*, SOC. MEDIA TODAY (Apr. 16, 2013), <http://www.socialmediatoday.com/content/6-cross-platform-hashtag-marketing-campaigns> [<https://perma.cc/H5SS-CATV>].

the winning drink at a discount,⁹⁹ and #FriendsAreWaiting for a Budweiser campaign about responsible drinking.¹⁰⁰ #LikeAGirl, a viral campaign from Procter & Gamble feminine hygiene brand Always, generated buzz with its televised advertisements that pushed viewers to reconsider their stereotypes about what it means to do something “like a girl.”¹⁰¹ Makeup brand Smashbox created a new set of products for eyebrow contouring and called it “Shape Matters,” using the hashtag #ShapeMatters on social media in connection with photos, video tutorials, and giveaways.¹⁰² Legal research company LexisNexis uses the hashtag #BeUnprecedented to connect with students online.¹⁰³ T-Mobile’s “Test Drive” campaign offered customers a free one-week trial of its services along with an iPhone during the trial period,¹⁰⁴ the company deployed the hashtag #7NightStand on social media to generate interest in the offer.¹⁰⁵ Abercrombie & Fitch brand Gilly Hicks uses the #TrendinGHot hashtag to create buzz about its underwear.¹⁰⁶

Among the creators of those campaigns, approaches to registration range from registering tagmarks and text marks for the same matter, to registering them for distinct matter, to registering one and not the other. Monster registered its tagline FIND BETTER in 2013 for providing online information about jobs and

99. Stacy Minero & James Cooper, *10 Trends Shaping the Future of Branded Content*, ADWEEK (Mar. 20, 2015), <http://www.adweek.com/news/advertising-branding/10-trends-shaping-future-branded-content-163591> [https://perma.cc/S29Z-AY64].

100. Rene Lynch, *Budweiser Video Depicts a Worried Dog to Help Prevent Drunk Driving*, L.A. TIMES (Sept. 22, 2014, 2:15 PM), <http://www.latimes.com/food/dailydish/la-dd-budweiser-viral-video-drunk-driving-20140922-story.html> [https://perma.cc/HHE6-NDP6].

101. Kristina Monillos, *How Always’ Brand Director Turned an Ad into a Movement that Shattered Stereotypes*, ADWEEK (Oct. 18, 2015), <http://www.adweek.com/news/advertising-branding/how-always-brand-director-turned-ad-movement-shattered-stereotypes-167468> [https://perma.cc/NZC5-AZME].

102. See #ShapeMatters search results, INSTAGRAM, <https://www.instagram.com/explore/tags/shapematters/?hl=en> [https://perma.cc/CGL5-UT4V]; #ShapeMatters search results, TWITTER, <https://twitter.com/search?q=%23ShapeMatters%20&src=typd> [https://perma.cc/37C9-VP4W] (last visited Mar. 3, 2017); #ShapeMatters search results, YOUTUBE, https://www.youtube.com/results?search_query=%23ShapeMatters [https://perma.cc/F2T7-C7F8] (last visited Mar. 3, 2017).

103. See #BeUnprecedented search results, FACEBOOK, <https://www.facebook.com/search/top/?q=%23BeUnprecedented> [https://perma.cc/YG3N-WCNU] (last visited Mar. 3, 2017); #BeUnprecedented search results, TWITTER, <https://twitter.com/search?q=BeUnprecedented%20&src=typd> [https://perma.cc/CMR8-JKVN] (last visited Mar. 3, 2017).

104. John Fremel, *T-Mobile Uncarrier 5.0 Is Here: #7nightstand*, POCKETABLES (June 19, 2014), <http://www.pocketables.com/2014/06/t-mobile-uncarrier-5-0-6-0-7-nightstand-music-freedom.html> [https://perma.cc/6N9J-GUST].

105. See #7NightStand search results, TWITTER, <https://twitter.com/search?q=%237NightStand&src=typd> [https://perma.cc/CQ9K-QYR5] (last visited Feb. 27, 2017).

106. See #trendinGHot search results, INSTAGRAM, <https://www.instagram.com/explore/tags/trendinghot/?hl=en> [https://perma.cc/FG9U-7E7N] (last visited Feb. 27, 2017).

for social networking services.¹⁰⁷ When it sponsored a promoted trend on Twitter two years later, engaging millions of consumers and encouraging them to share stories at the hashtag #FindBetter,¹⁰⁸ it didn't apply to register the tagmark with the USPTO. Monster likely reasonably believed that its registration for FIND BETTER provided adequate coverage. Likewise, Nike, Starbucks, and Budweiser have not sought federal registration for the slogans mentioned above, with or without the hashtag.

Conversely, other companies have either sought to register or successfully registered tagmarks in this category. T-Mobile registered #7NightStand Challenge for phone service.¹⁰⁹ There is a published application based on intent to use (ITU)¹¹⁰ for #BeTheGirl and another for #BtheG.¹¹¹ Procter & Gamble applied in 2014 to register #LikeAGirl for feminine hygiene products as well as advertising and marketing services.¹¹² Seven months later, the company sought to protect the phrase without the hashtag when it applied to register LIKE A GIRL for feminine hygiene products.¹¹³ Smashbox paired its house mark with its hashtag, applying to register Smashbox #ShapeMatters.¹¹⁴ LexisNexis parent company Reed Elsevier registered BE UNPRECEDENTED¹¹⁵ and #BeUnprecedented¹¹⁶ for the same services, both based on use, suggesting the company either hedged its bets to ensure at least one application succeeded or else believed that the two registrations protect distinct matter and provide distinct rights. Lululemon applied to register THE SWEAT LIFE for retail, online stores,¹¹⁷ and clothing¹¹⁸ and #TheSweatLife for a range of services including fitness classes, training, and interactive websites,¹¹⁹ all on the same day. And Restaurant BurgerFi applied to register its slogan TRY SOME BETTER as a

107. FIND BETTER, Registration No. 4,310,338.

108. *#FindBetter: Monster's Promoted Trend Engages Millions on Twitter*, MONSTER BLOG (Mar. 31, 2015), <http://www.monster.com/about/b/findbetter-monster-promoted-trend-engages-millions-on-twitter-0331> [<https://perma.cc/C6KP-L5GK>].

109. #7NightStand Challenge, Registration No. 4,671,787.

110. An ITU application is one based on an intent to use the trademark in the future, under Lanham Act section 1(b), rather than one based on current use filed under Lanham Act section 1(a). 15 U.S.C. § 1051 (2012).

111. U.S. Trademark Application Serial No. 86/529,197 (filed Feb. 9, 2015) (for cosmetics and diet pills); *see also* U.S. Trademark Application Serial No. 86/529,170 (filed Feb. 9, 2015) (for #BTHEG, filed on the same date for the same goods).

112. U.S. Trademark Application Serial No. 86/321,325 (filed June 26, 2014).

113. U.S. Trademark Application Serial No. 86/517,828 (filed Jan. 29, 2015).

114. U.S. Trademark Application Serial No. 86/541,505 (filed Feb. 20, 2015).

115. BE UNPRECEDENTED, Registration No. 4,694,668 (for services in International Classes 035, 041, and 045).

116. #BEUNPRECEDENTED, Registration Nos. 4,694,671, 4,671,869.

117. U.S. Trademark Application Serial No. 86/400,116 (filed Sept. 19, 2014).

118. U.S. Trademark Application Serial No. 86/400,117 (filed Sept. 19, 2014).

119. U.S. Trademark Application Serial No. 86/400,119 (filed Sept. 19, 2014). According to its applications, the company already uses the tagmark in commerce, while it applied to register the text marks on an intent-to-use basis.

word mark for restaurant services in July of 2014¹²⁰ and then applied to register the hashtag version, #TrySomeBetter, eleven months later.¹²¹

C. Consumer-generated Hashtags

Consumer-generated hashtags discuss or respond to a producer's goods or services with or without incorporating the producer's mark into the hashtag. Social media provides consumers opportunities to engage directly with brands, whether to offer criticism,¹²² commentary, or praise. Sites like Facebook, Twitter, and Reddit also contributed substantially to the rise of the meme.¹²³ The consumer-generated category consists of hashtags that are tied to a particular brand or product, arise organically, and catch on quickly—in many cases “going viral.”

Some consumer-generated hashtags create a space for consumers to join together in criticizing a brand,¹²⁴ such as #NBCFail or #ComcastSucks, the latter of which recently appeared in thousands of tweets within a three-day period.¹²⁵ Some reflect simple fandom, like #Linsanity or #TransJenner. They differ from the direct use of trademarks as hashtags in that they reflect new coinages—#Linsanity instead of #JeremyLin; #TransJenner instead of #CaitlinJenner. Others reflect more creativity and take on momentum. Posts tagged #ThingsTimHowardCouldSave, for example, feature photoshopped images of soccer goalie Tim Howard saving everything from the dinosaurs to Janet

120. U.S. Trademark Application Serial No. 86/335,840 (filed July 14, 2014).

121. U.S. Trademark Application Serial No. 86/679,452 (filed June 30, 2015). The earliest uses of the hashtag #trysomebetter appeared on Twitter around November 2014. *See* #trysomebetter search results, TWITTER, <https://twitter.com/search?q=%23trysomebetter&src=typd> [<https://perma.cc/6SGB-545>] (last visited March 21, 2017).

122. *See also* Lindsay Zoladz, *The #Art of the Hashtag*, PITCHFORK (Mar. 12, 2014), <http://pitchfork.com/features/ordinary-machines/9351-hashtags> [<https://perma.cc/UA9C-2EQH>] (“As quickly as companies realized that they could use the hashtag as an advertising tool, Twitter users realized that they could use sponsored hashtags as a way to talk back to the whole idea of being sold to.”).

123. *See* Kate Miltner, *Srsly Phenomenal: An Investigation into the Appeal of LOLCats* (Aug. 2011) (unpublished MSc dissertation, London School of Economics and Political Science), <https://dl.dropboxusercontent.com/u/37681185/MILTNER> DISSERTATION.pdf [<https://perma.cc/BE5Z-ENSB>] (“The concept of the meme was introduced by evolutionary biologist Richard Dawkins as part of a theory that explained why certain ideas, catchphrases, trends, and other pieces of cultural information replicate through a population. . . . The term ‘Internet meme’ . . . has come to refer to the ‘inside jokes or pieces of hip underground knowledge’ that inhabit social networks and email inboxes across the world.”) (internal citations omitted).

124. Just as the rules for trademarks parallel those for domain name trademarks, this category of negative or critical consumer-generated trademarks parallels the category of domain names used for gripe sites, also known as “sucks sites.” *See generally* 5 MCCARTHY, *supra* note 8, § 25A:45 (“If the gripe site identified by the target’s name or trademark is purely noncommercial, then even if web users are confused . . . the griper’s free speech rights will prevail over the public’s right not to be confused.”).

125. *See* #ComcastSucks search results, TWITTER, <https://twitter.com/search?q=%23ComcastSucks%20&src=typd> [<https://perma.cc/7FFY-G5JW>] (for the month of Sept. 2015).

Jackson's exposed breast.¹²⁶ #NewHarryPotterBooks¹²⁷ is a hashtag game in which Twitter users brainstorm funny future novel titles for the series, like "Snapes on a Plane" and "Fifty Shades of Granger."¹²⁸ Sometimes hashtags reference a brand but focus on a particular phenomenon rather than on the brand itself, like the hubbub over cute teenage cashier #AlexFromTarget¹²⁹ or the photos of drugstore receipts as tall as people that consumers collect at the hashtag #CVSReceipts.¹³⁰ Viral sensation #MailKimp referred to email client MailChimp, but had little to do with the product itself and more to do with its mispronunciation in connection with the public radio series "Serial."¹³¹

While we expect to see far fewer applications to register tagmarks in this category than in those categories of tagmarks selected and deployed by producers and marketers, some fans and entrepreneurs do seek to register user-generated hashtags as marks. The hashtag #9RGNG, shorthand for Forty-Niners Gang, is registered for apparel.¹³² Applications have also been filed to register Baltimore Ravens hashtag #RavensNation;¹³³ Pittsburgh Steelers' #HereWeGo;¹³⁴ New

126. Sam Frizell, *The 7 Best #ThingsTimHowardCouldSave*, TIME (July 2, 2014), <http://time.com/2949316/tim-howard-world-cup-football-soccer> [<https://perma.cc/9N8C-W6C4>].

127. Sam Wallace, *#NewHarryPotterBooks Hashtag Game Confused And Disappointed a Lot of Harry Potter Fans*, SMASH (July 31, 2015), <http://www.smash.com/newharrypotterbooks-hashtag-game-confused-disappointed-lot-harry-potter-fans> [<https://perma.cc/L7DK-LCC6>].

128. Jessica Goodman, *Twitter Comes up with #NewHarryPotterBooks We'd Actually Want to Read*, ENT. WKLY. (July 30, 2015, 1:21 PM), <http://www.ew.com/article/2015/07/30/new-harry-potter-books-hashtag-twitter> [<https://perma.cc/4WWD-L9A4>].

129. "The #AlexFromTarget meme amplified the Target brand, potentially persuading members of the users' social network to also shop there." Leah Chan Grinvald, *Social Media, Sharing, and Intellectual Property Law*, 64 DEPAUL L. REV. 1045, 1047 (2015) (reviewing ROBERTA ROSENTHAL KWALL, *THE MYTH OF THE CULTURAL JEW: CULTURE AND LAW IN THE JEWISH TRADITION* (2015)); see also Maureen O'Connor, "Alex From Target" and the Mess of Uncontrollable Fame, N.Y. MAG. (Nov. 6, 2014, 3:30 PM), <http://www.nymag.com/thecut/2014/11/alex-from-target-fame.html> [<https://perma.cc/9KGG-G2YB>].

130. For examples of the meme, see Ashley Lutz, *Why CVS Receipts Are So Long*, BUS. INSIDER (Nov. 3, 2014, 5:14 PM), <http://www.businessinsider.com/why-cvs-receipts-are-so-long-2014-11> [<https://perma.cc/7KJA-SW9T>] (describing the trend of posting pictures of and comments about CVS receipts on social media and noting "CVS'[s] long receipts have become infamous," but concluding "[i]t's possible that the company's reputation for unwieldy receipts actually helps business. As customers share on social media, CVS essentially receives free advertising.").

131. *MailChimp in Who Dunnit Murder Mystery*, TANKER (Nov. 28, 2014), <http://tankercreative.com/mailchimp-in-who-dunnit-murder-mystery/2014/11> [<https://perma.cc/4CV2-LPU4>].

132. #9RGNG, Registration No. 4,537,669.

133. U.S. Trademark Application Serial No. 86/632,598 (filed May 18, 2015) (abandoned).

134. U.S. Trademark Application Serial No. 86/673,791 (filed June 25, 2015) (for action skill games, footballs, and more).

York Knicks' #knickstape;¹³⁵ Nebraska Cornhuskers' #Nebrasketball;¹³⁶ the nickname for Seattle Seahawks' Marshawn Lynch, #BeastMode;¹³⁷ and #WRTS, the acronym version of Texas A&M University slogan "We Run This State."¹³⁸

Some hashtags straddle the second and third categories—marketer-deployed and consumer-generated—by employing a term associated with a person, entity, or brand that may or may not actually constitute a trademark. Most major social media platforms have particular hashtags associated with them, like Instagram's #regram and #latergram and Twitter's #subtweet,¹³⁹ #RT (retweet) and #MT (modified tweet). #NoFilter is a common hashtag¹⁴⁰ among users who want to emphasize that they posted their photograph without applying an Instagram filter to it. #ThrowbackThursday and #TBT are used across social media sites but are associated most closely with Instagram; tens of thousands of people use the hashtag every week when they share old photographs on Thursdays.¹⁴¹ #Selfie has been used millions of times on Instagram to label

135. U.S. Trademark Application Serial No. 85/801,484 (filed Dec. 13, 2012) (abandoned after failure to respond to an Office Action that cited a likelihood of confusion with the team-owned KNICKS registrations); *see also* Richard Bertin, *It's Time to Retire #Knickstape*, DAILY KNICKS (Oct. 2, 2014), <http://dailyknicks.com/2014/10/02/time-retire-knickstape> [<https://perma.cc/46S2-5SXL>] ("[F]or the past two seasons just about every mention, tweet, image, meme, and post related to the Knicks has had 'Knickstape' tacked onto it somehow.").

136. U.S. Trademark Application Serial No. 86/241,120 (filed Apr. 3, 2014) (abandoned after publication).

137. U.S. Trademark Application Serial No. 86/294,801 (filed May 29, 2014) (abandoned after failure to respond to an Office Action that cited a likelihood of confusion with the numerous BEAST MODE registrations and pending applications owned by Lynch himself).

138. #WRTS, Registration No. 4,778,707. The application generated controversy because it was granted to an athlete's father, arguably in contravention of NCAA rules. *See* Dave McKenna, *How Did a Texas A&M Recruit's Dad End Up with a Trademarked Hashtag?*, DEADSPIN (Feb. 27, 2015, 12:19 PM), <http://deads핀.com/how-did-a-texas-a-m-recruits-dad-end-up-with-a-trademark-1686107690> [<https://perma.cc/VGY2-ACHB>]; John Taylor, *A&M Distances Itself from #WRTS Hashtag Connected to 2015 Recruit*, NBC SPORTS (Feb. 27, 2015), <http://collegefootbaltalk.nbcsports.com/2015/02/27/am-distances-itself-from-wrts-hashtag-connected-to-2015-recruit> [<https://perma.cc/CUZ4-GXUW>] (including a statement from the team disavowing any intent to profit from the hashtag or any connection with the trademark registration).

139. *See* the company's widely reported application to register SUBTWEET for online networking and other services. U.S. Trademark Application Serial No. 86/805,466 (filed Oct. 30, 2015); *see also* TWEETSTORM, U.S. Trademark Application Serial No. 86/328,428 (filed July 3, 2014).

140. An October 9, 2016 search of Instagram.com revealed a total of 167,747,963 photos tagged with the hashtag #NoFilter, as well as thousands of uses of variations like #NoFilterNeeded, #NoFilterFriday, and #NoFilterSelfie. *See also* Will Simon, *On Instagram, #nofilter Is Just Another Filter*, BIG SPACESHIP, <http://www.bigspaceship.com/instagram-nofilter> [<https://perma.cc/QBK9-ZXVU>] (last visited Feb. 28, 2017).

