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## #Hashmarks: Can a Hashtag be a Trademark?



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Through its automatic web of connections, the humble hashtag has been repurposed: it's now associated with the cachet of internet fame. In social media platforms the hashtag brings users from one descriptor to thousands of associated results. It has evolved into a key that opens doors for political activism, news coverage, and interest groups, as well as marketing and advertising.

How did this all start? From as far back as the late 1980s some computer users used the “#” symbol as a way to categorize and search content. Twitter borrowed the concept in 2007, and its utility was really seen when Twitter hyperlinked all posts using the same # symbol. Other social media platforms soon followed suit, including Google, Facebook, Pinterest, and Instagram.

With social media exploding as a platform for business promotion, the hashtag evolved from a tool to organize information into a valuable marketing asset. With the right hashtag, consumers will not only use your product or service, but will also willingly promote it.

The question is whether a hashtag has evolved further so that it functions as a hashtag trademark... or a "[tagmark](#)".

The answer is an unequivocal yes.

In both Canada and the US, hundreds of tagmarks have been registered by some of the world's biggest consumer products companies, and some of the smallest startups.

Hashtag-related claims have emerged in a number of trademark infringement lawsuits. While we don't have a lot of guidance from Canadian courts on this topic, there are a number of US decisions that have tackled this issue: the 2015 US case *Eksouzian v. Albanese* (2015 WL 4720478 (C.D. Cal. Aug. 7, 2015)) is a dispute over the hashtag #cloudpen.

In that case, two competing companies selling vaporizer pens had reached a settlement agreement concerning their use of the word CLOUD as part of a

trademark. From this settlement, a dispute arose over the use of the hashtag #cloudpen; the court had to determine whether use of the hashtag constituted a breach of the agreement. The court took the view that hashtags only facilitate categorization in a descriptive way, and should *not* be registrable trademarks.

As a general doctrine of trademark law, this is too restrictive. A hashtag can certainly function as a trademark, provided the other criteria for trademark registrability are satisfied. To put this another way, if you take a word that is unregistrable as a trademark due to descriptiveness or lack of distinctiveness, then merely adding a hashtag, without more, will not be sufficient to transform that word into a registrable mark. Conversely, the use of a hashtag will not automatically turn a registrable mark into an unregistrable mark. Each mark will be assessed on its own merits, according to the usual criteria of registrability.

To quote the Trademarks Office "the addition of the # symbol or equivalent word to a clearly descriptive trademark will not render it registrable. ( ... ) each trademark must be examined based on its own merit and trademarks consisting of, or containing, the hash symbol or word 'hashtag' will always be examined on a case by case basis." (Canadian Intellectual Property Office, Trademarks Examination Manual, September 2017 update)

In Canada, not only do we have guidance from the Trademarks Office, we also can see from reviewing the trademarks register that many hashtag marks have been successfully registered. A good example of this is Toronto-based influencer platform Hashtag Paid Inc. This company has successfully registered the trademark "#paid" in association with advertising agency services, and advertising and business management consultancy services, among other things. #paid illustrates how brands have developed a distinctive hashtag to be used as an identifier, and a registrable mark.

The world of hashtag trademarks continues to evolve, and the law is playing catching up. We can expect that the number of hashtags being used and applied for as trademarks will increase as businesses start relying more heavily on social media as sales platforms and increase the scope of their branding efforts to incorporate the use of hashtags as identifiers of their offerings.

To learn more about how can protect your brand effectively and the benefits to registering trademarks in Canada contact [Laura MacFarlane](mailto:Laura.MacFarlane@fieldlaw.com) at [lmacfarlane@fieldlaw.com](mailto:lmacfarlane@fieldlaw.com) or [Richard Stobbe](mailto:Richard.Stobbe@fieldlaw.com) at [rstobbe@fieldlaw.com](mailto:rstobbe@fieldlaw.com).

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