Hashtag Trademarks and Modernization of Intellectual Property

One cannot negate the steady escalation of technology or dispute its benefits, but the recent trend of protection sought under Intellectual Property Rights, spurred by this monstrous growth is a distress signal. The trend can be labelled in just one term- Hashtags. For those who are fortunately (or not) unaware of the hashtag culture, it is a tool to characterize content into groups; by placing a '#' character, also known as the hash symbol, in front of a word or a phrase, the author makes it easier for the reader to locate a work when searched by the specific word or phrase.

Hashtags are all around us. They are online, offline and the term was also announced by the Oxford University Press as 'Children's Word of the Year' in 2015.[1] No more a mere symbol on the keypad of a phone, hashtags are serving as investment points for companies wanting to carve a brand niche. It is interesting to learn that popular brand campaigns #HowDoYouKFC and #McDstories, belonging to food giants KFC and McDonald, respectively, the soft drink specialist Coca-Cola company's #smilewithacoke, the viral fundraiser #IceBucketChallenge and the global phenomenon of #TBT popularized by Instagram, are protected as Trademarks. By the end of 2015 more than two hundred hashtags were registered as trademarks in the United States of America, while thousands more awaited their chance. A WIPO Magazine article[2], cites a survey establishing 64% hike in hashtag trademark applications in 2016 as compared to previous year. By according such protection, we may have diluted the concept of IPR rather than expanding it.

What was a modest beginning in the year 2007, a decade later, hashtag has earned a remarkable status. And with an unprecedented growth in social media, hashtags have managed a mind boggling feat. Safe to say, hashtags have engulfed humanity, with not a life remaining untouched (except of course, lives in the remotest parts of the earth). Addressing the concern mentioned in the previous paragraph, it is worrisome to imply gullibility in the IPR regime and the regime needs to be strengthened at a faster pace in order to maintain its sanctity.

IPR protection is commonly placed under two major theories- i) Utilitarian ii) Natural; the former recognizing a creation or an invention thereby incentivizing to create or invent further, the latter backing the idea that an individual must be able to protect the result of their creative, inventive or commercial labour. Society has a need for intellectual productions in order to ensure its development and cultural, economic, technological and social progress and therefore grants the creator a reward in the form of an intellectual property right, which enables him to exploit his work and to draw benefits from it. In return, the creator, by rendering his creation accessible to the public, enriches the community. Intellectual property law is thus the product of a type of "social contract" between the author and society.[3]

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[1]David Sillito, Hashtag is 'children's word of year', available at http://www.bbc.com/news/entertainment-arts-32902170

[2]Claire Jones, *Hashtag Trademarks: what can be protected* WIPO Magazine, October 2017 available at http://www.wipo.int/wipo_magazine/en/2017/05/article_0009.html

[3]Christophe Geiger, *The Social Function of Intellectual Property Rights,* Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-06 (2013)

Globally, economies are advancing at a swift rate based on "knowledge products and intangibles", resulting in rapid expansion of IPRs. Author Christophe Geiger[4] cites the implications of widening the ambit of IPRs, in it that such multiplication is mindless, the consequences of which are not "thought through in advance".

Putting in perspective a wide understanding, a trademark may be one or more words, devices or symbols- or composite of both-that is used to distinguish goods or services of one from others. Most scholars and courts agree that trademarks serve two purposes: to protect consumers from deception and confusion, and to protect the infringed mark as property. Traditionally Courts while deciding whether a trademark is distinctive or not, will usually place a mark under any of the four categories i) Generic, ii) Descriptive, iii) Suggestive, or iv) Arbitrary/ fanciful. Such adjudication is based on the relationship between the mark and the good/ service it is associated with. Moving further, the trademark regime was widened to include unconventional categories such as shapes, smells, colours, sounds and so on. Currently, companies also seek to register slogans as trademark, however the spectrum of generic-to-arbitrary/fanciful is applicable in this case as to the usual marks.

With reference to the given background, the question that arises is whether hashtags fit in the traditional legal framework for trademark? When companies can register words, phrases or slogans as trademarks, what difference does a hashtag make? The judiciary has been divided on whether trademark protection granted to hashtags is valid, hence the inconsistent outcomes.

The debate goes on with equal amount of support and dissent for hashtags as trademarks. Not leaning towards procedural aspects, my argument sticks to a singular reservation i.e. the social function of IPR, which is to be beneficial to the individual creator and serve the community, at the same time. A single person or company's rights must be weighed in harmony with the rights of the society as a whole. If the right is to be used in accordance with its function, it must not be used "anti-socially", i.e. disregarding certain fundamental values and competing rights.[5] To insist on the social functions of IPRs is thus to identify a need for moderation and balance in the conception and implementation of these rights.[6]

With the meteoric percolation of social media into daily lives of people, it becomes increasingly important to limit the philosophical basis of IPR, to not bring in any and everything under the sun within an overcrowded umbrella of IP protection. The foundational philosophy of Intellectual Property is not to provide monopoly but competitive property rights; to promote healthy competition and lend help to creativity. However, the flurry with which private corporations take over social media with tools like hashtags, can have a cascading effect on rise in litigations. While lawmakers and judiciary must look into easing the chaos on trademark registers, to restore strength in the IPR regime, a unanimous global decision on the parameters of IPR protection will certainly aid the situation.

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[4] Id. at 3

[5] Christophe Geiger, *The Social Function of Intellectual Property Rights,* Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-06 (2013)

[6] Id.