

#BlackLivesMatter
... a Hashtag, a Rallying Cry, a Social Movement, a Global Network
... but not a Trademark

An Analysis of Trademark Protection for the Well-Turned Phrase of a Social Movement (Slogans, Taglines, Mottoes and Hashtags).

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I. INTRODUCTION

In 2015, the United States Patent and Trademark Office (USPTO) rejected an application to grant a trademark to “Black Lives Matter” for use on t-shirts and similar articles of clothing. The refusal by the USPTO was based on the fact that the term had become so widely-used, it could not be associated with any one thing. Other attempts in 2015 and 2016 to register the phrase in connection with clothing and greeting cards were also rejected or abandoned.¹

The May 2020 murder of George Floyd sparked a new wave of #BlackLivesMatter activism and discussion. It also prompted a surge of filing for trademarks² with reference to the phrase—bringing the total applications filed between 2015 and August 2021 to 72.³ The proposed trademarks ranged from “Black Lives Matter Academy” to “Black Lives Matter Moscato.” These filings have or should be met with the same fate as the previous round, abandoned or refused for failure to function as a trademark.

Social media thrives on phrases that capture a moment or a mood. “Black Lives Matter” is just one of many phrases that have resonated. Other examples include “Occupy Wall Street,”

¹ Author review of BLACK LIVES MATTER applications of the USPTO Trademark Electronic Search System (TESS), July and August, 2021.

² Reference to trademarks in this paper also includes service marks.

³ TESS.

“MeToo,” and “StopAsianHate.” These well-turned phrases also launch movements. Various people, recognizing the value such phrases might have when used in conjunction with goods and services, have attempted to profit from these rallying cries by registering them as trademarks. The attempts to register “Occupy Wall Street” and “MeToo” did not meet with success for the same reason “Black Lives Matter” was rejected—too ubiquitous to be associated with any one thing or company. The same outcome is expected for the one pending application for “StopAsianHate.”⁴

This paper reviews trademark protection as it relates to the well-turned phrases of social movements--slogans, mottoes and hashtags. Does the Lanham Act help or hinder the transformative rallying cries of social movements? Some have argued that trademark law needs to be adapted to protect social movement slogans. New protections posited include supplemental registration or a provisional hashtag mark. What, if any, trademark law modifications are needed to achieve a fair, just and equitable society?

Part Two of this paper looks at the historical development of slogans, mottoes and hashtags in general and from the perspective of social movements and networks. One use of slogans has been consistent over time, that of serving as a rallying cry.

Part Three considers slogans and hashtags as potential trademarks. Adding the hash symbol, #, to a phrase does not render it more suited for protection. Hashtags, therefore, are viewed with the same scrutiny slogans and other phrases receive, do they distinctively indicate the source of the goods or service⁵? While slogans have always faced difficulty in meeting the “distinctiveness” requirement, attempts to register these well-turned phrases have increased. In

⁴TESS.

⁵ Future references to goods also refers to services.

response to this flood of registrations, the USPTO amended its Trademark Manual of Examining Procedure (TMEP) to address “Merely Informational Matter.”

Part Four takes a brief look behind the curtain and considers why there has been a veritable gold-rush to the trademark office to protect the well-turned phrase. It is helpful to consider how individuals and companies seek to profit from the monopoly granted by registration.

Part Five considers possible modifications to trademark law. Of particular note are arguments which posit a supplemental registration or a provisional hashtag mark. This paper agrees requiring secondary meaning for protection of most slogans should be the norm. When considering the well-turned phrase that arises from community creation, two “protections” are necessary. The first “protection” is that it remains with the community. The second protection comes into play if the slogan has become iconic and that protection is similar to that provided famous trademarks, anti-dilution.

II. The Historical Development of the Well-Turned Phrase Slogans, Mottoes and Hashtags

The Cambridge Dictionary defines “well-turned” as: “expressed in an interesting and intelligent way.”⁶ Slogans, mottoes and hashtags are all various forms of a “well-turned phrase,” though the difference between them is not always clear. A somewhat confusing subcategory of slogans is the tagline. The two terms are often used interchangeably when discussing their use in advertising. There is less confusion between slogans and mottoes as slogans are viewed as pertaining solely to advertising while a motto may be associated with an individual or organization. Hashtags are words and phrases that begin with the hash symbol, #.

⁶ *Well-turned*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/well-turned> (last visited Aug. 10, 2021).

As discussed in Part Three, trademark law does not make a distinction between a slogan, motto or hashtag--the concern of trademark law is whether the mark is distinctive and indicates the source of a good or service. It is, however, useful to consider the history of slogans, mottoes and hashtags in order to fully understand their application to social movements and networks.⁷

A slogan is “a catchy phrase or series of words used to help consumers remember a company, brand or product.”⁸ The tagline is the catchy phrase that comes at the end of an ad. JUST DO IT for Nike shoes is a tagline. Some professionals note that taglines usually last longer while slogans come and go.⁹ Taglines are likely to create an impression about your brand while slogans will focus on the product and will change with each new marketing campaign.¹⁰ The difference between a slogan and a tagline is not always clear in the mind of the public or the profession.

