

Oppressive and Empowering #Tagmarks

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#SayHerName is a hashtag social movement that works to amplify the names and narratives of Black women killed by police and to raise awareness about how state violence intersects with race and gender. Kimberlé Crenshaw, cofounder and executive director of the African American Policy Forum (AAPF), is credited with founding the movement¹ following the police killing of Michelle Cusseaux in 2014.² The following year, AAPF hosted “#SayHerName: A Vigil in Memory of Black Women and Girls Killed by the Police” and released a report that outlined the movement’s objectives.³ Since then, and especially following the death of Sandra Bland in police custody, the hashtag has taken off on social media. The AAPF applied to register #SayHerName as a trademark for charitable services and promoting awareness in 2016, but the US Patent and Trademark Office (USPTO) issued an office action refusing registration because it deemed the mark an informational slogan incapable of functioning as a source indicator. Citing copious online evidence, the examining attorney asserted that “because consumers are accustomed to seeing this slogan commonly used in everyday speech by many different sources . . . the public would not perceive the slogan #SAYHERNAME as source-identifying matter that identifies applicant as the source of the services but rather as an expression of support for anti-violence advocates and civil rights groups.”

Meanwhile, media consultant Jade Bryan, who says she created the #DeafTalent hashtag used to highlight Deaf and hard of hearing members of the entertainment community and protest the casting of hearing actors in deaf character roles, successfully registered “#DeafTalent” as a trademark for entertainment and education services. She now tries to prohibit others from using the phrase; her website claims

that every use of the hashtag requires a license, and she has messaged members of the deaf community to demand they cease use.⁴ Bryan also succeeded in getting the UK advocacy group Deaf Talent Collective, which helped many Deaf actors of color earn roles in mainstream film and television productions, suspended from Twitter over a trademark complaint.⁵

The technical trademark analysis arguably does not come down on either AAPF's side or Bryan's. While Crenshaw and AAPF played a key role in making the #SayHerName hashtag go viral, its very virality prevented it from doing what a trademark must do—indicate to consumers that goods or services come from one specific source. And the uses to which Bryan objects are mostly expressive, non-trademark displays of the phrases, making them legally permissible under fair use doctrine. Even commercial uses of marks similar to registered marks can coexist with those registered marks if they don't create confusion, which is more likely when both incorporate descriptive phrases like "Deaf talent." Nonetheless, it's easy to understand AAPF's and Bryan's actions. Bryan secured a registration for a hashtag she adopted, and that registration purports to provide exclusive property rights. AAPF sought to do the same for a hashtag it created and made popular, and in connection with which it provides educational and charitable services. Trademark law is widely acknowledged to be weighted in favor of corporate interests and against individuals and somewhat less widely acknowledged to be more accessible to wealthy white producers than to people of color.

Because of that imbalance, a movement is currently afoot to educate artists, entrepreneurs, activists, and online content creators, particularly those who are members of marginalized groups, about their rights and to help them avail themselves of intellectual property protection. But when members of those groups do apply for trademark registrations or assert common law trademark rights, particularly those based on hashtag social movements and other online uses, they often find their applications refused or their attempts to stop others' uses deemed over-enforcement.⁶ Populations that are underrepresented among trademark owners need a clear understanding of what trademark law protects—one that equips them to invest their time and effort building something that they can legally safeguard and effectively enforce. Improving access to information via agency websites and other government resources can help level the playing field. Improving access to competent legal representation, including through law school clinics and opportunities for pro bono advice and representation, is also crucial. And trademark lawyers should work to educate themselves about their clients' artistic, political, or entrepreneurial work and address their own biases or gaps in cultural knowledge to ensure effective advocacy.⁷ When resources are free or low-cost, easy to find, and designed for laypeople, members of groups that have traditionally been disenfranchised under intellectual property laws can access the information and protection necessary to formalize and exploit their rights in service of their commercial

efforts. And they can enforce those rights in ways that do not use trademark law to silence the speech of other artists, activists, and creators.

