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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, hashtags—which I call them “tagmarks”—are having a moment. Given the amount of resources that brands invest in marketing via social media, and specifically in
choosing and using hashtags, it’s not surprising that some players have begun to seek federal trademark registration for their hashtags. By the end of 2015, companies had successfully registered more than two hundred tagmarks, 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. 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. As such, even tagmarks comprising suggestive or arbitrary terms will


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 (TMEP) § 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 TMEP § 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, 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 applications in part to ensure that registered terms and phrases are used as trademarks and actually function as trademarks. However, a careful review suggests that some or all of those two hundred registered tagmarks ought to have been refused registration. 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 distinctive than it would be without it. 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. Sarnoff-Irving Hat Stores, 164 A. 246, 250 (1933).


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 & TRADEMARKS § 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. . . . If 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 wrappers for registered tagmarks reveals that USPTO attorneys are not applying uniform principles in evaluating the use, distinctiveness, and registrability of those marks. It is little wonder given that tagmarks pose a new set of challenges and span a broad range of contexts and uses. In the wake of several federal district court cases, practitioners call the legal status of tagmarks “murky” and predict more battles to come. 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, while another acknowledged that using a hashtag could deceive consumers in violation of the Lanham Act.

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 matter

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).


22. “Matter” in the Lanham Act refers to anything—words, logos, packaging, product configuration, etc.—that functions as a trademark.
that is considered functional. 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. 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, 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; 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 individual or a likelihood of consumer confusion with another mark. 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. 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.

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.
28. § 1052(d).
29. See TMEP § 1213.05(b)(i).
A history and taxonomy of hashtags is crucial background for considering tagmarks' quality 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," 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. 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. While Twitter divulges only that hashtags were “created on Twitter,” 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. After Twitter rejected the idea, Messina pitched it to citizen journalists covering forest fires in San Diego; #SanDiegoFire took off, 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.

Non-social media platforms also support hashtags. Auction site eBay employs “smart hashtags” that populate when users share items from eBay on social media. Amazon recently rolled out #AmazonCart, enabling customers to automatically purchase items on Amazon by using a hashtag on Twitter. 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 and off.

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.”).
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.
and offline. Online, hashtags are used in an increasingly broad range of ways.\footnote{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.}

Offline, hashtags have begun to appear everywhere from magazines, billboards, and television shows\footnote{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-familyss-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.”).} to buildings, product packaging,\footnote{“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].} college acceptance letters,\footnote{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?caseld=sn86367137&docld=SPE2015031165209#doclndex=5&page=1 [https://perma.cc/PTM2-VF4Y].} bathing suits,\footnote{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].} and the 25-yard-line of a football stadium.\footnote{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].}

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,\footnote{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.} dominates Twitter—97 percent of the top one hundred brands that posted a tweet in the fourth quarter of 2014 included a hashtag.\footnote{Yohn, supra note 3.} Hashtags play an increasingly important role on other platforms, including Facebook and Instagram. Corporations have begun staffing
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.
Yet marketers acknowledge that when it comes to hashtag marketing, they cede a good deal of control over campaigns to consumers. 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. 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. 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.” 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.” 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.

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.”).
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.”).
In the first three days after the Supreme Court’s gay marriage decision in Obergefell, over eleven million tweets employed the hashtag #LoveWins.

But social media users don’t just use hashtags to link content, engage with marketers, and talk about products, 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.” Linguists note the tension between corporate, mass media, and “indie” uses. 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.” Education expert Benjamin Gleason considers how hashtags can be used for learning by exploring the “information neighborhood” created by tagged tweets. New York Times Magazine points out that while some hashtags are appended to tens of thousands of tweets, others will only be used once. Researchers mine hashtags for insight not only about linguistic patterns, consumer behavior, and superficial trends, but also about issues as disparate as drug interactions and political polarization predictive of violence.

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”).
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.
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. 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, 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.

Strategies vary, though, and some companies opt to register tagmark versions of already registered text marks. Bank PNC successfully registered VIRTUALWALLET in 2009 and VIRTUAL WALLET in 2010, both for banking services, and then applied to register the hashtag #VirtualWallet—once again, for banking services—in 2015. 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’ articles 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, the startup that hoped for the exclusive

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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.


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

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

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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 2015 and applied to register it for online retail stores and entertainment services five months later. 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. The Lean In Foundation, after applying to register LEAN IN for printed matter, online business education services, and apparel in 2012, applied to register #LeanInTogether for those same goods and services in 2015. The National Academy of Recording Arts & Sciences applied to add #GrammyGlam to its cadre of GRAMMY-related registered marks. Walmart applied to register WALMART ELVES in 2013 and #WalmartElves a year later; 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.