A motto is a phrase that expresses a belief or purpose.¹¹ Mottoes are used by a diverse group of entities ranging from nations to football teams. The official motto of the United States is “In God We Trust,” while the motto of the United States Marine Corps is “*Semper Fidelis*.”¹² Other mottoes are inspirational phrases, such as “When life gives you lemons, make lemonade.” Schools across the U.S. and Canada have the motto, “Enter to Learn, Go Forth to Serve.”¹³

⁷ Taglines are considered part of slogans for the purposes of considering the history of this type of phrase.

⁸ Chris Newton, *What Does Slogan Advertising Mean?*, Chron.com, <https://smallbusiness.chron.com/branding-slogan-20583.html> (last visited Aug. 10, 2021).

⁹ Kapok Marketing Staff, *The Difference Between Brand Taglines and Slogans*, Strategic Marketing Planning Blog, <https://www.kapokmarketing.com/the-difference-between-brand-taglines-and-slogans/>, (last visited Aug. 10, 2021).

¹⁰ *Id.*

¹¹ *Motto*, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/motto>, (last visited Aug. 10, 2021).

¹² Always Faithful.

¹³ While this statement may be found on signs welcoming people to Brigham Young University’s campus, it is not an official school motto. Tad Walch, *BYU Not Alone In Using Motto ‘Enter to Learn.’* Deseret News, Aug. 4, 2007, <https://www.deseret.com/2007/8/4/20033524/byu-not-alone-in-using-motto-enter-to-learn>.

Hashtags are the newest opportunity for the well-turned phrase. A hashtag, a word or words that begin with the number, or hash, symbol “#,” is a means of identifying topics discussed in a social media post. The use of hashtags allows others to search quickly for posts on the same topic, i.e., posts using the same hashtag phrase. But hashtags are much more than a one or two-word topical guide of social media, when combined with the right slogan, they can rally the masses and change society.

Slogans have a very long history harkening back to the battle cry. The word “slogan” finds its roots in the Scottish Gaelic *sluagh-ghairm*, from *sluagh* army, host and *ghairm* cry or shout. The word *slogorne* first appeared in English in the early 16th century. The first use of its modern meaning, a distinctive word or phrase use by a group, was noted in 1704.¹⁴

The Greek poet Homer, writing of events that may have taken place as early as the 13th century B.C.E., spoke of the battle cry and described one man as “Diomedes of the loud battle-cry.”¹⁵ During the Greco-Persian Wars of the 5th century B.C.E., the Greeks¹⁶ were said to have shouted *Alala* or *Eleleu* while banging their swords on their shields to spook the enemies’ horses and the enemy. One war cry of the Roman legion was a guttural cry known as the *Barritus*. “Tenno Heika Banzai” (Long Live the Emperor) was the war cry of Japanese soldiers as they rushed into battle during World War II.¹⁷ And what schoolchild in the United States has not heard the rallying cry from the 1836 battle of San Jacinto, the decisive battle of the Texas Revolution, “Remember the Alamo”?

¹⁴ *Slogan*, Online Etymology Dictionary, <https://www.etymonline.com/search?q=slogan>, (last visited August 10, 2021).

¹⁵ *Homer, The Illiad*, (Samuel Butler, ed.). Homer wrote this work sometime in the 8th century B.C.E. though when these events took place is uncertain. <https://www.worldhistory.org/iliad/>, (last visited Aug. 10, 2021).

¹⁶ Evan Andrews, *8 Legendary Battle Cries*, History.com: History Stories, (Sept. 1, 2018), <https://www.history.com/news/8-legendary-battle-cries>.

¹⁷ *Id.*

The Italians gave us the word “motto” in the 15th century. “Motto” is derived from the Late Latin *muttum* meaning “grunt” or “word.”¹⁸ Very early examples of mottoes include those of the 6th century figure Benedict of Nursia and of the 9th century ruler Charlemagne. St. Benedict admonished his followers to “Ora et labora” (pray and work). This instruction is now the motto of the Order of St. Benedict. Charlemagne, crowned Emperor of the Holy Roman Empire in 800 a.d., had his motto inscribed over the entrance to the town hall in Aquae Granni (now Aachen, Germany), “Per me regnes regnant” (Through me kings rule).

Mottoes began being incorporated in one’s coat of arms in the 14th century. Perhaps the earliest example of this innovation is the motto for the Order of the Garter, “Honi soit qui mal y pense” (Shame on him who thinks this evil). This venerable Order was founded in 1348 by English King Edward III and is still in operation today with Queen Elizabeth II at its head.

Slogans have always been an integral part of advertising. The earliest known example of a printed advertisement includes a logo and two slogans. Among the antiquities of the Northern Song Dynasty of China, 960-1127 is a copper engraving used to print handbills advertising a needle shop.¹⁹ A rabbit, standing upright and holding a needle, was featured in the middle of the ad with a slogan on each side. The slogans direct consumers to look for the white rabbit in front of the door.²⁰

Twenty-first century marketing professionals are quick to remind their clients that the company’s slogan is today’s equivalent of their “battle cry.” Branding and marketing strategist

¹⁸ *Motto*, Dictionary.com Unabridged, <http://www.dictionary.com/browse/motto> (last visited August 10, 2021).

