

#Newyear #hashtag #valuableasset

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10 Jan 2018

Once-descriptive social media hashtags and Twitter handles are now valuable assets associated with specific parties. Businesses in particular should have social media account user names and hashtags cleared before using them to market and advertise their goods or services.

Initially, hashtags and Twitter handles were seen as merely descriptive devices for directing consumers to promotions, not as trademarks; but now, the importance of these symbols has changed. Not only are they key to accessing discussions and trending topics on social media, they are also relevant in ways that were unforeseeable a decade ago. Recent litigation between two competitors, Eksouzian and Albanese, examined the evolution of these social media tools into forms of intellectual property.

In *Eksouzian v Albanese* both parties made and sold compact vaporiser pens and settled a trademark infringement dispute. However, in a motion to enforce the settlement agreement – which pertained to avoiding consumer confusion by limiting the use of words such as ‘cloud’ and ‘pen’ – the parties alleged that each had violated the agreement.

The court evaluated the impact of using #cloudpen in Instagram posts, citing the following passage from the Trademark Manual of Examining Procedure: "generally, the hash symbol and the wording HASHTAG do not provide any source-indicating function because they merely facilitate categorization and searching within online social media". Further, it noted that "[t]he addition of the term HASHTAG or the hash symbol (#) to an otherwise unregistrable mark typically cannot render it registrable". Accordingly, the court found the plaintiff's use of #cloudpen to be a non-infringing, merely descriptive device for directing consumers to its promotions.

However, had the defendant demonstrated that its mark CLOUD PEN had gained secondary meaning and was therefore registrable, the hashtag form (#cloudpen) might have been considered trademark infringement. The Trademark Manual of Examining Procedure allows for a mark that includes the hash symbol to be registered only if it functions as an identifier of the source of the applicant's goods or services, as determined on a case-by-case basis. For example, #SKATER for skateboarding equipment is merely descriptive and unregistrable, but #INGENUITY for business consultation services is registrable with a disclaimer of the hash symbol.

Numerous trademark registrations for marks that include the hash symbol already exist, including #BOSSBABE (US Patent 4750980) and #FIXITJESUS (US Patent 4743330).

Litigation surrounding hashtags is likely to increase as they evolve from social media tools to forms of intellectual property. The nature of hashtags will present an interesting dilemma when testing for trademark infringement (ie, demonstrating a likelihood of confusion). One factor which tends to disprove confusion and therefore infringement is the use of a mark in connection with unrelated goods or services. However, consumer confusion is highly likely because a hashtag creates a single feed for all posts containing that tag, regardless of whether the listed goods or services relate to a specific party.

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