



## **Registrability of #Hashtags as Trade Marks: a brief overview of the position in Singapore, Malaysia and Thailand**

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### **I. INTRODUCTION**

1. #Barcamp: this was the first hashtag to be used on a social media platform (Twitter) by a man named Chris Messina back in 2007. His proposal to Twitter to categorise content using the pound sign, which Twitter candidly ignored, was intended to allow users with little technological background to easily locate relevant content in the unnavigable sea of social media posts.
2. Despite the initial non-recognition, hashtags are becoming an increasingly prominent tool in the Internet age. From activism campaigns such as the #MeToo and #BlackLivesMatter campaigns to celebrating #WorldOrigamiDay and even to denouncing election results (#NotMyPresident), so long as it may be put into words, the chances are it is a hashtag somewhere.
3. It is thus not surprising that brand owners are growing more aware of the marketing power of hashtags, especially in this social media era where traditional advertising mechanics are overturned in favour of "trending posts" and "social media influencers" are now a recognised occupation.
4. Given so, brand owners now find themselves wondering whether a hashtag used in conjunction with their marketing campaigns or products can be registered as a trade mark. This article thus seeks to explore the registrability of hashtags under the trade mark laws in Singapore, Malaysia and Thailand.

### **II. HASHTAGS: WHAT ARE THEY AND HOW DO BRAND OWNERS USE THEM**

5. Hashtags are highly versatile social media tools, it can simply be #anything. On the technical end, they are a type of metadata tag used on social networks and other similar services, which allows the users to generate customised tags. Words, phrases, sentences, even a series of punctuation or emoticons can be a hashtag.
6. They seek to categorise social media posts and, in turn, this also gives rise to its searchability function. Users can simply click on or search a specific hashtag to see all posts related to the hashtag and some social media platforms also have a "trending" function which will list the most used hashtags in real time.



7. There are an infinite number of ways for brand owners to make use of hashtags. They can hashtag their brand name, hashtag their slogan or hashtag a contest tagline, just to name a few ways. Some brand owners also make use of trending hashtags to garner more attention such as an activism or charitable hashtag which may be related to their product (for instance, "#noanimaltesting" or "#crueltyfree").

### III. TRADEMARKING HASHTAGS

#### A. The Singapore Position

8. There is no separate regime or provision under the Singapore trade mark laws which govern the registration of hashtags as trade marks. It would thus appear that the general registrability assessment will apply similarly to hashtags which are seeking registration as trade marks.

##### *i. General criteria for trade mark registration*

9. Based on the general principles of trade mark registrability, a hashtag must be a sign<sup>1</sup> used in the course of business or trade to distinguish the owner's goods and/or services from others'.
10. By and large, a hashtag will be registrable if it is distinctive; the hashtag should thus be able to serve its purpose of distinguishing the trader's goods. While generally a trade mark which lacks distinctiveness will not be registrable, if the trade mark has substantial prior use resulting in the mark having acquired distinctiveness through such use, the mark may nevertheless be registrable.
11. A hashtag may be rejected from registration for the following reasons:
  - (a) It is descriptive of the goods/services it is seeking registration for;
  - (b) It contains signs which are common to the trade and thus no longer serves to distinguish the goods/services in the business;
  - (c) It is devoid of distinctive character;

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<sup>1</sup> A sign is defined under the Singapore Trade Marks Act (Cap. 332, 2005 Rev. Ed.) to be any letter, word, numeral, device (drawing or design), name, brand, label, aspect of packaging, shape, colour, sound, or a combination of these elements



- (d) It is contrary to public policy or morality;
  - (e) It is deceptive, for example where the mark seeks to misrepresent certain features of the goods/services;
  - (f) It is identical to earlier marks on the Register;
  - (g) If registered, it may cause confusion to the public, for example where a similar mark is registered for similar goods/services; and
  - (h) It is identical/similar to a well-known mark.
12. As such, if a hashtag is able to satisfy the registrability criteria and is not excluded from registration by any of the abovementioned reasons, it should be registrable.
- ii. *What hashtags may be registrable and what may not be?*
13. There already exists some hashtag marks on the Singapore Trade Marks Register. For instance, there is currently a trade mark for “#BDOUNIBANK” in Class 36 for banking related services registered in the name of BDO UNIBANK, Inc.
14. However, more commonly than trade names, taglines or slogans form the majority of the current hashtag registrations. Pepsico, Inc. owns the registered trade mark for “#SAYITWITHPEPSI” in Class 32 for soft drinks, Pizza Hut International, LLC has a mark for “#PIZZAMENOW” in Class 43 for restaurant services, The Procter & Gamble Company has registered the “#ChangeDestiny” tag for their SK-II campaign and most recently Sephora has obtained a registration for “#LIPSTORIES” in Class 3 for lipsticks.
15. The public sector has also recorded hashtag logograms such as “#OneNationTogether” which is recorded by the Singapore Armed Forces for the National Day Parade celebrations in 2017 and “#CoachAsLeader” which is recorded for a series of conferences held by the Singapore Sports Council.
16. On the other hand, with regards to unregistrable hashtag marks, there is currently no caselaw in this regard. However, given that most hashtags are employed to register slogans or campaign taglines/names, caselaw in relation to slogan marks may be instructive.