¹⁹ Giana M. Eckhardt and Anders Bengtsson, *A Brief History of Branding in China*, 30(3) *Journal of Macromarketing* 210-221 (2010).

²⁰ *Id.*

Laura Ries has written one book called “Battlecry: Winning the battle for the mind with a slogan that kills.”

Unlike the somewhat hazy origin of slogans and mottoes, the history of hashtags is clear. On August 23, 2007, tech developer Chris Messina tweeted, “how do you feel about using # (pound) for groups. As in #barcamp[msg]?”²¹ Messina had approached Twitter founder Biz Stone with the idea who was lukewarm to the concept. “I don’t think he was proposing an actual system by which we would search or display the tags. He was just saying people should use tags. I said, “OK, but what do you want me to do about that? Go ahead and do it.”²²

The first real support for the idea came two days following Messina’s tweet. Futurist and researcher Stowe Boyd tweeted “I support the hash tag convention: [#hashtag #factoryjoe #twitter](http://tinyurl.com/2qttlbb).”²³ Not only did Boyd provide reinforcement for the idea, he also gave the practice its name—the now one-word, “hashtag.” However, it would take some time for the use of hashtags to catch on.

Two months elapsed before Messina’s idea found a significant use. In October of 2007, Messina noticed a number of tweets about the San Diego fires by web developer and blogger Nate Ritter. Instead of blogging about the unfolding events, Ritter had started to tweet about them as “it went so fast ... I ended up using Twitter because it was so quick, short, to the point, just facts, and I could post a zillion times”²⁴ Messina reached out to Ritter and suggested he

²¹ Christopher Isak, *The History of the Hashtag*, TechAcute: The History of Everything, (Jul. 22, 2015), <http://techacute.com/the-history-of-the-hashtag/>.

²² Ben Wiseman, *An Oral History of the #Hashtag*, Wired, (May 19, 2017), <https://www.wired.com/2017/05/oral-history-hashtag/>.

²³ Ines Anić, *The History of Hashtags*, Wallery Blog, (Aug. 8, 2017), <https://walleryapp.com/2017/08/08/the-history-of-hashtags/>.

²⁴ *Twitter and the San Diego Fires: An Interview with Nate Ritter*, NetSquared, <http://www.netsquared.org/blog/britt-bravo/twitter-and-san-diego-fires-interview-nate-ritter> (last visited Aug. 10, 2021).

use the hashtag “#sandiegofire” which was already in use on the photo sharing site Flickr. Ritter spent 12 hours a day for three days tweeting fire updates every two to three minutes.²⁵

Hashtags caught on much quicker with the public than with Twitter programmers. It was another two years before the company hyperlinked these phrases enabling searches for all tweets using the same hashtag. By that time hashtags had been used by then-candidate President Barack Obama, #askobama, during his 2008 campaign and later by those protesting the Iranian presidential election in 2009, #iranelection. Today hashtags are in use across all of social media, Facebook, Pinterest, Instagram, Google+, LinkedIn, YouTube and other networking sites. Hashtags are an easy method of extending slogans and mottoes through the social media world. They are widely used in advertising and marketing campaigns and are prominent in non-commercial uses as well. Hashtags have also taken on a life of their own—giving rise to many short phrases that have permeated society.

Each year hashtags are also credited for starting a wide variety of grassroots movements in the U.S. The social issues have included economic inequality (#OccupyWallStreet), domestic violence (#WhyIStayed and #WhyILeft),²⁶ sexual assault (#BeenRapedNeverReported),²⁷ sexual harassment (#MeToo),²⁸ funding research to find treatments and a cure for amyotrophic lateral sclerosis (#IceBucketChallenge),²⁹ and social justice and racial equality and dignity (#Ferguson,

²⁵ *Id.*

²⁶ Tasha Digital, *Top 10 Social Activism Hashtags of 2014*, Huffington Post, Dec. 17, 2014, updated Dec. 6, 2017, https://www.huffingtonpost.com/tasha-mitchell/top-10-social-activism-hashtags_6331648.html.

²⁷ *Id.*

²⁸ *Six Activists Who Are Using Social Media for Change Offline*, UN Women, June 29, 2018, <https://www.unwomen.org/en/news/stories/2018/6/compilation-social-media-day>.

²⁹ Amanda Trejos, *Ice Bucket Challenge: 5 Things You Should Know*, USA Today, Jul. 3, 2017.