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, #MakeltCount for a Nike fitness campaign encouraging users to post photographs, #VoteForJoy for a Starbucks campaign that asked customers to vote for their favorite drink and then offered

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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 (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 (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.


the winning drink at a discount, and #FriendsAreWaiting for a Budweiser campaign about responsible drinking. #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.” 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. Legal research company LexisNexis uses the hashtag #BeUnprecedented to connect with students online. T-Mobile’s “Test Drive” campaign offered customers a free one-week trial of its services along with an iPhone during the trial period, the company deployed the hashtag #7NightStand on social media to generate interest in the offer. Abercrombie & Fitch brand Gilly Hicks uses the #TrendinGHot hashtag to create buzz about its underwear.

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


for social networking services. 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, 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. There is a published application based on intent to use (ITU) for #BeTheGirl and another for #BtheG. Procter & Gamble applied in 2014 to register #LikeAGirl for feminine hygiene products as well as advertising and marketing services. 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. Smashbox paired its house mark with its hashtag, applying to register Smashbox #ShapeMatters. LexisNexis parent company Reed Elsevier registered BE UNPRECEDENTED and #BeUnprecedented 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, and clothing and #TheSweatLife for a range of services including fitness classes, training, and interactive websites, all on the same day. And Restaurant BurgerFi applied to register its slogan TRY SOME BETTER as a

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107. FIND BETTER, Registration No. 4,310,338.
109. #7NightStand Challenge, Registration No. 4,671,787.
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).
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.
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.
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, 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).
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 Miltnor, 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-DISSERATION.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 tagmarks parallel those for domain name trademarks, this category of negative or critical consumer-generated tagmarks 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.”).
Jackson’s exposed breast.126 #NewHarryPotterBooks127 is a hashtag game in which Twitter users brainstorm funny future novel titles for the series, like “Snipes 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

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.”).
132. #9RGNG, Registration No. 4,537,669.
York Knicks’ #knickstape; Nebraska Cornhuskers’ #Nebrasketball; the nickname for Seattle Seahawks’ Marshawn Lynch, #BeastMode; and #WRTS, the acronym version of Texas A&M University slogan “We Run This State.”

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, #RT (retweet) and #MT (modified tweet). #NoFilter is a common hashtag 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. #Selfie has been used millions of times on Instagram to label

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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. 86/294,801 (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).

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).


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.bigspacehip.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.
pictures that social media users take of themselves, and #tweet\textsuperscript{142} 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.\textsuperscript{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.\textsuperscript{144}

\subsection*{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.\textsuperscript{145} Hashtags serve as rallying cries for social justice or link reactions to current events, such as #BringBackOurGirls,\textsuperscript{146} #JeSuisCharlie, #ICantBreathe, #IfTheyGunnedMeDown,\textsuperscript{147} or #Ferguson.\textsuperscript{148} A hashtag can be a means to bring attention to a taboo topic or encourage the sharing of stories, such as #YesAllWomen,\textsuperscript{149} #WhyIStayed,\textsuperscript{150} #IllRideWithYou, and #CrimingWhileWhite. Others are code words for group membership, like

\begin{itemize}
\item \textsuperscript{142} TWEET, Registration No. 4,338,963.
\item \textsuperscript{143} See #tweet search results, TWITTER, https://twitter.com/search?q=%23tweet&src-typd [https://perma.cc/U84X-852T] (last visited Feb. 27, 2017).
\item \textsuperscript{144} Registration No. 47/85,880.
\item \textsuperscript{145} See Chander & Lé, 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.").
\item \textsuperscript{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].
\item \textsuperscript{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].
\item \textsuperscript{148} #Ferguson appeared in nearly eight million tweets in a single week. Zak, supra note 35.
\item \textsuperscript{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. . . . Between Saturday and Tuesday morning, #YesAllWomen had been tweeted more than 1 million times.").
\end{itemize}
#TutLife or #ThugLife; well-recognized drug references like #420 or #GetFried; in-jokes and cultural catchphrases like #SorryNotSorry, #ByeFelicia, and #BoyBye; or hashtag games like #UpdatedTVShows, #BreakfastFilms, or #LessInterestingBooks.

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." 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."

French fry-focused eatery #GetFried Fry Café, for example, chose the hashtagged phrase as its name and primary trademark, 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, but the hashtag predates her televised use of the phrase and remains a widely used expression of frustration and appeal to a higher power, alternately ironic and sincere. After the hashtag #IWokeUpLikeThis took off on social