17. In 2004, the Singapore Trade Mark Registry rejected the application to register a slogan, being "MAKES LIFE BETTER", as a trade mark in Classes 7, 9 and 11 for general home electronics and appliances, such as washing machines, radios, televisions and air conditioning appliances.<sup>2</sup> The Registry was of the view that the slogan is devoid of distinctive character and that it designates the quality, intended purpose or other characteristics of the goods.
18. Even though the applicant had sought to show that the mark had acquired distinctiveness through use (having been used by the applicant for 6 months), the Registry was of the view that the phrase "MAKES LIFE BETTER" is incapable of distinguishing the goods supplied by the applicant. In other words, if a consumer were to only see the words "MAKES LIFE BETTER", they would not identify that these goods being sold originates from the applicant.
19. The case illustrates an example of a slogan/tagline which is considered to be undistinctive or descriptive of the goods/services. Even if the slogan had been in the form of a hashtag, it is likely that the mark would still be rejected for lack of distinctiveness.

## **B. The Malaysia Position**

20. There are currently no practice directions issued by the Malaysia Intellectual Property Corporation (MyIPO) on the use of hashtags as trade marks. As the "#" sign is essentially a symbol, it would arguably fall under the definition of "mark" under the Malaysia Trade Marks Act 1976, which includes devices, words, letters, numerals (to name a few). For now, it would appear that the registrability test for ordinary marks will equally apply to hashtag marks.
  - i. *General criteria for trade mark registration in Malaysia*
21. To qualify for registration as a trade mark, a hashtag mark must first of all fulfil the following conditions:
  - (a) The mark is used or proposed to be used as a trade mark;
  - (b) The mark is used in relation to goods or services;

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<sup>2</sup> Re an Application for a mark "MAKES LIFE Better" by Aki Habara Electric Corporation Pte Ltd in classes 7, 9 and 11 [2004] SGIPOS 13.



- (c) The mark is used for the purpose of indicating a connection in the course of trade between the goods or services and the registered proprietor or registered user.
22. A hashtag mark may also be rejected from registration for any of the reasons that are stated in paragraph 11 above.
23. Similar to the other jurisdictions, distinctiveness is often a hindrance to the registration of a hashtag mark given that such marks, more likely than not, uses common dictionary words. In this regard, submission of evidence of use of the mark could aid in showing that the mark has acquired distinctiveness, such that it has become an identifier of the source of goods/services.
- ii. What hashtags may be registrable and what may not be?*
24. As a parallel to the successful registrations of hashtag marks in Singapore, the marks for “#SAYITWITHPEPSI”, “#ChangeDestiny” and “PIZZAMENOW” are also successfully registered in Malaysia.
25. An example of a hashtag mark that has failed to obtain registration with the MyIPO Registry is “#ANAKANAKMALAYSIA”.
26. Meanwhile, other examples that are currently facing objections at the Registry stage are “#sayangketatsendatpadat” and “#LIPSTORIES”.
27. In such cases where hashtag marks invariably contain elements which refer, in varying degrees, to some character or quality of the goods or services, and the reference is direct such that an ordinary person would understand the word when applied to the goods as describing their nature or some of their attributes, the mark would be unregistrable unless it can be shown by evidence that it is factually distinctive (as described in paragraph 23 above).
28. As an illustration, in **Titan (M) Sdn Bhd v The Registrar of Trade Marks**,<sup>3</sup> it was held that the mark “Sure-Loc” together with the device of a ‘key lock’ at the letter ‘O’ has a direct reference to the character or quality of the goods, which included door locks, cylindrical locks, rim locks and padlocks. The court held that the expression would indicate to the public that the goods were indeed secure when they were used and this clearly defined the character of the applicant’s goods.

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<sup>3</sup> [2009] 7 Malayan Law Journal 193.



### **C. The Thailand Position**

29. Hashtags are also widely used on social media in Thailand. A hashtag can be trademarked in Thailand so long as it serves a source-identifying function for the trademark owner's goods or services. However, there is no specific regime or provision under Thai trade mark laws governing the registration of hashtags as trade marks. Therefore, the general registrability assessment will apply similarly to hashtags which are seeking registration as trade marks.