141. *See* search results for #TBT and #ThrowbackThursday on Twitter, Facebook, and Instagram, <https://twitter.com/search?q=%23tbt&src=typd>, <https://twitter.com/search?q=%23ThrowbackThursday&src=tyah>, <https://www.facebook.com/search/posts/?q=%23tbt>, https://www.facebook.com/search/str/%23throwbackthursday/keywords_blended_posts, <https://www.instagram.com/explore/tags/tbt/>, <https://www.instagram.com/explore/tags/throwbackthursday/>.

pictures that social media users take of themselves, and #tweet¹⁴² has long referred to a 140-character post on Twitter—the term in hashtag form dates back to Twitter’s earliest days and continues to appear frequently on the site.¹⁴³ If anyone were to assert trademark rights in those hashtags, the logical applicant would be the social network on which it gained prominence. However, applications to register #selfie come not from Instagram, but from a variety of other entities, and a California winemaker recently registered #TBT for wine.¹⁴⁴

D. Citizen-created Hashtags

The final category is for hashtags created by members of the public, as a lot of the action on social media has nothing to do with brands. Connecting individuals with one another is the ostensible *raison d’être* of hashtags.¹⁴⁵ Hashtags serve as rallying cries for social justice or link reactions to current events, such as #BringBackOurGirls,¹⁴⁶ #JeSuisCharlie, #ICantBreathe, #IfTheyGunnedMeDown,¹⁴⁷ or #Ferguson.¹⁴⁸ A hashtag can be a means to bring attention to a taboo topic or encourage the sharing of stories, such as #YesAllWomen,¹⁴⁹ #WhyIStayed,¹⁵⁰ #IllRideWithYou, and #CrimingWhileWhite. Others are code words for group membership, like

142. TWEET, Registration No. 4,338,963.

143. See #tweet search results, TWITTER, <https://twitter.com/search?q=%23tweet&src=typed> [<https://perma.cc/U84X-852T>] (last visited Feb. 27, 2017).

144. Registration No. 47/85,880.

145. See Chander & Lê, *supra* note 55, at 547–48 (“The hashtag [is] a democratizer of speech, allowing anyone to have her thoughts echoed around the world. . . . No one can un-hashtag someone else’s speech. The hashtag is free and open.”).

146. #BringBackOurGirls is a viral hashtag that was used to spread awareness about the abduction of hundreds of Nigerian girls by terrorist group Boko Haram; over five million people used the hashtag on social media. Camila Ruiz Segovia, *Political Hashtagging: Is Online Activism Effective?*, BROWN POL. REV. (Nov. 4, 2014), <http://www.brownpoliticalreview.org/2014/11/political-hashtagging-is-online-activism-effective> [<https://perma.cc/B6NM-AURN>].

147. See Laura Stampler, *Twitter Users Ask What Photo Media Would Use #IfTheyGunnedMeDown*, TIME (Aug. 11, 2014), <http://time.com/3100975/iftheygunnedmedown-ferguson-missouri-michael-brown> [<https://perma.cc/7HDP-XRZ4>].

148. #Ferguson appeared in nearly eight million tweets in a single week. Zak, *supra* note 35.

149. See Emanuella Grinberg, *Why #YesAllWomen Took off on Twitter*, CNN (May 27, 2014, 4:10 PM), <http://www.cnn.com/2014/05/27/living/california-killer-hashtag-yesallwomen> [<https://perma.cc/57Q7-39NU>] (“[A]ll women experience harassment, discrimination or worse at some point in their lives. That’s the message at the core of an ongoing Twitter conversation that emerged after a rampage last week that left six students from the University of California, Santa Barbara, dead and wounded 13 others. . . . B[etween Saturday and] Tuesday morning, #YesAllWomen had been tweeted more than 1 million times.”).

150. After video footage of football player Ray Rice assaulting his fiancée went viral, “[t]he hashtag took off . . . when many asked why women stay in abusive relationships.” See *Hashtag Activism in 2014: Tweeting ‘Why I Stayed,’* NPR (Dec. 23, 2014, 4:21 PM), <http://www.npr.org/2014/12/23/372729058/hashtag-activism-in-2014-tweeting-why-i-stayed> [<https://perma.cc/R677-JHUU>].

#TutLife or #ThugLife; well-recognized drug references¹⁵¹ like #420 or #GetFried; in-jokes and cultural catchphrases like #SorryNotSorry,¹⁵² #ByeFelicia, and #BoyBye; or hashtag games like #UpdatedTVShows, #BreakfastFilms, or #LessInterestingBooks.¹⁵³

Given the lack of connection to any goods, services, or brands, it might seem unnecessary to analyze citizen-created hashtags as marks. Yet, repeatedly would-be registrants have seen an opportunity to capitalize on hashtags in this category by pairing them with goods or services—most often, apparel—and applying to register them as trademarks, sometimes retaining the hash mark and other times dropping it. Cynthia Lynch, the USPTO Administrator for Trademark Policy & Procedure, told Time Magazine that while the USPTO does not keep statistics on the phenomenon, “anecdotally, when there is a catchphrase or a quote or something prominent in the news, in many instances we see one or multiple parties apply for a trademark for it in close proximity.”¹⁵⁴ Shontavia Johnson calls it “widely understood that the possibility of exclusive, national rights in media-amplified words and catchphrases has created a veritable race to the trademark office among both entrepreneurs and opportunists seeking to harness the strength of media publicity.”¹⁵⁵

French fry-focused eatery #GetFried Fry Café, for example, chose the hashtagged phrase as its name and primary trademark,¹⁵⁶ likely a tongue-in-cheek reference to a hashtag used on social media for marijuana use. Real Housewives of Atlanta star Phaedra Parks applied to register #FixItJesus for apparel,¹⁵⁷ but the hashtag predates her televised use of the phrase¹⁵⁸ and remains a widely used expression of frustration and appeal to a higher power, alternately ironic and sincere.¹⁵⁹ After the hashtag #IWokeUpLikeThis took off on social

151. *Unhashing Marijuana #hashtags on Twitter*, SPARK REP. (June 13, 2009), <http://sparkreport.net/2009/06/unhashing-marijuana-hashtags-on-twitter> [<https://perma.cc/E4WQ-K45E>].

152. Tom Durby, *#SorryNotSorry: 3 Reasons Why It Will Always Trend*, HASHTAGS.ORG (Nov. 7, 2013), <https://www.hashtags.org/research/analysis-research/sorrynotsorry-3-reasons-why-it-will-always-trend> [<https://perma.cc/7L7G-WL5H>].

153. Jeff Alexander, *The Hashtag Game: Waste of Time or Art Form?*, TIME (Nov. 11, 2011), <http://ideas.time.com/2011/11/11/the-hashtag-game-waste-of-time-or-art-form> [<https://perma.cc/U6Y9-N2FH>].

154. Tim Newcomb, *Q&A: How Can Someone Trademark 'Occupy Wall Street'?*, TIME (Oct. 27, 2011), <http://newsfeed.time.com/2011/10/27/qa-how-can-someone-trademark-occupy-wall-street> [<https://perma.cc/JM6X-EEZN>].

155. Shontavia Jackson Johnson, *Memetic Theory, Trademarks & the Viral Meme Mark*, 13 J. MARSHALL REV. INTEL. PROP. L. 96, 97 (2013).

156. #GETFRIED FRY CAFÉ, Registration No. 4,962,520.

157. #FixItJesus, Registration No. 4,743,330.

158. Jocelyn Vena, *Phaedra Parks Launches 'Fix It Jesus' T-Shirt Line*, BRAVO: DAILY DISH (Feb. 17, 2015, 10:21 AM), <http://www.bravotv.com/the-daily-dish/phaedra-parks-launches-fix-it-jesus-t-shirt-line> [<https://perma.cc/Q838-3B9U>].

159. See #FixItJesus search results, TWITTER, <https://twitter.com/search?q=%23FixItJesus&src=typd> [<https://perma.cc/35VF-NDRS>] (last visited Mar. 3, 2017).

media, an applicant sought to register WOKE UP LIKE DIS for apparel;¹⁶⁰ the ITU application sailed through to publication without any objection, despite its status as a popular trending term and its close association with singer Beyoncé. A recent application to register FIRST WORLD PROBLEMS for entertainment services¹⁶¹ likely seeks to capitalize on the ubiquitous #FirstWorldProblems hashtag.¹⁶² #Dadbod entered the zeitgeist in 2015 to describe “a physique that looks like a formerly fit athlete has gone a bit to seed,”¹⁶³ and the hashtag quickly went viral¹⁶⁴ as a tag for comments on Twitter and photos on Instagram and Flickr. Applicants dropped the hashtag in the mark when they applied to register DADBOD for beer,¹⁶⁵ books,¹⁶⁶ and clothing,¹⁶⁷ although the t-shirt shown in the latter specimen displays the hashtag #DADBOD in large font across the wearer’s chest.¹⁶⁸

While putative trademarks #GetFried Fry Café, DADBOD, and #FixItJesus are fairly innocuous examples, the public has been offended by attempts to register as trademarks the products of hashtag activism, or what one attorney has called “trending rallying cries.”¹⁶⁹ Recently, an applicant applied to register

160. U.S. Trademark Application Serial No. 86/170,225 (filed Jan. 20, 2014) (abandoned).

161. U.S. Trademark Application Serial No. 86/972,719 (filed Apr. 12, 2016).

162. See *First World Problems*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/first-world-problems> [<https://perma.cc/JL33-Y88D>] (last visited Feb. 24, 2017); Ed Payne & Chandler Friedman, *Viral Ad Campaign Hits #FirstWorldProblems*, CNN (Oct. 23, 2012), <http://www.cnn.com/2012/10/23/tech/ad-campaign-twist> [<https://perma.cc/WQN2-J9FV>]; see also #FirstWorldProblems search results, INSTAGRAM, <https://www.instagram.com/explore/tags/firstworldproblemsolved/?hl=en> [<https://perma.cc/VJJ2-R49F>] An August 28, 2015 search showed over a million uses of the tag on Instagram.

163. Brian Moylan, *‘Dad Bod’ Is a Sexist Atrocity*, TIME (May 5, 2015), <http://time.com/3846828/dad-bod-is-a-sexist-atrocity> [<https://perma.cc/6ZCZ-AETF>].

164. Madeline Boardman, *Dadbod Trend Goes Viral, Celebrates Fathers’ Imperfect Physiques*, US WKLY. (May 1, 2015), <http://www.usmagazine.com/celebrity-news/news/dadbod-trend-goes-viral-celebrates-fathers-imperfect-physiques-201515#ixzz3fytBqajS> [<https://perma.cc/8HT5-PS2U>] (characterizing #dadbod as “a trending term celebrating fathers’ imperfect physiques”); Spencer Kornhaber, *Dadbod: A New Word for a Timeless Physique*, ATLANTIC (Apr. 30, 2015), <http://www.theatlantic.com/entertainment/archive/2015/04/dadbod/391961> [<https://perma.cc/FZU3-DWFQ>] (“#dadbod has gone viral on social media . . . Check Twitter to see all the guys hailing the new terminology as a hall pass.”).

165. U.S. Trademark Application Serial No. 86/645,069 (filed May 29, 2015) (abandoned).

166. U.S. Trademark Application Serial No. 86/680,371 (filed July 1, 2015) (abandoned).

167. U.S. Trademark Application Serial No. 86/652,397 (filed June 4, 2015) (abandoned); see also U.S. Trademark Application Serial No. 86/634,220 (filed May 19, 2015) (application to register DADBOD for apparel).

168. The trademark application for DADBOD for apparel, submitted with a specimen showing the term used with a hash symbol, was filed in 2015 but claims a first use in commerce date of 2013; as of that date, the hashtag was in common use on Twitter but had not achieved the level of fame it did in 2015. U.S. Trademark Application Serial No. 86/652,397 (filed June 4, 2015) (abandoned); see also #dadbod search results, TWITTER, <https://twitter.com/search?q=%23dadbod&src=typd> [<https://perma.cc/2KXH-NMRZ>] (last visited Feb. 27, 2017).

169. Roberto Ledesma, *Do Not File a Trademark Application for a Trending Rallying Cry*, EVERYTHINGTRADEMARKS.COM (Jan. 10, 2015), <http://everythingtrademarks.com/2015/01/10/do-not-file-a-trademark-application-for-a-trending-rallying-cry> [<https://perma.cc/5PZ3-DWSU>].

#ICantBreathe for shirts,¹⁷⁰ a reference to the last words of Eric Garner, who was killed when a policeman put him in a chokehold and ignored his cries of distress.¹⁷¹ Comments to an article about the trademark application on *The Smoking Gun* called her “trashy,” “greedy,” “evil,” and “disgusting” for attempting to “cash in on” Garner’s plight.¹⁷² #Peace4Trayvon began trending shortly after Florida teenager Trayvon Martin was killed in 2012 and continues to appear on social media.¹⁷³ When an applicant sought to register it for refrigerator magnets and other tchotchkes in 2014, the application was refused on a number of bases, including a likelihood of confusion with several marks that Trayvon’s mother, Sybrina Fulton, had already applied to register.¹⁷⁴ Fulton’s lawyer told the media that her applications were primarily defensive: “There are so many people out there doing things with Trayvon’s name and some inappropriate people, so without that trademark [Fulton] did not have the right to tell them to cease and desist.”¹⁷⁵

In the summer of 2014, the “ice bucket challenge” became a viral sensation as people worldwide, including countless celebrities, dared one another to dump a bucket of ice water over their heads to raise awareness for ALS,¹⁷⁶ donate directly to the cause, or both. Participants posted videos on social media alongside the hashtag #icebucketchallenge. While the ALS Association had nothing to do with the origin of the phenomenon, the challenge raised over a

170. #ICANTBREATHE, U.S. Trademark Application Serial No. 86/485,865 (filed Dec. 19, 2014).

171. Garner had been suspected of selling loose cigarettes. Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/6JVN-4VC7>].

172. *Woman Seeks Trademark for ‘I Can’t Breathe,’ Dying New York Man’s Final Words*, SMOKING GUN (Dec. 18, 2014), <http://www.thesmokinggun.com/buster/woman-files-for-I-Cant-Breathe-trademark-798432> [<https://perma.cc/J96C-GED3>]; see also Tina Nguyen, *Woman Files Trademark Application for ‘I Can’t Breathe,’* MEDIAITE (Dec. 19, 2014), <http://www.mediaite.com/online/woman-files-trademark-application-for-i-cant-breathe> [<https://perma.cc/2LHQ-6JGA>] (“A woman has filed a trademark application for the phrase ‘I Can’t Breathe,’ [sic] because there is nothing more American than making money off the suffering of African [] Americans.”); A.J. Ross, *Garner Family to Fight Woman Trying to Trademark ‘I Can’t Breathe,’* ABC7 (Dec. 19, 2014), <http://7online.com/news/garner-family-to-fight-woman-trying-to-trademark-i-cant-breathe/444523> [<https://perma.cc/YP7N-46Q9>] (reporting Eric Garner’s mother “devastated at the thought of a perfect stranger now trying to profit off her son’s final words”).

173. #peace4trayvon search results, TWITTER, <https://twitter.com/search?q=%23peace4trayvon%20&src=typd> [<https://perma.cc/86EX-763R>] (last visited Feb. 28, 2017).

174. U.S. Trademark Application Serial No. 86/014,534 (filed July 18, 2013). The Office Action, listing the USPTO’s bases for refusal, can be viewed by pulling up the application, selecting “TSDR” to view the filer wrapper, and then selecting “Offc Action Outgoing” (Aug. 12, 2013).

175. Athena Jones & Eric Marrapodi, *Sybrina Fulton Seeks to Trademark Trayvon Rallying Cries*, CNN (Mar. 28, 2012, 11:29 PM) <http://www.cnn.com/2012/03/28/justice/florida-teen-shooting-trademarks> [<https://perma.cc/C3BH-H5ES>].

176. ALS stands for Amyotrophic Lateral Sclerosis, also known as Lou Gehrig’s Disease.

hundred million dollars for the organization in just thirty days.¹⁷⁷ In August 2014, with the movement at its peak, the ALS Association filed applications to register #IceBucketChallenge¹⁷⁸ and #ALSIceBucketChallenge.¹⁷⁹ After significant blowback from the public, which called the Association's attempts to register the tagmarks "shameful," "disgusting," and "distasteful,"¹⁸⁰ it abandoned both applications.¹⁸¹

The hashtag taxonomy reflects a linguistic innovation rich in meaning and versatile in function. Producers, marketers, consumers, journalists, and citizens not only use hashtags in a variety of ways, they also understand hashtags as serving a multitude of purposes and fulfilling a plethora of needs. While the goals and perceptions of each group of hashtag users may in some cases coalesce, in other cases, they are likely to be at odds. Think of the way celebrities understood #IceBucketChallenge and the way the ALS Association did, or your friends' goals in tagging a photo #TBT compared with the goals of the winery owner who registered it. Existing trademark doctrines are proving inadequate to assess this new category of word marks, and standard approaches to assessing use, distinctiveness, and consumer perception are proving ill-fitting.

177. Press-Release, *The ALS Association Expresses Sincere Gratitude to Over Three Million Donors*, ALS ASS'N (Aug. 29, 2014), <http://www.alsa.org/news/media/press-releases/ice-bucket-challenge-082914.html> [<https://perma.cc/2LR8-8PFL>]. As a result of this funding, major breakthroughs in ALS research occurred. See Robert Gebelhoff, *Scientists Are Crediting the ALS Ice Bucket Challenge for Breakthroughs in Research*, WASH. POST (Aug. 19, 2015), <https://www.washingtonpost.com/news/to-your-health/wp/2015/08/19/scientists-are-crediting-the-ice-bucket-challenge-for-breakthroughs-in-research> [<https://perma.cc/X7UB-6WGX>].

178. U.S. Trademark Application Serial No. 86/375,299 (filed Aug. 22, 2014).

179. U.S. Trademark Application Serial No. 86/375,307 (filed Aug. 22, 2014). The ALS Foundation also applied to register ICE BUCKET CHALLENGE, U.S. Trademark Application Serial No. 86/375,292 (filed Aug. 22, 2014), and ALS ICE BUCKET CHALLENGE, U.S. Trademark Application Serial No. 86/375,305 (filed Aug. 22, 2014).

180. See Ledesma, *supra* note 169 (applying to register #ICEBUCKETCHALLENGE constituted "a distasteful approach to branding"); Mike Masnick, *ALS Association Tries to Trademark Ice Bucket Challenge, Despite Having Nothing to Do With It Originally*, TECHDIRT (Aug. 28, 2014, 8:13 AM), <https://www.techdirt.com/articles/20140827/17325528346/als-association-tries-to-trademark-ice-bucket-challenge-despite-having-nothing-to-do-with-it-originally.shtml>

[<https://perma.cc/9662-JSM3>] (characterizing the ALS Association asserting trademark rights in the phrase as "kind of disgusting"); Abby Ohlheiser, *ALS Association Withdraws Controversial Applications to Trademark 'Ice Bucket Challenge'*, WASH. POST (Aug. 30, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/08/28/can-the-als-association-trademark-the-ice-bucket-challenge-its-going-to-try> [<https://perma.cc/6ZRF-KTDZ>] (quoting an attorney who called the attempt to register the mark "shameful").

181. The ALS Association Facebook page stated: "We've received several messages regarding the trademark applications we filed. We filed for these trademarks in good faith as a measure to protect the Ice Bucket Challenge from misuse after consulting with the families who initiated the challenge this summer. However, we understand the public's concern and are withdrawing the trademark applications. We appreciate the generosity and enthusiasm of everyone who has taken the challenge and donated to ALS charities." Robbie Couch, *ALS Association Withdraws Ice Bucket Challenge Trademark Applications Amid Backlash*, HUFFINGTON POST (Sept. 2, 2014, 1:41 PM), http://www.huffingtonpost.com/2014/09/02/als-association-trademark_n_5752920.html [<https://perma.cc/BQT3-U6ZM>].