#BlackLivesMatter and #StopAAPIHate).³⁰ Hashtags have risen to the level of importance that there is no lack of advice on selecting the right hashtag.³¹

#BlackLivesMatter was coined by California activist Alicia Garza and her friend, fellow California activist Patrisse Cullors following the 2013 Florida trial that acquitted George Zimmerman. Zimmerman had shot and killed Trayvon Martin, an unarmed African-American teenager, after an unfortunate and unnecessary interaction. Upon hearing the verdict in the case, Garza posted a short message on Facebook: “Black people. I love you. I love us. Our lives matter.” Cullors added the hashtag and began posting the phrase on social media.³² Opal Tometi was inspired by the posts of Garza and Cullors, her friends, and called them saying they needed to create a platform for #BlackLivesMatter.³³ For the remainder of 2013, the hashtag was used an average of 30 times per day on Twitter.³⁴

The movement found critical mass the next year (2014) following the deaths of two black men by police officers—Eric Garner in New York City, who died while in a chokehold, and Michael Brown in Ferguson, Missouri, who was shot. For about three weeks following the death of Brown, the hashtag was used on Twitter an average of 58,747 times per day. This usage rose to 172,772 times in one day on the day following the Ferguson grand jury’s decision to not indict

³⁰ Kimberlee Morrison, *2015’s Top 5 Social Activism Campaigns: #BlackLivesMatter, #LoveWins & More*, Adweek: Social Pro Daily, Dec. 28, 2015, <http://www.adweek.com/digital/2015s-top-5-social-activism-campaigns-blacklivesmatter-lovewins-more/#/>

³¹ A search using Google will generate nearly 18 million results, (last visited Aug. 10, 2021).

³² Alex Altman, *Person of the Year: The Short List: No. 4: Black Lives Matter: A New Civil Rights Movement is Turning a Protest Cry into a Political Force*, Time, <http://time.com/time-person-of-the-year-2015-runner-up-black-lives-matter/> (last visited Aug. 10, 2021).

³³ Julia Craven, *Black Lives Matter Co-Founder Reflects On The Origins Of The Movement*, Huffington Post: Politics, Sept. 30, 2015, https://www.huffingtonpost.com/entry/black-lives-matter-opal-tometi_us_560c1c59e4b0768127003227.

³⁴ Monica Anderson, 3. *The Hashtag #BlackLivesMatter Emerges: Social Activism On Twitter*, Pew Research Center: Social Media Conversations About Race, Aug. 15, 2016, <http://www.pewinternet.org/2016/08/15/the-hashtag-blacklivesmatter-emerges-social-activism-on-twitter/>.

the police officer responsible for Brown's death. Over the next three weeks the hashtag was used 1.7 million times.³⁵

The phrase remained in the mainstream with spikes in use around certain events. The New York grand jury's decision to not indict the police officers involved in Garner's death elicited use of the hashtag 189,210 times in a single day. Presidential candidate Senator Bernie Sanders defended the Black Lives Matter movement and railed against institutional racism during a debate in October 2014, which led to more than 127,000 Twitter uses the following day. The anniversary of Brown's death in 2015 saw the hashtag appearing 120,067 times on August 9th and 98,518 times on the 10th.³⁶

#BlackLivesMatter, like protests for social justice, exploded following the death of George Floyd at the hands of Minneapolis police officer Derek Chauvin in May 2020. In the 11-day period following Floyd's murder (May 26-June 11),³⁷ the hashtag was used, on Twitter alone, more than 47 million times—just under 3.7 million uses per day. May 28 represented the high mark of nearly 8.8 million uses of #BlackLivesMatter. The usage of May 28 and that of May 26-June 11 dwarfs any previous public engagement with this rallying cry.

By July 2020, it was clear that this hashtag had acquired iconic status. BBC News reporter Aleem Maqbool termed it a “global phenomenon.”³⁸ Twitter revealed that the most used hashtag of 2020 was #COVID19 followed by #BlackLivesMatter. TikTok reported 12 billion views for #BlackLivesMatter videos.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Chauvin was later convicted (April 21, 2021) of second-degree unintentional murder, third-degree murder and second-degree manslaughter.

³⁸ Aleem Maqbool, *Black Lives Matter: From Social Media Post to Global Movement*, BBC News, Jul. 10, 2020, <https://www.bbc.com/news/world-us-canada-53273381>.

It is difficult to overstate the impact this one slogan has had globally. The phrase is now ubiquitous in American culture and has rallied people around the world to march for social justice. A search on Google yields 197 million results. One NBC journalist, Char Adams, has noted “[w]hat started as a poignant hashtag has come to define a generation. . . . Black Lives Matter has become a multichapter organization that has changed the very framework with which the nation talks about race.”³⁹

III. Trademark Law and the Well-Turned Phrase

The Lanham Act defines a trademark as a word, phrase, symbol, design, or a combination of these things that identifies a good or service.⁴⁰ The requirement is two-fold: the words, phrases, symbols, designs and their combinations, i.e., matter, must identify the source of the goods and distinguish those good from the goods of others. Anything that fulfills these requirements could, ostensibly, serve as a trademark. Colors, sounds, smells and even live goats on a roof have been registered as marks.

The matter must also be **used** as a trademark. This **use** comprises both use in commerce and used in such a way in connection with the goods or services that consumers recognize it to be a trademark. If this use is missing, the mark will not achieve its primary purpose of being a source indicator for the goods at hand.

Use in commerce is fairly straightforward. The mark must appear on a product, on the product’s container or on a display connected with the product and the product sold interstate or abroad. Appearance of the mark on product tags or hangtags satisfies this requirement. For service marks, the mark must appear in sales or advertising of the service that is offered in

³⁹ Char Adams, *A Movement, A Slogan, A Rallying Cry: How Black Lives Matter Changed America’s View On Race*, NBCNews.com, Dec. 29, 2020, <https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434>.