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

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


media, an applicant sought to register WOKE UP LIKE DIS for apparel;\footnote{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 services\footnote{161} likely seeks to capitalize on the ubiquitous #FirstWorldProblems hashtag.\footnote{162} #Dadbod entered the zeitgeist in 2015 to describe “a physique that looks like a formerly fit athlete has gone a bit to seed,”\footnote{163} and the hashtag quickly went viral\footnote{164} 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,\footnote{165} books,\footnote{166} and clothing,\footnote{167} although the t-shirt shown in the latter specimen displays the hashtag #DADBOD in large font across the wearer’s chest.\footnote{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.”\footnote{169} Recently, an applicant applied to register

\begin{footnotes}
\item[161] U.S. Trademark Application Serial No. 86/972,719 (filed Apr. 12, 2016).
\item[166] U.S. Trademark Application Serial No. 86/680,371 (filed July 1, 2015) (abandoned).
\item[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).
\item[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 #dadabod search results, TWITTER, https://twitter.com/search?q=%23dadabod&src=typd [https://perma.cc/2XXH-NMRZ] (last visited Feb. 27, 2017).
\end{footnotes}
#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


\(^{174}\) 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 wrapper, and then selecting “Offic Action Outgoing” (Aug. 12, 2013).


\(^{176}\) 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.


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. In order to trigger protection under the Lanham Act, which draws its power from the Commerce Clause of the Constitution, 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, 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 suggestive 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. 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.

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 Solns., 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 Cnty. College Dist., 889 F.2d 1018, 1022 (11th Cir. 1989) (common law trademark rights require use in commerce); FirstBank 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).
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” or “primarily geographically descriptive.”

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.” The goal of functionality doctrine is to prevent trademark protection from inhibiting competition by allowing a single producer to monopolize a useful product feature. While functionality considerations vary somewhat across circuits, traditional utilitarian functionality analysis 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. 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. But for certain types of word marks used online, such

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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.
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.
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
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,
[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
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. 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:

![Example of #Steakworthy](image_url)

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205. Id. at 1387.
Hashtags' functionality problem is related, but not identical, to their use problem discussed in Part II.C. 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 distinctiveness 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. 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.\textsuperscript{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,\textsuperscript{210} like PICKETT SUITE HOTEL,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 clothing\textsuperscript{214} was allowed without a showing of secondary meaning, as were #LetsBowl for bowling balls,\textsuperscript{215} #ProudMama for entertainment services, #NormalizeSociety for a blog about gentle parenting,\textsuperscript{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.\textsuperscript{217} #Running was registered for promoting youth leadership skills, i.e. teaching young people about “running” things,\textsuperscript{218} and #KeepYourSoleClean was registered in connection with adhesive film for sneakers designed to keep your sole clean.\textsuperscript{219}

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

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\item \textsuperscript{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.").
\item \textsuperscript{210} 15 U.S.C. § 1052 (2012); TMEP § 1211.
\item \textsuperscript{211} In re Pickett Hotel Co., 229 U.S.P.Q. 760 (T.T.A.B. 1986).
\item \textsuperscript{212} TMEP § 1202.18.
\item \textsuperscript{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.
\item \textsuperscript{214} #SMART, Registration No. 4,551,737.
\item \textsuperscript{215} #LETSBOWL, Registration No. 4,668,238 (disclaiming “bowl” but not the hash mark).
\item \textsuperscript{216} Specimen, #NORMALIZESOCIETY, Registration No. 4,734,839, https://tsdr.uspto.gov/documentviewer?caseld=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).
\item \textsuperscript{217} Compare to #MusicVideoMonday, which was refused registration on the Principal Register as merely descriptive. #MUSICVIDEOMONDAY, Registration No. 4,718,32 (Supplemental Register).
\item \textsuperscript{218} #RUNNING, Registration No. 4,862,129.
\item \textsuperscript{219} #KEEPYOURSOLECLEAN, Registration No. 4,726,556.
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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. 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. 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. But at least one group of scholars has called those assumptions into question using empirical data. 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.” 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. 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.

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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. 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. Consumer perception, not the mark owner’s belief or intent, determines whether the term functions as a mark. 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. 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); 1 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).


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. 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.

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." The sudden popularity of domain name marks 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. 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://tsearch.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, grouping comments and enabling users to monitor a discussion. 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. Participants can use it to comment, criticize, express affiliation or affinity, or add their content to the stream of content indexed at the hashtag.

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

![#TanLife](image)

#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.” And while it’s paired with a house

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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&docld=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
brand—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:

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?caseld=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.”

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. 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.” 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, http://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."  

Other specimens displaying tagmarks next to social media logos have passed through without objection, such as the one for #TrendinGHot. 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

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246. Office Action, #KEEPYOURSOLECLEAN, 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?caseld=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, while Procter & Gamble registered #LikeAGirl using a screenshot of its Twitter page as specimen.

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.”

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.

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Nor are offline tagmark uses, such as those reflected in LexisNexis’s specimens for its #BeUnprecedented 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.” When offline uses simply mirror online ones, 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

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251. #BEUNPRECEDENTED, Registration Nos. 4,671,869, 4,694,671.
searching online social media, and not as a service mark for particular services.»

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." 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. Specimens showing tagmarks used in classic trademark locations, such as on hangtags, or the front pocket, or the inside back of t-shirts, 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.