II. PROTECTABILITY PROBLEMS

To be protectable under federal law, a word mark must meet a number of requirements. First, a mark must be in use to be registered.¹⁸² In order to trigger protection under the Lanham Act, which draws its power from the Commerce Clause of the Constitution,¹⁸³ the use must be in interstate commerce. The use must be “as a mark,” ruling out, for example, descriptive text within a label, instruction manual, or advertisement; use solely as a trade name, phone number, or web address; or use in metadata. It must be capable of indicating a single source. And the use must also be made in connection with the sale of the specific goods or services identified in the application.

Second, to garner protection,¹⁸⁴ a mark must also be distinctive, which means it must be the kind of mark consumers automatically perceive as a source indicator or a mark that they have come to perceive as one. If the mark is fanciful, arbitrary, or suggestive¹⁸⁵ for the goods or services with which it is used, trademark law characterizes it as inherently distinctive and presumes that consumers will perceive it as a mark.¹⁸⁶ If the mark merely describes the goods or services, then the applicant needs to show that based on use, the mark indicates to consumers that the goods or services come from a single, consistent source. This change in how consumers perceive a mark is called secondary meaning or acquired distinctiveness.¹⁸⁷

Third, in addition to the use and distinctiveness requirements, a mark cannot run afoul of section 2 of the Lanham Act. Among the most relevant section 2 prohibitions, for the purposes of hashtag registration, are those barring marks that consist of or include matter that may falsely suggest a connection with a person or entity. Another important prohibition bars marks that are

182. Foreign registered marks, however, may be registered without prior use in the United States. 15 U.S.C. § 44(e) (2012).

183. *Trade-Mark Cases*, 100 U.S. 82, 86–87 (1879).

184. This Article focuses on tagmark registration and registrability, but it’s important to note that trademarks can also be protectable and thus enforceable without registration, based simply on their use. 15 U.S.C. § 1125(a)(1). Many of the registration requirements discussed in this section—use in commerce; use as a mark; distinctiveness—are also required for common law protection, and are assessed at the time the mark owner attempts to enforce the mark. 15 U.S.C. § 1127; *see also, e.g., Sam’s Riverside, Inc. v. Intercon Sols., Inc.*, 790 F. Supp. 2d 965, 976–85 (S.D. Iowa 2011) (common law trademark rights require use as a mark); *Tally-Ho, Inc. v. Coast Cmty. College Dist.*, 889 F.2d 1018, 1022 (11th Cir. 1989) (common law trademark rights require use in commerce); *First Bank v. First Bank Sys., Inc.*, 84 F.3d 1040, 1046 (8th Cir. 1996) (common law trademark rights require distinctiveness).

185. *See infra* note 210.

186. 2 MCCARTHY, *supra* note 8, § 11:4.

187. Unless the mark owner procures a survey that reflects consumers’ actual perceptions, evidence of acquired distinctiveness (also called secondary meaning) is typically offered in the form of proxies such as sales, advertising expenditures, length and exclusivity of use, unsolicited media coverage, and copying by competitors. *Cicena Ltd. v. Columbia Telecomms. Grp.*, 900 F.2d 1546, 1551–52 (Fed. Cir. 1990).

functional.¹⁸⁸ Several other categories of marks are not flatly prohibited, but—like descriptive marks—are only registrable with a showing of secondary meaning. Those include marks that consumers will perceive as “merely a surname”¹⁸⁹ or “primarily geographically descriptive.”¹⁹⁰

A. Functionality

As an initial matter, hashtags used online have a serious functionality problem suggesting that many, if not most, are unprotectable. The Lanham Act bars the registration of a proposed mark comprising “matter that, as a whole, is functional.”¹⁹¹ The goal of functionality doctrine is to prevent trademark protection from inhibiting competition by allowing a single producer to monopolize a useful product feature.¹⁹² While functionality considerations vary somewhat across circuits,¹⁹³ traditional utilitarian functionality analysis¹⁹⁴ focuses on questions like whether and to what degree a product feature is useful, whether it’s the best or one of the best designs available, and whether competitors would need to use the same design or feature to compete effectively.¹⁹⁵ Given the function that tagmarks serve on social media, this doctrine arguably ought to bar many of them from registration.

The concept of functionality is usually limited to trade dress and seldom applied to word marks.¹⁹⁶ But for certain types of word marks used online, such

188. See 15 U.S.C. § 1052(a), (c), (e) (2012).

189. 15 U.S.C. § 1052(e)(4); TMEP § 1211; 1211.01.

190. 15 U.S.C. § 1052(e)(2); TMEP § 1210.02.

191. 15 U.S.C. § 1052(e)(5).

192. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 164 (1995). Congress explicitly recognized functionality doctrine in 1998 via an amendment to the Lanham Act that formalized what courts and the USPTO were already doing. 1 MCCARTHY, *supra* note 8, § 7:63.

193. “It seems that there are as many definitions of what is ‘functional’ as there are courts.” 1 MCCARTHY, *supra* note 8, § 7:69.

194. Most but not all circuits differentiate utilitarian functionality from aesthetic functionality. Broadly, a product’s design or trade dress may be unprotectable based on utilitarian functionality if it is useful by reason of engineering (e.g., the design of a pizza delivery box with folding perforations, tabs, and holes to vent heat); it may be unprotectable based on aesthetic functionality if it is desirable to consumers because of its aesthetic appeal (e.g., a heart-shaped box of chocolates). See *id.* §§ 7:69, 7:80, 7:87.

195. *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1340–41 (C.C.P.A. 1982).

196. Landmark functionality cases have focused on trade dress rather than word marks and consistently frame analyses in terms of whether a “product feature” is functional. See, e.g., *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 164 (1995); *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, n.10 (1982); see also TMEP § 1202.02(a)(ii) (“functionality doctrine . . . prohibits registration of functional *product features*”) (emphasis added); 1 MCCARTHY, *supra* note 7, § 7:69 (summarizing different circuits’ tests for functionality). But see *Damn I’m Good, Inc. v. Sakowitz, Inc.*, 514 F. Supp. 1357 (S.D.N.Y. 1981) (DAMN I’M GOOD functional for bracelets and jewelry); *In re Schwauss*, 217 U.S.P.Q. 361 (T.T.A.B. 1983) (holding FRAGILE functional for labels and bumper stickers). Burk notes several other cases holding “two-dimensional” marks functional, including *Atari, Inc. v. Mattel, Inc.*, 217 U.S.P.Q. (BNA) 816, 819 (T.T.A.B. 1982) (video game character configurations) and *Moore Bus. Forms, Inc. v. Nat’l Comput. Sys., Inc.*, 211 U.S.P.Q. (BNA) 909, 916 (T.T.A.B. 1981) (test answer sheets for machine-scanning).

as hashtags, keywords, metatags, and domain names, utility takes primacy over the source indicating role, rendering them functional and thus unprotectable as trademarks. Dan Burk calls these marks “cybermarks”¹⁹⁷ and argues that they’re distinct from traditional word marks in that they are “physically operative.” He asserts that cybermarks should therefore be immune to trademark infringement allegations¹⁹⁸ precisely because of their functionality. As “components of a data processing system, intended to initiate and control discrete functions of a machine,”¹⁹⁹ cybermarks “behave”²⁰⁰ rather than communicate. While Burk did not explicitly address the status of hashtags as cybermarks, his framework sheds light on the protectability of tagmarks, which arguably fail to function as marks when they are employed online as hyperlinked tags that trigger search results when clicked.²⁰¹

Burk’s model applies most cleanly to marks that are invisible to laymen,²⁰² like metatags.²⁰³ But other types of cybermarks, such as hashtags, are visible to users and are thus capable of being perceived as marks. Functionality is therefore necessarily context-dependent,²⁰⁴ and perhaps rarely more so than in the case of tagmarks. When a producer’s only use of a tagmark (or the use featured in its specimen) is a social media use or any other hyperlinked use, the tagmark is a means of organizing content and facilitating search; as such, functionality doctrine cautions that granting exclusive rights to use it may inhibit competition. Within this framework, applicants’ use of the hashtags #SecureYourself, #TipMas, #MyJihad, #SwedeSpeak, #BecauseBags, and #HollywoodTrends,

197. Dan L. Burk, *Trademarks Along the Infobahn: A First Look at the Emerging Law of Cybermarks*, 1 RICH. J.L. & TECH. 1 (1995); Dan L. Burk, *Cybermarks*, 94 MINN. L. REV. 1375 (2010).

198. “The question that is squarely presented is whether translating a consumer’s mental associations regarding a trademark term into an indexing apparatus can somehow constitute trademark infringement.” Burk, *Cybermarks*, *supra* note 197, at 1389.

199. *Id.* at 1376.

200. *Id.* at 1403.

201. As Burk writes of cybermarks, “The entry of alphabetic symbols into a search engine by a consumer”—or, in the case of hashtags, the entry of alphabetic symbols into a social media search box or post by a user—“is a mediated convenience; strings of letters are automatically translated by intervening layers of software into codes recognized by the machines that comprise the search system. . . . Thus, at one level, search terms are human-recognizable strings of letters that appear to comprise a trademark. At another level, the domain name or search term represents a series of sequences of bits that may be portrayed as the ones and zeroes of binary code.” *Id.* at 1386. At least one practitioner has raised the question of whether hashtags should be considered functional. Valentina Torelli, *Trade Marks in Social Networks: The Case of Coke’s Hashtag Trade Mark Applications*, IPKAT (Apr. 15, 2015), <http://ipkitten.blogspot.com/2015/04/trade-marks-in-social-networks-case-of.html> [https://perma.cc/E7W7-Y7NS].

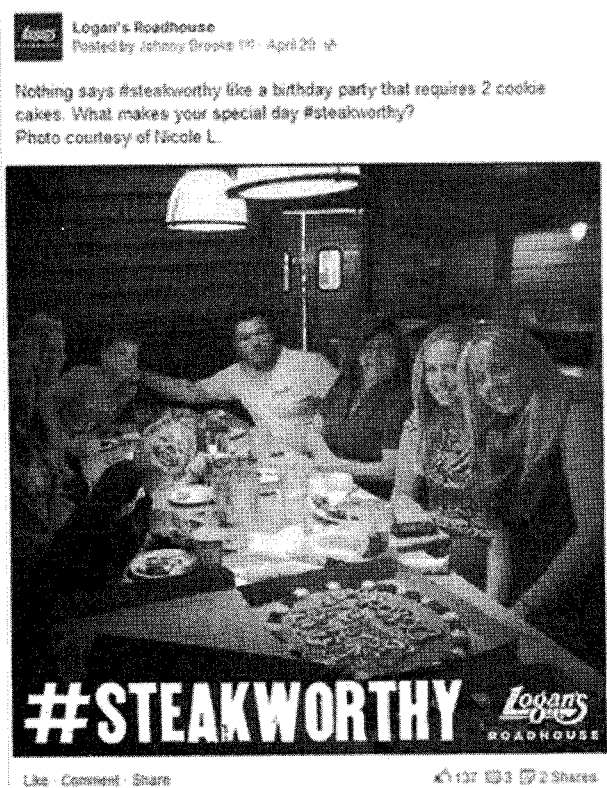
202. Burk, *Cybermarks*, *supra* note 197, at 1383; *see also* Margreth Barrett, *Trademarks and Digital Technologies: “Use” on the Net*, 13 J. INTERNET L. 1, 10 (2010) (For a defendant’s use to infringe, “consumers should be able to *perceive* the defendant’s application of the allegedly confusing word or symbol.”).

203. A metatag is a statement in HTML that describes or relates to the contents of a webpage and is used by search engines to index that page. *Metatag*, AMERICAN HERITAGE SCIENCE DICTIONARY (4th ed. 2002).

204. Burk, *Cybermarks*, *supra* note 197, at 1413–14.

submitted with specimens comprising screenshots from Twitter, Facebook, and YouTube, should be barred from registration as functional matter. This prohibition governs even when a mark owner can show that the mark acquired distinctiveness.

On the other hand, #GetFried on a restaurant sign and #FixItJesus on a shirt are not physically operative in the same way: the marks could theoretically be or become protectable because the concerns that taint cybermarks do not apply. The offline tagmark can become associated with goods or services, but that association is not automatic the way cybermarks' functions are.²⁰⁵ Based on this distinction, a trademark examining attorney might like to know whether the appearance of a tagmark on an applicant's website is actually hyperlinked, thus functioning as a piece of code, or whether it simply appears in plain text. In many cases, use and specimens of use include both tagmarks that function as code and those that don't, as in the following example for #Steakworthy:



205. *Id.* at 1387.

Hashtags' functionality problem is related, but not identical, to their use problem discussed in Part II.C.²⁰⁶ While hashtags that behave like cybermarks are arguably not used as marks, the cybermark framework does not provide much guidance regarding those tagmarks that don't perform technical functions. Those marks may nonetheless be perceived as primarily referencing online hashtags rather than primarily identifying the source of goods or services and, as such, either don't yet function as marks or are incapable of ever doing so.

B. Distinctiveness

In addition to their functionality problem, tagmarks have a distinctiveness²⁰⁷ problem: even when they can technically be categorized as inherently distinctive because of the relationship between the words and the goods, consumers may not perceive them as distinguishing source. That's because the presence of the hash symbol primes consumers to perceive tagmarks as mere hashtags. Because of that symbol, a tagmark's role in search, organization, and self-expression will take precedence in consumers' minds over any trademark role it might be intended to fulfill.

To earn protection under the Lanham Act, a trademark must be distinctive—it must distinguish the goods of one producer from those of another. In evaluating distinctiveness, word marks are typically placed in one of several categories.²⁰⁸ The first three categories of word marks—fanciful, arbitrary, and suggestive marks—are protectable as soon as a producer begins using them in commerce. This is because courts consider them inherently distinctive—capable of serving as source indicators from the moment they are affixed to goods or used in connection with services. Terms and phrases categorized as generic, on the other hand, can never be protected as trademarks. And terms and phrases characterized as descriptive can become protectable marks, but only upon a showing of acquired distinctiveness. Because they function to describe goods and communicate qualities about them, it takes a substantial period of use,

206. *Id.* at 1413–15.

207. A trademark is characterized as “inherently distinctive,” i.e., inherently capable of serving as a trademark from its earliest use, if it is fanciful, arbitrary, or suggestive for the goods or services in question. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 786 (1992). If matter has come to serve as a trademark based on use, it is said to have “acquired distinctiveness.” In re *Chippendales USA, Inc.*, 622 F.3d 1346, 1349 (Fed. Cir. 2010); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 115 (2d Cir. 2001).

208. A fanciful mark is a neologism—a word coined for the purpose of serving as a trademark, such as EXCEDRIN for pain reliever. An arbitrary mark is an existing term or phrase used in connection with goods for which it has no logical meaning, like APPLE for computers. A suggestive mark is a term or phrase that hints at or suggests some quality or characteristic of the product in question without describing it directly, like GREYHOUND for bus services. A descriptive mark explicitly describes something about the goods or services, such as an ingredient, function, taste, smell, or intended use or user—TRIM for a nail clipper is an example. Lastly, a term or phrase like STRAWBERRY MILK for strawberry-flavored milk would be categorized as generic. For a discussion of word mark classifications, see *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790–91 (5th Cir. 1983) abrogated by *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004).

marketing, and exposure to a term before the law presumes a descriptive term has come to take on trademark significance to consumers.²⁰⁹ Descriptive marks also include those that feature laudatory terms like DELICIOUS and SUPERIOR. Marks that use non-deceptive geographic terms, like CALIFORNIA CLOSET, and those that feature terms consumers will perceive as primarily surnames,²¹⁰ like PICKETT SUITE HOTEL,²¹¹ also require secondary meaning for protection.

According to the TMEP, the addition of a hash sign will almost never render a descriptive or generic mark distinctive.²¹² Likewise, removing spaces and punctuation from a phrase to convert it into hashtag form, i.e. transforming I CAN'T BREATHE to ICantBreathe or EVERYDAY MADEWELL to EverydayMadewell, should have little to no effect on the mark's distinctiveness.²¹³ But in practice, USPTO examining attorneys have apparently struggled to filter out the hashtag and view the mark itself in isolation. Those struggles result in inconsistent outcomes. #Smart for clothing²¹⁴ was allowed without a showing of secondary meaning, as were #LetsBowl for bowling balls,²¹⁵ #ProudMama for entertainment services, #NormalizeSociety for a blog about gentle parenting,²¹⁶ and #BlogathonATX for a blogging marathon in Austin, Texas. #WeatherWednesday was registered for a weekly inspirational newsletter about the weather and its effects, presumably issued on Wednesdays.²¹⁷ #Running was registered for promoting youth leadership skills, i.e. teaching young people about "running" things,²¹⁸ and #KeepYourSoleClean was registered in connection with adhesive film for sneakers designed to keep your sole clean.²¹⁹

These examples of arguably descriptive marks granted registration without a showing of secondary meaning raise the possibility that descriptive tagmarks

209. See, e.g., Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 557 (2006) ("Secondary meaning exists when a significant number of consumers use the mark to identify a single source of the product. In short, a descriptive mark is protectable only if it actually serves an information transmission function.").

210. 15 U.S.C. § 1052 (2012); TMEP § 1211.

211. *In re Pickett Hotel Co.*, 229 U.S.P.Q. 760 (T.T.A.B. 1986).

212. TMEP § 1202.18.

213. "A mark or portion of a mark is considered 'unitary' when it creates a commercial impression separate and apart from any unregistrable component. The test for unitariness inquires whether the elements of a mark are so integrated or merged together that they cannot be regarded as separable." TMEP § 1213.05.

214. #SMART, Registration No. 4,551,737.

215. #LETSBOWL, Registration No. 4,668,238 (disclaiming "bowl" but not the hash mark).

216. Specimen, #NORMALIZESOCIETY, Registration No. 4,734,839, <http://tsdr.uspto.gov/documentviewer?caseId=sn86402627&docId=SPE20140925081905#docIndex=8&page=1> [<https://perma.cc/TCT9-N2R2>] (tagmark is difficult to find on the website specimen and likely fails to show use as a mark).

217. Compare to #MusicVideoMonday, which was refused registration on the Principal Register as merely descriptive. #MUSICVIDEOMONDAY, Registration No. 4,718,32 (Supplemental Register).

218. #RUNNING, Registration No. 4,862,129.

219. #KEEPLYOURSOLECLEAN, Registration No. 4,726,556.

are more often treated as inherently distinctive than are traditional descriptive word marks. But whether a mark is descriptive or inherently distinctive is often a close call, and reasonable examining attorneys can differ.²²⁰ More fundamentally, a close look at tagmarks should lead us to question whether the *Abercrombie* pyramid is a relevant tool in assessing them, and indeed whether applying *Abercrombie* consistently produces correct results in trademark distinctiveness analysis at all.