A trademark is any device used in connection with goods or services that indicates their source. It can be a word, name, symbol, slogan, or even a scent or shape. It tells consumers who stands behind products or signals that those products come from only one producer. Some categories of marks, such as coined terms or those that don't describe any aspect of the goods or services, can be protected immediately upon use; others, such as marks that describe where the product is made or what it's for or marks that comprise the design of a product, are only protectable upon a showing that they have come to serve as source indicators in the eyes of consumers. In the United States, trademark rights are based on use in commerce and distinctiveness: owners can apply to register matter as a trademark to formalize their federal rights, but registration is not required for rights to accrue, so no single comprehensive list of all enforceable trademarks exists. The goals of trademark law include protecting consumers from deception, promoting economic efficiency and fair competition, and providing trademark owners incentive to invest in producing and marketing high-quality goods and services to generate goodwill. Owners of both registered and unregistered trademarks can sue other entities that create a likelihood of consumer confusion by using a similar mark in commerce; owners of marks that are famous nationwide can also sue for dilution when someone uses a mark that tarnishes the famous mark's reputation or blurs its distinctiveness. Yet most trademark disputes happen outside of the courtroom—cease and desist letters or email demands that someone stop or alter their use are far more common than lawsuits, which means most trademark bargaining and dispute resolution takes place in the shadow of the law.⁸

Intellectual property scholars have decried racial and gender disparities in ownership, prosecution, and examination across all areas of IP, including patent⁹ and copyright law.¹⁰ Trademark law is not immune from those inequities. The vast majority of trademark applications are filed by corporate entities, so data on race and gender disparities in trademark registration are somewhat limited compared to other forms of IP.¹¹ But in a study of over a million trademark applications filed by individuals, researchers found that Black and Hispanic applicants were underrepresented, as were women, while white applicants and male applicants were overrepresented compared to the population.¹²

Individuals and activist groups need opportunities, resources, and support to innovate (patent), create expressive works (copyright), and engage in commerce (trademark).¹³ Access to formal IP protection requires access to information, capital, and expertise. What's more, intellectual property laws are structured to privilege and protect some forms of innovation, commerce, and art over others—and those forms of knowing and creating tend to be predominantly white and male.¹⁴ IP is often said to serve the twin goals of incentivizing and rewarding labor and innovation. But the creative and entrepreneurial endeavors of women, people of

color, and members of other marginalized groups are less likely to be rewarded with protection and exclusive rights. Unequal numbers in ownership and disparate outcomes at the USPTO and the Copyright Office are not the only reflections of structural inequality. As KJ Greene has written, “A feminist critique recognizes that rights governing cultural production did not arise in a social or cultural vacuum, but in a crucible of gender and racial subordination, the embers of which still burn today.”

What happens to ownership of intellectual property in the age of social media? It has become easier than ever to create something that goes viral, but virality rarely begets control—ask Kayla Newman (aka Peaches Monroe), who coined “on fleek”; or Patty Mallette, who created the popular hashtag #LoveWins in the wake of the Supreme Court’s recognition of same-sex marriage; or the young, often Black choreographers who create viral TikTok dances¹⁵ only to see white influencers perform them on television.¹⁶ As intellectual property laws intersect with new forms of creativity and creation, the gulf between those who create the content that drives cultural conversations and those who monetize that content becomes increasingly apparent.¹⁷ Several challenges stand in the way of creators profiting from their creativity in this context. One takes the form of barriers to access to intellectual property rights described earlier. Another is the fact that those IP rights are often ill-suited for the particular types of creative works in question.

Take hashtags, which began appearing on social media in 2006. While they were originally designed to sort content and enable people to find posts on particular topics, they have evolved to do much more: social media users employ hashtags to label, link, discuss, criticize, and promote content. They call upon hashtags to build communities and engage in activism.¹⁸ Corporations often use a hashtag as a call to action, encouraging fans to add user-generated content to an advertising campaign or proclaim their affinity for a brand. Some companies use hashtags to celebrate a particular group, as with Equinox’s #PoweredByPride, Marriott’s #LoveTravels, and American Eagles’ #WeAllCan, all designed to broadcast—or, more cynically, perform—the brands’ support of their LGBTQ customers.¹⁹ But corporate hashtags are rarely the ones that generate the most engagement. The slogans, catchphrases, and hashtags that catch the public’s attention are far more likely to arise organically.

By the end of 2015, over two hundred hashtags were registered with the USPTO as trademarks.²⁰ In 2023, the number of registered tagmarks is well into the thousands.²¹ The Trademark Office added a section on hashtags as trademarks to its Manual of Examining Procedure in 2013,²² though I have argued that examination of marks in this category is insufficiently stringent.²³ Trademark registration is typically unnecessary for corporations, as owners of plain-text marks like OREO or KFC possess robust rights and receive little or no additional benefit from registering #oreo or #HowDoYouKFC as trademarks.²⁴ When a hashtag is used like a traditional trademark and affixed to products, trademark protection makes sense.

