WHY *JACK DANIEL'S* CAN'T STOP #WESTELMCALEB, AND WHAT NOW?

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INTRODUCTION

The recent Supreme Court ruling in the case of *Jack Daniel's Properties, Inc. v. VIP Products LLC*, which pitted the alcoholic-beverage giant against a company making dog chew toys parodying famous trademarks, has provided an important victory for entities seeking to protect their marks against infringement and dilution.[1] The decision stated, among other things, that parodies of trademarks are only exempt from liability if they are not used to designate the source of another product.[2] Brand owners, however, may not find relief in the decision when dealing with one of the most significant problems they face: the risk that a viral social media campaign embedding their trademarks in (often-parodic) hashtags could rapidly and seriously harm the value of the brand. This Article teases out the post–*Jack Daniel's* opportunities for legal protection for brand owners, as contrasted with the possibilities of methods driven mainly by self-help.

The virality problem has arisen frequently in recent years, with companies such as the famous furniture designer finding itself embroiled in the widespread "#WestElmCaleb" campaign because one of its employees allegedly exhibited predatory behaviors against women online (such as allegedly sending unsolicited nude pictures); it also happened when the famous dating app became associated with "#TinderSwindler" after one of its users extorted his victims to the tune of ten million dollars and Netflix created a "Tinder Swindler" documentary whose title spectators took viral in hashtag format on social media.[3] This Article assumes the task of analyzing the legal status of such uses after *Jack Daniel's*. It distinguishes uses by third parties that deploy these marks within hashtags purely to describe particular individuals (Caleb, or the Swindler) without seeking financial gain, from uses by commercial entities—both competitors and noncompetitors—that deploy the hashtags for commercial purposes such as advertising. The Article shows how while noncommercial uses will likely continue to receive legal blessing after *Jack Daniel's*, commercial uses could run into trouble depending on the context. Even there, however, the opportunities for legal action are often tenuous, and brand owners would be better off not facing the involved dilemmas in the first place.

Because of the legal uncertainties and the fact that even successful legal claims risk drawing more negative attention to plaintiff companies in this context,[4] they

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[1] 599 U.S. 1404 (2023). For some recent critiques of the decision, see Christine Haight Farley & Lisa P. Ramsey, *Raising the Threshold for Trademark Infringement to Protect Free Expression*, 72 AM. U. L. REV. 1225 (2023); Mark A. Lemley & Rebecca Tushnet, *First Amendment Neglect in Supreme Court Intellectual Property Cases*, 2023 SUP. CT. REV. 85 (2024).

[2] *See Jack Daniel's*, 599 U.S. at 162.

[3] *See infra* Section II.B.3.

[4] Indeed, "IP enforcement, like all litigation, carries the risk of the Streisand Effect." Andrew Gilden, *Sex, Death, and Intellectual Property*, 32 HARV. J.L. & TECH. 67, 112–13, 113 n.269 (2018) ("[N]amed after the actress Barbra Streisand, the Streisand Effect describes

must think outside the intellectual property toolbox to discourage the appearance of problematic hashtags tied to its employees or users in the first place. This Article discusses ways to prevent reputational harm to companies by outlining the benefits of supplementing trademark law tools with those of employment law and general better business practices to further safeguard marks against threats both internal and external. In particular, this Article argues that companies should add to their annual harassment trainings to rein in potential predatory employee behavior and protect themselves against possible social media fallouts; similarly, they should provide safer environments for their customers who otherwise risk being financially, physically, and emotionally fleeced by violators in a way that could ultimately also turn away other consumers from their brand.[5] As this Article shows, mark owners who rely on trademark enforcement alone for brand management after *Jack Daniel's* risk being sorely disappointed in the age of social media for both legal and practical reasons. The recommendations here seek to fill the gap between owners' needs and these realities.

This Article proceeds in four Parts. Part I provides a basic overview of trademark law and brand protection. It explains the key components of the Lanham Act, the central federal legislation in this area—including the two federal causes of action, trademark infringement and trademark dilution—and explores the law's role in brand protection. Next, Part II discusses the area of social media and brand promotion. It begins with examining the rise of social media and the emergence of hashtags, in addition to trademarks used within hashtags and the registration of hashtags by the United States Patent Trademark Office (USPTO) as well as objections to that practice. Then, the discussion moves to the effect of hashtags on social media, with a focus on both the positive and negative impacts on brands of the use of hashtags that include trademarks.

Part III discusses in depth the liability implications of the unauthorized use of such hashtags on social media. First, it provides an analysis of trademark infringement

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how efforts to suppress a juicy piece of online information can backfire." (quoting T.C., *What Is the Streisand Effect?*, THE ECONOMIST (Apr. 15, 2023), https://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect [https://perma.cc/YAK3-RECM])).

[5] Stock analysts have already flagged as a "glaring (and potentially huge) issue," for the value of its parent company Match Group, the decline in global daily new users at Tinder, which would need to be turned around via "marketing awareness for Tinder, focusing on improving the experience for women, and innovating with new products." Brett Schafer, *Is the Stock of Tinder's Parent Company in Trouble?*, MOTLEY FOOL (Feb. 3, 2024, 2:47 PM), https://www.fool.com/investing/2024/02/03/is-the-stock-of-tinders-parent-company-in-trouble/ [https://perma.cc/Q24X-62Z7] (noting that Match Group stock is down about 80% from its all-time high); *see also* Alexander Fabino, *Tinder Owner Loses Almost 1 Million Customers: 'Much Work to Be Done*,*'* NEWSWEEK (Nov. 1, 2023, 6:38 PM), https://www.newsweek.com/tinder-match-group-million-user-drop-share-decline-swipe-off-challenge-revenue-1840049 [https://perma.cc/PN5K-Z7FW].

and trademark tarnishment caused by these hashtags, as well as of the possibility of so-called trademark "genericide" through hashtags (whereby the original owner loses protection once a trademark is deemed generic). Second, it examines closely the scope and strength of trademark dilution laws after *Jack Daniel's Properties, Inc. v. VIP Products LLC*. Last, it describes some of the limitations and challenges to litigating under the current framework of trademark law when it comes to social media and hashtags. Part IV introduces proposals to bridge the gap under this existing framework. It also discusses how companies can combine trademark law with other tools such as practices related to employment law and training, or product safety measures, to effectively combat reputational damage to brands that may be caused by their employees' or users' actions.

I. TRADEMARK LAW AND BRAND PROTECTION

This Part provides guidance about the basic functioning of trademark law, including the concepts of infringement and dilution as well as relevant fair use defenses. This is key to understanding the use of trademarks within hashtags explained in later parts of the Article.

A. Overview

Whether we look at ancient times or the modern age, one of the fundamental reasons and justifications for the use of trademarks is, in the words of the U.S. Supreme Court, that they "foster competition and the maintenance of quality by securing to the producer the benefits of good reputation."[6] It is possible that marks were used as early as the Stone Age, to designate who produced pottery thousands of years ago.[7] Manufacturers could thus inform (even faraway) consumers who was the source of a product, and consumers could return to that manufacturer if satisfied—similarly to the way the modern marketplace functions.[8] One of the earliest known pieces of trademark legislation was passed in 1266 England and regulated the way that bakers should put their marks on loaves of bread.[9] In the United States, while trademark law was originally rooted in common law, the federal Lanham Act of 1946 is now the "core" statute governing trademark law.[10]

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[6] Matal v. Tam, 582 U.S. 218, 225 (2017) (quoting S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 531 (1987)).

[7] *See* Gerald Ruston, *On the Origin of Trademarks*, 45 TRADEMARK REP. 127, 128 (1955). In his article, Ruston provides pictorial examples of ancient marks. *See, e.g.*, *id.* at 129.

[8] *See* Sidney A. Diamond, *The Historical Development of Trademarks*, 73 TRADEMARK REP. 222, 227 (1983).

[9] *See* FRANK I. SCHECHTER, THE HISTORICAL FOUNDATIONS OF THE LAW RELATING TO TRADE-MARKS 49–50 (1925).

[10] Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 145 (2023).

The Lanham Act's purpose is "to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not."[11] Since its enactment, it has undergone significant transformations over the years to adapt to the ever-changing dynamics of interstate commerce. Importantly, fifty years after the initial passage of the law, Congress enacted the Federal Trademark Dilution Act of 1995 (FTDA) that expanded legally actionable behavior—for famous marks—from only infringement (via the creation of likelihood of confusion) to so-called dilution by blurring, tarnishment, or disparagement.[12] The Trademark Dilution Revision Act of 2006 (TDRA) followed, which stated that only likelihood of dilution was necessary under the FTDA and added other measures protecting famous marks.[13]

The development of dilution law in the United States was highly influenced by Frank Schechter, who argued in a 1927 article in the *Harvard Law Review* that "[t]rademark pirates are growing more subtle and refined," and "proceed circumspectly, by suggestion and approximation, rather than by direct and exact duplication of their victims' wares and marks," and therefore he believed that it was crucial to give protection for marks that are distinctive to ensure that they are not diluted.[14] The owners of famous trademarks were generally highly supportive of the passage of anti-dilution legislation and its expansion.[15]

B. Proving Trademark Infringement and Dilution

The term trademark, under the Lanham Act, is defined as "any word, name, symbol, or device, or any combination thereof . . . used . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others and to indicate the source of the goods."[16] The Act also provides for a centralized system of federal trademark registration that gives nationwide rights.[17] The Lanham Act primarily seeks to prevent consumer confusion in the marketplace. In *Jack Daniel's*, Justice Kagan called consumer confusion as to source the "cardinal sin" of trademark law.[18] Hence, one of the key functions of trademarks under the Lanham Act is that it must

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[11] S. REP. NO. 79-1333, at 4 (1946).