Traditionally, under *Abercrombie*, a trademark examining attorney determines word mark distinctiveness in two steps: first, she classifies a putative mark as fanciful, arbitrary, suggestive, descriptive, or generic.²²¹ Once she selects a category, a protectability determination automatically follows. Examining attorneys adhere to clear and copious precedent in assessing marks this way; the categorization scheme is firmly entrenched in United States trademark law and examiners and courts rarely second-guess the assumptions that accompany it.²²²

But at least one group of scholars has called those assumptions into question using empirical data.²²³ A study by Lee et al. revealed no statistically significant difference in consumers' perceptions of distinctiveness among the various types of word marks when the marks were presented on a box of cookies in an "average trademark use context."²²⁴ According to the authors' survey, consumers perceive even merely descriptive terms as distinctive trademarks when they appear on products with various nonsemantic indicia of trademark use, including prominent placement, capitalization, large font, and color that set them apart from the background. Consequently, the study's authors propose abandoning the *Abercrombie* taxonomy in favor of a model that considers only nonlexical indicators of whether a term or phrase is being used in a way likely to lead consumers to recognize it as a mark.

The Lee survey serves as an important reminder that categorizing a word mark within the *Abercrombie* taxonomy may not always result in a correct assessment of its distinctiveness.²²⁵ It also provides empirical evidence that

220. For a more fulsome discussion of the rules and tests factfinders apply to distinguish descriptive marks from suggestive marks in borderline cases, see Alexandra Roberts, *How to Do Things with Word Marks: A Speech-Act Theory of Distinctiveness*, 65 ALA. L. REV. 1035 (2014); see also Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367 (2015) (arguing that the boundary between the two categories of marks is necessarily fuzzy because there is little cognitive difference in how consumers perceive them).

221. See 2 MCCARTHY, *supra* note 8, § 11:2.

222. Thomas R. Lee, Eric D. DeRosia & Glenn L. Christensen, *An Empirical and Consumer Psychology Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033, 1036–37 (2009) (“[F]or all their practical and legal significance, these premises have rarely been questioned—much less subjected to careful theoretical and empirical evaluation. Judges, practitioners, and scholars reflexively and unquestioningly have embraced the *Abercrombie* formulation of trademark distinctiveness.”).

223. *Id.* at 1033.

224. *Id.* at 1033–34.

225. See also Elizabeth A. Falconer, *#CanHashtagsBeTrademarked: Trademark Law and the Development of Hashtags*, 17 N.C. J.L. & TECH. ONLINE 1, 3 (2016) (arguing “a hashtag is incapable

context and visual cues strongly affect whether consumers perceive a term or phrase as a trademark. Intuitively, the results make sense—“thin mints” in small font on the side of a cookie package in the middle of a sentence describing its contents, for example, creates a different impression than “THIN MINTS” in capital letters and extra-large, brightly colored, stylized font centered on the front of the package. Consumers don’t think in terms of trademark categories or legal precedent; they simply react to what they see. Extrapolating from the study’s findings, context and visual cues likely also play crucial roles in consumers’ perception of tagmarks.

While word marks are often shoehorned into the categories described above in a one-size-fits-all approach, it seems probable that the addition of a hash symbol to a phrase actually alters the way that consumers perceive the phrase. So, for example, if Hollister uses the mark **SOCAL STYLIST** for retail services, that mark might be properly categorized as merely suggestive and thus inherently distinctive. But when the mark is **#SoCalStylist** and the use made online, consumers are more likely to perceive it first and foremost as a hashtag—an invitation to look for the term on social media or use it to tag their own content.



As such, the online version of the mark can’t justify its treatment as an inherently distinctive mark because it isn’t initially perceived as a source-indicator. Just as descriptive, geographic, and surname marks are treated as “primarily merely” something other than a trademark until they acquire secondary meaning, tagmarks should be deemed “primarily merely hashtags” until they resonate with consumers as trademarks.

of identifying a source, does not cause consumer confusion, and will encourage genericide,” so granting trademark protection to hashtags runs contrary to public policy).

C. Use as a Mark

In order to acquire trademark rights, a term or phrase must be used in commerce *as a mark*—i.e. as a symbol that distinguishes the goods or services of one source from those of another.²²⁶ Whether consumers know the identity of a source is immaterial; they need only recognize that the mark signals the product is tied to a single producer.²²⁷ Consumer perception, not the mark owner's belief or intent, determines whether the term functions as a mark.²²⁸ At the heart of the protectability question for tagmarks lies the conundrum of whether they are used in such a way that consumers will actually perceive them as source-indicators.

Trademark examining attorneys review an applicant's specimen to evaluate whether consumers will perceive a tagmark as a source-indicator or a mere hashtag. The TMEP emphasizes the importance of the use as a mark requirement in assessing the registrability of tagmarks:

If the specimen shows the hash symbol . . . in a proposed mark as merely a tag used to reference or organize keywords or topics of information to facilitate searching a topic, the relevant public will not view the hash symbol . . . in the mark as identifying the source of the goods or services. In such cases, registration must be refused.²²⁹

The TMEP also compares tagmarks to domain name marks and hash symbols to top-level domain indicators (like the “.com” in “toysrus.com”). That analogy is designed to guide examiners in evaluating generic and descriptive

226. 15 U.S.C. § 1127 (2012); KRUGMAN, *supra* note 26, § 2:98 (“Not everything adopted and used by a party as a trademark functions as a mark. After reviewing the evidentiary record, including specimens and any promotional material of record, an Examiner may find that the matter presented for registration is not used as a trademark or otherwise does not function as a mark.”); *see also* Am. Express Co. v. Goetz, 515 F.3d 156, 161 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 176 (2008); Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods., 134 F.3d 749, 753 (6th Cir. 1998); *In re Roberts*, 87 U.S.P.Q.2d 1474, 1479 (T.T.A.B. 2008); *In re Eilberg*, 49 U.S.P.Q.2d 1955, 1957 (T.T.A.B. 1998); *In re Local Trademarks, Inc.*, 220 U.S.P.Q. 728, 730 (T.T.A.B. 1983); I MCCARTHY, *supra* note 8, § 3:3 (“[T]o create trademark or trade dress rights, a designation must be proven to perform the job of identification: to identify one source and distinguish it from other sources. If it does not do this, then it is not protectable as a trademark . . .”).

227. *But see* Graeme B. Dinwoodie & Mark D. Janis, *Confusion over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597, 1644–46 (2007) (asserting that the “use as a mark” requirement primarily serves as proxy for other trademark doctrines, such as distinctiveness, confusion, or functionality).

228. *See In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d 1227, 1229 (T.T.A.B. 2010); *In re Aerospace Optics, Inc.*, 78 U.S.P.Q.2d 1861 (T.T.A.B. 2006) (“A critical element in determining whether matter sought to be registered is [sic] a trademark is the impression the matter makes on the relevant public. . . . [T]he critical inquiry is whether the asserted mark would be perceived as a source indicator.”); *In re The Standard Oil Co.*, 125 U.S.P.Q. 227, 229 (C.C.P.A. 1960).

229. TMEP § 1202.18 (citing 15 U.S.C. §§ 1051, 1052, 1053, 1127). Read closely, this text is less straightforward than it appears and provides a clue as to why applications to register tagmarks are not always treated consistently. The Manual states that if the hash *symbol* functions merely as a tag to organize content, the public will not view the hash *symbol* as identifying the source of goods, so registration of the entire *tagmark* must be refused. *Id.*

marks, but it's also instructive on the question of use as a mark.²³⁰ As McCarthy explains,

the key to legal protection and registration of a domain name as a mark is to *use it as a mark, not merely as a domain name*. If a domain name is used only like a telephone number and address, inconspicuously printed in small letters on business letterhead stationery, business cards, and advertisements, then it is being used only as a domain name The key is whether the designation claimed as a protectable mark has been used to make such a visual impression that *the viewer would see it as a symbol of origin separate and apart from anything else*. Only then does it perform the role of a mark to identify and distinguish source.²³¹

With a traditional, offline trademark use, the examining attorney simply inquires whether a word mark is affixed to goods sold in interstate commerce, or whether it's used appropriately in connection with services rendered. For a phrase to be protectable, its use as a mark must be obvious: "it must be used in such a manner that its nature and function [as a trademark] are readily apparent and recognizable without extended analysis or research and certainly without legal opinion."²³² The sudden popularity of domain name marks²³³ complicated the formerly straightforward trademark use question, because such marks serve two distinct but interrelated purposes—they function as website addresses and also as source distinguishers.²³⁴ For the domain name mark to succeed as a mark, consumers must perceive both roles.

230. The question of whether a domain name use is a trademark use has primarily been evaluated in the context of infringement suits rather than acquisition of rights; the use requirements are not identical. Jeffery R. Peterson, *What's the Use? Establishing Mark Rights in the Modern Economy*, 5 HOUS. BUS. & TAX L.J. 453, 475 (2005) (citing Connie L. Ellerbach, *Domain Name Dispute Remedies: Tools for Taming the World Wide Web*, 759 PLI/PAT 513, 517–18 (2003)).

231. 1 MCCARTHY, *supra* note 8, § 7:17.50 (emphasis added); *see, e.g.*, *Sam's Riverside, Inc. v. Intercon Sol., Inc.*, 790 F. Supp. 2d 965, 984–85 (S.D. Iowa 2011); *In re Unclaimed Salvage & Freight Co.*, 192 U.S.P.Q. 165, 168 (T.T.A.B. 1976) (affirming refusal of registration of trade name as trademark where specimen demonstrated use only to identify applicant as a business); *Lockheed Martin Corp. v. Network Sols., Inc.*, 985 F. Supp. 949, 956 (C.D. Cal. 1997), *aff'd*, 194 F.3d 980 (9th Cir. 1999) ("Domain names . . . do not act as trademarks when they are used merely to identify a business entity."). *See generally* TMEP § 1215.02(a).

232. *Ex parte Nat'l Geographic Soc'y*, 83 U.S.P.Q. 260 (Comm'r Pat. & Trademarks 1949); *see also In re Morganroth*, 208 U.S.P.Q. 284 (T.T.A.B. 1980) (The trademark use requirement "does not contemplate that the public will be required or expected to browse through a group of words, or scan an entire page in order to decide that a particular word, separated from its context, may or may not be intended, or may or may not serve to identify the product of the manufacturer or dealer.").

233. Over 25,000 dot-com (.COM) marks are currently registered, to say nothing of the more than 40,000 unsuccessful or unperfected applications for such marks and the similar applications and registrations for marks that include .ORG, .BIZ, .NET, and other top-level domain suffixes. *See* searches for ".com," ".org," ".biz," and ".net" trademarks, USPTO TRADEMARK ELECTRONIC SEARCH SYS. (TESS), <http://tmsearch.uspto.gov> [<https://perma.cc/4KB3-QSS5>] (last visited Mar. 3, 2017).

234. *See Ana Racki Marinkovic, On Domain Names and Trademarks*, 15 J. INTERNET L. 29 (2012) ("[T]he primary function of domain names is to serve as unique identifier of Web sites. Nevertheless . . . domain names . . . have become much more than just tools to navigate the Internet. Domain names have also gained increasing importance as business identifiers in online commerce."). The same is true of phone number trademarks like 1-800-FLOWERS. *Id.*

The distinction between use as a trademark—with all the indicia of trademark use—and use as a mere domain name applies equally well to tagmarks, although the analogy is imperfect. Like domain names, hashtags fulfill a technological function,²³⁵ grouping comments and enabling users to monitor a discussion.²³⁶ But they also do much more. A web address is passive and static; a consumer can visit it and complete transactions once there, but cannot change it or become its coauthor. A hashtag, on the other hand, is collaborative and dynamic. It serves expressive and communicative functions as well as technological ones, and is shaped by those who interact with it.²³⁷ Participants can use it to comment, criticize, express affiliation or affinity, or add their content to the stream of content indexed at the hashtag.²³⁸

Tagmark use can mirror text mark use, especially when producers use tagmarks offline, as in this specimen for #TanLife tanning lotion:²³⁹



#TanLife appears to meet “the traditional criteria” for use as a mark: “larger-sized print, all capital letters or initial capitals, distinctive or different print style, color and prominent position on label.”²⁴⁰ And while it’s paired with a house

235. See Xuan-Thao N. Nguyen, *Shifting the Paradigm in E-Commerce: Move over Inherently Distinctive Trademarks—The E-Brand, I-Brand and Generic Domain Names Ascending to Power?*, 50 AM. U. L. REV. 937, 960–61 (2001) (“Both domain names and telephone numbers ‘make it easier for customers to find’ the company. Such use, as a machine-linking function, is not trademark usage.”).

236. See Falconer, *supra* note 225, at 34 (“[A] hashtag denotes a topic, not an original source.”).

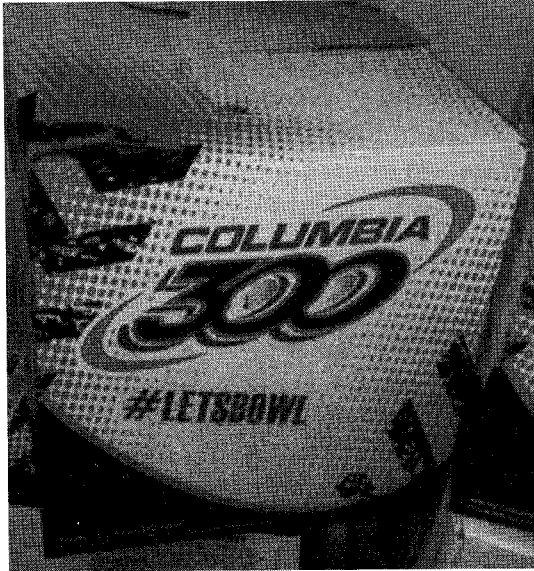
237. See, e.g., Jeff Huang et al., *supra* note 34 (asserting use of hashtags on Twitter is primarily social and conversational, via participation in micromemes); Shapp, *supra* note 63, at 2 (characterizing the hashtag as “a tool originally innovated for the purpose of information organization and management . . . [that has] gained many expressive functions”). Shapp distinguishes organizational “tag” hashtag uses from expressive “commentary” hashtag uses. See Shapp, *supra* note 63, at 2.

238. “Technically, the purpose of a hashtag is to allow searching for updates containing the same, uniform sequence of characters An alternative use of hashtags has emerged where it is used as a commentary or appraisal.” Herwig, *supra* note 33, at 13.

239. #TANLIFE, Registration No. 4,753,382.

240. 1 MCCARTHY, *supra* note 8, § 7:17.50. Compare, for example, the specimen for #SHARETHESILENCE, Registration No. 4,749,708, for alcoholic beverages, <http://tsdr.uspto.gov/documentviewer?caseId=sn86368080&docId=SPE20150321155210#docIndex=5&page=1> [<https://perma.cc/KH28-A426>]. The mark appears in miniscule print on the label affixed to applicant’s mezcal, which prominently displays the trademark EL SILENCIO at the top in flowery

brand²⁴¹—Devoted Creations—#TanLife dominates the visual field. Based on this specimen, consumers might conceivably view #TanLife as a trademark. The tagmark #LetsBowl, on the other hand, is also affixed to tangible packaging, but its size and placement make it more susceptible to being viewed as a mere hashtag.²⁴²



In any event, purely offline, nonornamental uses of tagmarks constitute the exception, not the rule. Far more frequently, producers employ a tagmark solely or primarily online. Examining attorneys have in some cases refused applications to register tagmarks based on applicants' failure to establish their use of the hashtags as trademarks. In the USPTO's nonfinal refusal to register #LeadershipFlow for business education services, the examining attorney asserted that the use reflected in the initial specimen (pictured below) did not

cursive, followed by information about the company, a safety warning, and a bar code. At the bottom of the label, in font smaller than anything else on the bottle, the tagmark appears. See also specimens for registered tagmarks #BESTFEELINGS, Registration No. 4642340, and #REACHFORPEACH, Registration No. 4829027.

241. See *Textron, Inc. v. Cardinal Eng'g Corp.*, 164 U.S.P.Q. 397 (T.T.A.B. 1969) (acknowledging that a mark used for a particular product in conjunction with a broader house brand may be less likely to be perceived as a trademark, i.e. may not "possess[] a separate trademark significance," depending on the commercial impression and manner of use); see also Tushnet, *supra* note 12, at 923–24 ("limping marks").

242. Specimen, #LETSBOWL, Registration No. 4,668,238, <http://tsdr.uspto.gov/documentviewer?caseId=sn85942398&docId=SPE20141017171722#docIndex=8&page=1> [<https://perma.cc/9TAW-LVZG>] (for #LetsBowl for bowling balls). This specimen image is a partial screenshot of the specimen on file with the USPTO, as are a number of the specimen images shown in this Article.

constitute “commercial trademark use[] on the services, but rather, merely serve[d] as a topical sorting mechanism,” so the mark “would be perceived as a data tag used for searching online social media, and not as a trademark or service mark for particular services.”²⁴³ In other words, the application to register #LeadershipFlow was refused for failing to function as a mark, because the specimen submitted to the USPTO didn’t show it in use as a mark.



The USPTO also rejected the initial specimens for #KeepYourSoleClean for shoe protectors, including the one pictured below.²⁴⁴ In her office action, the examining attorney asserted failure to function as a trademark as grounds for refusal. She noted that the tagmark appeared in the specimen right below the company’s domain name and “immediately adjacent to the icons for popular social networking sites that employ . . . hashtags to organize users’ comments.”²⁴⁵ That proximity to the Twitter, Instagram, and Facebook logos

243. First Office Action, #LEADERSHIPFLOW, Registration No. 4,670,399.

244. Specimen, #KEEPYOURSOLECLEAN, Registration No. 4,726,556, <https://tsdr.uspto.gov/documentviewer?caseId=sn86298631&docId=SPE20140606071258#docIndex=12&page=1> [<https://perma.cc/7GXX-N4LP>]. The image shown here is an excerpt from the specimen submitted June 3, 2014, which was refused.

245. Office Action, #KEEPYOURSOLECLEAN, Registration No. 4,726,556; *see also* TMEP § 1202.18(a) (“[I]f the proposed mark #SEWFUN for instruction in the field of sewing appears on a specimen comprising a screenshot of a social networking site used merely to organize users’ comments

raised concerns that the phrase was “used merely as a hashtag” and “would be perceived as a data tag used for searching online social media, and not as a trademark for particular goods.”²⁴⁶



Other specimens displaying tagmarks next to social media logos have passed through without objection, such as the one for #TrendinGHot.²⁴⁷ And some tagmarks have been registered with specimens that are nothing more than screenshots of social media pages. A wedding planning company successfully registered the tagmark #McCallWeddings, for example, with a specimen that

about sewing classes applicant offers, the mark must be refused registration for failure to function as a service mark.”).

246. Office Action, #KEEPLYOURSOLECLEAN, Registration No. 4,726,556. Ultimately, the applicant submitted a new specimen that separated the tagmark from the social media icons, which satisfied the examining attorney without actually reflecting substantially different use.