And hashtag creation may involve labor and creativity. But hashtags as hashtags are unlikely to truly qualify for trademark protection: most fail to function as trademarks for particular goods or services.²⁵ For those few hashtags that are truly used as marks, many are plagued by functionality, lack of distinctiveness, false association with a celebrity, or likelihood of confusion with another brand.²⁶ In other words, hashtags frequently fail to meet the requirements for federal protection. They may also be incapable of creating an association with a single source because hashtags are, by their very nature, collectives—the assertion that a hashtag functions as a trademark is often at odds with the way members of the public understand and use hashtags.²⁷

But new hashtags are created every day, and when they take off, it is something to behold—consider, for example, the way that survivors of sexual assault and harassment have come together around the #MeToo hashtag; the staying power and emotional resonance of #BlackLivesMatter; the triumph and pride signaled by #LoveWins. #OscarsSoWhite generated dialogue about the awards show that shaped media coverage far beyond the confines of Twitter. It's no coincidence that many of those viral hashtags were created by women or people of color: the hashtag has emerged as a way to center marginalized people and give voice to grassroots movements. Researchers have noted Black Twitter in particular uses hashtags to create a counterpublic within a public space to better communicate about and amplify issues relevant to participants' experiences and concerns.²⁸ And trademark law, at least in theory, can offer group members a way to assert control over a hashtag and use it to generate revenue and goodwill.

There are trademark applications and registrations for ubiquitous hashtags and phrases including #MeToo, #StopAsianHate,²⁹ #TransLivesMatter;³⁰ and #GirlsLikeUs³¹—but the applicants and registrants are not always the hashtag's creators or the movement's leaders. Makeup company Hard Candy applied to register #MeToo as a trademark for cosmetics and fragrances before backlash led it to expressly abandon the endeavor.³² The expression “Black girls are magic” was coined by CaShawn Thompson in 2013 to celebrate and uplift Black women,³³ but both concept and phrase have been coopted by corporations,³⁴ as the forty-five trademark applications for variations on the phrase attest: registrations cover everything from wine³⁵ to curriculum development³⁶ to charitable fundraising services³⁷ to apparel.³⁸ What's more, while hashtag use usually constitutes fair use,³⁹ some courts have found hashtag uses to infringe existing trademark rights.⁴⁰ And for every successful plaintiff, there are many more bullied by mark owners asserting rights broader than those to which their common law or registered rights entitle them. Even Kris Jenner is not immune.⁴¹

Grassroots organizations seeking to avail themselves of trademark protection have also stumbled, and their stories raise interesting questions for trademark law. The Association for Size Diversity and Health (ASDAH) registered HEALTH AT EVERY SIZE and its acronym HAES, both ubiquitous on social media in hashtag

form,⁴² as trademarks for educational services in 2012.⁴³ The phrase originated with the fat acceptance movement and is also the title of a 2010 book, although the movement predates the book and ASDAH has since severed ties with the book's author, Lindo Bacon.⁴⁴ In fact, ASDAH leadership warned that Bacon's planned publication of a revised *Health At Every Size* book would create confusion with ASDAH's registered trademark.⁴⁵ Like Jade Bryan, ASDAH lists extensive trademark use guidelines on its website, including requiring that anyone who uses either phrase receive permission in advance, pair the mark with the ® symbol and a generic noun, and prominently display a trademark notice.⁴⁶ Those requirements are not mandated by trademark law's supposed "duty to police" and are incompatible with fair use principles. Nominative fair use doctrine provides that anyone can reference a brand by using its trademark, including to describe the user's own goods or services—"we repair TELFAR handbags" or "the Blavity app can be downloaded to Android and Chromebook devices."⁴⁷ Members of the public can always use trademarks when they discuss, reference, or criticize a company or brand, and they can also use descriptive terms in their descriptive sense. Enforcing trademark rights against social media posters who talk about how "the #healthateverysize movement changed my relationship with my body" or tag photos "#haes" would chill speech and undermine the organization's very purpose (in addition to constituting trademark bullying). And reporters are certainly not bound to seek permission or approval before discussing the hashtag movement or philosophy by name.