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

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, as are a significant proportion of tagmark applications that are never granted or perfected. While the USPTO rejects many such specimens, some tagmark applications showing ornamental use succeed. The specimens on file for registered tagmarks #LiveTheGive, #TutLife, #FixItJesus, 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).


262. Specimen, #TutLife, Registration No. 4,681,881, http://tsdr.uspto.gov/documentviewer?caseld=sn86324752&docId=SPE20140703073632#docIndex=8&page=1 [https://perma.cc/EA93-5FZB]. The tagmark appears ornamentally on a 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?caseld=sn86416339&docId=SPE201410071412#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 commerce\textsuperscript{264} in connection with goods or services\textsuperscript{265} 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,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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...
for its Always brand (excerpt shown below).\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{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.”

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

\textsuperscript{271} Id.

\textsuperscript{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.\(^\text{273}\) 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.\(^\text{274}\) Section 2(d) bars registration of marks likely to cause consumer confusion, typically due to similarity with other protected marks.\(^\text{275}\) 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.\(^\text{276}\) Citizen-created hashtags constitute a type of viral meme.\(^\text{277}\)

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.\(^\text{278}\) 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
under section 2(a) for falsely suggesting a connection with Trayvon Martin. 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. The application to register #ICantBreathe was refused because it falsely suggested a connection with Eric Garner. 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.

The application to register the tagmark #9RGNG for use in connection with clothing, 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. It's also possible that the examiner understood the connection but found it unlikely to cause confusion with the team's registered marks, including 49ERS and NINERS. 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

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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.
286. Registration No. 1,318,640.
is registered in connection with use as a hashtag for weekly Twitter chats regarding career development. Likewise, applications to register #TBT, #Selfie, and #TheSelfie have succeeded, and intent-to-use applications for #FollowMe, #Instaglam, and #Instaready 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.

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.


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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{297}

Based on that reasoning, slogans including “we go the extra mile”\textsuperscript{298} “Come on Strong”,\textsuperscript{299} “escape from the ordinary”,\textsuperscript{300} “drive safely”,\textsuperscript{301} and “WHY PAY MORE!”\textsuperscript{302} have been held unprotectable because they couldn’t identify a single source in the minds of consumers.\textsuperscript{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 apparel\textsuperscript{304} 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.\textsuperscript{305} Likewise, applications to register marks like #FixItJesus, #LetsBowl, #TBT, and #BoyBye should be met

\textsuperscript{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.”).

\textsuperscript{296.} Reed v. Amoco Oil Co., 611 F. Supp. 9, 12 (M.D. Tenn. 1984).

\textsuperscript{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”).

\textsuperscript{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”).

\textsuperscript{299.} B & L Sales Assoc. v. H. Daroff & Sons, Inc., 421 F.2d 352 (2d Cir. 1970).

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


\textsuperscript{302.} In re Wakefield 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).

\textsuperscript{303.} See 3 CALLMANN, supra note 29, § 18:76 for additional examples.

\textsuperscript{304.} Registration No. 4,657,752.

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, those deemed "informational matter" are simply unregistrable. The TMEP summarizes this principle in its section on Informational Matter: "Because 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." 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.

Trademark law "assumes a model in which authorship is singular or several, not massively composite," and yet authorship of hashtags often is massively composite. 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." 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.


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.


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,\textsuperscript{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.\textsuperscript{315} NIKE should provide broader coverage than #Nike, just as AMAZON might provide broader coverage than AMAZON.COM.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.name “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. 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. 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 #Running and #Influential. 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,” suggesting most don’t continue trending long enough to survive the trademark registration process, 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.” And Robert Sherwin identifies the specter of trademark bullying as the primary reason that the USPTO should refuse to register tagmarks altogether.

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”).
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, 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.

As an agency, the USPTO likely is not empowered to issue binding rules on core trademark law questions, and federal courts, particularly the Federal Circuit, give little deference to USPTO determinations of law or fact. The USPTO characterizes the TMEP as containing only “guidelines for Examining Attorneys and materials in the nature of information and interpretation.” 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, so its editors could...
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.” By the end of 2012, the USPTO had issued registrations for only eleven tagmarks, 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, 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, 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

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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. Fargnoli, 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.
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. 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.”

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. 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. 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.”

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)) (“[D]efendants’ 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.”).
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

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\(^{341}\) 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 contexts 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, sending cease and desist letters, 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, and then the TTAB and federal courts will be forced to confront these questions about tagmark protectability directly.

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

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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.


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

<table>
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<tr>
<th>Mark</th>
<th>Reg. Number</th>
<th>Reg. Date</th>
<th>Filing Basis</th>
<th>Supp? (S)</th>
<th>Design? (D)</th>
<th>Goods (G) &amp; Services (S)</th>
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