247. Specimen, #TRENDINGHOT, Registration No. 4,672,253, <http://tsdr.uspto.gov/documentviewer?caseId=sn85784245&docId=SPE20141204161800#docIndex=5&page=1> [<https://perma.cc/A4PT-RS48>]. The clothing company submitted as its specimen what appears to be an online lookbook for bras. The tagmark is featured on a virtual pink sticky note (“#TrendinGHot bralettes and bandeaus”) in close proximity to the icons for Facebook, Twitter, Pinterest, and Instagram, arguably creating the impression that the hashtag is there to remind loyal customers to use #trendinGHot as a tag on social media.

showed only the company's use of the hashtag on its own Facebook page,²⁴⁸ while Procter & Gamble registered #LikeAGirl using a screenshot of its Twitter page as specimen.²⁴⁹

Given the primary association triggered by the hash symbol, it seems self-evident that a specimen reflecting use of a hashtag on social media should be incapable of establishing use of that hashtag as a source indicator. That association taints other online uses, too. The four-page specimen for #PowerOfHer not only features its use as a hashtag on Twitter, but also highlights the hashtag's status as a hashtag, inviting viewers to "Be a part of the conversation" and "Post #PowerOfHer on Facebook, Twitter, or Instagram."²⁵⁰ When a producer displays a hashtag on its own website, consumers may perceive that hashtag as merely signaling that the brand is active on social media and inviting consumers to join the conversation by using the tag when they post content, rather than serving as a source indicator.

248. Specimen, #MCCALLWEDDINGS, Registration No. 4,872,729, <http://tsdr.uspto.gov/documentviewer?caseId=sn86312410&docId=SPE20140620071555#docIndex=22&page=1> [<https://perma.cc/95FF-EBW9>].

249. #LIKEAGIRL, Registration No. 4,785,927, <http://tsdr.uspto.gov/documentviewer?caseId=sn86517834&docId=SPE20150202134414#docIndex=10&page=1> [<https://perma.cc/98W5-8X72>]; Registration No. 4,899,174, <http://tsdr.uspto.gov/documentviewer?caseId=sn86321325&docId=SPE20150414150614#docIndex=8&page=1> [<https://perma.cc/AQ3D-UG67>].

250. Specimen, #POWEROFHER, Registration No. 4,855,203, <http://tsdr.uspto.gov/documentviewer?caseId=sn86591514&docId=SPE20150411081432#docIndex=8&page=1> [<https://perma.cc/2XZR-MSVL>]; *see also* Specimen, #STARTBETTER, Registration No. 4,871,621, <http://tsdr.uspto.gov/documentviewer?caseId=sn86383853&docId=SPE20151028171335#docIndex=5&page=1> [<https://perma.cc/52P6-DUGL>] (Clinique's specimen for #STARTBETTER inviting consumers to "Start sharing. What will you #StartBetter today?" with a link to Instagram).

Nor are offline tagmark uses, such as those reflected in LexisNexis's specimens for its #BeUnprecedented²⁵¹ registrations, necessarily immune to the use problem. One specimen comprises six images of law students with captions designed to mirror social media statuses, such as "First one called on in Civ Pro. #SocraticMethod #BeUnprecedented" and "First request for free legal advice. #Family #BeUnprecedented."²⁵² When offline uses simply mirror online ones,



First request for free legal advice.
#Family #BeUnprecedented

they too make it likely that consumers will perceive the use as merely signaling a presence on social media and inviting them to join a conversation, rather than indicating source.

The "failure to function as a mark" refusal is also a common response to applications to register citizen-created hashtags tied to political movements, current events, or pop culture trends. The application to register #IfTheyGunnedMeDown for attorney and advertising services, for example, was met with an office action refusing registration "because the applied-for mark, as used on the specimen of record, is used merely as a hashtag for online social media and does not function as a service mark to indicate the source of applicant's services and to identify and distinguish them from others. . . . [A]s used on the specimen of record, [it] would be perceived as a data tag used for

251. #BEUNPRECEDENTED, Registration Nos. 4,671,869, 4,694,671.

252. Specimen, #BEUNPRECEDENTED, Registration No. 4,694,671, <http://tsdr.uspto.gov/documentviewer?caseId=sn86239942&docId=SPE20140405073946#docIndex=11&page=1> [<https://perma.cc/NC9X-7KRR>].

searching online social media, and not as a service mark for particular services.”²⁵³

One subcategory of failure to show use as a mark is ornamentality. According to the TMEP, “Subject matter that is merely a decorative feature does not identify and distinguish the applicant’s goods and, thus, does not function as a trademark.”²⁵⁴ Ornamentality is a common basis for refusal when an applicant appears to be using its desired mark only as a slogan or decoration on apparel. Examining attorneys reasonably assume that because consumers have been conditioned to associate words and logos as source indicators when they appear in certain places and manners on clothing, such as in small font on the breast pocket or the inside tag, they’re likely to regard logos and text in other places and manners as ornamental.²⁵⁵ Specimens showing tagmarks used in classic trademark locations, such as on hangtags,²⁵⁶ or the front pocket,²⁵⁷ or the inside back of t-shirts,²⁵⁸ have been accepted as showing use in commerce, even when the tagmark is also featured decoratively on the apparel and even if it appears the company was created for the sole purpose of selling clothing featuring the tagmark.

253. #IFTHEYGUNNEDMEDOWN, U.S. Trademark Application Serial No. 8,366,208 (filed Aug. 13, 2014) (abandoned).

254. TMEP § 1202.03(f)(i) (citing *In re Pro-Line Corp.*, 28 U.S.P.Q.2d 1141 (T.T.A.B. 1993) (BLACKER THE COLLEGE SWEETER THE KNOWLEDGE primarily ornamental)); *Damn I’m Good Inc. v. Sakowitz, Inc.*, 514 F. Supp. 1357 (S.D.N.Y. 1981) (DAMN I’M GOOD on bracelets and hang tags found to be without any source-indicating significance); *In re Dimitri’s Inc.*, 9 U.S.P.Q.2d 1666 (T.T.A.B. 1988) (SUMO, as used in connection with stylized representations of sumo wrestlers on applicant’s T-shirts and baseball-style caps, merely ornamental); *In re Astro-Gods Inc.*, 223 U.S.P.Q. 621, 624 (T.T.A.B. 1984) (ASTRO GODS, as used on applicant’s T-shirts and sweatshirts, merely ornamental); *In re Original Red Plate Co.*, 223 U.S.P.Q. 836 (T.T.A.B. 1984) (YOU ARE SPECIAL TODAY for ceramic plates found to lack any source-indicating significance).

255. When evaluating a mark that appears to be ornamental, the size, location, dominance, and significance of the alleged mark as applied to the goods are all relevant factors in determining the applied-for mark’s commercial impression. *In re Lululemon Athletica Can. Inc.*, 105 U.S.P.Q.2d 1684, 1687 (T.T.A.B. 2013) (quoting *In re Right-On Co.*, 87 U.S.P.Q.2d 1152, 1156 (T.T.A.B. 2008)); *In re Dimitri’s Inc.*, 9 U.S.P.Q.2d 1666, 1667 (T.T.A.B. 1988); see also, e.g., office action for application to register #TEAMGIFTED for apparel, U.S. Trademark Application Serial No. 86/240,598 (filed Apr. 2, 2014) (published for opposition).

256. See, e.g., Specimen, #NOBASICS, Registration No. 4,759,534, <http://tsdr.uspto.gov/documentviewer?caseId=sn86428040&docId=SPE20141023071328#docIndex=14&page=1> [<https://perma.cc/ZSW2-2LRJ>]; Specimen, #BESOMEBODY., Registration No. 4,273,141, <http://tsdr.uspto.gov/documentviewer?caseId=sn85443778&docId=SPE20121115153348#docIndex=8&page=1> [<https://perma.cc/ZRC3-N7HB>].

257. See, e.g., Specimen, #AllOne, Registration No. 4,638,112, <http://tsdr.uspto.gov/documentviewer?caseId=sn86025469&docId=SPE20140919153606#docIndex=5&page=1> [<https://perma.cc/4TVJ-BVVA>].

258. See, e.g., Specimen, #BossBabe, Registration No. 4,750,980, <http://tsdr.uspto.gov/documentviewer?caseId=sn86346587&docId=SPE20140728071015#docIndex=8&page=1> [<https://perma.cc/VG7H-ECQ8>]; Specimen, #EverybodySkates, Registration No. 4,768,377, <http://tsdr.uspto.gov/documentviewer?caseId=sn86452823&docId=SPE20141117071646#docIndex=9&page=1> [<https://perma.cc/ZE2C-VRSQ>].

Applications to register tagmarks for apparel or other expressive merchandise are especially susceptible to ornamentality problems because their ornamental value is so often the reason for their selection—producers determine that apparel or tchotchkes printed prominently with a popular hashtag would sell well, and then they seek trademark protection to exclude others from competing with them, even though they’re using the hashtag merely as a decoration and not as a mark. Roughly a third of registered tagmarks are registered for clothing,²⁵⁹ as are a significant proportion of tagmark applications that are never granted or perfected. While the USPTO rejects many such specimens,²⁶⁰ some tagmark applications showing ornamental use succeed. The specimens on file for registered tagmarks #LiveTheGive;²⁶¹ #TutLife;²⁶² #FixItJesus;²⁶³ and #TeamGifted serve as just a few examples.

259. As of December 31, 2015, sixty-nine tagmarks were registered for apparel. *See* App. A.

260. *See, e.g.*, Registration No. 4,631,061 (first specimen for #|Baddie| showed used on the front of a hat); U.S. Trademark Application Serial No. 86/567,777 (filed Mar. 15, 2015) (first specimen for #TeamSparkle, featuring the hashtag in large print across the front of a shirt and also on a hangtag, refused as ornamental); U.S. Trademark Application Serial No. 86/240,598 (filed Apr. 2, 2014) (specimen for #TeamGifted showed the hashtag on T-shirts and wristbands on the applicant’s website and Facebook, Twitter, and Google+ pages).

261. Specimen, Registration No. 4,755,658, <http://tsdr.uspto.gov/documentviewer?caseId=sn86435546&docId=SPE20141030073320#docIndex=7&page=1> [<https://perma.cc/FAN8-CLXM>] (showing tagmark in use only on the front of a children’s scrimmage jersey).

262. Specimen, #TutLife, Registration No. 4,681,881, <http://tsdr.uspto.gov/documentviewer?caseId=sn86324752&docId=SPE20140703073632#docIndex=8&page=1> [<https://perma.cc/EA93-5FZB>]. The tagmark appears ornamentally on T-shirt and on a handwritten hangtag that reads “MEN #TUTLIFE T-SHIRT M \$40.” While a hangtag is typically acceptable to show use of a trademark in connection with apparel, the use in this case looks more like a description of the shirt and less like an indication of source.

263. Specimen, #FIXITJESUS, Registration No. 4,743,330, <http://tsdr.uspto.gov/documentviewer?caseId=sn86416339&docId=SPE20141010071412#docIndex=8&page=1> [<https://perma.cc/Q8RB-6VJK>] (Specimen shows T-shirt featuring #FixItJesus tag on website that describes the shirt as “#FixItJesus - Black V-neck tee with cap sleeve, unisex, 100% cotton.”).

D. Use with Services

In addition to being used as a mark, a term or phrase must be used in interstate or foreign commerce²⁶⁴ in connection with goods or services²⁶⁵ to garner federal protection. Trademark examining attorneys assess applicants' assertions of use in connection with specific goods or services based on the specimens they submit to the USPTO. Registrations for tagmarks are about evenly split between those used in connection with goods and those used with services,²⁶⁶ but demonstrating satisfactory use tends to be less complicated for goods than it is for services because trademarks used with goods can be displayed easily and obviously on the goods themselves or on their packaging. The Lanham Act defines a trademark as used with services "when it is used or displayed in the sale or advertising of services and the services are rendered in commerce."²⁶⁷

Tagmarks are more likely than other marks used with services to fail to satisfy this requirement. Part of establishing legitimate use in connection with services is making clear what the nature of the services are in the specimen itself; if a specimen fails to make a direct association between the applied-for mark and the services that the applicant offers, it may be refused.²⁶⁸ For its application to register #LikeAGirl for "[p]roviding information in the field of female empowerment [and] anti-gender discrimination via social media," Procter & Gamble submitted, and the USPTO accepted, a screenshot of the Twitter page

264. The requirement that a trademark be used in connection with commerce between states or between the United States and foreign nations, or with commerce that substantially affects interstate or foreign commerce, to come within the purview of the Commerce Clause of the Constitution is fairly easy to satisfy. *See, e.g., Christian Faith Fellowship Church v. Adidas AG*, 841 F.3d 986 (Fed. Cir. 2016) (holding the sale of two hats in Illinois to someone who lived in Wisconsin sufficient to satisfy the use in commerce requirement); *United We Stand Am., Inc. v. United We Stand, Am., N.Y., Inc.*, 128 F.3d 86, 92–93 (2d Cir. 1997) (use in commerce not limited to "profit-seeking uses of a trademark"); *Larry Harmon Pictures Corp. v. Williams Rest. Corp.*, 929 F.2d 662, 666 (Fed. Cir. 1991) (trademark use in connection with single-location restaurant serving interstate consumers satisfies use in commerce requirement). That requirement is therefore unlikely to disproportionately impact attempts to protect hashtag marks, especially those used online.

265. "Congress drafted the 'use in commerce' definition narrowly to include only uses likely to establish a connection between a mark and a product or service in the minds of consumers." Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669, 1676 (2007).

266. A review of all registered tagmarks through 2015 revealed 109 unique registrations for goods and 107 for services. The most popular classes for tagmarks appear to be class 025 (clothing: 69 registrations), 035 (advertising; business management; office functions: 54 registrations), and 041 (education and entertainment services: 34 registrations). Separate registrations for the same tagmark by the same applicant were counted only once per category, i.e., a mark registered for both goods and services counted in both categories, but a mark registered for several classes of goods was counted only once.

267. Lanham Act § 45, 15 U.S.C. § 1127 (2012).

268. "Specimen" Refusal and How to Overcome This Refusal, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademark/laws-regulations/specimen-refusal-and-how-overcome-refusal> [<https://perma.cc/4ZFL-682P>] (last visited Mar. 1, 2017).

for its Always brand (excerpt shown below).²⁶⁹ The image could be an advertisement, but it's unclear what it's advertising; the repetition of the hashtag with each image, incorporated into descriptive sentences, seems more consistent with hashtag use than service mark use.



While the USPTO found Procter & Gamble's specimen adequate, it refused an application to register #Influential for personnel recruitment services because the specimen showed the hashtag on the company's website but didn't show the mark used in connection with the services specified.²⁷⁰ According to the examining attorney, "no specific mention is made of the applicant's personnel recruitment services . . . the specimen only features a particular employee and his accomplishments, but there is no context [or] use of this person in relation to personnel recruitment."²⁷¹ And a specimen submitted with the application to register #Running for charitable services was rejected because it did not show the mark "used in reference to the actual charitable services referenced in the application," "[but only] used as a slogan with no indicator as to what the services are."²⁷²

Uses that fail to associate a tagmark directly with the services on offer may be an inevitable result of seeking trademark protection for a hashtag campaign. In many cases, producers seek registration because they believe they are accruing goodwill in their hashtag as a hashtag, so they want to map that goodwill onto a trademark in order to secure legal protection for it. But establishing trademark use in connection with specific services demands more. Requiring secondary meaning before granting registrations to tagmarks would likely alleviate this

269. U.S. Trademark Application Serial No. 86/517,834 (filed Jan. 29, 2015) (published for opposition). The full specimen also shows a single tweet, which provides a YouTube link with the comment "Send this [video] to the last person who said you do something #LikeAGirl."

270. See First Specimen & Office Action, #LIKEAGIRL, Registration No. 4,785,927.

271. *Id.*

272. See First Specimen and Office Action, #RUNNING, Registration No. 4,862,129.

problem, because producers would be required to show that consumers actually connect the tagmark to the services and understand what the services distinguished by the tagmark entail.

E. False Association

Tagmarks are also particularly prone to false association problems under Lanham Act Sections 2(a), 2(c), and 2(d). Section 2(a) bars the registration of a mark that disparages or falsely suggests a connection with any people, institutions, beliefs, or national symbols.²⁷³ Section 2(c) prohibits the registration of a mark that consists of or includes a name identifying a particular living individual whose written consent is not on record.²⁷⁴ Section 2(d) bars registration of marks likely to cause consumer confusion, typically due to similarity with other protected marks.²⁷⁵ Johnson points to section 2(a) false connection as one of the two bases for refusal most relevant to viral meme mark applications, presumably because meme marks are so often tied to an individual, an institution, or—interpreting the prohibition broadly—a movement or group.²⁷⁶ Citizen-created hashtags constitute a type of viral meme.²⁷⁷

Public use doctrine also intersects with these prohibitions and with meme mark registrability in interesting ways. Courts have typically held that consumers' use of a nickname or variation on a protected trademark, such as COKE for COCA-COLA, inures to the benefit of the trademark owner.²⁷⁸ Numerous hashtags, some of which become tagmarks, fall into the category of nicknames or slogans that reference a well-known mark.

Many of the consumer-generated hashtags discussed in Part II have been refused, or should have been refused, on one or more of these bases. For example, an application to register the tagmark #Peace4Trayvon for magnets was refused

273. 15 U.S.C. § 1052(a) (2012).

274. § 1052(c).

275. § 1052(d).

276. Johnson, *supra* note 155, at 124.

277. Barton Beebe suggests that the low cost of trademark applications might help explain this “curious—and increasingly notorious—phenomenon of what might be termed ‘meme mark’ filings, in which all manner of applicants rush to register various words and phrases . . . very soon after their appearance in the media.” Beebe, *supra* note 12, at 757.