ASDAH articulates its goal in registering the two trademarks as honoring the community-based advocacy work that led to its formation by "protect[ing] th[e] phrase from individuals or large corporations who would seek to co-opt the phrase to hawk their latest diet or weight-loss program."⁴⁸ In other words, it frames the registration as a defensive move. Celebrities like Jay-Z and Tom Brady have made similar statements to the press about their efforts to register name-related marks,⁴⁹ but trademark law is not designed to enable owners to play defense without also making affirmative use. While some ASDAH community members celebrated the decision, many others have pushed back, noting that the goals of the organization and the strictures of trademark law seem to be in tension.⁵⁰ Activists and scholars Drs. Jacqui Gingras and Charlotte Cooper explore that tension in their critique of ASDAH's decision to register the trademarks, arguing that the HAES movement contains multitudes and reflects a rich history of grassroots activism that amplifies different voices, while registering the trademarks relinquishes that history, promotes commodification, and silences those voices and multitudes of meaning by assigning the phrase a singular definition.⁵¹ The decision to register HAES and HEALTH AT EVERY SIZE as trademarks with the goal of prohibiting their exploitation in service of diet culture "fails to interrogate broader misuses of power, particularly under capitalism, or build an intersectional movement that is able or ready to engage with a multiplicity of social justice issues. It is a move that, ironically, concedes powerlessness."⁵²

The chilling effects of registration that Gingras and Cooper note are also often seen when private companies seek registration for a phrase or hashtag widely used within a particular community. For example, #a11y is a numeronym that stands for “accessibility.” The term is used frequently by digital accessibility practitioners to advocate for accessibility, tag content that discusses it, or identify content that has been made accessible to those using assistive technology.⁵³ A company called Accessibility Now applied to register A11Y as a trademark for technology that enables users to comply with website accessibility regulations; when the USPTO issued an initial refusal for mere descriptiveness, noting that a11y “appears to be a well-known short-hand for ‘accessibility’ in the use of computers and related equipment” and that was precisely what applicant’s website promised to do, Accessibility Now converted its application from the Principal to the Supplemental Register.⁵⁴ While its trademark rights are far less robust based on that registration, the owner can still use the registration to attempt to quash speech it dislikes, as this particular owner has a demonstrated track record of doing.⁵⁵ Given the term’s widespread use and its utility to a community of users, trademark failure to function doctrine should have barred its registration by deeming it informational matter.⁵⁶ Likewise, when the seller of a vibrator labeled “enby” sought to register ENBY as a trademark for sex toys, the USPTO issued two office actions deeming it merely descriptive, given that “enby” is widely-used to mean “nb” or “nonbinary” and the vibrator is for users of any or no gender.⁵⁷ The seller then sued a competitor, a Black- and trans-owned online retailer operating at the domain name www.shopenby.com, alleging trademark infringement of its common law rights.⁵⁸ The court granted the defendant’s motion to dismiss, finding that the plaintiff had not adequately alleged ownership of a valid and protectable trademark, but only after the suit cost the defendant time, money, and energy.⁵⁹

Trademark law is known for its David versus Goliath stories: major corporations regularly use it to silence speech or force much smaller rightsholders to abandon their names. But when it comes to disputes over trademark rights in hashtags and trending terms, there are often no clear villains or victims. The existence of online spaces has helped to amplify diverse voices, broaden access to IP protection, and subvert trademark law’s traditional binaries. Members of groups long marginalized by intellectual property law—women, artists, people of color—are finally, at least occasionally, gaining access to trademark and other IP regimes that had long eluded them and perpetuated inequality.⁶⁰ But the uses they seek to protect and the uses to which they object don’t fit neatly within trademark’s core protections and exclusions.

Creators of viral phrases and hashtags need resources and information about which kinds of uses they must make to merit legal protection and which kinds of uses by others they should seek to enjoin. Participants in the content economy equipped with an understanding of trademark law can better resist and bring to light trademark bullying. And trademark law itself must continue to evolve in acknowledgment of both its own systemic biases and new phenomena like memes

and viral content.⁶¹ In her book *Branding Black Womanhood: Media Citizenship from Black Power to Black Girl Magic*, Communications professor Timeka Tounsel writes, “In the end, Black Girl Magic matters because it is one process through which a constrained public can access media citizenship. Despite its limitations as a form of enfranchisement . . . this framework offers Black women a pathway to a kind of everyday empowerment.”⁶² Trademark law can provide voice, access, and economic opportunity. Despite its limitations and potential for abuse, it can enable members of marginalized communities to commercialize and capitalize on their labor and creativity.