[12] Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996).

[13] *See* Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730; *see also* Jake Linford & Kyra Nelson, *Trademark Fame and Corpus Linguistics*, 45 COLUM. J.L. & ARTS 171, 177–79 (2022) (summarizing the history of federal dilution protection).

[14] Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927).

[15] Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 510–11 (2011).

[16] 15 U.S.C. § 1127 (2018).

[17] The registration provisions of the Lanham Act can be found at 15 U.S.C. § 1051 (2018).

[18] Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 157 (2023).

serve "to identify the origin or ownership of the article to which it is affixed"[19] or in Justice Kagan's words, "a mark [must] tell the public who is responsible for a product."[20] This is how trademarks assist consumers in selecting the products they want to buy and help producers earn the financial rewards linked to products' good reputation,[21] thereby benefiting both parties.

Most importantly, the Lanham Act gives trademark owners an array of legal means to enforce their rights. In particular, as noted in the previous Section, it creates two federal causes of action allowing trademark owners to bring legal action in federal court—trademark infringement, which was established under the original framework in 1946, and trademark dilution, which was adopted in 1995, as noted, with the passage of the Federal Trademark Dilution Act.[22] In a typical trademark infringement case, the issue rests on whether the defendant's use of a mark is "likely to cause confusion."[23] To prevail in a trademark infringement case, a plaintiff has to meet several elements. For example, besides the requirement that a trademark be distinctive, it must also be non-functional, used in commerce, and likely to cause confusion.[24]

Numerous courts have elaborated on the meaning of these elements. For example, regarding distinctiveness, the court in *Abercrombie & Fitch Co. v. Hunting World, Inc.* discusses the four different categories with respect to trademark protection.[25] "Arrayed in an ascending order which roughly reflects their eligibility to trademark status and the degree of protection accorded, these classes are (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful."[26] The court specifies that "when a suggestive or fanciful term has become generic as a result of a manufacturer's own advertising efforts, trademark protection will be denied."[27]

In a standard trademark infringement case, once she clears the bar of having the kind of mark that "counts" as distinctive, a plaintiff must demonstrate that the defendant created a likelihood of confusion with the plaintiff's mark. The Second Circuit created a multifactor balancing test in *Polaroid Corp. v. Polarad Electronics Corp.* to determine whether there is likelihood or confusion, and other circuits have

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[19] *Id.* at 146 (quoting Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412 (1916)).

[20] *Id.*

[21] *Id.*

[22] 15 U.S.C. § 1114 (2005); Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (1996).

[23] 15 U.S.C. § 1114 (2005).

[24] *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163–64 (1995); Traffix Devices, Inc. v. Marketing Displays, Inc., 532 U.S. 23, 34–35 (2001); Rescuecom Corp. v. Google, Inc., 562 F.3d 123, 127–28 (2d Cir. 2009).

[25] 537 F.2d 4, 9 (2d Cir. 1976).

[26] *Id.*

[27] *Id.* at 10; *see also* Murphy Door Bed Co. v. Interior Sleep Sys., Inc., 874 F.2d 95, 97 (2d Cir. 1989). For a discussion of trademark owners voluntarily declaring terms they have created generic, see Jorge L. Contreras, *Sui-Genericide*, 106 IOWA L. REV. 1041 (2021).

created similar tests.[28] These factors include: (1) "the strength of his mark," that is the level of distinctiveness; (2) "the degree of similarity between the two marks," in terms of meaning, sight and/or sound; (3) "the proximity of the products," which is whether they are directly competing with each other; (4) "the likelihood that the prior owner will bridge the gap" between the plaintiff's and the defendant's markets; (5) "actual confusion"; (6) "the reciprocal of [the] defendant's good faith in adopting its own mark"; (7) "the quality of [the] defendant's product"; and (8) "the sophistication of the buyers."[29]

As to the other main federal cause of action under the Lanham Act, trademark dilution, it expressly serves—as discussed above—to protect famous and distinctive trademarks from tarnishment and blurring, whether there is (likely or actual) confusion, competition, or economic injury.[30] Dilution by tarnishment is defined as an "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark."[31] The court in *Deere & Co. v. MTD Products, Inc.* articulated that tarnishment generally occurs when the "plaintiff's trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner's product."[32] Consequently, it stated that,

> [i]n such situations, the trademark's reputation and commercial value might be diminished because the public will associate the lack of quality or lack of prestige in the defendant's goods with the plaintiff's unrelated goods, or because the defendant's use reduces the trademark's reputation and standing in the eyes of consumers.[33]

Thus, the key question for tarnishment is whether the plaintiff's mark will suffer negative associations due to the way the defendant is using the mark.[34]

As for dilution by blurring, it is defined as an "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark."[35] The court in *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC* further elaborated that blurring occurs "when consumers mistakenly associate a famous mark with goods and services of a junior mark, thereby

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[28] 287 F.2d 492, 495 (2d Cir. 1961). For an overview of different circuits' tests, see 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:31-43 (5th ed. 2023).

[29] *Polaroid*, 287 F.2d at 495.

[30] 15 U.S.C. § 1125(c)(1).

[31] *Id.* § 1125(c)(2)(C).

[32] 41 F.3d 39, 43 (2d Cir. 1994).

[33] *Id.*

[34] Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497, 507 (2d Cir. 1996).

[35] 15 U.S.C. § 1125(c)(2)(B).

diluting the power of the senior mark to identify and distinguish associated goods and services."[36] Moreover, dilution by blurring is described as "the whittling away of [the] established trademark's selling power and value through its unauthorized use by others."[37]

In 2006, after the Supreme Court held in *Moseley v. V Secret Catalogue, Inc.* that actual dilution is required for a plaintiff to prevail in a cause of action for trademark dilution, Congress revised the Dilution Act to eliminate that requirement.[38] It passed the Trademark Dilution Revision Act, which enables trademark owners to obtain injunctions against an unauthorized third-party use that is *likely* to cause dilution.[39] This change toward plaintiffs needing only to prove a likelihood of dilution represented another important victory for trademark owners looking to protect their famous marks from trademark dilution. As the court stated in *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, the Trademark Dilution Revision Act "allowed famous mark owners to 'prevent dilution at its incipiency' and not force them to 'wait until the harm has advanced so far that . . . the recognition of the mark . . . is permanently impaired' in order to sue."[40]

Nonetheless, the threshold for establishing a cause of action for trademark dilution remains the same: the mark must be famous. The Lanham Act states that a mark is deemed famous "if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner."[41] The ability to protect trademarks has only gained increased significance with the prominent use and advertising of specific brands in online environments such as social media.

II. SOCIAL MEDIA AND BRAND PROMOTION

Underlying trademark owners' desire to have as strong protections as possible via infringement and dilution legislation is the role of brands in their portfolios. As one of us has written before, "[b]rands are created for reputational gain as well as for a company's financial gain," and companies invest significant time, energy, and resources in developing, enhancing, and protecting their brands.[42] Moreover,

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[36] 464 F. Supp. 2d 495, 504 (E.D. Va. 2006).

[37] Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d 93, 111 (2d Cir. 2010) (alteration in original).

[38] 537 U.S. 418 (2003); Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730.

[39] Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 736 F.3d 198, 202 (2d Cir. 2013).

[40] *Id.* at 206 (alterations in original) (quoting *Committee Print to Amend the Federal Trademark Dilution Act: Hearing Before the H. Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm on the Judiciary*, 108th Cong. 10 (2004) (statement of Jacqueline A. Leimer, INTA)).

[41] 15 U.S.C. § 1125(c)(2)(A); *see also* Linford & Nelson, *supra* note 13, at 179–90 (explaining that fame turns on the relative prominence and singularity of the brand).

[42] Irina D. Manta, *Branded*, 69 SMU L. REV. 713, 746 (2016).

"[b]rands that contain trademarks form a significant part of the market economy"[43] and "at times the trademarked elements they contain have become the most significant assets of many corporations."[44] When Frank Schechter famously advocated for protection against dilution, he emphasized that trademarks are not just symbols of goodwill but in fact agents to create goodwill,[45] and that marks sell goods, with more distinctive marks doing so more effectively.[46] This has never been truer than today, with marks prominently displayed and used on social media.

This Part highlights the importance of the relationship between the strength of brands and their appearance on social media, with a focus on the role of hashtags in brands' personas. It also explains the status of hashtags-as-marks in the trademark legal arena, in particular when it comes to the ability to register such marks. Last, it gives examples of viral campaigns embedding trademarks within both flattering and unflattering hashtags and the consequences for mark owners.