278. Nat'l Cable Television Ass'n v. Am. Cinema Editors, Inc., 937 F.2d 1572, 1757–58 (Fed. Cir. 1991) (“Such public use by others inures to the claimant’s benefit and, where this occurs, public use can reasonably be deemed use ‘by’ that party in the sense of a use on its behalf.”); Coca-Cola Co. v. Busch, 44 F. Supp. 405, 409–10 (E.D. Pa. 1942); 1 MCCARTHY, *supra* note 8, § 7:18; Llewellyn Joseph Gibbons, *Crowdsourcing A Trademark: What the Public Giveth, the Courts May Taketh Away*, 35 HASTINGS COMM. & ENT. L.J. 35, 35–36 (2012) (“The public use doctrine attempts to solve this problem by imputing the public’s noncommercial use of the designation as a commercial use for the benefit of the referent-mark holder, and so permits the referent-mark holder to appropriate rights in the mark without actually using it in commerce.”). *But see* Cont'l Corrugated Container Corp. v. Cont'l Grp., Inc., 462 F. Supp. 200 (S.D.N.Y. 1978) (holding it is “doubtful” whether a producer can assert protection for an abbreviation that only the public, not the producer, has used).

under section 2(a) for falsely suggesting a connection with Trayvon Martin.²⁷⁹ Likewise, the applicant who sought to register #KnicksTape in connection with a wide variety of goods and services saw its application refused under section 2(d) based on a likelihood of confusion with the Knicks's registered marks, including KNICKS and NEW YORK KNICKS.²⁸⁰ The application to register #ICantBreathe was refused because it falsely suggested a connection with Eric Garner.²⁸¹ And the individuals who hoped to lay claim to #TweetLife as a trademark for clothing received a section 2(d) refusal due to the likelihood consumers would confuse their mark with Twitter's then-registered mark for apparel, TWEET.²⁸²

The application to register the tagmark #9RGNG for use in connection with clothing,²⁸³ however, was not refused on any of those bases. It's possible that the examining attorney did not understand #9RGNG to be equivalent to "Niner Gang," a phrase that refers to fans of the San Francisco Forty-Niners.²⁸⁴ It's also possible that the examiner understood the connection but found it unlikely to cause confusion with the team's registered marks, including 49ERS²⁸⁵ and NINERS.²⁸⁶ Likewise, while some journalists believe the hashtag #WRTS (for "we run this state") to be clearly and unambiguously associated with the Texas A&M football team, the Aggies, the application to register the mark for use on apparel without permission of the team survived examination and the mark was ultimately registered on the Principal Register. Shoe brand Skechers' application to register #GoMeb for footwear ought to have required the explicit permission of Olympic athlete and marathon winner Mebrahtom "Meb" Keflezighi if the trademark examining attorney understood the tagmark to reference him by name; while Keflezighi has an endorsement deal with Skechers, section 2(a) requires his explicit sign-off. And while #TweetLife was refused, #TChat survived, and

279. Office Action, U.S. Trademark Application Serial No. 86,014,534 (filed July 18, 2013).

280. Serial No. 85,801,484 (filed Dec. 13, 2012), Office Action Outgoing (Apr. 4, 2013) (refusal based on likelihood of confusion, citing marks in U.S. Registration Nos. 4,187,699, 4,171,079, 4,099,180, 3,603,369, 3,035,311, 2,916,171, 2,590,981, 2,573,267, 2,563,428, 2,197,935, 1,988,809, 1,768,640).

281. Office Action, U.S. Trademark Application Serial No. 86/485,865 (filed Dec. 19, 2014). Although the test for false association usually asks whether the phrase is or includes a name or nickname of an individual, the Office Action notes that "a term at issue need not be the actual, legal name of the party falsely associated with applicant's mark to be unregistrable under Section 2(a)," but must simply be "so uniquely and unmistakably associated with the named party as to constitute that party's name or identity." (citing TMEP § 1203.03; *Buffett v. Chi-Chi's, Inc.*, 226 U.S.P.Q. 428, 429-30 (T.T.A.B. 1985) (finding MARGARITAVILLE to be the persona of singer Jimmy Buffett)).

282. TWEET, Registration No. 2,749,830 (canceled).

283. Registration No. 4,537,669.

284. See #9rgng search results, TWITTER, <https://twitter.com/search?q=%239rgng&src=typd> [<https://perma.cc/9V6J-84NL>] (last visited Feb. 28, 2017); #ninerang search results, TWITTER, <https://twitter.com/search?q=%23ninerang&src=typd> [<https://perma.cc/K8EC-9DVU>] (last visited Feb. 28, 2017) (many of which use the hashtag in combination with tags like "#49ers," "#SF49ers," "#sf," and "#NinerNation").

285. Registration No. 3,535,892.

286. Registration No. 1,318,640.

is registered in connection with use as a hashtag for weekly Twitter chats regarding career development.²⁸⁷ Likewise, applications to register #TBT,²⁸⁸ #Selfie,²⁸⁹ and #TheSelfie²⁹⁰ have succeeded, and intent-to-use applications for #FollowMe,²⁹¹ #Instaglam,²⁹² and #Instaready²⁹³ have not garnered final refusals despite likely associations between those hashtags and the social media sites on which they're most popular, Twitter and Instagram.

Based on these few examples, it's hard to generalize whether tagmarks are more prone to false association problems than are marks in the general pool. But false association is one of the registrability issues most likely to plague consumer-generated tagmarks. By definition, hashtags in that category reference existing brands, people, or institutions by name or nickname. USPTO attorneys may be less likely, when examining marks in this category, to recognize them as in danger of being perceived by consumers as affiliated with a particular person or entity, in part because tagmarks frequently rely upon abbreviations, nicknames, and in-jokes only recognizable by a niche audience, such as fans of a particular team, celebrity, television show, or website. Examining attorneys should thus be particularly wary of this issue when considering the registrability and alleged ownership of a particular tagmark.²⁹⁴

F. Ability to Indicate a Single Source

In order to be protectable, a trademark must distinguish the goods or services of one producer from those of its competitors—in other words, it must indicate that the goods or services come from a single source, regardless of

287. #Tchat, Registration No. 4,228,826. The registration states that the mark covers “Providing news, information and commentary in the field career development [sic], recruiting and human resources.” The specimen tells a different story, though: “What is #TChat? Join us for #TChat on Twitter every Tuesday from 8-9 p.m. ET . . . “Specimen, #Tchat, Registration No. 4,228,826, <http://tsdr.uspto.gov/documentviewer?caseId=sn85408932&docId=SPE20110831062017#docIndex=13&page=1> [https://perma.cc/UB5N-JG5P]. While the “T” in “#TChat” could stand for Tuesdays or for mark owner TalentCulture, LLC, it seems surprising based on the specimen that the examining attorney did not question whether consumers would perceive the tagmark as referring to Twitter itself.

288. #TBT, Registration No. 4,785,880 (for wine). *But see* U.S. Trademark Application Serial No. 86/417,396 (for #THROWBACKTHURSDAY) (registration refused based on mere descriptiveness).

289. #Selfie, Registration No. 4,642,072 (design plus words); *see also* U.S. Trademark Application Serial No. 86/572,948 (filed Mar. 23, 2015) (published).

290. #TheSelfie, Registration No. 4,650,601.

291. U.S. Trademark Application Serial No. 86/505,621 (filed Jan. 16, 2015).

292. U.S. Trademark Application Serial No. 86/238,150 (filed Apr. 1, 2014).

293. U.S. Trademark Application Serial No. 86/562,566 (filed Mar. 12, 2015).

294. For discussion of ways that examining attorneys can familiarize themselves with niche uses of terms and phrases to aid them in assessing false association, *see* Roberts, *supra* note 220, at 1082–85 (suggesting examining attorneys look to outside evidence to gauge whether a term or phrase has meaning for a particular community that isn't immediately apparent to the examiner, and citing examples of resources including online message boards, blogs, consumer reviews, auction sites, periodicals, and social media sites); Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CALIF. L. REV. 351 (2014) (proposing courts and examining attorneys use Google search results to evaluate proposed marks' inherent distinctiveness).

whether consumers can actually name that source.²⁹⁵ In the words of one federal court, “[t]he more common a phrase is, the more it appears in everyday parlance, less is the likelihood that the phrase identifies the source of a certain product, and less is the likelihood that it deserves trademark protection absent a strong showing of a protectable interest by the party who first used the phrase.”²⁹⁶ According to the Trademark Trial and Appeal Board (TTAB), “as a matter of competitive policy, it should be close to impossible for one competitor to achieve exclusive rights in common phrases or slogans.”²⁹⁷

Based on that reasoning, slogans including “we go the extra mile”,²⁹⁸ “Come on Strong”,²⁹⁹ “escape from the ordinary”,³⁰⁰ “drive safely”,³⁰¹ and “WHY PAY MORE!”³⁰² have been held unprotectable because they couldn’t identify a single source in the minds of consumers.³⁰³ Hashtags are often well-known and widely used phrases, either because they were well-known before they were used as hashtags or because they gained prominence and popularity in hashtag form. Phrases meeting that description shouldn’t be treated as inherently distinctive marks, because consumers are very unlikely to associate them with a single source. For example, the registration of a design mark comprising the text #420 in an oval as a trademark for apparel³⁰⁴ is surprising in light of the well over eighteen million appearances of the hashtag on Instagram and many more uses on Twitter dating back to the site’s early days.³⁰⁵ Likewise, applications to register marks like #FixItJesus, #LetsBowl, #TBT, and #BoyBye should be met

295. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13(a) (AM. LAW. INST. 1995) (A mark is inherently distinctive if “prospective purchasers are likely to perceive it as a designation that . . . identifies goods or services produced or sponsored by a particular person, whether known or anonymous.”).

296. *Reed v. Amoco Oil Co.*, 611 F. Supp. 9, 12 (M.D. Tenn. 1984).

297. *In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d 1227, 1229–30 (T.T.A.B. 2010) (internal quotation marks omitted) (holding ONCE A MARINE, ALWAYS A MARINE to be an “old and familiar Marine expression . . . that should remain free for all to use”); *see also In re Phoseon Tech. Inc.*, 103 U.S.P.Q.2d 1822, 1827 (T.T.A.B. 2012) (noting the critical inquiry in determining whether a specimen functions as a trademark is the “commercial impression it makes on the relevant public (e.g., whether the term sought to be registered would be perceived as a mark identifying the source of the goods or merely as an informational phrase”).

298. *Reed*, 611 F. Supp. at 13–14 (holding plaintiff’s slogan “Goin’ the extra mile” descriptive without secondary meaning for consumers; phrase may possess secondary meaning within the relevant industry but court finds no likelihood of confusion with defendant’s slogan “we go that extra mile”).

299. *B & L Sales Assocs. v. H. Daroff & Sons, Inc.*, 421 F.2d 352 (2d Cir.1970).

300. *Norm Thompson Outfitters, Inc. v. Gen. Motors Corp.*, 448 F.2d 1293 (9th Cir. 1971).

301. *In re Volvo Cars of N. Am. Inc.*, 46 U.S.P.Q.2d 1455, 1459 (T.T.A.B. 1988).

302. *In re Wakefern Food Corp.*, 222 U.S.P.Q. 76 (T.T.A.B. 1984) (affirming refusal to register on ground that slogan fails to function as a mark and reversing refusal on the ground that the slogan is not inherently distinctive).

303. *See* 3 CALLMANN, *supra* note 29, § 18:76 for additional examples.

304. Registration No. 4,657,752.

305. #420, INSTAGRAM, <https://www.instagram.com/explore/tags/420/?hl=en> [<https://perma.cc/8MM6-2DJ9>]; #420, TWITTER, <https://twitter.com/search?q=%23420&src=typd> [<https://perma.cc/9K75-BW2R>] (completed Nov. 11, 2016); *see, e.g.*, Stoner Jesus (@stonerjesus420), TWITTER (March 4, 2009, 4:21PM) <https://twitter.com/stonerjesus420/status/1280429287> [<https://perma.cc/WJL8-CNDF>].

with skepticism because they are unlikely to identify a single source in the minds of consumers due to their ubiquity.

While some slogans can be granted protection upon a showing of secondary meaning,³⁰⁶ those deemed “informational matter” are simply unregistrable.³⁰⁷ The TMEP summarizes this principle in its section on Informational Matter: “[b]ecause the function of a trademark is to identify a single commercial source for particular goods/services, if consumers are accustomed to seeing a slogan used in connection with goods/services from many different sources, it is likely that consumers would not view the slogan as a source identifier for such goods/services.”³⁰⁸ In the case of applications to register citizen-created hashtags and the marks derived from them, such as #Peace4Trayvon or #ICantBreathe, the USPTO has sometimes refused registration of a phrase as merely conveying an informational message and thus incapable of functioning as a mark.³⁰⁹

Trademark law “assumes a model in which authorship is singular or several, not massively composite,”³¹⁰ and yet authorship of hashtags often *is* massively composite.³¹¹ The requirement that a mark indicate a single source or be capable of doing so presents a hurdle for those seeking to register popular consumer-generated or citizen-created hashtags. As Llewellyn Gibbons has written in the context of public use doctrine, “[t]here is a long tradition of trademark holders relying on the public to create designations that they then adopt as a trademark.”³¹² But adopting a widely used phrase and making the type of consistent use that ultimately imbues it with source-indicating significance can take years, if it is even possible for that particular phrase. In many cases, the single source requirement should serve as a bar for citizen-created hashtags,³¹³

306. *Sec. Works!, Inc. v. Sec. World Int’l, Inc.*, No. 94-6625-CIV-MARCUS, 1994 WL 806086, at *3 (S.D. Fla. Nov. 14, 1994) (citing 1 JEROME GILSON, *TRADEMARK PROTECTION & PRACTICE* § 2.10 at 2–151 [edition unknown]) (holding “Security Works!” a merely descriptive slogan).

307. *City of Newark v. Beasley*, 883 F. Supp. 3, 9 (D.N.J. 1995), *as amended* (May 5, 1995) (“The slogans ‘auto theft—stop the madness’ and ‘stolen cars = lethal weapons’ are instructional slogans and are not protectable under the Lanham Act.”); TMEP § 1202.04 (“Slogans and other terms that are merely informational in nature, or common laudatory phrases or statements that would ordinarily be used in business or in the particular trade or industry, are not registrable.”).

308. TMEP § 1202.04.

309. *See, e.g., In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d 1227 (T.T.A.B. 2010) (citing *In re Boston Beer Co.*, 198 F.3d 1370, 53 U.S.P.Q.2d 1056 (Fed. Cir. 1999)); Office Action, HANDS UP DON’T SHOOT, U.S. Trademark Application Serial No. 86/373,501 (filed Aug. 21, 2014).

310. Goodman, *supra* note 58, at 685 (referencing false advertising law).

311. *See* Robert T. Sherwin, *#HaveWeReallyThoughtThisThrough?: Why Granting Trademark Protection to Hashtags Is Unnecessary, Duplicative, and Downright Dangerous*, 29 HARV. J.L. & TECH. 455, 473 (2016) (noting hashtags “are specifically calculated to take advantage of social media’s ‘dialogic’ transmission model (many sources to many receivers), as opposed to the ‘monologic’ transmission model (one source to many receivers) of traditional marketing”).

312. Gibbons, *supra* note 278, at 35.

313. *See* Johnson, *supra* note 155, at 112 (“[I]f strong memes, and not the putative trademark owner’s own efforts, have propagated the strength and distinctiveness of a trademark, the USPTO should consider this when assessing trademark applications.”).

whether political “rallying cries” like #Peace4Trayvon,³¹⁴ viral events like #IceBucketChallenge, or the in-jokes and trending phrases that appear across social media sites, such as #FixItJesus, #NoFilter, #IWokeUpLikeThis, or #TBT.

III. IMPLICATIONS

Granting producers exclusive rights in tagmarks demands thoughtful consideration of the implications for each stakeholder group across the various types of tagmarks. The protectability problems highlighted in Part II map onto the hashtag types identified in Part I in different ways and to different extents. Requiring secondary meaning for registration is the best way to address the particular problems discussed in Part II, including use, distinctiveness, and functionality. Part III expands on that proposal, considers the ramifications of Part I and II for stakeholders, and raises broader implications for trademark law.

A. Implications by Tagmark Type

1. Producer-Selected & Marketer-Deployed Hashtags

Are producer-selected hashtags like #Nike or #Greyhound ever worth registering, from a producer perspective? When it comes to tagmarks that simply add a hash sign to already registered word marks for the same goods or services, it’s hard to imagine a scenario in which the tagmark’s registration would achieve more than registration of the word mark alone.³¹⁵ NIKE should provide broader coverage than #Nike, just as AMAZON might provide broader coverage than AMAZON.COM.³¹⁶ The redundancy of tagmark registrations is especially true when a famous word mark appears in hashtag form, because consumers will likely view the hashtag as a reference to the mark rather than as a new and separate source-indicator.

Nor does registering tagmarks further serve the signaling function of trademark law. To the extent that trademark registrations generally perform a signaling function to new entrants, there is no reason to believe tagmark

314. See generally Johnson, *supra* note 155, at 124–28 (discussing applications to register “viral meme marks,” including I AM TRAYVON; JUSTICE FOR TRAYVON; OCCUPY WALL STREET; LET’S ROLL; and SHOCK AND AWE).

315. See Sherwin, *supra* note 311, at 475 (“[G]ranting trademark status to hashtags provides no legitimate advantage to a marketer that it could not . . . obtain through traditional (i.e., sans hashtag) registration.”). Sherwin argues that registration of hashtags primarily provides fodder for trademark bullies, rather than serving legitimate trademark goals. *Id.*

316. See 1 MCCARTHY, *supra* note 8, § 7:17.50 (“The ‘.com’ portion of the domain name has no trademark significance Thus, it may be wise policy to delete the generic term from the mark to be registered if it adds nothing to the status of the domain name as a mark There is no advantage (and possible disadvantage) to adding more matter to the mark to be registered.”); DeGidio v. West Grp. Corp., 355 F.3d 506 (6th Cir. 2004), *cert. denied*, 542 U.S. 904 (2004) (plaintiff’s assertion of exclusive rights in trademark LAWOFFICE.NET equates to a claim for rights in LAWOFFICE alone, because top-level domain.net “has no trademark significance”).

registration provides greater notice than text mark registration combined with hashtag use. Competitors are at least as likely to search social media before launching a hashtag campaign or naming a new product as they are to search the Federal Trademark Register.³¹⁷ Even for the rare producer-selected mark that exists in both text and hashtag form from the producer's earliest uses, registering the text mark rather than the tagmark seems to provide greater protection.

It appears from the set of existing tagmark registrations that producers have been more apt to register tagmarks that contain their distinctive marks but behave like slogans, such as #HowDoYouKFC or #LeanInTogether, than hashtags in other categories.³¹⁸ Here, too, it's hard to believe those registrations provide better or different protection from the registrations for KFC or LEAN IN. We can imagine their owners seeking to enforce them against parallel campaigns like #HowDoYouTacoBell or similar-sounding slogans like #LeanCuisineTogether, but the chance of establishing a likelihood of consumer confusion in such cases is very slight. Further, protection for these types of tagmarks ought to be narrow given their descriptive elements. Trademark examining attorneys should avoid deeming a tagmark inherently distinctive merely because the distinctive mark contained within it imparts a halo of protectability.

A marketer-deployed mark like #BeTheGirl or #TheSweatLife also functions like a slogan or secondary mark, but it lacks the halo generated by inclusion of a preexisting distinctive mark. In assessing these marks, examiners should be particularly wary of granting registration for tagmarks that lack distinctiveness or that don't meet the use as a mark requirement and thus fail altogether to function as source indicators. These tagmarks are also particularly prone to challenges when it comes to showing use in connection with specific goods and services, as demonstrated in the initial failed attempts to register marks like #Running³¹⁹ and #Influential.³²⁰ Owners of marketer-deployed tagmarks, like those of producer-selected tagmarks, should consider registering the text version of their marks rather than the hashtag versions if they do indeed use both. Examining attorneys and courts considering tagmarks' protectability should pay careful attention to ensure the marks pass muster under functionality, distinctiveness, and trademark use doctrines. Requiring secondary meaning for registration of tagmarks in these categories would help ensure that only those tagmarks that actually function as source indicators are protected.

317. See, e.g., Dean Logan, *No One Really Cares What You Call It (and Other Startup Naming Tips)*, TECH.CO (July 6, 2016, 8:00 PM), <http://tech.co/startup-naming-no-one-cares-tho-2016-07> [<https://perma.cc/A632-8AMZ>] (advising entrepreneurs that "[a]n hour with Google should tell you everything you need to know" about the availability of a potential trademark). While Google searches will return results showing the use of a term or phrase on social media websites, including Twitter, Facebook, and Instagram, they will not return results from the USPTO database.