NOTES

1. Malika Saada Saar, *#SayHerName: A Q&A with Professor Kimberlé Crenshaw*, YOUTUBE BLOG, <https://blog.youtube/news-and-events/sayhername/>.
2. Donna M. Owens, *Breonna Taylor, and Hundreds of Black Women Have Died at the Hands of Police. The Movement to Say Their Names Is Growing*, USA TODAY (Mar. 11, 2021) <https://www.usatoday.com/in-depth/news/investigations/2021/03/11/sayhername-movement-black-women-police-violence/6921197002/>.
3. AAFP, *About #SayHerName*, <https://www.aapf.org/sayhername>.
4. Jade Films, <https://www.jadefilm.com/deaftalent-trademark>.
5. The Limping Chicken, “Deaf Talent” Trademark Dispute Leads to Fears That Deaf Creatives May No Longer Be Able to Use Hashtag or Term, <https://limpingchicken.com/2021/10/16/deaf-talent-trademark-dispute-leads-to-fears-that-deaf-creatives-may-no-longer-be-able-to-use-hashtag-or-term/> (Oct. 16, 2021).
6. See Shontavia Johnson, *Memetic Theory, Trademarks, & the Viral Meme Mark*, 13 J. MARSHALL REV. INTELL. PROP. L. 96, 129 (2013) (“the potential for overenforcement of trademarks is high for viral meme marks”).
7. Jordana R. Goodman and Khamal Patterson, *Access to Justice for Black Inventors*, VANDERBILT L. REV. (forthcoming 2024).
8. William T. Gallagher, *Trademark and Copyright Enforcement in the Shadow of IP Law*, 28 SANTA CLARA HIGH TECH. L.J. 453, 456 (2012).
9. Jordana Goodman, *Addressing Patent Gender Disparities*, SCIENCE 376 (694) 706–7 (2022); A. Tulle, et al., *Progress and Potential: 2020 Update on US Women Inventor-Patentees*, US Patent and Trademark Office (2020), <https://www.uspto.gov/sites/default/files/documents/OCE-DH-Progress-Potential-2020.pdf>; Kyle Jensen, Balázs Kovács & Olav Sorenson, *Gender Differences in Obtaining and Maintaining Patent Rights*, 36 NATURE BIOTECH. 307–8 (2018); Lisa D. Cook & Chaleampong Kongcharoen, *The Idea Gap in Pink and Black* 1, 28 (Nat’l Bureau Econ. Rsch., Working Paper No. 16331, 2010), https://www.nber.org/system/files/working_papers/w16331/w16331.pdf [<https://perma.cc/U6Y9-S2E9>]; W. Michael Schuster, R. Evan Davis, Kourtenay Schley & Julie Ravenscraft, *An Empirical Study of Patent Grant Rates as a Function of Race and Gender*, 57 AM. BUS. L.J. 281, 317–18 (2020); Jessica Milli, Barbara Gault, Emma Williams-Baron, Jenny Xia & Meika Berlan, *The Gender Patenting Gap*, INST. FOR WOMEN’S POL’Y RSCH. 7 (2016), <https://iwpr.org/iwpr-general/the-gender-patenting-gap/>; Jessica Milli, Emma Williams-Baron, Meika Berlan, Jenny Xia & Barbara Gault, *Equity in Innovation: Women Inventors and Patents*, INST. FOR WOMEN’S POL’Y RSCH. 5 (2016), <https://iwpr.org/wp-content/uploads/2020/12/C448-Equity-in-Innovation.pdf>.
10. Robert Brauneis & Dotan Oliar, *An Empirical Study of the Race, Ethnicity, Gender, and Age of Copyright Registrants*, 86 GEO. WASH. L. REV. 46, 59–60 (2018).

11. A corporate entity may be a large corporation like Nike or Starbucks. But it might also be an individual: for example, each of the Kardashian sisters owns dozens if not hundreds of trademark registrations, but each has created a corporate entity as holder of their intellectual property: Kim's is Kimsaprincess Inc., Kourtney's is 2Die4Kourt, Inc., and Khloe's is Khlomoney, Inc. Meredith Haggerty, *The Kardashians' Corporation Names Are More Embarrassing Than Your First AIM Screen Name*, RACKED (Mar. 22, 2016), <https://www.racked.com/2016/3/22/11286814/kardashians-corporation-names-kimsaprincess-khlomoney-2die4kourt>.

12. W. Michael Schuster, Miriam Marcowitz-Bitton & Deborah R. Gerhardt, *An Empirical Study of Gender and Race in Trademark Prosecution*, 94 S. CAL. L. REV. 1407, 1439–51 (2021).

13. See generally K. J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER SOC. POL'Y & L. 365 (2008); K. J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM'NS & ENT. L.J. 339 (1998); Ann Bartow, *Women in the Web of Secondary Copyright Liability and Internet Filtering*, 32 N. KY. L. REV. 449 (2005).

14. Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273, 303–4 (2007) (“When we compare fields that get intellectual property protection (software, sculpture) with fields that do not (fashion, cooking, sewing), it becomes uncomfortably obvious that our cultural policy has expected women's endeavors to generate surplus creativity but has assumed that men's endeavors require compensation”); see also Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, & Copyright Law*, 14 AM. U. J. GENDER SOC. POL'Y & L. 551, 551–52 (2006) (“Copyright laws are written and enforced to help certain groups of people, largely male, assert and retain control over the resources generated by creative productivity. Consequently, the copyright infrastructure plays a role, largely unexamined by legal scholars, in helping to sustain the material and economic inequality between women and men”).

15. Morgan Sung, *Black TikTok Creators Are “Striking” to Protest Uncredited Viral Dance Trends*, MASHABLE (June 23, 2021) <https://mashable.com/article/black-tiktok-strike-dance-megan-thee-stallion-thot-shit>.

16. Ashley Turner, *Social Media Slams “The Tonight Show Starring Jimmy Fallon” TikTok Dance Segment Where Black Creators of the Routines Were Not Credited*, ATLANTA BLACK STAR (Mar. 31, 2021) <https://atlantablackstar.com/2021/03/31/social-media-slams-the-tonight-show-starring-jimmy-fallon-tiktok-dance-segment-where-black-creators-of-the-routines-were-not-credited/>. The article credits Tiktokkers @noahschnapp, @jazlynebaybee, @yvnggprince, @flyboyfu, @kekejanjah, @macdaddyz, @theemyanicole, and @thegilberttwins as the original choreographers of the dances Addison Rae performed.

17. Jenna Wortham, *The Internet Is Where We Share—and Steal—the Best Ideas*, NEW YORK TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/magazine/the-internet-is-where-we-share-and-steal-the-best-ideas.html>.

18. Alexandra J. Roberts, *Tagmarks*, 105 CAL. L. REV. 599, 605–7 (2017).

19. In fact, Marriott owns a trademark registration for #LoveTravels for entertainment services (Registration No. 5,137,233), Equinox has a pending application to register POWERED BY PRIDE for charitable services and fitness instruction (Serial No. 88,408,050), and American Eagle's parent company applied to register #WeAllCan in sixteen categories (Serial No. 87159504 [abandoned]).

20. Roberts, *supra* note 18, 601.

21. A search on TESS for live registered marks that contain the “#” symbol returned 3,706 hits on June 19, 2023. Most appear to be tagmarks, but some use the hashtag as a number sign or to indicate a censored word—for example, #1 BROTHER'S PIZZA or KINKY MUHF#@KIN HAIR. Without the “registered” and “live” qualifiers, the number of hits is 8,842, indicating far more applications pending than marks registered.