A. The Rise of Social Media

Social media is not only the "modern public square," but also the new marketplace—a complex, multilayered technological advancement that has significantly transformed the way individuals communicate, share information, and connect with each other.[47] In the past decade or thereabouts, social media has been the focus of how businesses seek to build ties with their consumers as the global social commerce industry will likely grow at triple the rate of traditional e-commerce to reach $1.2 trillion by 2025.[48] As one can see, while the modest roots of social media can be traced back to the early days of the internet, social media sites have exploded over the years.

Early sites from Sixdegrees.com in 1997 to Friendster in 2002 are often considered the ones that cemented the way for modern social networking platforms.[49] For example, Six Degrees allowed users to connect with friends and create personal profiles whereas Friendster let users post status and mood updates.[50] Although

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[43] *Id.* at 757.

[44] *Id.* at 735.

[45] Schechter, *supra* note 14, at 818.

[46] *Id.* at 819.

[47] Packingham v. North Carolina, 582 U.S. 98, 107 (2017). *See generally* Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J. F. 427 (2021).

[48] *Shopping on Social Media Platforms Expected to Reach $1.2 Trillion Globally by 2025, New Accenture Study Finds*, ACCENTURE (Jan. 4, 2022), https://newsroom.accenture.com/news/2022/shopping-on-social-media-platforms-expected-to-reach-1-2-trillion-globally-by-2025-new-accenture-study-finds [https://perma.cc/M48S-H2MY].

[49] danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUT.-MEDIATED COMMC'N 210, 214–16 (2007).

[50] *See* Camille Fine, *From Vine to Friendster, A Look Back on Defunct Social Networking Sites We Wish Still Existed*, USA TODAY (Aug. 14, 2023, 9:00 AM), https://www.usatoday

Friendster faced many challenges and eventually declined, it set a bigger stage for the social networking expansion that has become a monumental component in the global economy.[51] Friendster's concept led to the founding of MySpace in 2003, followed by Facebook in 2004.[52] Arguably, Facebook catapulted social media into what it is today—globally prevalent and a force with which brands and trademark law have had to reckon for better or for worse.

1. The Emergence of Hashtags on Social Media

As other popular social networking sites followed—including YouTube, Twitter, Instagram, and TikTok—the rise of social media in turn gave rise to an instrumental tool that has significantly shaped the way that people discover, share, and engage with online content: hashtags. The concept of a hashtag is denoted by the "#" symbol and followed by a keyword or phrase.[53] It is said to have originated on Twitter in 2007 with user Chris Messina, but to have been adopted shortly after by Twitter itself during the San Diego County fire, when it used the hashtag #sandiegofire to allow its users to track updates and conversation about the fire.[54] After hashtags gained popularity on Twitter's platform, other sites including Instagram and Facebook adopted the use of hashtags, and since then, they have become a ubiquitous feature across various social media services, allowing users to categorize and discover content easily.[55]

Since their emergence, hashtags, in consort with social media, have had a profound impact on various aspects of society, including communication, marketing, politics, and culture. With millions of hashtags shared every day, the hashtag has become a powerful tool that facilitates global connections, transforms business practices, and even shapes public discourse.[56] For example, it played a significant role in bringing attention to the #MeToo movement, #BlackLivesMatter rallies, and even #FreeBritney.[57] Unquestionably, the use of such hashtags allowed these

.com/story/tech/2023/08/14/list-of-memorable-failed-social-media-sites/70509601007/ [https://perma.cc/DQS4-HW5W].

[51] *Id.*

[52] James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1144 (2009).

[53] *See* Erin Black, *Meet the Man Who 'Invented' the #Hashtag*, CNBC (Apr. 30, 2018, 7:09 PM), https://www.cnbc.com/2018/04/30/chris-messina-hashtag-inventor.html [https://perma.cc/3YJ2-8857].

[54] Ben Panko, *A Decade Ago, the Hashtag Reshaped the Internet*, SMITHSONIAN MAG. (Aug. 23, 2017), https://www.smithsonianmag.com/smart-news/decade-ago-hashtag-reshaped-internet-180964605/ [https://perma.cc/K258-4MC8].

[55] *Id.*

[56] *Id.*

[57] *See* JoAnne Sweeny, *The #MeToo Movement in Comparative Perspective*, 29 AM. U. J. GENDER, SOC. POL'Y & L. 33, 34–36 (2020); Ho-Chun Herbert Chang et al., *#Justicefor*

movements to gain traction and visibility on a global scale and provide people with a way to connect with each other and support these causes in unprecedented ways.

2. The Proliferation of Hashtags Involving Brands on Social Media

Not surprisingly, businesses also quickly recognized the potential of hashtags as a marketing tool and wasted no time capitalizing on it. Some of the most famous brands' owners, including those of McDonald's and Coca-Cola, have used hashtags to connect with consumers and promote their brands on social media.[58] Others created custom hashtags to promote campaigns, contests, and events, and hashtags' use officially "exploded" in 2011.[59] For example, McDonald's posted its first hashtag in 2012, #McDStories, to have consumers share their stories and experiences.[60] Audi was the first to air a Super Bowl commercial that included reference to a hashtag, and by 2013 half of all such commercials had one.[61] Whether they "love[d] them or hate[d] them, marketers [could] no longer ignore them" and hence, the use of trademark-related hashtags on social media rose exponentially.[62]

Hashtags used in connection with goods or services are everywhere now. They have become an important and permanent element of branding and marketing strategy. From well-established brands to startup companies, various entities are using them

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GeorgeFloyd: How Instagram Facilitated the 2020 Black Lives Matter Protests, 17 PLOS ONE (Nov. 12, 2022), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9728865/ [https://perma.cc/XG9A-9GNZ]; Jamillah Bowman Williams et al., *#BlackLivesMatter—Getting from Contemporary Social Movements to Structural Change*, 12 CALIF. L. REV. ONLINE 1, 2–10 (Nov. 1, 2021), https://www.californialawreview.org/online/blacklivesmattergetting-from-contemporary-social-movements-to-structural-change [https://perma.cc/956W-UTQL]; Elizabeth Chuck, *#BlackLivesMatter: How a Hashtag Became a Digital Civil Rights Anthem*, NBC NEWS (Aug. 11, 2015, 12:56 PM), https://www.nbcnews.com/news/nbcblk/blacklivesmatter-how-hashtag-became-digital-civil-rights-anthem-n405316 [https://perma.cc/7CMW-HBDS]; Blake Morgan, *What the #FreeBritney Movement Teaches About the Power of Community*, FORBES (Sept. 7, 2021, 6:07 PM), https://www.forbes.com/sites/blakemorgan/2021/09/07/what-the-freebritney-movement-teaches-about-the-power-of-community/?sh=61b207a23fae [https://perma.cc/T7T3-LS55]. *See generally* Alyssa Hasegawa Smith et al., *You Want a Piece of Me: Britney Spears as a Case Study on the Prominence of Hegemonic Tales and Subversive Stories in Online Media*, 28 FIRST MONDAY 1, 6–14 (Dec. 7, 2023), https://doi.org/10.5210/fm.v28i12.13314 [https://perma.cc/49R3-UD7E].

[58] *See, e.g.*, Robert T. Sherwin, *#HaveWeReallyThoughtThisThrough?: Why Granting Trademark Protection to Hashtags Is Unnecessary, Duplicative, and Downright Dangerous*, 29 HARV. J.L. & TECH. 455, 473, 476–77 (2016).

[59] *Id.* at 463.

[60] *Id.* at 456. This campaign did not necessarily have the intended positive effects, see *infra* Section II.B.2.

[61] Sherwin, *supra* note 58, at 463.

[62] *Id.* at 464.

on social media to connect with their target consumers. In 2014, even Merriam-Webster announced that it would add the word "hashtag" to its dictionary.[63] It is officially defined as "a word or phrase preceded by the symbol # that classifies or categorizes the accompanying text (such as a tweet)."[64] Then, in 2017, Twitter put into perspective the number of hashtags shared every day when it reported an astonishing 125 million shares a day, with some hashtags exceeding a billion such shares.[65]

3. Federal Registration of Hashtags as Trademark

The increased usage of trademark hashtags on social media associated with goods and services subsequently led companies to file a number of new related trademark applications with the USPTO.[66] Given the branding power that hashtags possess, and the "amount of resources that [businesses] invest" in social media marketing campaigns to promote their products, services, or events, seeking federal trademark registration is a logical next step for companies.[67] It is a way for them to further protect their brand and secure their mark from infringement and dilution.

However, while it may be an advantageous approach for companies to protect their brands on social media, not all hashtags containing a trademark are registrable. According to the USPTO's *Trademark Manual of Examining Procedure*, "[a] mark consisting of or containing the hash symbol (#) or the term HASHTAG is registrable as a trademark or service mark only if it functions as an identifier of the source of the applicant's goods or services."[68] The manual further states that determination for hashtag registration should proceed on a case-by-case basis.[69] It also cautions that "[w]hen examining a proposed mark containing the hash symbol, careful consideration should be given to the overall context of the mark, the placement of the hash symbol in the mark, the identified goods and services, and the specimen of use, if

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[63] Randy Michels, *Branded Hashtags: The Next Big Thing?*, WIPO MAG. (Sept. 2014), https://www.wipo.int/wipo_magazine/en/2014/05/article_0008.html [https://perma.cc/8WMN-D88J].