318. See App. A.

319. Registration No. 4,862,129.

320. See Office Action (June 26, 2014), Registration No. 4,734,151 (refusing registration in part because the specimen did not show the applied-for mark in use in commerce in connection with any of the services specified in the application).

2. Consumer-Generated & Citizen-Created Hashtags

Consumer-generated hashtags—consumer hashtags talking to or about brands or products—often simply constitute speech. As such, the most frequently occurring forms of these tagmarks neither merit trademark protection themselves, nor infringe other existing trademarks. Instead, they will often constitute fair uses of distinctive marks. When applicants seek protection for tagmarks in this category, they often do so as fans—sports catchphrases like #KnicksTape or #WRTS are examples. Entrepreneurs considering using this type of hashtag as a mark should be aware of the many roadblocks they will likely face. Trademark examining attorneys should scrutinize applications to register consumer-generated hashtags for all of the issues highlighted in Part III, but especially for issues under Lanham Act sections 2(a) (false association), 2(c) (false identification), and 2(d) (likelihood of confusion).

A study of conversational tagging reveals that hashtag micromemes “are both adopted and abandoned in a short period of time,”³²¹ suggesting most don’t continue trending long enough to survive the trademark registration process,³²² let alone to acquire secondary meaning. Citizen-created hashtags are unlikely to be protectable, for the reasons discussed above, and may lead to backlash. Concerns over backlash are especially salient when the hashtags constitute political speech or activism.

But in those cases where registrations are successful, applicants are unlikely to see any reason to refrain from using, registering, and policing their marks. That’s not because tagmarks are special, but simply because policing and enforcement typically follow registration. Trademark bullying—when trademark registrants aggressively assert tenuous claims, often via cease-and-desist letters threatening legal action against smaller and weaker parties—has received increased attention from scholars and practitioners in recent years. Stacey Dogan contends that “structural and doctrinal features of trademark . . . law enable and, in some cases, reward aggressive claiming.”³²³ And Robert Sherwin identifies the specter of trademark bullying as the primary reason that the USPTO should refuse to register tagmarks altogether.³²⁴ Nonetheless, enforcement of tagmarks may prove challenging given their ubiquity. Even if they come to serve as source-indicators for a narrow class of

321. Huang et al., *supra* note 34.

322. *Id.*; see also Zoladz, *supra* note 122 (describing hashtag song titles that have “outlived their trending moments”).

323. Stacey Dogan, *Bullying and Opportunism in Trademark and Right-of-Publicity Law*, 96 B.U.L. REV. 1293, 1294 (2016).

324. See Sherwin, *supra* note 311, at 475 (“[G]ranting trademark status to hashtags provides no *legitimate* advantage to a marketer that it could not already obtain through traditional (i.e., sans hashtag) registration. What it *does* do is arm companies with a weapon that would make it easier to bully social media networks and users into silence when these ‘trademarked’ hashtags spark viral discussions that go off the tracks.”).

goods or services, use in adjacent categories of products is far less likely to cause confusion than use of a fanciful mark would be.

In sum, a trending hashtag for which trademark protection is sought may lack distinctiveness, fail to function as a mark, be unable to indicate a single source, or suggest a false association with individuals, institutions, or ideologies. And a large proportion of those producers that apply to register trending hashtags as trademarks are making merely ornamental uses of them,³²⁵ even if their applications satisfy the USPTO with technically acceptable use. For the producers and entrepreneurs seeking to capitalize on these types of hashtags, registration will not (or at least should not) be easy. Here too, requiring secondary meaning for registration would more effectively keep producers from commandeering popular hashtags until they have successfully rendered them distinctive marks.

B. Implications for the USPTO and Courts Assessing Protectability

Trademark examining attorneys appear to have received little specific guidance in reviewing and categorizing tagmarks. The TMEP entry gestures toward a number of potential obstacles to the registration of tagmarks but offers no particular test for assessing their protectability. As such, examiners' approaches to tagmarks have been inconsistent, leading to inequity for prior applicants and a lack of predictability for future applicants. The few decided cases litigating hashtags as trademarks reflect the lack of a consistent approach across jurisdictions, and that inconsistency will only escalate as these cases increase in number and size.³²⁶

As an agency, the USPTO likely is not empowered to issue binding rules on core trademark law questions,³²⁷ and federal courts, particularly the Federal Circuit, give little deference to USPTO determinations of law or fact.³²⁸ The USPTO characterizes the TMEP as containing only "guidelines for Examining Attorneys and materials in the nature of information and interpretation."³²⁹ But the agency is usually the first to see new categories of marks arise, and its response influences individual registration decisions that in turn influence producers' decisions about use and enforcement. Neither the TTAB nor any federal courts adjudicated cases involving tagmarks in 2013 when the TMEP first incorporated an entry on the treatment of hashtags,³³⁰ so its editors could

325. See *supra* notes 254–258.

326. See *infra* pp. 154–157.

327. Wasserman, *supra* note 9, at 1534.

328. *Id.* at 1526. *But see* B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1310 (2015) ("So long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before a district court, issue preclusion should apply.").

329. TMEP Foreword (Oct. 2015).

330. *Webceleb, Inc. v. Procter & Gamble Co.* was pending before the Southern District of California and included allegations about hashtag use constituting trademark infringement as early as 2010, but the written decision in that case did not address the parties' hashtag-related arguments. See

only extrapolate from existing precedent and draw parallels to analogous categories of marks in proffering guidelines to examiners faced with applications to register tagmarks. As one scholar has noted, “the Trademark Office has historically lacked [the] robust economic and consumer psychology expertise that it needs to make informed trademark policy decisions.”³³¹ By the end of 2012, the USPTO had issued registrations for only eleven tagmarks,³³² so it may not have foreseen the coming onslaught of applications when it created the 2013 TMEP entry. With tagmark registrations now numbering in the hundreds and applications in the thousands, and with federal courts beginning to consider whether and when hashtag use constitutes trademark use, the entry is ripe for revision.

The question of whether and when a tagmark use actually performs a trademark function is not only the most crucial and inadequately explored issue in assessing protectability, it’s also a major question for plaintiffs complaining about use of their trademark as a hashtag by others. A defendant’s use of matter *as a mark* is not a threshold requirement for an infringement plaintiff in all jurisdictions,³³³ but it is in some, and defendant’s use in commerce is always required. Courts’ inconsistent characterizations of hashtag use are likely to impact registrability outcomes and shape the behavior of companies and consumers.

In 2015, federal district courts adjudicated several cases in which parties brought trademark infringement or dilution claims that involved the use of one party’s trademark as a hashtag by another. In one, the court declined to dismiss a hashtag infringement claim based on a designer’s use of the hashtags #fraternitycollection and #fratcollection where her former collaborator asserted common law trademark rights in FRATERNITY COLLECTION,³³⁴ finding that the hashtag use might be enough to create a likelihood of consumer confusion. In another, the owner of the trademark WEBCELEB briefed the Ninth Circuit on an allegedly infringing use of its mark that included use of the hashtag

No. 10-CV-2318 DMS (NLS), 2012 WL 460472 (S.D. Cal. Feb. 13, 2012); Plaintiff’s Memorandum of Points & Authorities in Support of Motion for Preliminary Injunction at 11, *Webceleb, Inc. v. Procter & Gamble Co.*, 2012 WL 460472 (S.D. Cal. Feb. 13, 2012) (No. 10-CV-2318 DMS (NLS)) (“[O]ne of [Procter & Gamble]’s most damaging uses of the mark is in its Twitter ‘hashtags’ There, [Procter & Gamble] is using the hashtag “#webceleb” and thus has eliminated even this subtle distinction [between ‘web celeb’ and ‘webceleb’].”).

331. Wasserman, *supra* note 9, at 1570.

332. *See* App. A.

333. *See* 4 MCCARTHY, *supra* note 8, § 23:11.50 (asserting the Lanham Act does not require an infringement defendant’s use be a “trademark use” but acknowledging a circuit split on the issue); Margreth Barrett, *Internet Trademark Suits and the Demise of “Trademark Use,”* 39 U.C. DAVIS L. REV. 371, 374 (2006); Dinwoodie & Janis, *supra* note 227, at 1600–02 nn.10–12, 16; Dogan & Lemley, *supra* note 265, at 1670.

334. *Fraternity Collection, LLC v. Fagnoli*, No. 3:13-CV-664-CWR-FKB, 2015 WL 1486375, at *4 (S.D. Miss. Mar. 31, 2015). In rejecting defendant’s motion for summary judgment, the court “accept[ed] for present purposes the notion that hashtagging a competitor’s name or product in social media posts could, in certain circumstances, deceive consumers.” *Id.*

#webceleb on Twitter. The plaintiff asserted that the hashtag use was particularly problematic and did not qualify as a protected fair use because it employed the one-word phrase “webceleb.” In defendants’ other allegedly infringing uses, they employed the two words descriptively in a sentence, properly spaced.³³⁵ The court found the defendants’ use of the phrase “web celeb” constituted statutory fair use and thus did not infringe, but it declined to explicitly address their use of the hashtag “#webceleb.”³³⁶

Another district court took up the question of whether one party’s use of a hashtag infringed the other party’s trademark rights in *Eksouzian v. Albanese*. The litigants were former partners who became competitors, and who both sold portable vaporizer pens. A July 2014 settlement agreement restricted the use of the term “cloud” by each party, including prohibiting plaintiffs from using “cloud” with “pen” or “penz” as a unitary mark in connection with their own goods. Defendants owned a registration for CLOUD PENZ for electronic cigarettes and vaporizer pens.³³⁷ In the relevant portion of the suit, defendants accused plaintiffs of violating the settlement agreement when plaintiffs used the hashtags #cloudpen and #cloudpenz on social media to tag pictures of their own products and held a sweepstakes for fans in which entry required fans to use the hashtag when they posted their personal content. The court held that plaintiffs’ hashtag use did not constitute use of a unitary trademark in connection with plaintiffs’ goods.³³⁸ It unceremoniously dispensed with the hashtag-related claim, declaring hashtags to be “merely descriptive devices, not trademarks” and characterizing the hashtag itself as “merely a functional tool [and] not an actual trademark.”³³⁹ The court also focused its analysis on #cloudpen and not

335. *Webceleb, Inc.*, 554 F. App’x at 607.

336. *Id.* (citing *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1066 (9th Cir. 1999)) (“Defendants’ use of ‘web celeb’ was purely descriptive. The difference between ‘web celeb’ and ‘WEBCELEB’ is ‘pivotal,’ since ‘web celeb’ has a common meaning that defendants intended to invoke.”).

337. *Eksouzian v. Albanese*, No. CV 13-00728-PSG-MAN, 2015 WL 4720478, at *5 (C.D. Cal. Aug. 7, 2015); *see also* Roberts, *supra* note 220.

338. *Id.* at *8. While the Plaintiffs’ briefs and expert report imply that they viewed this type of hashtag use as a nominative fair use—i.e., as a trademark use that referenced Defendants’ products—the court dismissed it as a statutory fair use, i.e. a non-trademark use of descriptive terms. *Eksouzian*, 2015 WL 4720478, at *14 (“Plaintiffs’ Use Of ‘# cloudpen’ Was Merely Descriptive And Did Not Breach Paragraph IIB Of The SA”); Plaintiffs’ Supp. Brief in Support of Motion to Enforce Settlement Agreement at 12–14, *Eksouzian v. Albanese*, 2015 WL 4720478 (C.D. Cal. Aug. 7, 2015) (No. CV 13-00728-PSG-MAN); Decl. of Andrew Fryer in Support of Plaintiffs’ Motion to Enforce Settlement Agreement at 5, *Eksouzian v. Albanese*, 2015 WL 4720478 (C.D. Cal. Aug. 7, 2015) (No. CV 13-00728-PSG-MAN) (“[U]se of the hashtag ‘#cloudpen’ . . . does not constitute use in association with [Plaintiffs’] products. . . . Rather, the hashtag ‘#cloudpen’ is merely used to broaden the audience that the promotion will be viewed by . . . it merely reflects one competitor using social media to reach another competitor’s customers. . . .”).

339. *Eksouzian*, 2015 WL 4720478, at *15–16. Note that defendants did not allege infringement of their CLOUD PENZ mark, but rather violation of the settlement agreement that prohibited plaintiffs from using “cloud” with “pen” or “penz” as a unitary mark in connection with their own goods. The court held that plaintiffs’ hashtag use did not constitute use of a unitary trademark. *Id.* at *14–15.

#cloudpenz, an important omission given that it's easier to dismiss the former than the latter as a statutory fair use of a descriptive phrase.

Some interpreted the court's dicta that "hashtags are not trademarks" literally and broadly, suggesting that it left federal jurisprudence at odds with USPTO policy on registering tagmarks.³⁴⁰ However, the court most likely did not intend to opine that a phrase preceded by a hash symbol can never be a trademark, but rather that use of a hashtag *as a hashtag* on social media is not an actionable trademark use. Even based on that more limited reading, though, the approach of the *Eksouzian* court conflicts with that in *Fraternity Collection*.

Thus far, courts have primarily considered only whether a hashtag use may constitute actionable infringement. No court has addressed head-on whether a tagmark merits protection as a trademark,³⁴¹ nor has any tagmark registrability decision been appealed to the TTAB.

Part II highlighted a number of protectability problems. Most stem from the likelihood that consumers will not initially perceive a tagmark as a source-indicator due to their primary associations with hashtags and the types of uses to which tagmarks are typically put. In that respect, a tagmark resembles a word mark characterized as merely descriptive, primarily geographically descriptive, or primarily merely a surname. Trademark law treats marks in those categories as initially unprotectable on the expectation that consumers won't automatically perceive them as source indicators when they are first used in commerce. A mark in one of these categories is only granted protection when its owner demonstrates that the mark has acquired distinctiveness by virtue of that use. It can do so by: (1) establishing its substantially exclusive and continuous use in commerce for five years; (2) asserting ownership of one or more prior registrations on the Principal Register of the same mark for related goods or services; or (3) submitting actual evidence of acquired distinctiveness.³⁴² A producer using a

340. See, e.g., David Kohane, *#UNDECIDED: Trademark Protection for Hashtags*, IPWATCHDOG (June 24, 2016), <http://www.ipwatchdog.com/2016/06/24/undecided-trademark-protection-hashtags/id=70111> [<https://perma.cc/NJ2Z-3YYB>]; *Are Hashtags Trademarks?*, GEEK L. (Sept. 2, 2015), <https://nicoterablwg.wordpress.com/2015/09/02/are-hashtags-trademarks> [<https://perma.cc/5NNL-E5XH>] ("[T]he judge held that hashtags are not trademarks."); Milagros Villalobos Navas, *#Trademarks: Are Hashtags Protected by Trademark Law?*, NYU JIPEL ONLINE (Oct. 17, 2016), <http://blog.jipel.law.nyu.edu/2016/10/trademarks-are-hashtags-protected-by-trademark-law> [<https://perma.cc/73GM-EZ7A>] ("*Eksouzian* is arguably in conflict with the PTO's position that hashtags are registrable as trademarks."); Falconer, *supra* note 225, at 1 ("[A] federal district court in *Eksouzian v. Albanese* determined a hashtag is not a trademark").

341. Hashtags have appeared in trademark cases in other contexts, too. In *Penshurst Trading Inc. v. Zodax LP*, the court declined to characterize plaintiff's infringement claims as frivolous and award attorneys' fees to defendant by citing the plaintiff's argument that consumers' use of the hashtag #BerryAndThread to reference its allegedly distinctive berry and thread trade dress provided proof of secondary meaning. No. 14-CV-2710 RJS, 2015 WL 4716344, at *3 (S.D.N.Y. Aug. 7, 2015). In *TWTB, Inc. v. Rampick*, the court cited defendant's use of the hashtag #LucysNola to refer to its New Orleans restaurant as one piece of evidence demonstrating the restaurant was known as "Lucy's" even when it was formally named "Lucy's Retired Surfer's Bar & Restaurant." 152 F. Supp. 3d 549, 563 (E.D. La. 2016).

342. 37 C.F.R. § 2.41 (2016); TMEP §§ 1212.04; 1212.05; 1212.06.

tagmark may have a difficult time showing acquired distinctiveness by proving five years of exclusive use; if its mark is also a hashtag used by the public, true exclusivity may be hard to establish.

In considering whether a mark has acquired distinctiveness, trademark examining attorneys and courts look to various indicia of secondary meaning, including the nature, expense, and amount of advertising; length, exclusivity, and manner of use; total sales; consumer statements; survey evidence; and unsolicited media coverage.³⁴³ The inquiry focuses generally on the extent of promotional efforts and on their effectiveness in altering the way consumers perceive the mark.³⁴⁴ Distinctiveness doctrine presumes that the longer consumers have been exposed to a mark in connection with goods or services, the more likely it is that the mark has come to distinguish those goods or services and indicate their source. Requiring tagmark owners to establish secondary meaning would have the definite effect of eliminating ITU applications for tagmarks and the likely effect of substantially reducing the number of tagmarks registered. It would weed out registrations by entrepreneurs looking to capitalize on a trend before it burns out and leave only those registrations by producers who intend, and succeed in, using the tagmark long-term. As such, it would solve a number of the problems that overprotecting tagmarks creates.

C. *Implications for Trademark Law*

The word mark categories articulated in *Abercrombie* have shaped American trademark law for nearly a century and dictated distinctiveness outcomes by judges, juries, and trademark examining attorneys for equally as long. According to that tradition, a word mark is either fanciful, arbitrary, suggestive, or descriptive for the goods or services with which it is used. If it falls into one of the first three categories, it is deemed inherently distinctive and granted automatic protection; if it falls into the fourth, it must acquire distinctiveness before it can earn common law protection or federal registration. However, the empirical study discussed in Part II dramatically undermines the wisdom of *Abercrombie* and its progeny by highlighting the crucial importance of context in influencing whether consumers perceive a word or phrase as a trademark. So does this Article's explication of tagmark registration.

When registrability assessments produce bad outcomes—outcomes that harm competition, chill speech, or conflict with black-letter law—they raise several related challenges. Examining attorneys must adhere to court precedent and TMEP guidelines in making their determinations. Those precedents and guidelines themselves must be clear and consistent, and must produce correct results when properly applied. And finally, if there are categories of marks or categories of mark uses for which the default rules lead factfinders astray, those

343. 2 MCCARTHY, *supra* note 8, §§ 15:30, 15:70.

344. *Aloe Creme Labs., Inc. v. Milsan, Inc.*, 423 F.2d 845, 850 (5th Cir. 1970).

categories of marks and uses require separate guidelines to ensure consistent outcomes.