⁴⁰ 15 U.S.C. §1127

multiple states or countries. An applicant for trademark protection may indicate whether the mark is currently in use or will be in use, an intent-to-use application.⁴¹

Use as a consumer-recognized trademark is more complex and has generated a great deal of analysis and discussion by courts, scholars, and practitioners. Use as a mark has been construed to encompass considerations of the matter's distinctiveness and whether it functions as a trademark.

In 1976, the Second Circuit resolved a fight over the word *Safari* between Abercrombie & Fitch and Hunting World by establishing the current doctrine of distinctiveness. Proposed trademarks are classified as being fanciful, arbitrary, suggestive, descriptive, or generic. Fanciful marks are invented words like KODAK for photographic film and digital printing presses. Arbitrary marks are existing words applied in an unusual fashion such as IVORY for soap or APPLE for computers. Suggestive marks hint at quality or characteristic of the product or service. In this category one finds NETFLIX for streaming services and NOBURST for liquid antifreeze and rust inhibitor. Fanciful and arbitrary marks are the strongest and most easily protectable marks. These types of marks are easier to register and to defend. Suggestive marks are also considered to be strong marks, but not as strong as fanciful and arbitrary. Descriptive trademarks, such as HOLIDAY INN for hotel services, are weak marks and may only receive protection upon a showing that they have acquired secondary meaning, i.e., over time people have come to associate HOLIDAY INN with a particular chain of hotels. Generic terms are neither registrable or enforceable as trademarks. These are the common, everyday terms for the

⁴¹ Once an intent-to-use application has survived the registration process and the Notice of Allowance (NOA) has been issued, use must begin within six months of the date of the NOA. However, the applicant may file Requests for Extension and effectively be granted 36 months (3 years) in use to begin using the mark in commerce.

product or service.⁴² No one questions the harm that would result if one party were allowed to monopolize and own generic terms.

Alexandra Roberts has written an analysis of the interplay of distinctiveness with use as a trademark.⁴³ She argues that distinctiveness has received a disproportionate share of attention and more consideration should be given as to how the matter is used. “Distinctiveness has received the lion’s share of attention, generating rules and tests applied in thousands of cases and USPTO decisions and discussion in hundreds of articles, books, and practice guides.”⁴⁴ This focus on distinctiveness has led to such great reliance on the tests of distinctiveness, that consideration of how a mark is used has languished.

Distinctiveness is a semantic consideration—the words and their meaning—while use as a trademark considers the aesthetics of the mark—how it appears on the product, package or display. People expect trademarks to be set off from other words that appear on the product or package. The matter should also look *distinctive* with special fonts, colors, or a design. Roberts observes that “the relationship between use as a mark and distinctiveness is interdependent and inverse: the less distinctive a mark is, the greater indicators of trademark use are needed to ensure consumers will perceive it as a mark, and vice-versa.”

There are attributes of a proposed mark that will prevent registration. One common reason an application is refused by USPTO examining attorneys is that the proposed mark is sufficiently similar in appearance, sound, meaning or the impression it makes on consumers that they will confuse it with another trademark for the same or related goods. Another ground for refusing matter is that it creates a false association or suggests a false connection with a person

⁴² *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976).

⁴³ Alexandra J. Roberts, *Trademark Failure to Function*, 104 Iowa L. Rev. 1977 (2019).

⁴⁴ *Id.*

or an institution. Failure to function as a trademark: the matter is ornamental, merely descriptive, or consists of a geographic description or a person's name complete the list of primary reasons for refusing registration, though the last three grounds may be overcome by a showing that the matter has acquired secondary meaning.

For a slogan to become a trademark, it must meet the requirements and avoid the pitfalls discussed above. The path from slogan to trademark has always been an uphill battle. Even greater challenges arise when a slogan is to be placed on what Lee Burgunder refers to as “billboard goods,” t-shirts, hats, mugs, key chains, bumper stickers, and other expressive products.⁴⁵ Even before the July 2017 amendment to the Trademark Manual of Examining Procedure (TMEP), Section 12032.03(f)(i) was devoted to Slogans and Words Used on Goods. It states, “[s]logans or phrases used on items such as t-shirts and sweatshirts, jewelry, and ceramic plates have been refused registration as ornamentation that purchasers will perceive as conveying a message rather than indicating the source of the goods.”

Fashion company Peace Love World Live, LLC sought trademark protection for their line of I LOVE YOU bracelets. Registration was refused as I LOVE YOU did not function as a trademark and was merely a decorative feature of the bracelet. The Trademark Trial and Appeal Board (TTAB) noted that in this instance, the phrase “I Love You” is essentially the bracelet itself and is, consequently, ornamental. The phrase was also found to be in widespread use on bracelets and other jewelry.

I♥DC was regarded as an expression of enthusiasm for Washington, D.C. and consequently refused as a mark for clothing.⁴⁶ The encouragement for people to THINK

⁴⁵ Lee B. Burgunder, *Opportunistic Trademarking of Slogans: It's No Clown Issue, Bro.*, 31 Cardozo Arts & Ent. L.J. 769 (2013).