[64] *Hashtag*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/hashtag [https://perma.cc/7VYN-LFJL] (last visited Feb. 19, 2025).

[65] Brett Molina, *Want to Feel #Old? This Is the First Tweet with a Hashtag*, USA TODAY (Aug. 23, 2017, 2:18 PM), https://www.usatoday.com/story/tech/talkingtech/2017/08/23/twitter-hashtag-turns-10/592868001/ [https://perma.cc/AK6H-SSAR].

[66] Elizabeth A. Falconer, *#CanHashtagsBeTrademarked: Trademark Law and the Development of Hashtags*, 17 N.C. J.L. & TECH. ONLINE 1, 7 (2016).

[67] Alexandra J. Roberts, *Tagmarks*, 105 CALIF. L. REV. 599, 600–01 (2017).

[68] U.S. PATENT & TRADEMARK OFF., § 1202.18 HASHTAG MARKS, TRADEMARK MANUAL OF EXAMINING PROCEDURE (Nov. 2024) [hereinafter TRADEMARK MANUAL OF EXAMINING PROCEDURE].

[69] *Id.*

available."[70] Notably, a "HASHTAG combined with wording that is merely descriptive or generic for the goods or services, or fails to function as a trademark" will not be registered.[71]

Furthermore, when using a trademark within a hashtag, courts have differentiated between doing so to promote one's own goods or services versus for other purposes, such as referring to another's goods and services.[72] The latter use of trademarks within a hashtag can be grouped into two classes of a particular taxonomy: (1) consumer-generated hashtags and (2) citizen-generated hashtags.[73] Consumer-generated hashtags are those that comment on a producer's goods or services with or without incorporating the mark into the hashtag.[74] "Citizen-created hashtags" are those "[c]onnecting individuals with one another [and] serve as rallying cries for social justice or link reactions to current events."[75] With these, companies sometimes may seek to get involved after virality has been reached, such as the ALS Association attempting to register a trademark on #ALSIceBucketChallenge after having no involvement with the original phenomenon.[76] The ALS Association faced significant backlash from the general public for this and ended up cancelling its trademark application.[77]

Once any trademark is registered, the line is far from clear as to when infringement or dilution may occur in the context of hashtags, especially when considering the function of a hashtag, which is to categorize metadata that may confuse consumers in search of the brand or could tarnish the brand's goodwill.[78] Indeed, while some courts have been hesitant to uphold trademark registrations of hashtags due to functionality concerns, an entity that succeeds in its registration attempt could potentially make threats (against people who are continuing to use the hashtag as

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[70] *Id.*

[71] *Id.*

[72] *See, e.g.*, 3 Ratones Ciegos v. Mucha Lucha Libre Taco Shop 1 LLC, No. CV-16-04538-PHX-DGC, 2017 WL 4284570, at *3 (D. Ariz. Sept. 27, 2017); Align Tech., Inc. v. Strauss Diamond Instruments, Inc., No. 18-CV-06663-TSH, 2019 WL 1586776, at *5–6 (N.D. Cal. Apr. 12, 2019).

[73] Roberts, *supra* note 67, at 616, 619.

[74] *See id.* at 616–17 (explaining that some consumer-generated hashtags may criticize brands, such as #NBCFails or #ComcastSucks, some may show praise, such as #Linsanity instead of #JeremyLin, some may reflect creativity, such as #ThingsTimHowardCouldSave, and others may reference a brand but focus on a phenomenon rather than the brand itself, such as #AlexFromTarget).

[75] *Id.* at 619, 623 (including hashtags such as #BringBackOurGirls, #ICantBreathe, and #ALSIceBucketChallenge).

[76] *Id.* at 622–23.

[77] *Id.* at 623.

[78] Align Tech., Inc. v. Strauss Diamond Instruments, Inc., No. 18-CV-06663-TSH, 2019 WL 1586776, at *6–7 (N.D. Cal. Apr. 12, 2019).

part of a movement) by taking overly expansive interpretations of its legal rights.[79] Such concerns have led to objections to registering hashtags as trademarks.

4. Objections to Registering Hashtags as Trademarks

Despite registration occurring on a case-by-case basis with careful examination of hashtags, some intellectual property scholars have argued against the USPTO granting such trademark protection to hashtags.[80] Their arguments hinge on the notion that hashtag registration is both "unnecessary and unwise."[81] For one, the argument is that "offering protection to words and phrases prefaced with a '#' serves no purpose that is not already protected" and therefore it produces "no legitimate advantage to a marketer that it could not already obtain through traditional . . . registration."[82]

Additionally, since "slogans or other combinations of words have long been protected so long as they're used to identify and distinguish a seller's goods," the argument goes that hashtags containing trademark therefore are already protected.[83] For example, the hashtags #cokecanpics or #smilewithacoke do not need to be registered as trademarks because "Coca-Cola already has a trademark in the word 'Coke,' and thus any competitor who used '#cokecanpics' or '#smilewithacoke' would unquestionably be infringing Coca-Cola's trademark."[84]

Second, as to the argument of it being unwise for the USPTO to award federal trademark protection for hashtags, it rests in part on the theory that such protection would work in a way to quiet critics of the trademark holder. The concern has arisen that such protection will "make it easier to bully social media networks and users into silence when these 'trademarked' hashtags spark viral conversations that go off the tracks."[85] Furthermore, "[t]rademark owners might attempt to do that in a number of creative ways—perhaps by employing trademark dilution or initial-interest confusion theories. And while those theories may not ultimately be successful, they may nevertheless work by 'chilling' speech that is critical of the trademark holder."[86] The Lanham Act, however, explicitly states that, among other things, "[a]ny non-commercial use of a mark," "use in connection with . . . identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner," and "[a]ll forms of news reporting and news commentary"

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[79] Sherwin, *supra* note 58, at 490.

[80] *Id.* at 459.

[81] *Id.*

[82] *Id.* at 459, 475 (emphasis omitted).

[83] *Id.* at 470.

[84] *Id.* at 477.

[85] *Id.* at 475; *see also* Robert T. Sherwin, *Clones, Thugs, 'N (Eventual?) Harmony: Using the Federal Rules of Civil Procedure to Simulate a Statutory Defamation Defense and Make the World Safe from Copyright Bullies*, 64 DEPAUL L. REV. 823, 826–31 (2015).

[86] Sherwin, *supra* note 58, at 478.

are permissible rather than "actionable as dilution by blurring or dilution by tarnishment."[87] It is therefore an open question to what extent users would be chilled in their social media use, and some of it might depend on the level of knowledge they have about the law.

B. The Effect of Trademark Hashtags on Social Media

Hashtag registration arguably gives trademark owners and businesses some form of protection against some of the negative effects that arise when trademarks are used within a hashtag on social media. Fair use exclusions to trademark law, as discussed above, are at least meant to protect against chilling effects.[88] Whether registrability exists or not, however, trademark owners must think carefully about the advantages and harms that can come from use of their marks in hashtags. This Section discusses the highs and lows of the social media lives of these hashtags—with some of the situations initiated by the owners and others by third parties—before the next Part explores how brand owners can try to prevent some of the worst resulting harms.

1. The Good

As noted, the use of hashtags in brand promotion on social media can be a powerful and strategic tool for businesses. It encourages user participation and engagement, which fosters a sense of community among followers, and in turn serves as authentic endorsements for brands and their products and/or services. There are numerous success stories in which hashtags contribute to brand promotion. Take for example, Disney's collaboration with the Make-a-Wish Foundation. In celebration of "90 years of Mickey Mouse," back in 2018, Disney launched the #ShareYourEars campaign on social media.[89] For every photo shared with Mickey Mouse ears using that hashtag, Disney pledged to donate $5 to Make-A-Wish.[90] The campaign not only raised millions of dollars for a worthy cause,[91] making wishes come true for children with critical illnesses, but it also generated substantial social media buzz and positive brand sentiment.

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[87] 15 U.S.C. § 1125(c)(3).

[88] Sherwin, *supra* note 85, at 835, 841 ("[F]air use exists to maintain the delicate balance between encouraging original authors to create and encouraging secondary authors to benefit the public by building on that work.").

[89] *The Walt Disney Company and Make-A-Wish® Invite Fans to "Share Your Ears" to Help Grant Wishes in Celebration of 90 Years of Mickey Mouse*, WALT DISNEY CO. (Nov. 4, 2018), https://thewaltdisneycompany.com/the-walt-disney-company-and-make-a-wish-invite-fans-to-share-your-ears-to-help-grant-wishes-in-celebration-of-90-years-of-mickey-mouse/ [https://perma.cc/YMH7-4LLF].

[90] *Id.*

[91] *Disney and Make-A-Wish® Invite You to Share Your Ears*, MAKE-A-WISH, https://wish.org/shareyourears [https://perma.cc/P97D-CKVS] (last visited Feb. 19, 2025).