In the Lee et al. study, consumers found descriptive marks just as highly source-indicating as suggestive marks when they were displayed in a particular context, i.e. when they were truly used as marks. In this exploration of tagmarks, I argue that even suggestive or arbitrary terms and phrases are unlikely to function as distinctive marks when preceded by a hash symbol due to the types of uses producers make of tagmarks, the contexts in which they appear, and the effect of the hash symbol's presence on consumer perception. The *Abercrombie* taxonomy conserves resources by providing a quick and easy test for distinctiveness that works fine for some marks in some contexts³⁴⁵ but falls short for other types of marks in other contexts.

CONCLUSION

Producers, marketers, consumers, and citizens continue to create, use, and make viral different categories of hashtags, and applications to register tagmarks continue to climb. Mark owners are now beginning to take legal or extra-legal action in relation to the use of their trademarks in hashtag form, availing themselves of social media websites' takedown policies,³⁴⁶ sending cease and desist letters,³⁴⁷ or suing in federal court. It's only a matter of time before a producer appeals the USPTO's refusal to register its hashtag or sues a competitor for infringing its registered or common law tagmark,³⁴⁸ and then the TTAB and federal courts will be forced to confront these questions about tagmark protectability directly.³⁴⁹

Hashtags come in a variety of categories and flavors, and they differ from traditional marks in a number of significant ways. They also resist easy

345. *Abercrombie* is the primary, if not the sole, test used for word marks, but is often a poor fit for design marks and trade dress, which rely on tests like those articulated in *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342, 1344 (C.C.P.A. 1977) and *Duraco Prods., Inc. v. Joy Plastic Enters., Ltd.*, 40 F.3d 1431, 1434 (3d Cir. 1994). This Article's analysis of tagmark distinctiveness suggests *Abercrombie* also fails to provide a helpful framework for certain types of word marks.

346. See, e.g., *Twitter Publishes Trademark Takedowns for First Time*, TRADEMARKS & BRANDS ONLINE (Dec. 8, 2015), <http://www.trademarksandbrandsonline.com/news/twitter-publishes-number-of-trademark-takedown-notice-4456> [<https://perma.cc/8V2K-FEPM>].

347. See, for example, the much-publicized story of restaurant chain Taco John's successful effort to enforce its registration for TACO TUESDAY against an Oklahoma restaurant's use of the hashtag #tacotuesday. Emily E. Campbell, *Taco John's Claims Rights in Taco Tuesday*, DUNLAP CODDING INTELL. PROP. L. (Aug. 4, 2010, 12:43 AM), <http://dunlapcoddington.com/phosita/2010/08/taco-johns-claims-rights-taco-tuesday> [<https://perma.cc/6SX3-EXFG>].

348. A search of the TTAB website reveals several pending inter partes oppositions involving tagmarks, but no ex parte appeals of registrability decisions.

349. Several cases assessing hashtags as trademarks have already been litigated in federal court, but so far all have considered whether a hashtag infringes another party's trademark rights, rather than whether the hashtag itself constitutes a protectable mark. See, e.g., *Eksouzian v. Albanese*, 2015 WL 4720478, at *7-8 (C.D. Cal. Aug. 7, 2015); see also *Fraternity Collection, LLC v. Fargnoli*, 2015 WL 1486375, at *4 (S.D. Miss. Mar. 31, 2015).

categorization, as their capacity to function as marks depends upon their creation, use, meaning, context, and ability to indicate a single source. Most tagmarks simply fail to function as distinctive marks, suggesting that current USPTO policies and practices are not adequately aligned with consumer perception. Rather than sweeping generalizations about their status, tagmarks—like other communicative symbols that differ from traditional word marks—require nuanced analysis that takes into account their use, distinctiveness, and history in order to more accurately determine when and whether they merit protection as marks. To strike a better balance among the competing trademark concerns of consumer protection, producer reward, and speech, the USPTO should revise TMEP section 1202.18 to mandate that every tagmark be categorized as “primarily merely a hashtag” until the applicant can establish that the mark actually functions as a source-indicator.

APPENDIX A

Registered Tagmarks Through 2015

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
#SHARETHESILENCE	4749708	6/2/2015	1B-1A			G
#HASHTAG PRODUCTIONS	4749879	6/2/2015	1A	S		S
#REMBRANDTCHARMS	4738428	5/29/2015	1A			S
#DONTNEED2	4735059	5/12/2015	1A			S
#INFLUENTIAL	4734151	5/12/2015	1A			S
# HASHTAGLUNCHBAG (design)	4733946	5/12/2015	1A		D	S
#FLUENTCARES	4730229	5/5/2015	1A			S
#STFUDANCE	4727567	4/28/2015	1A			G
#KEEPYOURSOLECLEAN	4726556	4/28/2015	1A			G
#MUSICVIDEOMONDAY	4718322	4/7/2015	1A	S		S
#VFSOCIALCLUB	4713397	3/31/2015	1B-1A			S
#MYCHASENATION	4699905	3/10/2015	1A			S
HASHTAG#SPORTS (stylized)	4701647	3/10/2015	1A	S		S
#HASHTAGS	4701141	3/10/2015	1B-1A			G

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
#STEAKWORTHY	4695901	3/3/2015	1A			S
#BEUNPRECEDENTED	4694671	3/3/2015	1A			S
#BEUNPRECEDENTED	4671869	1/13/2015	1A			S
#TRUE POWER	4687230	2/17/2015	1A			G
#BEENTRILL#	4569896	7/15/2014	1B-1A			S
YES WE CODE	4603219	9/4/2014	1B-1A		D	S
#JOYDELIVERED	4682222	2/3/2015	1A		D	S
#TEAM TRUTH	4682998	2/3/2015	1A	S	D	G
#DIVASONLY	4671916	1/13/2015	1A			G
#7NIGHTSTAND CHALLENGE	4671787	1/13/2015	1A			S
#THEFITNEWYORKER	4665079	12/30/2014	1A	S		S
#DATASS	4664511	12/30/2014	1B-1A			G
#BESTBOOTYEVER	4658719	12/23/2014	1A			G
#420 (in oval: design mark)	4657752	12/16/2014	1B-1A.		D	G
#WHITECUP GANG	4655486	12/16/2014	1A			G
#THESELFIE	4650601	12/2/2014	1A	S		G
#ENGAGE	4635867	11/11/2014	1A			S
# BADDIE	4631061	11/4/2014	1A			G
#WEATHERWEDNESDAY	4630209	10/28/2014	1A	S		S
#DIRTYCHEST (stylized)	4622792	10/14/2014	1A	S		G
#IMPROOF	4621082	10/14/2014	1A			G&S
#WHITECUPGANG	4609335	9/23/2014	1A			S
#JUGLIFE	4575811	7/29/2014	1A			G
#JUGLIFE (design plus words)	4588946	8/19/2014	1A		D	G
#THECODE	4581939	8/5/2014	1B-1A			S
#JACQUES ELLIOTT	4574835	7/29/2014	1A			G&S
#HELMETSARECOOL	4563601	7/8/2014	1A			G
#SHOWINGMYSUPPORT (design plus words)	4516704	4/15/2014	1A	S	D	G

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
#9RGNG	4537669	5/27/2014	1A			G
#LETSBOWL	4668238	1/6/2015	1B-1A			G
#TAG	4697799	3/10/2015	66A			G
# HASH (design plus words)	4658456	12/23/2014	1A		D	G
#tutlife	4681881	2/3/2015	1A			G
#LeadershipFlow	4670399	1/13/2015	1A			S
SATURDAY NIGHT #SOCIAL	4672960	1/13/2015	1B-1A			S
#TRENDINGHOT	4672253	1/13/2015	1B-1A			S
#REALNESS BY ALYMARIE	4768686	7/7/2015	1A			S
#EVERYBODYSKATES	4768377	7/7/2015	1A			G
#CHILLAX	4768091	7/7/2015	1A			G
#SOCALSTYLIST	4769902	7/7/2015	1B-1A			S
#SUPERSENSITIVE	4764505	6/30/2015	1A			G
#SUPERCLEAR	4764446	6/30/2015	1A			G
#SIMPLEGIVING	4763055	6/30/2015	1A			S
#IWEARORANGE	4762981	6/30/2015	1A			S
#NOBASIC	4759534	6/23/2015	1A			G
#LIVETHEGIVE	4755658	6/16/2015	1A			G
#BUILTBYGIRLS	4753408	6/9/2015	1B-1A			S
#TANLIFE	4753382	6/9/2015	1B-1A			G
#BOSSBABE	4750980	6/9/2015	1A			G
#PIBU PICKITBACKUP (design plus words)	4752683	6/9/2015	1B-1A		D	G
#FIXITJESUS	4743330	5/26/2015	1A			G
#ASTONLIFE	4742760	5/26/2015	1A			S
#WARMGLASS	4740345	5/19/2015	1B-1A			G
#JESUSMUSIC	4736989	5/12/2015	1A	S		G
#NORMALIZESOCIETY	4734839	5/12/2015	1A			S
#NORMALIZESOCIETY	4731447	5/5/2015	1A			G

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
#HMF	4716193	4/7/2015	1A			G
#HAVE MORE FUN	4716191	4/7/2015	1A			G
#:)	4714953	4/7/2015	1A			G
#VIDIT (stylized)	4710756	3/31/2015	1A			S
#HD	4708133	3/24/2015	1A			G
#FINISHIT (design plus words)	4703809	3/17/2015	1A		D	S
#CUT50	4692073	2/24/2015	1A			S
#BESOMEBODY.	4690717	2/24/2015	1A			G&S
#WRITERGRIND	4651620	12/9/2014	1A			S
#CHATAUTISM	4650746	12/2/2014	1A	S		S
#BESTFEELINGS	4642340	11/18/2014	1B-1A			G
#SELFIE (design plus words—mark appears in mirror image)	4642072	11/18/2014	1B-1A		D	G
#ALONE (design plus words)	4638112	11/11/2014	1B-1A		D	G
BLEND IN FOR WHAT?! #BLENDINFORWHAT	4627434	10/28/2014	1A			G
#B (design plus words)	4617602	10/7/2014	1A		D	G
#TIPMAS	4608749	9/23/2014	1A			S
#EATBRIGHTER	4773036	7/14/2015	1A			S
#X	4771590	7/14/2015	1A			S
#CARBIKELOVE	4560178	7/1/2014	1A			G
#SMART	4551737	6/17/2014	1A			G
#GRAMFAM	4489881	2/25/2014	1A	S		G
#DOYOUVEVGRINDBRO	4521848	4/29/2014	1A			G
#HOWDOYOUKFC	4523521	4/29/2014	1B-1A			S
#JACQUES BY ARONOW	4514144	4/15/2014	1A			G
#Tchat	4228826	10/23/2012	1A			S
#BEAUTYSERVICE	4726061	4/28/2015	1B;44D-44E			S
#ICANBREATHE	4556994	6/24/2014	1B-1A			G
#SPEEDSWAG	4720669	4/14/2015	1B-1A			G

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
#DSOLIVE LIVE FROM ORCHESTRA HALL	4405551	9/24/2013	1A		D	S
#HIPHOPED (Supp Reg)	4676757	1/20/2015	1A	S		S
#HOLLYWOODTRENDING	4527066	5/6/2014	1B-1A			S
#REALFAN	4426745	10/29/2013	1B-1A			S
#SWEDESPEAK	4645607	11/25/2014	1B-1A			S
#SAYLOVE (stylized)	4615901	10/7/2014	1A			S
THINK BEFORE YOU SHOOT #TB4YS (stylized)	4586214	8/12/2014	1A	S		G
#IFLMDOG	4582611	8/12/2014	1A			S
#WINELOVER	4345897	6/4/2013	1A			G
#EATING	4538710	5/27/2014	1B-1A			G
#DRINKTHEPINK	4570988	7/22/2014	1B;44D-1A			G
NETNOG: #LEAD	4570822	7/22/2014	1A			G&S
NETNOG: #TALK	4570794	7/22/2014	1A			S
NETNOG: #BRAND	4570793	7/22/2014	1A			S
NETNOG: #BUY	4570792	7/22/2014	1A			S
NETNOG: #COMPETE	4566462	7/15/2014	1A			S
#TXT	4562421	7/8/2014	44D;44E-44E			G
#WHATSITLIKE?!	4557351	7/24/2014	1B-1A		D	G
#WHATSITLIKE?!	4561362	7/1/2014	1B-1A			G
#STAYCRUSHING	4466030	1/14/2014	1A			G
#FITTAG (stylized)	4469853	1/21/2014	1A			S
#STRAIGHTJUICIN	4462472	1/7/2014	1A			G
#BLAMEMUCUS	4508016	4/1/2014	1B-1A			G&S
#GOLF-STRONG	4459062	12/31/2013	1A			G
#BECAUSEBAGS	4528245	5/13/2014	1A			S
SNAP #TAG PRINT	4496470	3/11/2014	1A	S		S
#THECODE (stylized)	4539940	5/27/2014	1B-1A			G&S
#THECODE	4534680	5/20/2014	1B-1A			G&S

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
#SAYLOVE	4509405	4/8/2014	1A			S
#7THIRTEEN	4387964	8/20/2013	1A			G
#MYJIHAD	4376246	7/30/2013	1A			S
#MYLONDON	4468955	1/21/2014	1B;44D-44E			G
#DABSOHARD	4489728	2/25/2014	1B-1A	S		G
#GNATION	4508985	4/8/2014	1A			G
#TSHIRTLIFE	4353469	6/18/2013	1A			G
#MINIMONDAY	4342355	5/28/2013	1A			G
ARTIST#TALK	4363837	7/9/2013	1A			S
#TAGBOARD (stylized)	4502286	3/25/2014	1B-1A			S
#NOLALOVE	4311909	4/2/2013	1A			G
#TEAMPRETTY	4249377	11/27/2012	1A			S
#CUTTYDOESIT	4314057	4/2/2013	1B-1A			G
#BESOMEBODY.	4273141	1/8/2013	1B-1A			G
#HURT	4118056	3/27/2012	1A			S
#ROCHE	4159312	6/12/2012	1A	S		S
#GBNB	4196814	8/28/2012	1B-1A			G
#MAKEEVERYTHING	4238574	11/6/2012	1B-1A			G
#BLOGATHONATX	4045115	10/25/2011	1A			S
#FLYLIFE	4432861	11/12/2013	1B-1A			G
#LEY	4064898	11/29/2011	1B-1A	S		S
#TRANCEFAMILY	3879735	11/23/2010	1A			S
#GNO	3848868	9/14/2010	1B-1A			S
#RUNCHAT BE THERE, OR BE RUNNING	4135190	5/1/2012	1A			S
#GMLA GRINDINGMYLIFEAWAYMOVEMENT (stylized)	4331018	5/7/2013	1A			G
BOOM APPAREL #LEAVING OUR MARK	4474589	1/28/2014	1A		D	G
M#FABFOUND	4435768	11/19/2013	1A		D	S
BAG OR DIE #BAGORDIE (design plus words)	4780533	7/28/2015	1A		D	G

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
LAS#TAG	4775188	7/21/2015	44D-44E			G
#ATHLETE CODE (design plus words)	4782047	7/28/2015	1A		D	S
#EXPLOREYOURSTATE	4776626	7/21/2015	1A			G
#CYBER360	4776178	7/21/2015	1A			S
#WRTS	4778707	7/21/2015	1B-1A			G
#SHATTER SX-7	4786590	8/4/2015	1B-1A			G
#LIKEAGIRL	4785927	8/4/2015	1A			S
#TBT	4785880	8/4/2015	1A			G
#RESPECTTHEMELANIN	4785495	8/4/2015	1A			G
I FLORISTS #IHEARTFLORISTS (design plus words)	4787392	8/4/2015	1A		D	S
I FLORISTS #IHEARTFLORISTS (design plus words)	4787391	8/4/2015	1A		D	S
#GETBETTER	4786750	8/4/2015	1A			G
#MAKEBETTERHAPPEN	4790678	8/11/2015	1A			S
#BEYOU	4796911	8/18/2015	1B-1A			G
#GETPT	4801360	8/25/2014	1A	S		S
#MFGIS (design plus words)	4799312	8/25/2015	1A		D	S
#MYANALOGCLOUD	4806034	9/8/2015	66A			G
#GHENTITEPHOTOGRAPHY	4803858	9/1/2015	1A			S
#REALNESS BY ALYMARIE	4810200	9/8/2015	1B-1A			G
#MAKEITMONTCO	4809565	9/8/2015	1B-1A		D	G&S
#ASKMMC	4812869	9/15/2015	1A			S
#BFD	4812954	9/15/2015	1A			S
#FINISHIT (stylized)	4823597	9/29/2015	1B-1A			S
#REACHFORPEACH	4829027	10/6/2015	1B-1A			G
#EATING	4832569	10/13/2015	1B-1A			G
#ASHCAM	4833006	10/13/2015	1B-1A			G&S
#OWNNOW	4837330	10/20/2015	1B-1A			S
#FAMOUS	4838259	10/20/2015	1B-1A			G

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
#M (design)	4835592	10/20/2015	1A		D	G&S
#CRPSORANGEDAY	4836664	10/20/2015	1A			S
#LIFESABEACH (stylized)	4839652	10/27/2015	1A			G
#CHARMEDHER	4842577	10/27/2015	1B-1A			S
#CHARMEDHIM	4842578	10/27/2015	1B-1A			S
#SYBOLSANEXPRESSIONS	4842579	10/27/2015	1A			S
#GETTHERESAFE	4839746	10/27/2015	1A			S
#BRINGYOUROWN	4841551	10/27/2015	1A			S
#BORNPERFECT	4846016	11/3/2015	1A			G
#CHRISTIAN LIVES MATTER	4848316	11/3/2015	1A	S		G
#MISSIONBIRD	4852775	11/10/2015	1B-1A			S
#NOTJUSTUS	4850063	11/10/2015	1A			S
#NONAMERS (stylized)	4856606	11/17/2015	1B-1A			G
#ATLAST	4855164	11/17/2015	1A			G
#POWEROFHER	4855203	11/17/2015	1A			S
#SECUREYOURSELF	4855726	11/17/2015	1A			S
#HEGOIGO	4854416	11/17/2015	1A			G
#REFLECTIE	4863920	12/1/2015	1B-1A			S
#RUNNING	4862129	12/1/2015	1A			S
#GYMKITTY	4862817	12/1/2015	1A			G
#CARSWITHBENEFITS	4863065	12/1/2015	1A			S
#BYBB	4868461	12/8/2015	1B-1A			G
#THROWUPTHEX	4866317	12/8/2015	1A			G
#B (design plus words)	4866838	12/8/2015	1A		D	S
#BEYOU	4871157	12/15/2015	1B-1A			G
#STARTBETTER	4871621	12/15/2015	1B-1A			G
#FATGUYAPPROVED	4870604	12/15/2015	1A			S
#BEYOU	4872101	12/15/2015	1B-1A			G&S

Mark	Reg. Number	Reg. Date	Filing Basis	Supp? (S)	Design? (D)	Goods (G) & Services (S)
#MCCALLWEDDINGS	4872729	12/22/2015	1A			S
#SERVE	4876213	12/22/2015	1A	S		G
#TAKEMEOFFMUTE	4873781	12/22/2015	1A			S
#CHECKGANG	4878426	12/29/2015	1B-1A			G
#WHATTHETUCK	4877732	12/29/2015	1A			G