22. TMEP § 1202.18.

23. Roberts, *supra* note 18, 602.
24. #HOWDOYOUKFC was registered for restaurant services but later abandoned. Registration No. 4,523,521.
25. *Tagmarks* at 624–49; Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 2010–2012 (2019).
26. See Dan L. Burk, *Cybermarks*, 94 MINN. L. REV. 1375, 1376 (2010).
27. See Abigail De Kosnik & Keight Feldman, eds., #IDENTITY: HASHTAGGING RACE, GENDER, SEXUALITY, AND NATION 64 (“Despite our ability to trace hashtags such as #YouOkSis to a single origin point [in this case, Twitter user @FeministaJones], hashtags do not follow an unproblematic, hierarchical linearity. . . . Because the hashtag multiplies infinitely—in that it can be taken up and used for almost any purpose that aligns with the hashtag originator’s intent or greatly deviates from that intent—a dynamic tension with linearity serves as a fundamental for thinking through the innate nature of the hashtag. Framing hashtags as multiplicitous [technocultural] assemblages provides a way to think through the various strategies users implement to shape engagement with hashtags they have authored or to cultivate certain parameters of use around hashtags on their own timelines”).
28. Lyndsay Michalik Gratch & Ariel Gratch, *DIGITAL PERFORMANCE IN EVERYDAY LIFE* 30 (2021).
29. Serial No. 90,638,513 (abandoned application for apparel). A shooting at three Atlanta spas and growing violence targeting Asians and Asian Americans gave rise to the #StopAsianHate hashtag and movement.
30. TRANS LIVES MATTER was registered for charitable services in 2013 and cancelled in 2018. Registration No. 4,353,324.
31. The hashtag #GirlsLikeUs was created in 2012 by trans writer, director, and activist Janet Mock. Abbie E. Goldberg & Genny Beemyn, eds., *Identity Exploration and Knowledge Sharing*, in THE SAGE ENCYCLOPEDIA OF TRANS STUDIES (2021). An application filed by Kimberly Rose to register GIRLS LIKE US for entertainment featuring LGBTQ people was abandoned before registration. Serial No. 88,288,512.
32. Serial No. 87,653,745.
33. CaShawn Thompson, Bio, <https://cashawn.com/> (“Black Girls Are Magic became wildly popular in 2013 after CaShawn began using the phrase online (which was later shortened to the hashtag #BlackGirlMagic) to uplift and praise the accomplishments, beauty and other amazing qualities of Black women”); Tamika N. Tounsel, *BRANDING BLACK WOMANHOOD: MEDIA CITIZENSHIP FROM BLACK POWER TO BLACK GIRL MAGIC* 14 (2022) (“it was the feeling that Black women were under assault, especially across social media platforms, that prompted CaShawn Thompson to create a hashtag-ready resistance motto in the first place”).
34. Tounsel, *supra* note 33, 68–93.
35. BLACK GIRL MAGIC, Registration No. 6,646,502.
36. Registration No. 6,689,956.
37. BLACK GIRL MAGIC BALL, Registration No. 5,874,284.
38. BLACK GIRL MATHGIC, Registration No. 6,608,811; BLK GRL MGC, Registration No. 5,676,917 (Supplemental); “Black girls are . . . magic” logo for drinkware and apparel, Registration No. 5,582,603 (Supplemental) (registered to CaShawn Thompson). See also Registration No. 5,372,483 (BLACK GIRL MAGIC for creating and developing concepts for television programs).
39. *Eksouzian v. Albanese*, No. CV 13–00728-PSG-MAN, 2015 WL 4720478, at *10 (C.D. Cal. Aug. 7, 2015) (calling the hashtag “merely a functional tool [and] not an actual trademark” and holding that Plaintiffs did not breach settlement agreement when they used #cloudpen “as a hashtag”).
40. *Pub. Impact, LLC v. Bos. Consulting Grp., Inc.*, 169 F. Supp. 3d 278, 290 (D. Mass. 2016) (plaintiff had a substantial likelihood of success in proving defendant’s use of #PublicImpact hashtag infringed plaintiff’s PUBLIC IMAGE trademark); *Chanel v. WGACA, LLC*, No. 18 Civ. 2253 (LLS), 2018 WL 4440507, at *2 (S.D.N.Y. 2018) (plaintiffs plausibly alleged that defendant’s use of hashtag

#WGACACHANEL constituted trademark infringement); *Khaled v. Bordenave*, No. 18 CIV. 5187 (PAE), 2019 WL 1894321, at *6 (S.D.N.Y. Apr. 29, 2019) (plaintiffs' allegations as to defendants' use of hashtags including #WeTheBest "clearly state a claim of trademark infringement"); *Fraternity Collection, LLC v. Fargnoli*, No. 3:13-CV-664-CWR-FKB, 2015 WL 1486375, at *5-6 (S.D. Miss. 2015) (use of #fratcollection and #fraternitycollection could plausibly infringe on plaintiff's FRATERNITY COLLECTION trademark); *Align Tech., Inc. v. Strauss Diamond Instruments, Inc.*, No. 18-CV-06663-TSH, 2019 WL 1586776, at *4 (N.D. Cal. Apr. 12, 2019) (preliminarily enjoining defendants' use of plaintiff's marks as hashtags on social media based on likelihood of confusion).

41. The owner of a trademark registration for #ProudMama for jewelry demanded Jenner cease using the hashtag, even though Jenner was only tagging her social media posts and not using #ProudMama in connection with her jewelry sales. Leah Melby Clinton, *Kris Jenner Might Not Be Allowed to Be a #ProudMama on Instagram Anymore*, GLAMOUR (Feb. 1, 2016), <https://www.glamour.com/story/kris-jenner-proud-mama>.

42. E.g. IPS Health, *Health At Every Size, Body-Acceptance and Lizzo: What Does the Dietician Say?* <https://www.ipshealth.co.za/health-at-every-size-body/> ("There's a growing social body-positive movement that promotes non-judgement and self-acceptance, particularly of overweight individuals, that has emerged over the past decade. It can be seen under the hashtags #HAES [and others]").

43. Registration Nos. 4,145,545; 3,992,338.

44. ASDAH, *Holding Lindo Bacon Accountable for Repeated Harm in the Fat Liberation & HAES® Communities* (Mar. 10, 2022) <https://asdah.org/lindo-accountability/>.

45. *Id.* ("Your authorship of a revised Health at Every Size® book will cause confusion with ASDAH's work promoting Health at Every Size®. A Health at Every Size® book will be reasonably interpreted to be ASDAH's opinions, violating our trademark").