Another buzzworthy campaign that started with a hashtag on social media featured the Calvin Klein brand. Calvin Klein's #MyCalvins campaign encouraged users to share photos of themselves wearing Calvin Klein products.[92] The hashtag became widely popular on social media, with celebrities and influencers joining the trend.[93] While it started back in early 2014, it is still going strong and has led to "significant growth on Calvin Klein's social platforms."[94] The #MyCalvins campaign is another great example of the effects that hashtags have on social media when they effectively blend user-generated content with brand promotion. It was reported that the #MyCalvins campaign reached "a global audience surpassing 469 million fans, yielding 23.5 million fan interactions."[95]

Then there is the famous #ShareACoke campaign by Coca-Cola. After facing a steady decline for eleven years in a row, Coca-Cola launched the #ShareACoke hashtag as part of a bigger marketing campaign strategy to reverse its downward slide.[96] The company replaced its famous trademarked logo with popular names and encouraged people to share a Coke with friends or family whose names were on the bottles; the hashtag went viral, leading to increased user engagement, social media mentions, and sales.[97] Similarly, Nike's iconic "Just Do It" campaign has been instrumental in promoting the brand's values of determination and excellence.[98] Although the slogan was originally launched in 1988, the hashtag version of it has been used across various social media platforms, encouraging individuals to pursue their goals and overcome challenges while it subtly, yet effectively, promotes the Nike brand name.[99]

2. The Bad

Conversely, sometimes the use of hashtags can backfire when they are turned into "bashtags" for companies who seek to use them in brand promotion.[100] In 2012,

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[92] *#MyCalvins*, CALVIN KLEIN, https://www.calvinklein.us/en/mycalvins.html [https://perma.cc/N6Y2-7WPC] (last visited Feb. 19, 2025).

[93] Nicola Fumo, *Unpacking Calvin Klein's Wildly Successful #MyCalvins Campaign*, RACKED (Oct. 15, 2015, 11:15 AM), https://www.racked.com/2015/10/15/9534325/calvin-klein-mycalvins-justin-bieber-kendall-jenner [https://perma.cc/7VNH-67FC].

[94] *Id.*

[95] *Id.*

[96] Mike Esterl, *'Share a Coke' Credited with a Pop in Sales*, WALL ST. J. (Sept. 25, 2014, 12:12 PM), https://www.wsj.com/articles/share-a-coke-credited-with-a-pop-in-sales-1411661519 [https://perma.cc/7AX3-CHH8].

[97] *Id.*

[98] Margaret A. Grogan, *The Psychological Power of a Marketing Slogan*, SAMFORD UNIV. (June 8, 2016), https://www.samford.edu/sports-analytics/fans/2016/the-psychological-power-of-a-marketing-slogan [https://perma.cc/LW9N-SJWN].

[99] *Id.*; Katarzyna Dereń, *How Effective Is Nike's Social Media Strategy? Report [2024]*, BRAND24 (Nov. 25, 2024), https://brand24.com/blog/nike-social-media-strategy/ [https://perma.cc/6EX3-GYE2].

[100] Kashmir Hill, *#McDStories: When a Hashtag Becomes a Bashtag*, FORBES (Apr. 15,

as part of an effort to encourage positive and heartwarming stories about its brand, McDonald's initiated the #McDStories hashtag campaign.[101] It intended for customers to share their positive experiences and fond memories associated with the brand, as part of a broader strategy to engage with customers on social media.[102]

However, the campaign quickly took an unexpected turn as users on Twitter began deploying the hashtag to share negative stories about their experiences with McDonald's (including quality issues or unsatisfactory service) and make other criticisms. For example, one read, "Dude, I used to work at McDonald's. The #McDStories I could tell would raise your hair," another, "I walked into McDonalds, and I could smell Type 2 diabetes floating in the air and I threw up. #McDStories," and another, "Ate a McFish and vomited 1 hour later . . . . The last time I got McDonalds was seriously 18 years ago in college."[103] In under two hours, it was reported that McDonald's "pulled the campaign."[104] Yet, despite terminating it on the company's end, the negative #McDStories continued.[105]

The New York Police Department (NYPD) faced a similar social media backlash when it attempted to launch a positive campaign using the hashtag #myNYPD. The campaign was intended to encourage users to share photos with police officers to promote a positive image of community engagement.[106] The hashtag quickly backfired when users began sharing photos depicting instances of alleged police misconduct, brutality, and negative encounters.[107] Instead of generating the intended positive content, the #myNYPD hashtag became a platform for users to criticize and bring attention to issues concerning the police department.[108]

Hence, the effect of using hashtags with trademarks on social media to promote brands can lead to enormous unanticipated problems for companies and other entities. While hashtags play a crucial role in brand promotion, these examples highlight only a portion of the challenges that businesses and organizations may face as a result of (legal or not) brand diminishments from the public, but the issue gets

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2014, 10:55 AM), https://www.forbes.com/sites/kashmirhill/2012/01/24/mcdstories-when-a-hashtag-becomes-a-bashtag/?sh=67e1cc6ded25 [https://perma.cc/URL3-NBT4]; Alexis C. Madrigal, *Neologism Watch: From Hashtag to Bashtag*, THE ATLANTIC (Jan. 24, 2012), https://www.theatlantic.com/technology/archive/2012/01/neologism-watch-from-hashtag-to-bashtag/251924/ [https://perma.cc/Y49Y-RV97] ("A bashtag is what happens when a company (McDonald's) tries to start a promotional hashtag (#McDStories) and users use it to hate on said company.").

[101] Hill, *supra* note 100.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] Jolie Lee, *NYPD's Twitter Campaign Backfires*, USA TODAY (Apr. 23, 2014, 9:24 AM), https://www.usatoday.com/story/news/nation-now/2014/04/23/nypd-twitter-mynypd-new-york/8042209/ [https://perma.cc/BN6V-PMAT].

[107] *Id.*

[108] *Id.*

uglier and murkier when the actions of the companies' own employees put brand reputation at risk.

3. The Ugly

It gets worse for companies trying to leverage social media for positive engagement and promotion that are harmed by the actions of their own employees. Such actions can have a significant impact on a company's brand image, and instances of inappropriate or controversial behavior can find their way quickly to social media, whether the employee behavior itself took place there or not. Given that social media platforms are the new norm regarding how individuals communicate, share information, and connect with each other, word of indiscretion can spread easily by just a share of a hashtag with a company's trademark attached, and pose a substantial harm to that company's brand reputation.

In 2022, the hashtag #WestElmCaleb launched a social media phenomenon and was dubbed "one of the latest trends to take social media by storm."[109] It started rather innocently, when a "TikTok user posted [a] video in which she joked about being 'ghosted' by a man named Caleb."[110] Although, "her video [was] not referring to the now infamous 'West Elm Caleb,' her post was quickly inundated with stories from other women in New York City about their terrible experiences with a man named Caleb who works at West Elm."[111] The common thread in all of their stories was that they were "love bomb[ed]" by an alleged serial dater, who expressed strong initial interest, prompted date plans, and ended up ghosting them.[112] In no time, this group of women on social media (who previously had not known each other) realized that they may have all been dating the same individual.[113] At least one woman stated that he had sent her an unsolicited picture of his genitals, which moved his behavior from the more pedestrian unethical into potential sexual harassment.[114]

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[109] Erika Wheless, *Why Brands Should Avoid 'West Elm Caleb' and Similar TikTok Trends*, AD AGE (Jan. 24, 2022), https://adage.com/article/digital-marketing-ad-tech-news/west-elm-caleb-tiktok-trend-why-brands-should-stay-away/2394586 [https://perma.cc/F9J9-D5UM].

[110] Noah Klein, *West Elm Caleb: The Right of Publicity and Why Brands Should Stay Away*, COLUM. J.L. & ARTS (Feb. 14, 2022), https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/493 [https://perma.cc/EBB8-3G55].

[111] *Id.*

[112] Anna Moiseieva, *What the Hell Happened: West Elm Caleb and NYC's Latest Dating Horror Story*, HARV. CRIMSON (Feb. 2, 2022), https://www.thecrimson.com/article/2022/2/2/west-elm-caleb-tiktok-love-bombing-explainer/ [https://perma.cc/BUR9-FR4B].

[113] Casey Fiesler, *What Tiktok's 'West Elm Caleb' Says About Dating, Social Media—and Us*, NBC NEWS (Jan. 26, 2022, 10:44 AM), https://www.nbcnews.com/think/opinion/what-tiktok-s-west-elm-caleb-says-about-dating-social-ncna1288021 [https://perma.cc/Y5B3-NMNW].

[114] *See* Gita Jackson, *'West Elm Caleb' Is Just Some Guy*, VICE (Jan. 21, 2022, 3:17 PM), https://www.vice.com/en/article/epxbyk/west-elm-caleb-is-just-some-guy [https://perma.cc/R4VP-SV9C].