#### *i. General Criteria for Trademark Registration in Thailand*

30. Typically, the hash or pound sign alone will be considered devoid of distinctiveness and will have to be disclaimed as it does not have any significance in identifying the source. Therefore, combining the same with a generic or descriptive word or phrase will not increase the registrability of an undistinctive trade mark.

31. Like any other word, phrase or sign that seeks to be registered as a trade mark in Thailand, a hashtag mark must be sufficiently distinctive, not be prohibited by the Thailand Trademark Act ("the Thailand TMA") and not be identical or similar to a registered trademark owned by any third parties.

32. The grounds of objections for the registration of a hashtag mark may be raised by the Thai Trademark Office ("TTMO") on similar grounds as stated in paragraph 11 above.

33. If a hashtag mark meets all the registrability criteria, is not excluded from the registration by any of the abovementioned reasons, and functions as source-identifying for the applicant's goods or services, it will be eligible for trademark registration in Thailand.

#### *ii. What hashtags may be registrable and what may not be?*

34. Based on the TTMO Database, there is only one hashtag mark which has been registered up to now in Thailand, being "#ChangeDestiny" in Class 3 for skin care and cosmetic products registered in the name of the Procter & Gamble Company.



35. In addition, there are currently three pending applications for hashtag marks which are in the process of being examined by the Trademark Registrar, namely "#SOCALSTYLIST" in the name of Abercrombie & Fitch Europe Sagl in Class 35, "#SAYITWITHPEPSI" in the name of Pepsico, Inc. in Class 32, and "#LIPSTORIES" in the name of Sephora in Class 3 for lipsticks.
36. With regards to hashtag marks which are considered unregistrable, there have been three applications which were rejected by the TTMO, namely "#BDOUNIBANK", "#BDOBANCODORO" and "#BDOREMIT", all of which are in Class 36 for banking related services in the name of BDO UNIBANK, Inc. The reason that these marks were was because the Registrar considered these marks to be devoid of distinctive characters. As an illustration, in relation to the mark "#BDOUNIBANK", the Registrar opined that this hashtag mark lacks distinctiveness because the letters 'B', 'D, and 'O' are just ordinary Roman letters without any stylization and the words 'UNI' and 'BANK' refers to the characters or qualities of the services in Class 36, which relates to banking services.

#### IV. SO, SHOULD I REGISTER A HASHTAG MARK?

37. With all that said above, can business owners register hashtags as their trade mark? Yes, they can. But the real question is whether they should, and the answer is, unsurprisingly, it depends.
38. The extent of legal protection of a hashtag mark still remains a grey area in most jurisdictions, where little caselaw is available on this topic. The scope of protection of a hashtag registered as a trade mark would, *ceteris paribus*, most likely be narrower as compared to a plain word mark (i.e. "#JustDolt" vs "Just Do It"). That is to say, trade mark owners may find it more difficult to deal with potential infringers if their registered trade mark is a hashtag while the alleged infringer's use is not in the form of a hashtag.
39. Brand owners who have registered their trade names will see little value in obtaining another registration for their brand name as a hashtag mark. However, where brand owners seek to register a slogan, tagline, campaign name or any such other marketing tool as a hashtag, the key challenge is always showing distinctiveness. It is clear from the above discussion that in all jurisdictions alike, a hashtag will not cause an otherwise descriptive trade mark to be registrable. In other words, the hashtag itself does not contribute to the



distinctiveness of a trade mark, as the “#” symbol is a generic symbol with no source-identifying significance.

40. Having said the same, although the general rules in relation to registrability (or the lack thereof) appears to be similar in these jurisdictions, the putting into practice of such rules still varies largely across these countries. For instance, a trade mark that is considered distinctive in Singapore may be considered descriptive under Thailand trade mark laws. The TTMO requests applicants to disclaim elements within their trade marks for lack of distinctiveness much more frequently than their Singapore and Malaysia counterparts.
41. Lastly, in the fast-moving world of social media, brand owners need to also be aware of the cost of time. The process of the trade mark registration varies from jurisdiction to jurisdiction. As an illustration, Thailand takes a relatively long time (at least ten to sixteen months even in a straightforward case) to register a trade mark. Thus, the resources and time expended in obtaining the registration of the hashtag mark may be spent in vain if a social media marketing campaign is wrapped up even before registration is obtained.
42. At the end of the day, while it is always good to have everything, time and resources (read: money) are often limited. As a matter of practicality, brand owners should carefully consider the cost and benefits of wanting to monopolise a hashtag as a trade mark. And in case you are not sure whether you should register your hashtag as a trade mark, #ContactUs.

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If you would like to have further information on this update or discuss the impact of this case on your business, please contact:

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