46. ASDAH, *Trademark Guidelines*, <https://asdah.org/trademark-guidelines/> (ASDAH does not claim these guidelines are legally binding though; instead it urges "those who espouse HAES® to be in right relationship with us by adhering to the following Health at Every Size® and HAES® trademarks guidelines").

47. To qualify as nominative fair use, courts typically require that (1) the product or service in question is not readily identifiable without use of the trademark; (2) only so much of the mark as is reasonably necessary to identify the product or service is used; and (3) use of the mark does not suggest sponsorship or endorsement by the trademark owner.

48. ASDAH Announces Health At Every Size® Registered Trademark and Final Schedule for August Conference in San Francisco (Aug. 1, 2011), <http://www.prweb.com/releases/2011/8/prweb8679043.htm>.

49. Jay Z on His Rags-to-Riches Story, Wooing Beyoncé, and How Blue Ivy Is His "Biggest Fan," VANITY FAIR (Oct. 1, 2013) <https://www.vanityfair.com/culture/2013/10/jay-z-beyonce-blue-ivy-story> ("Jay tells Robinson that he and Beyoncé trademarked their daughter's name [BLUE IVY] simply so others couldn't exploit it for profit. . . . "It wasn't for us to do anything; as you see, we haven't done anything"); Mike Reiss, *Not So Terrific: Tom Brady's Trademark Refused*, ESPN (Aug. 23, 2019), https://www.espn.com/nfl/story/_id/27445881/not-terrific-tom-brady-trademark-refused ("I didn't like the nickname and I [applied to register TOM TERRIFIC because I] wanted to make sure no one used it, because some people wanted to use it. I was trying to keep people from using it").

50. For example, Laurie Toby Edison, *Health at Every Size®: Now a Registered Trademark*, BODY IMPOLITIC (Aug. 9, 2011), <https://laurietobyedison.com/body-impolitic-blog/2011/08/health-at-every-size-now-a-registered-trademark/>.

51. Jacqui Gingras and Charlotte Cooper, *Down the Rabbit Hole: A Critique of the ® in HAES®, J. OF CRITICAL DIETETICS* 1 (2012) at 3-4.

52. *Id.*, at 4.

53. The Accessibility Project, <https://www.a11yproject.com/about/>.

54. US Registration No. 4824150, Office Action (July 24, 2015).

55. See, e.g., Adrian Roselli, *My Cease & Desist from AudioEye* (Apr. 15, 2022) <https://adrianroselli.com/2022/04/my-cease-desist-from-audioeye.html> (Accessibility Now, Inc., owner of the registration for A11Y, is a subsidiary of AudioEye).

56. TMEP § 1202.04; USPTO, Examination Guide 2–17: Merely Informational Matter (2017), <https://www.uspto.gov/trademark/trademark-updates-and-announcements/trademark-user-input>.

57. Serial No. 90256449. In fact, some favor the term because it distinguishes nonbinary from non-Black, while sharing the acronym “nb” for both can create confusion. Ana Mardoll, *Storify: Why I Use Enby and Not NB*, ANA MARDOLL’S RAMBLINGS (Feb. 28, 2018), <http://www.anamardoll.com/2018/02/storify-why-i-use-enby-and-not-nb.html>. The creation of enby is often credited to Tumblr user @revolutionator based on the post captured here: <https://cassolotl.tumblr.com/post/620371385484722176>.

58. Samira Sadeque, *Sex Toy Company Threatens to Sue Black, Trans-Owned Company over Its Name*, DAILY DOT (Nov. 26, 2020), <https://www.dailydot.com/irl/wild-flower-enby-store-trademark-dispute/>.

59. *Boyajian Prods. v. ENBY LLC*, 3:20-cv-01991-HZ (D. Or. Nov. 1, 2021).

60. Emma Gray Ellis, *Want to Profit Off Your Meme? Good Luck if You Aren’t White*, WIRED (Mar. 1, 2017) <https://www.wired.com/2017/03/on-fleek-meme-monetization-gap/> [<https://perma.cc/2LQH-K8YU>] “[The] problem [for Kayla Newman, who coined the term ‘on fleek,’] is part intellectual property law, part access to influence, and all systemic racial inequalities. However egalitarian the internet was supposed to be, creatives’ ability to profit off their viral content seems to depend on their race”.

61. Johnson, *supra* note 6, at 97 (“Should we revisit current trademark standards as social media, the Internet, and information transmission rapidly change and collide with the historical underpinnings of the law?”).

62. Tounsel, *supra* note 33, 125–26.