Women uncovered his identity due to the playlist that he sent to several of them as well as his job title on dating profiles, that of furniture designer at West Elm, ultimately earning him the nickname "West Elm Caleb."[115] And unwittingly, West Elm's trademark and brand reputation became embroiled in the dating horror story that went viral as a result of the alleged actions of its employee.[116]

"#WestElmCaleb" not only went viral but sparked a lot of discussions in the mainstream media. The story was featured in magazines (including *Rolling Stone*), on *NBC News*, and in various local newspapers plus on podcasts.[117] Other brands sought to capitalize on the viral trend surrounding West Elm Caleb. For example, "Hellmann's Mayonnaise tweeted 'West Elm Caleb thinks mayo is spicy,'" Ruggable posted a TikTok video that stated "None of these rugs were designed by West Elm Caleb," and the dating app Keepler went all out.[118] It appeared to show on a TikTok post, "a large ad on the side of a building that said, 'Red Flags: 6'4, mustache, furniture designer.'"[119] "Although the text does not actually appear on the side of that building and is merely the result of savvy photoshopping by Keepler's PR team, the text of the ad is clearly a description of Caleb and the TikTok [video] features the hashtag '#westelmcaleb.'"[120] Additionally, the true identity of so-called "West Elm Caleb" came to light, and much of his personal information was "circulated across TikTok and his place of employment, West Elm, was repeatedly tagged in videos by commenters requesting a statement from them"[121] and calling for his termination.

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[115] Moiseieva, *supra* note 112.

[116] At least one marketer speculated that the West Elm brand benefited from this incident because it generated organic interest in West Elm (almost doubling its hashtag mentions on TikTok if one includes #westelmcaleb and increasing Google searches for "West Elm" by 36%), drowning out stories involving complaints about its products, and creating relevance for Gen Z individuals. *See* Mae Rice, *3 Ways West Elm Caleb Boosted West Elm's Brand*, MARKETERHIRE (Jan. 25, 2022), https://marketerhire.com/blog/how-west-elm-benefits-from-west-elm-caleb [https://perma.cc/7UXC-EFP6]. It is rather questionable, however, whether this translated into increased purchases at the furniture store.

[117] *See, e.g.*, Brittany Spanos, *The Internet Uproar Around West Elm Caleb Is Out of Control*, ROLLING STONE (Jan. 20, 2022), https://www.rollingstone.com/culture/culture-news/caleb-west-elm-dating-saga-1288386/ [https://perma.cc/9TEA-WJTA]; Fiesler, *supra* note 113; Milly Tamarez & Alise Morales, *UNLOCKED: Search History: West Elm Caleb*, GO TOUCH GRASS (Dec. 27, 2023), https://headgum.com/go-touch-grass/unlocked-search-history-west-elm-caleb [https://perma.cc/DY4P-Z5Y6].

[118] Klein, *supra* note 110.

[119] *Id.*

[120] *Id.*; *see also* Katie Hicks, *What West Elm Caleb Revealed About Brands' Desire To Go Viral*, MARKETING BREW (Feb. 3, 2022), https://www.marketingbrew.com/stories/2022/02/03/what-west-elm-caleb-revealed-about-brands-desire-to-go-viral [https://perma.cc/WX4H-KZNK].

[121] Moiseieva, *supra* note 112. Based on what appears to be "West Elm Caleb's" LinkedIn account, it seems that he continues working for the furniture company. *See Caleb Hunter*, LINKEDIN, https://www.linkedin.com/in/caleb-hunter/ [https://perma.cc/CN6J-PMH7] (last visited Feb. 19, 2025).

Another example of the negative impact that hashtags containing trademarks can have on brand reputation is #TinderSwindler. The brand Tinder found itself in the middle of a fraud scheme in a Netflix documentary called *The Tinder Swindler*. The documentary featured one of Tinder's account holders, Shimon Hayut, who went by Simon Leviev and exploited multiple women that he met on the Tinder dating app.[122] *The Tinder Swindler* gained significant attention for shedding light on the deceptive tactics used by Leviev to manipulate his dates emotionally and financially.

For example, posing as the son of wealthy diamond businessman Lev Leviev, he led the women to believe that they were in genuine romantic relationships with him and then fabricated elaborate stories to extract money from them.[123] In some instances, he would claim that it was for emergencies and that his enemies were after him,[124] sending convincing photos of his alleged bodyguard Peter with stitches on his forehead and a video of himself wearing a bloodstained T-shirt, sitting in an ambulance with Peter whom a nurse was treating.[125] Hayut apparently used these tactics to trick many women into sending him large sums of money and likely stole over ten million dollars in all.[126] Days after the documentary was aired, Tinder stated that the company removed his account and after conducting an internal investigation, none of his known aliases were active any longer on Tinder.[127]

While the documentary sparked significant discussions about the dangers of online dating, the importance of verifying information about individuals met online, and the need for caution when it comes to financial transactions, it created negative associations with Tinder's brand in the process. As a result of the documentary and ensuing social media discussions—where on Instagram alone, the hashtag

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[122] John DiLillo, *Who Is the Tinder Swindler?*, TUDUM BY NETFLIX (Feb. 14, 2022), https://www.netflix.com/tudum/articles/who-is-tinder-swindler-real-shimon-hayut [https://perma.cc/8WDD-6QU8].

[123] *See* Skyler Caruso, *'The Tinder Swindler' True Story: Everything to Know About Netflix's New True Crime Documentary*, PEOPLE (Feb. 3, 2022, 5:33 PM), https://people.com/crime/the-tinder-swindler-true-story/ [https://perma.cc/L56M-35E5].

[124] *See* Charissa Cheong, *Simon Leviev and the Women Who Accuse Him of Fraud Have Become Memes Online. Experts Say It's Our Way of Coping.*, BUS. INSIDER (Feb. 21, 2022, 9:24 AM), https://www.businessinsider.com/tinder-swindler-simon-leviev-internet-meme-2022-2 [https://perma.cc/U7UG-SP36].

[125] *See* Hayley Soen, *The Tinder Swindler Bodyguard Is Suing Netflix: Who Is Peter and Where Is He Now?*, THE TAB (Feb. 9, 2022), https://thetab.com/uk/2022/02/09/the-tinder-swindler-who-is-bodyguard-peter-where-is-he-now-netflix-239678 [https://perma.cc/Y7MR-ZFGK].

[126] *See* Carmela Chirinos, *The 'Tinder Swindler' Accused of Duping Women Out of $10 Million Falls for Instagram Scam*, FORTUNE (Mar. 3, 2022, 1:49 PM), https://fortune.com/2022/03/03/the-tinder-swindler-falls-for-instagram-scam/ [https://perma.cc/DXJ8-EBVH].

[127] Wilson Wong, *Simon Leviev, Subject of Netflix's 'Tinder Swindler,' Banned from Dating Apps*, NBC (Feb. 8, 2022), https://www.nbcnews.com/pop-culture/pop-culture-news/simon-leviev-subject-netflixs-tinder-swindler-banned-dating-apps-rcna15330 [https://perma.cc/H4C3-X46Y].

#TinderSwindler has appeared over twenty-one thousand times so far—Tinder will likely be associated with the derogatory term for a long time.[128] This is all occurring in a context in which Tinder has already received widespread criticism for its poor safety practices, and the company needs to consider which future viral campaign could be its ultimate undoing.[129]

III. LIABILITY IMPLICATIONS AND LIMITATIONS OF TRADEMARK-RELATED HASHTAGS ON SOCIAL MEDIA

There has been some speculation about the liability implications of trademark-related hashtags on social media, but precisely what liability can be triggered and what is the likelihood of success under the law remains a topic of exploration. Specifically, what actions (if any) could Tinder have taken to protect its brand against #TinderSwindler, or West Elm to enjoin the #WestElmCaleb hashtag, or what could any other entity have done for that matter whose reputation was negatively impacted as a result of the unauthorized use of its trademark in a hashtag on social media? As stated in Part II of this Article, the USPTO at times recognizes hashtags as a form of trademark.[130] As of 2013, if a hashtag serves the function of "an identifier of the source of the applicant's goods or services," the hashtag is considered a trademark.[131] Thus, this recognition implies that, in certain situations mentioned earlier, a business theoretically could pursue a trademark infringement or dilution claim for unauthorized use of its hashtag, as it would for a traditional mark, and barring fair use exceptions, could succeed. As this Article shows, however, these claims become more difficult to win when the company name is not the *only* element of the hashtag, and cases can be tough to crack even when a commercial entity (such as a competitor) uses a hashtagged or previously hashtagged compound term. This Part demonstrates that the Supreme Court's decision in *Jack Daniel's* does not resolve this problem in most cases.

A. Implications and Analysis of Trademark Infringement

Again, in a cause of action for trademark infringement, one of the main elements is that of likelihood of confusion. "Confusion as to source is the bête noire of

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[128] *See #tinderswindler*, INSTAGRAM, https://www.instagram.com/explore/tags/tinderswindler/top/ [https://perma.cc/U9YZ-VGMX] (last visited Feb. 19, 2025).

[129] The Australian government, for example, told dating apps including Tinder in September 2023 that they have until June 30, 2024, to improve their safety standards or they would face legislation. *See* Rod McGuirk, *Australia Tells Dating Apps to Improve Safety Standards to Protect Users from Sexual Violence*, AP NEWS (Sept. 18, 2023, 10:37 PM), https://apnews.com/article/australia-dating-apps-sexual-violence-2d64e40d09551e18ce7cf1c2d16a9989 [https://perma.cc/M9SU-8KWV].