⁴⁶ D.C. One Wholesaler, Inc. v. Chien, 120 USPQ2d 1710, 1716 (TTAB 2016).

GREEN, was just that, a message promoting environment awareness, not a means to identify products that could be recycled.⁴⁷ The motto ONCE A MARINE, ALWAYS A MARINE, used by and about members of the U.S. Marine Corp, may not be applied to one specific brand of clothing.⁴⁸

Roberts has also examined issues surrounding hashtag trademarks, or tagmarks.⁴⁹ She considers the history and taxonomy of hashtags in relation to guidance provided by the USPTO. The TMEP was amended in 2013 to direct the examining attorneys that the addition of the hash symbol (#) or word HASHTAG would not transform an unregistrable mark into one that could be registered.⁵⁰ Roberts contends that adding a hashmark to a phrase may actually make the phrase less protectible due to consumer perceptions of hashtags as social media topic organizers.⁵¹

None of the challenges of a slogan or phrase having or acquiring the necessary distinctiveness to serve as a source indicator for goods or services have deterred those seeking to acquire exclusive rights to a particular phrase. In fact, from 2015 to 2016 there was a 64% in the number of tagmark applications filed worldwide. Of the more than 5,000 tagmark applications filed globally between 2010 and 2017,⁵² almost half were filed in 2016. The United States led 2016 tagmark filings with 608.⁵³ Not surprisingly, the USPTO amended the TMEP in 2017 to expand their guidance on “proposed marks that consumers would view as merely communication information *other than source*.” (italics original).

⁴⁷ In re Manco, 24 USPQ2d 1938, 1942 (TTAB 1992).

⁴⁸ In re Eagle Crest, Inc., 96 USPQ2d 1232.

⁴⁹ Alexandra J. Roberts, *Tagmarks*, 105(3) California Law Review 599 (June 2017).

⁵⁰ TMEP §1202.18

⁵¹ Roberts, *supra*.

⁵² 2010 was the first year a tagmark application was filed.

⁵³ William R. Samuels, *Did You Know You Can Trademark a Hashtag?: Yes! You Can Trademark a Hashtag*, Scarinci Hollenbeck, Nov. 21, 2017, <https://scarincihollenbeck.com/law-firm-insights/trademark-a-hashtag>.

Section 1202.04, Informational Matter. §1202.04(b), *Widely Used Messages*, now clarifies that “slogans, terms, and phrases used . . . to convey ordinary or familiar concepts or sentiments, as well as social, political, religious, or similar informational messages that are in common use” will most likely be refused registration. The rationale is simple, the more common the phrase and the more-widely used it is, “the less likely consumers will perceive the matter as a trademark or service mark for any goods and services.” The section specifies three categories of matter that is incapable of registration: matter used to convey information about the goods or services; matter commonly used in everyday speech by many different sources; and, matter that quotes a religious text.

IV. Profiting from the Well-Turned Phrase

In December 1996, Haig Fisher saw the movie *Jerry McGuire* in a local theatre. He enjoyed the movie but did more than smile and applaud. Fisher ran home and filed a trademark for SHOW ME THE MONEY. His alacrity beat out every other applicant seeking to lock up exclusivity to the phrase, including TriStar, the studio that produced the movie. The phrase was not in common use before Cuba Gooding Jr. introduced it to the world. It was distinctive and Fisher had created SHOW ME THE MONEY t-shirts. Suffice it to say that his action in securing the rights to a slogan someone else had written and a completely different fictional person had delivered, changed his life. After repeated offers, he sold his trademark to TriStar. Undoubtedly, many of the current tagmark applicants are seeking that same magical experience.

An July-August 2021 review of trademark applications based on BLACK LIVES MATTER shows 89 applications with all search terms with 72 of those applications using the exact phrase. Of the 89 applications, more than half were for clothing, typically t-shirts. A handful sought protection for mugs and other dishes. Many of the applications were devoid of

any design besides stylized words. Only one registration has issued: BLACK LIVES WILL MATTER TO THEM WHEN BLACK LIVES BEGIN TO MATTER TOO US for athletic apparel. Unfortunately, this business does not seem to be in operation.

There is, however, another economic power for the hashtag slogans of social movements—they have been very successful in stimulating contributions to organizations connected to social movements. #MeToo has been credited with lifting the fundraising of nonprofits focused on women’s issues by “many tens of millions” of dollars in the year after the movement took off in 2017.⁵⁴ In its first six weeks, #OccupyWallStreet “spontaneously attracted” \$454,000 in donations to support the effort in New York. A year later it was reported to have taken in \$800,000 in trackable donations,⁵⁵ an amount that likely did not account for donations across the country.

Shortly after the launch of the hashtag in 2013, the first local Black Lives Matter chapter was formed in Los Angeles by hashtag creator Cullors and her friend, Melina Abdullah. The following year (2014) more than 500 Black Lives Matters members from 17 different cities participated in non-violent demonstrations in Ferguson, Missouri following the fatal shooting of Michael Brown. Cullors, Garza and Tometi founded the Black Lives Matter Global Network Foundation (Foundation) in 2015 to spearhead the decentralized network of local chapters.

