



DO YOU OWN YOUR #HASHTAGS?

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Now fully integrated into everyday language, the hashtag has become a powerful marketing tool for companies wishing to promote their products and services through social media.

#Definition

Do you know what a "hashtag" is? This novel term composed of the words hash and tag represents the combination of the "#" symbol followed by one or more unspaced words. It is a marking system that allows users to tag content on social networks.

#Origin and #Use

The use of the hashtag has been popularized by the micro-blogging site Twitter, where the hashtag was first introduced in 2007 [http://www.nytimes.com/2011/06/12/fashion/hashtags-a-new-way-for-tweets-cultural-studies.html?_r=0], allowing users to tag and search for the latest trends among other users' publications. Ever since, the use of the hashtag has become common on other social networks such as Facebook, Google+ and Instagram, among others.

This begs the question: is it possible to register a hashtag and use it as a trade-mark?

Hashtag as a #Trade-mark

A trade-mark can be registered using a sign, a word, a letter, a number, a drawing, a color or a combination thereof, to distinguish the goods and/or services of one person from those of another. It is therefore quite possible to register a "hashtag" as a trade-mark. Moreover, many words and phrases preceded by the hash symbol have

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appeared in the Canadian Register of Trade-marks as well as the United States Patent and Trademark Office in the past years.

Beyond registration, in order for the trade-mark to be considered in use in connection with wares under the Trade-marks Act (hereafter the "Act"), the "hashtag" must be affixed to the wares themselves, to the packages in which they are distributed, or be otherwise associated with the wares in such a way that a person is given the impression that there is a link between the trade-mark and the wares when possession or ownership of the wares in question is transferred during the normal course of business. However, although the trade-mark visually corresponds to a "hashtag", the trade-mark does not contain the metadata marking properties if it appears outside of a web platform.

To constitute use in relation to services within the meaning of the Act, the "hashtag" should be used or displayed in the performance or advertising of those services. A publication by the owner of a trade-mark associated with a service advertised on Twitter accompanied by a "hashtag" can therefore constitute use of the "hashtag" as a trade-mark in connection with such service.

#Trade-mark Infringement

Can the use of a registered trade-mark by a third party on social networks be considered an infringement of said trade-mark?

Measures Implemented by Social Networks

Most social networks have policies to regulate the use of trade-marks in user-generated content.

Twitter, for example, has a Trademark Policy [<https://support.twitter.com/articles/75547-politique-en-matiere-de-marques-deposees#>] providing that the use of a trade-mark "in a manner that may mislead or confuse others with regard to its brand or business affiliation may be considered a trademark policy violation". However, the act of "using another's trademark in a way that has nothing to do with the product or service for which the trademark was granted is not a violation of Twitter's trademark policy." Thus, a Twitter user can theoretically use a "hashtag" that is the registered trade-mark of a third party if he does not use it in a way that could mislead consumers, for example by misrepresenting his products and services as those of the owner of the registered trade-mark.

Twitter provides a public complaint system allowing owners of registered trade-marks to report any violation of their trade-marks. Upon receipt of a report, Twitter can take measures such as suspending the account in question, or asking the account holder to "clear up any potential confusion."

Facebook has put in place a "Statement of Rights and Responsibilities"[\[https://www.facebook.com/legal/terms?ref=pf\]](https://www.facebook.com/legal/terms?ref=pf) governing the relationship between Facebook and its users. It is less detailed than the policy implemented by Twitter regarding the protection of trade-marks, but it prohibits Facebook users from violating trade-mark rights of other users. The social network also provides a system for "reporting trademark infringement"[\[https://www.facebook.com/help/440684869305015/\]](https://www.facebook.com/help/440684869305015/). Instagram has a similar statement and reporting system. Finally, Google+ provides a system for reporting counterfeit goods, but has no specific policy for trade-marks[\[https://support.google.com/legal/contact/lr_counterfeit?product=googleplus\]](https://support.google.com/legal/contact/lr_counterfeit?product=googleplus).

#Remedies

Beyond the policies implemented by social networks, nothing would prevent the holder of a hashtag registered as a trade-mark to turn to the courts in case of trade-mark infringement.

According to the Act, a person owning a registered trade-mark can prevent others from using the same mark for the same goods and services, or from using a trade-mark which could be confused with their trade-mark. The owner may also act to prevent the depreciation of goodwill and unfair competition related to its trade-mark.

However, no decision has been rendered thus far by Canadian courts on this subject. Considering the fact that the interest of using the "hashtag" on social media is widespread and that it allows the exchange of content (and even its proliferation), the desire to limit the use of a hashtag may seem counterintuitive. Lawsuits that will arise, if any, should particularly target obvious cases of unfair competition.

#tobecontinued



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