[130] *See supra* Part II; TRADEMARK MANUAL OF EXAMINING PROCEDURE, *supra* note 68.

[131] TRADEMARK MANUAL OF EXAMINING PROCEDURE, *supra* note 68.

trademark law—the thing that stands directly opposed to the law's twin goals of facilitating consumers' choice and protecting producers' good will."[132] Given this standard, the question then becomes, how conceivable is it that a plaintiff will be able to meet the burden of proof in showing likelihood of confusion by use of hashtags bearing its trademark, but perhaps also containing other elements?

Most social media platform users, who are viewed as the consumers by companies, understand the way that hashtags work.[133] Unlike companies, which use hashtags mainly as a branding tool to indicate the source for their products or services, consumers are adept at using hashtags primarily as a tagging or categorization tool to connect with other users. They do not "perceive a tagmark as a source-indicator."[134] Considering this usage, combined with the fact that "[t]he phrase 'likelihood of confusion' means the consumer is misled as to the source of the goods or as to the 'sponsorship or approval of such goods,'" proving confusion or likelihood thereof becomes a challenging task.[135]

Although the USPTO has recognized that some hashtags can serve as trademarks, to what extent those hashtags receive trademark protection on social media is not yet settled by the courts. In *Eksouzian v. Albanese*, one of the questions that the district court considered is when is the use of a hashtag considered a "unitary mark" that could infringe on a trademark owner's rights and when is it considered a "merely descriptive" tool.[136] The court defined unitary mark as "a group of words or symbols that are considered a single trademark, that is, where the elements are so closely aligned and situated that the average consumer would view the group of words or symbols as a single trademark."[137] Further, the court reiterated that "if a mark consists of the hash symbol or the term HASHTAG combined with wording that is merely descriptive or generic for the goods or services, the entire mark must be refused as merely descriptive or generic."[138] In *Eksouzian*, the court ruled that the hashtag in question does not "constitute a unitary mark from the perspective of an average consumer in the marketplace,"[139] because it was used in the context of serving as "merely a functional tool . . . [and] not an actual trademark."[140]

On the contrary, in *Fraternity Collection, LLC v. Fargnoli*, Fraternity Collection, a company that "designs, manufactures, and sells shirts," sued a former fashion designer for using the "terms '# fratcollection' and '# fraternitycollection' in her

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[132] Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 147 (2023).

[133] Falconer, *supra* note 66, at 39–40.

[134] Roberts, *supra* note 67, at 655.

[135] Debbie Chu, *#CautionBusinesses: Using Competitors' Hashtags Could Possibly Lead to Trademark Infringement*, 25 CATH. U. J.L. & TECH. 387, 398 (2017).

[136] No. CV 13-00728-PSG-MAN, 2015 WL 4720478, at *1, *5 (C.D. Cal. Aug. 7, 2015).

[137] *Id.* at *2.

[138] *Id.* at *8.

[139] *Id.* at *6.

[140] *Id.* at *8.

social media accounts to promote her designs for the competitor."[141] Fraternity Collection claimed that the terms create consumer confusion and "deprive Fraternity Collection of business and goodwill" and sought damages under the Lanham Act for trademark infringement as well as false advertisement.[142] The federal district found for Fraternity Collection, holding that "hashtagging a competitor's name or product in social media posts could, in certain circumstances, deceive consumers."[143]

Then, in *Public Impact, LLC v. Boston Consulting Group, Inc*., in 2016, Public Impact, an education policy and management consulting firm that owns a federal registration for the mark PUBLIC IMPACT, sought a preliminary injunction against Boston Consulting Group (or BCG), arguing among other things that BCG "infringes its mark on the social media website Twitter by using '@4PublicImpact' as its username and the hashtag '#publicimpact' in its posts."[144] Here, the court reasoned that "[b]ecause BCG competes with plaintiff in offering similar education-related consulting services, its use of the same two words that constitute plaintiff's mark as a source-identifier would be concerning in any context where the words are used without other distinguishing features," and granted a preliminary injunction.[145] The court enjoined the defendant from using or displaying "'#publicimpact' as a hashtag on Twitter, or any other social media, or for any other purpose in the Market" as well as using or displaying "'@4PublicImpact' as a username on Twitter, or any other social media, or for any other purpose in the Market."[146]

However, in another hashtag trademark infringement case, *Webceleb, Inc. v. Procter & Gamble Co.*, the plaintiff owner of the trademark WEBCELEB brought suit against the defendant alleging trademark infringement because the defendant used the term "web celeb" as a category for a television show award.[147] The district court granted the defendant's motion for summary judgment and the Ninth Circuit affirmed, holding that the defendant's use of the mark constituted fair use as it "meets the classic fair use elements: (1) the use of the mark is not a trademark use; (2) the use is fair and in good faith; and (3) the use is only descriptive" and furthermore, "[n]o reasonable jury could find a trademark use here because defendants did not use 'web celeb' as a source identifier."[148] Thus, while the uses of hashtags, whether federally registered or not, can potentially lead to trademark infringement, bringing such actions may be more successful against other business competitors, rather than against third-party defendants such as ordinary social media users. Unlike competing brands, these social media users are not using trademark hashtags in

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[141] No. 3:13-CV-664-CWR-FKB, 2015 WL 1486375, at *1 (S.D. Miss. Mar. 31, 2015).
[142] *Id.* at *2.
[143] *Id.* at *4.
[144] 169 F. Supp. 3d 278, 284–85, 290 (D. Mass. 2016).
[145] *Id.* at 295, 297.
[146] *Id.* at 297.
[147] 554 F. App'x 606, 607 (9th Cir. 2014).
[148] *Id.*

commerce as source indicators but rather as descriptive terms or tools for organizing topics of discussion, and courts tend to view these as less likely to create confusion and constitute trademark infringement.

The trademark questions surrounding hashtags were preceded by case law about the use of trademarks in meta tags on webpages.[149] Meta tags are segments of data that appear on a webpage's source code that help a search engine understand what a webpage is about.[150] The "meta" in meta tags describes metadata, which is data that the meta tags provide, that being, data about the data on the webpage.[151] Typically, however, the earlier cases have found infringement that resulted in no more than an injunction ordering the removal of the meta tag, rather than monetary damages.[152]

Courts have generally held that the purchase of another's trademark as a search-engine keyword, or use of another's trademark in website metadata, may constitute "use in commerce" for infringement purposes.[153] For example, in *Government Employees Insurance Co. v. Google Inc.*, the Eastern District of Virginia held that Google's use of the "GEICO" trademark to sell advertisements on its search engine constituted infringement since Google sold and made money when using the mark.[154] There, and in the majority of circuits, the crux of the "use in commerce" requirement for trademark infringement concerns whether another has *profited* from the use of

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[149] *See, e.g.*, Brookfield Communc'ns, Inc. v. W. Coast Ent. Corp., 174 F.3d 1036, 1041 (9th Cir. 1999); Roberts-Gordon, LLC v. Superior Radiant Prods., Ltd., 85 F. Supp. 2d 202, 205–07 (W.D.N.Y. 2000); Niton Corp. v. Radiation Monitoring Devices, Inc., 27 F. Supp. 2d 102, 104 (D. Mass. 1998); Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 459, 465 (7th Cir. 2000) (stating that use of the "Prozac" trademark in meta tags of Natural Answers' website promoting Prozac substitute "Herbrozac" evidenced wrongful intent and bad faith); Florists' Transworld Delivery, Inc. v. Original Florist & Gifts, Inc., No. 00 C 4458, 2000 WL 1923321, at *4–5 (N.D. Ill. Nov. 9, 2000) (explaining why the district court refused to shut down a website once infringing marks in text and meta tags were removed based upon the fact that search engines will often bring up obsolete webpages as a result of old "crawl" results); Playboy Enters., Inc. v. AsiaFocus Int'l, Inc., No. Civ.A. 97-734-A, 1998 WL 724000, at *3 (E.D. Va. Apr. 10, 1998) (infringing use of the "Playboy" and "Playmate" trademarks in the domain name and meta tags of the "Asian-Playmates.com" and "Playmates-Asian.com" websites); Playboy Enters., Inc. v. Terri Welles, Inc., 78 F. Supp. 2d 1066, 1095–96 (S.D. Cal. 1999) (holding that a former Playmate of the Year made fair use of the "Playboy" and "Playmate" trademarks in the text and meta tags of her website); Bihari v. Gross, 119 F. Supp. 2d 309, 322–23 (S.D.N.Y. 2000) (finding fair use of the service mark "Bihari Interiors" in the text and meta tags of a website disparaging Marianne Bihari's interior design business); Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp. 2d 1161, 1168 (C.D. Cal. 1998) (finding fair use of "Bally's sucks" in webpage and meta tags).

[150] *Meta Tags—How Google Meta Tags Impact SEO*, WORDSTREAM, https://www.wordstream.com/meta-tags [https://perma.cc/J2WW-CBDS] (last visited Feb. 19, 2025).