The Foundation has not sought trademark protection for any of the merchandise it sells through its website blacklivesmatter.com (23 different items dominated by various types of shirts).⁵⁶ But the Foundation is not reliant on the sale of merchandise to support its work.

⁵⁴ Catey Hill, *This is the Staggering Amount of Money #MeToo Has Helped Raise for Women’s Causes*, MarketWatch: Moneyish, Oct. 2, 2018, <https://www.marketwatch.com/story/this-is-the-staggering-amount-of-money-metoo-has-helped-raise-for-womens-causes-2018-10-02>.

⁵⁵ Mark Garrison, *What Happened to Occupy Wall Street’s Fundraising Haul*, Marketplace.org, Sept. 14, 2012, <https://www.marketplace.org/2012/09/14/what-happened-occupy-wall-streets-fundraising-haul/>.

⁵⁶ Author’s review of BlackLivesMatter applications on TESS, Jul. and Aug. 2021.

#BlackLivesMatter has been invaluable as both a rallying cry for protests and donations. Earlier this year (2021), and for the first time in its 8-year history, the Foundation released a detailed look at its finances to the Associated Press. The primary source of income for the Foundation was individual donations through its website. The average donation was \$30.76, with over 10% being recurring donations.

In 2020 the organization took in \$90 million. Expenses, staffing, operating and administrative costs along with rapid response, crisis intervention and civic engagement, consumed \$8.4 million. \$21.7 million was committed to grants to local chapters, both official and unofficial, and to an additional 30 local organizations, all led by African-Americans. Its grant funding and charitable giving accounted for a disbursement of almost 25% of its revenue. At the end of 2020, the Foundation showed a balance of more than \$60 million.

The Foundation is not the only organization to have benefitted from the largesse harnessed by #BlackLivesMatter following Floyd's murder. The American Civil Liberties Union, The Bail Project, Color of Change, The Equal Justice Initiative, the NAACP and the NAACP Legal Defense and Educational Fund, and Until Freedom are just a few of the social change organizations who received donations from corporate America. A study conducted by Creative Investment Research, a research consulting firm that focuses on corporate, environmental, and social governance, concluded that by June 2020, corporate American had donated \$1.678 billion to organizations relevant to #BlackLivesMatter.

V. TIME TO TWEAK TRADEMARK LAW?

Several arguments have been put forth that trademark mark law needs some adjustment to account for how a well-turned phrase is now deployed in society and the effect it has. Some might wonder, in light of the demonstrated fundraising power of a powerful hashtag, why any

changes are needed at all. Law is not just a guardrail for economic pursuits, it is a means by which fairness and equity are distributed.

As noted above, Burgunder's focus was on attempts to unfairly take a phrase out of circulation so it could be monetized on billboard products. Noah Bleicher expressed a similar concern when he commented on the then-current fight over control of LET'S ROLL, Todd Beamer's iconic final words before he and fellow passengers on United Airlines Flight 93 prevented 9/11 hijackers from reaching their target, instead crashing in Pennsylvania.⁵⁷ Roberts study of tagmarks concluded that changes were needed to take into account the various types and uses of hashtags. Stephanie Mahin and Victoria Ekstrand Smith, examining #BlackLivesMatter actions by the USPTO and the disparate impact felt by various demographics, have also proposed modifications to existing law.⁵⁸

Burgunder's argument relies on the First Amendment and rights of publicity.⁵⁹ NBA Los Angeles Laker Coach Pat Riley's registration of THREE-PEAT, a phrase first used by Laker player Byron Scott, served to chill speech protected by the First Amendment. The first application for registration of LET'S ROLL did not come from anyone related to Todd Beamer but from Iman Abdallah. While Major League Baseball's 19-year-old Rookie of the Year Bryce Harper did seek protection for his viral response to a journalist's question about whether he would drink a beer to celebrate his team's, the Washington Nationals, World Series victory, anyone could have sought registration of that phrase, "[t]hat's a clown question, bro." Harper

⁵⁷ Noah B. Bleicher, *Trademarking Tragedy: The Fight for Exclusive Rights to Let's Roll*, 52 Emory L.J. 1847 (2003).

⁵⁸ Stephanie L. Mahin and Victoria Smith Ekstrand, *Old Law, New Tech, and Citizen-Created Hashtags: #BlackLivesMatter and the Case for Provisional Hashtag Marks*, 98(1) Journalism & Mass Communication Quarterly 13 (2021).

⁵⁹ Burgunder, *supra*.

abstains from alcohol due to religious beliefs, though he was not of legal age to drink in many states.⁶⁰

The modification to trademark law proposed by Burgunder is that a phrase should not be registered unless it has acquired secondary meaning as a source indicator.⁶¹ The practical effect of implementing that requirement would be to reject intent-to-use applications for the well-turned phrase. He also posits that if the well-turned phrase is closely identified with an individual, then only that individual should be allowed to register the matter due to the demands of rights of publicity.

