



## INTELLECTUAL PROPERTY | Issue No. 29 | #BBQdiscussion

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I have often said that nowhere is it more evident than in the IP space that the law struggles to keep pace with technology.

Another example of that occurred to me in a “BBQ discussion” last weekend. I was having a conversation with a couple of more tech savvy (read younger) friends, when the topic turned to social media. I mentioned that there had been a couple of recent developments in that space, including in relation to the increased use of **hashtags** in social media marketing and the rights which apply to them.

For those who are unfamiliar (or as my friends put it “late to the party”), hashtags have, for some time, been used on social media platforms such as Instagram, Twitter and Facebook as a method of identifying, categorising or indexing messages. Hashtags have become powerful social media marketing tools which have differing levels of popularity with the public. They can be registered on various sites and are recognised as a symbol which has the capability of promoting goods/services. In some cases hashtags have gone viral after being promoted by social media ‘influencers’ or even after developing a life of their own after little promotion (or marketing spend).

A hashtag typically starts with the hash # symbol and is followed by a word or string of words (with no spaces) that link it to a common theme. The word/s after the hash symbol may be, for example, invented words, an individual's name, a company name, a product name or an event. Often hashtags are descriptive as they link posts with a common theme and they have become more widely used since Twitter (and now other platforms) adopted hashtags as a means of indexing tweets.

As is often the case, we are left to apply old law to new technology to identify the rights which may exist in the use of hashtags. I doubt that Lord Herschell would, in his wildest of dreams, have envisaged that his 120 year old judgement in *Reddaway v Banham* [1896] AC 199 could

have application to electronic technology in the 21<sup>st</sup> century. However, the legal principles for “passing off” – which are claims based on someone else seeking to leverage off your reputation – would apply equally to the misuse of hashtags. That may prevent others from misusing your hashtag if you can show that you have developed a reputation in it and others are seeking to gain an advantage from adopting it as their own.

Additional grounds for claim now apply under the Australian Consumer Law (which consolidated some of those old forms of claim) if the use of the hashtag is misleading and deceptive (or likely to be), causing confusion about the origin of the post or the material associated with it.

Some have argued that the law of copyright may apply to protect hashtags. However, to obtain protection, the hashtag would have to be regarded as a ‘literary work’. Although the *Copyright Act 1968 (Cth)* doesn’t define what amounts to a literary work, in 2010 the Federal Court (in *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984) found that headlines or titles were simply too insubstantial and too short to qualify for copyright protection as literary works. Although that case dealt with claims that an abstracting service had infringed a newspaper’s copyright in its headlines, it is likely that most hashtags would similarly not be regarded as literary works and not protected under the *Copyright Act 1968 (Cth)*.

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If the hashtag isn't intended to have a short shelf life, then the best form of protection may be to have it registered as a trade mark. As we know, trade marks can be registered where they distinguish the goods/services to be offered under the mark from others. Where marks are descriptive or suggestive of the goods/services, they are less likely to distinguish from traders offering similar goods/services.

As the # symbol is not regarded as distinctive, it is the words following the # which will be considered when assessing the distinguishing elements of a hashtag. IP Australia has said that where a trade mark consists of a # followed by descriptive or non-distinctive elements it will not generally be capable of distinguishing. An example would be "#playnetball" for sporting services. Compare that with the mark "#dreamjob", which may not distinguish in the case of recruitment services, but will distinguish from others and has been registered in relation to clothing, footwear and headgear.

If a trade mark is registered, protection will apply from the date of application. However, the registration process will take a minimum of seven and a half months and while not likely to put most people off, the cost of an application should also be considered.

Finally, but perhaps most importantly, as is the case with most forms of IP, care must be taken before adopting a hashtag to ensure that you are not infringing the rights of others through its use. Whilst hashtags may be a little unusual in that generally an owner will want to encourage others to contribute, that is unlikely to be the case if the use of the hashtag undermines or disrupts its use by the owner.

I trust that short overview will provide you with some food for thought, in the event that you use or are considering increasing either your own or the social media profile of your organisation. In many cases, it will now be worthwhile to consider registering a hashtag as a trade mark.

It certainly gave us something to chew over in the context of our #BBQdiscussion.



**Andrew Nicholson**

Partner

**Mullins Lawyers**

t +61 7 3224 0261

[anicholson@mullinslaw.com.au](mailto:anicholson@mullinslaw.com.au)