Roberts taxonomy of hashtags creates four categories: producer-selected, marketer-deployed, consumer-generated, and citizen-created.⁶² In addition to the argument noted above, that adding a hashmark can actually make a phrase less-protectible, using a tagmark solely online also lessens its trademark use—it looks like another hashtag topical guide rather than like an indicator of source. The taxonomy Roberts created is relevant due to the differing nature and function of hashtags. The first two categories, producer-selected and marketer-deployed, match up well with the implicit assumption of trademark law, that authorship is singular. Many producers and marketers give hashtags the same thought and attention they give to taglines, sometimes using the tagline as a hashtag. Nike has given us both #JustDoIt and #BetterForIt.

At the other end of the authorship spectrum are the consumer-generated and citizen-created hashtag. #BadCustomerService and #PoorCustomerService are two popular consumer-generated tags that any business would hope to never see in a customer's review.

#BlackLivesMatter differs from many citizen-created hashtags in that its origin is clear and

⁶⁰ *Id.* Harper is a member of the Church of Jesus Christ of Latter-day Saints, a church that prohibits consumption of alcohol, tobacco, coffee and black tea by its adherents.

⁶¹ *Id.*

⁶² Roberts, *Tagmarks*, *supra*.

documented unlike #MondayMotivation and its mystery origin. However, the rapid diffusion and meteoric rise of #BlackLivesMatter places it squarely in the citizen-created category. Its ubiquitous nature has rendered ownership of this well-turned phrase nigh impossible.

Roberts advocates that tagmark applications “be categorized as ‘primarily merely a hashtag’ until the applicant can establish that the mark actually functions as a source-indicator.”⁶³ The distinctive tagmarks of companies like Nike are already protected by their slogan trademark registrations. The non-distinctive tagmarks originating with producers and marketers should have already been subjected to the secondary meaning requirement by USPTO examining attorneys; adopting this suggestion would not change the status quo. As for the consumer-generated and citizen-created hashtags, the July 2017 amendment to the TMEP, which occurred after Roberts created the hashtag taxonomy and explored the world of tagmarks, confirms that such “widely used messages” are too commonplace to have any source-indicating function.

Mahin and Ekstrand brought the theoretical lens of Critical Race Theory and Intellectual Property (CRT-IP) to a review of the applications for registration of BLACK LIVES MATTER. Their review also included applications with the phrase LIVES MATTER. While all applications for protection of only the words had been refused, a number of other wordmarks for LIVES MATTER were allowed (IRISH LIVES MATTER, SMALL LIVES MATTER, FAT LIVES MATTER, and #CHRISTIAN LIVES MATTER).

“Approval of these marks represent exactly the kind of ‘colorblind conventions’ and ‘ways that state and cultural apparatuses protect the privileges of whiteness at the expense of people of color’ described by critical race and CRT-IP scholars.” Mahin and Ekstrand also point

⁶³ *Id.*

out that the LIVES MATTER marks draw on “the social capital from Black Lives Matter by using the ‘lives matter’ portion. As a result, these marks are now allowed to take credit and financially profit from marks that resemble the Black Lives Matter name.”

Several proposed modifications to trademark law are put forth by Mahin and Ekstrand. One is to create a type of collective mark that could be granted to citizen-created matter. They note that many communities of color have different ideas of creation, re-creation and ownership than those envisioned by existing law. A second possible modification is a temporary mark with limited protections, a provisional hashtag mark. Similar to today’s supplemental register for descriptive marks, evidence of secondary meaning would be required for this temporary mark to acquire full protection. Their third modification is for a review of current USPTO practices in light of addressing problems of cultural appropriation—in this specific instance, the halo effect enjoyed by LIVES MATTER.

Unless specifically created to promote a good and used in promotions and advertising, slogans and hashtags generally are not source-indicating. They are not the distinctive matter trademark law is primed to protect. Both Burgunder and Roberts suggest that it become even more difficult to remove a slogan from the public domain. These suggestions are in line with the USPTO action in amending the TMEP to advise that widely used messages do not function as source-indicators.

At the other end of the spectrum, i.e., more protection for the well-turned phrase, one of the key concerns of Mahin and Ekstrand is cultural appropriation. A fundamental presumption of law is fairness and misappropriating another’s social capital is not fair. No one has been allowed to own the words BLACK LIVES MATTER, but variations of LIVES MATTER have been

allowed. A collective mark would be unwieldy—the group is simply too large. Designs using the words would be distinctive, but those designs may be protected under existing law.

Famous marks enjoy the additional protection of trademark dilution laws. These laws cast a wider net than infringement laws and protect marks that are widely recognized by the general public from blurring and tarnishment. By analogy, slogans and hashtags that are widely known AND are of a social, political, religious or similar nature should also be protected from dilution.

VI. CONCLUSION

Slogans began as battle-cries and they continue to serve that purpose.

Few rise to the consequence that #BlackLivesMatter has had. It is, therefore, little wonder that so many have opted to acquire an exclusive license to this well-turned phrase. But this slogan cannot be assigned to just one. It is a phrase that belongs to all. As with all widely used slogans, it is available for all to use. Trademark law doesn't just protect the distinctive source-indicators for producers of goods and providers of services, it also protects the rally-cries that can change society.