[151] *Id.*

[152] *See, e.g.*, *Brookfield*, 174 F.3d at 1066–67.

[153] *See, e.g.*, Government Employees Ins. Co. v. Google, Inc., 330 F. Supp. 2d 700, 703–04 (E.D. Va. 2004).

[154] *Id.*

the mark.[155] Hence, similarly to the hashtag context, courts are most interested in commercial use by competitors.

Additionally, traditional infringement is seldom actionable concerning meta tags because internet consumers looking for a particular trademarked good or service via a search engine will know which website they are visiting and will generally not be confused as to the source or origin of the goods or services bearing the infringing mark.[156] Outside of "traditional" infringement, several courts have ruled that "initial interest confusion" is actionable under the Lanham Act, stating that federal trademark law and state unfair competition laws do in fact protect against this form of confusion.[157] This distinction, addressed in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.* in the Ninth Circuit, pertained to whether trademark use within meta tags creates consumer confusion via "initial interest confusion."[158]

As detailed in *Brookfield*, the initial interest confusion analysis is different from the traditional "likelihood of confusion" analysis.[159] Using the facts of *Brookfield* as an example, the "westcoastvideo.com" and "moviebuff.com" domains likely would not create prima facie consumer confusion because of the differences between the domain names.[160] However, under the initial interest confusion analysis, an individual's use of a trademark within a website meta tag *could* create actual consumer confusion because the meta tag will redirect website traffic and lead consumers to a dissimilar website.[161] If West Coast Video embedded the "MovieBuff" mark on its website's meta tags, users searching for "MovieBuff" may be directed to westcoastvideo.com, thus creating actual consumer confusion.[162] Hence, while the marks themselves are not similar, the use of "Moviebuff" in an effort to redirect internet traffic undoubtedly, as the court states, will result in "initial interest confusion."[163] Even though there is no source confusion in the traditional sense, "the use of another's trademark in a manner calculated 'to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement.'"[164]

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[155] *Id.* There is some question as to whether this will change in the future after the Supreme Court's recent decision in *Arbitron Austria GmbH v. Hetronic International, Inc.*, 600 U.S. 412 (2023). I would like to thank Jake Linford for our conversation on this topic.

[156] *See Brookfield*, 174 F.3d at 1044–45, 1055 (applying the theory of initial interest confusion to infringing meta tag use).

[157] *Id.* at 1063.

[158] *Id.* at 1061–62.

[159] *Id.* at 1062 n.24.

[160] *Id.* at 1061–62.

[161] *Id.* at 1065.

[162] *Id.* at 1062.

[163] *Id.*

[164] *Id.* (quoting Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1405 (9th Cir. 1997)).

However, claims of "initial interest confusion" often run into trouble under the eighth *Polaroid* factor,[165] which weighs the sophistication of purchasers when comparing the two marks, and have been met with scholarly skepticism generally.[166] In *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, however, the Second Circuit affirmed the district court's contention that "even though defendant's business is transacted in large quantities only with sophisticated oil traders, there is still and nevertheless a likelihood of confusion," when one focuses upon the probability that potential purchasers would be misled into an initial interest in Pegasus Petroleum.[167] Regardless, as stated in *Brookfield*, "[u]sing another's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store," although "[c]ustomers are not confused in the narrow sense . . . initial consumer confusion . . . would be misappropriating [the company's] acquired goodwill."[168] Today, courts generally require a showing of intentional deception to prove initial interest confusion;[169] indeed, a 2018 district court case in New York City did not even find such confusion where a charity purchased another charity's marks such as "Alzheimer's Association" as keywords in internet searches.[170]

Case law concerning the use of trademarks in hashtags (whether analyzing the existence of traditional or initial interest confusion) is rare, and no appellate court has decided a case in which an individual used a trademark in a hashtag. However, courts have found consumer confusion where a company selling similar goods has used a competitor's hashtag when advertising.[171] In *3 Ratones Ciegos v. Mucha Lucha Libre Taco Shop 1 LLC*, the district court held that the plaintiff, who was the owner of the "Libre Gourmet Taco Shop," "Lucha Libre Taco Shop," and "Lucha Libre" marks, stated a plausible claim for trademark infringement by demonstrating, in part, instances of actual confusion by consumers in Instagram posts when using

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[165] Epic Sys. Corp. v. YourCareUniverse, Inc., 244 F. Supp. 3d 878, 902 (W.D. Wis. 2017) ("[P]urchasing decisions at issue in this case involve sophisticated consumers making expensive purchases often over a long period of time after acquiring much information. All of these factors counsel against the possibility that initial interest confusion is at all likely.").

[166] *See id.*; ANNE GILSON LALONDE & JEROME GILSON, 1A GILSON ON TRADEMARKS § 5.14 (2024) ("Technology lawyer, professor, and smart blogger Eric Goldman has long decried initial interest confusion as 'a misguided doctrine that is too easy for plaintiffs to weaponize.'"); Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 144–45 (2005); Michael Grynberg, *The Road Not Taken: Initial Interest Confusion, Consumer Search Costs, and the Challenge of the Internet*, 28 SEATTLE U. L. REV. 97, 135–36 (2004).

[167] 818 F.2d 254, 260 (2d Cir. 1987).

[168] *Brookfield*, 174 F.3d at 1064.

[169] *See, e.g.*, Savin Corp. v. Savin Grp., 391 F.3d 439, 462 n.13 (2d Cir. 2004).

[170] *See* Alzheimer's Disease & Related Disorders Ass'n v. Alzheimer's Found. Am., 307 F. Supp. 3d 260, 299 (S.D.N.Y. 2018).

[171] *See* 3 Ratones Ciegos v. Mucha Lucha Libre Taco Shop 1 LLC, No. CV-16-04538-PHX-DGC, 2017 WL 4284570, at *4 (D. Ariz. Sept. 27, 2017).

#luchalibretacoshop and #luchalibre when referring to one or more of the defendant's shops.[172] The marks in *Mucha Lucha* concerned similar goods and services, and therefore consumer confusion based on the similar nature of the products—that is, tacos and other "Mexican food in 'lucha libre' themed eateries"—is more likely.[173] That said, the use of "parody marks" is unlikely to cause confusion when it comes to competing products because, as the Court stated in *Jack Daniel's*, a brand is unlikely to use its trademark for self-mockery,[174] and the same is likely true when a hashtag warns about an undesirable employee (West Elm Caleb) or product user (Tinder Swindler).

Likewise, under the *Albanese* line of cases, had the owners of the registered marks West Elm® and Tinder® brought claims against individuals using these terms in the hashtags #WestElmCaleb and #TinderSwindler to generate a mass of individuals behind a social movement, they most likely would not have prevailed. A court would likely reason that no confusion would arise by the trademark's use in a hashtag because that hashtag serves the function of associating an individual to a particular set of actions, rather than the hashtag serving as a trademark. Indeed, it would be a challenging task to prove likelihood of consumer confusion, especially when the use of #WestElmCaleb and #TinderSwindler is detached from the goods and services offered under each mark. Even (or especially) if a mark *was* used in a hashtag that criticized the companies, such as #AllTinderMenSuck or #TinderBreedsCreeps, it would be hard to prove a likelihood of consumer confusion regarding the source of the goods or services.

Under the doctrine of initial interest confusion and the *Align* and *Mucha Lucha* cases, a hashtag with a trademark could create consumer confusion because the metadata of the warning hashtag will become mixed with the metadata of the company using its own mark in a hashtag. For instance, suppose Tinder and West Elm decided to generate an advertisement campaign using hashtags of their trademarks. If a user commented #WestElmCaleb or #TinderSwindler on a West Elm or Tinder social media post, consumer confusion may become more likely because the #WestElmCaleb and #TinderSwindler metadata would now be associated with the company itself.

Using both hashtags—for example, #Tinder and #TinderSwindler—on the same post could place posts regarding the Tinder Swindler and posts by Tinder (the company) on the user's feed simultaneously and could therefore cause more consumer confusion under the initial confusion doctrine. In essence, a user who clicks on a #Tinder hashtag could be directed to posts about #TinderSwindler if the user of #TinderSwindler uses this hashtag in tandem with #Tinder. Even when considering that users may be sophisticated enough to know that Tinder would not use #TinderSwindler in their advertisements or posts, the ability to redirect website

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[172] *Id.* at *3–4.

[173] *Id.* at *3; *see also* Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 161 (2023).

[174] *See Jack Daniel's*, 599 U.S. at 161.

traffic by the mere use of Tinder's goodwill may satisfy initial consumer confusion and therefore demonstrate consumer confusion for infringement.[175]

Furthermore, given the social media frenzy that can be caused by the use of such hashtags—such as when several companies attempted to capitalize on the attention that #WestElmCaleb was receiving—brand owners like West Elm could arguably bring a trademark infringement or dilution claim against such other companies (for instance here, Hellmann's, Ruggable, and the dating app site Keepler) that used the original trademark in commercial materials without the owner's consent. While these companies might have tried and claimed that use of the mark is excluded from such claims on the grounds of fair use, arguing that it is criticism or parody, the Court in *Jack Daniel's* stated, "[t]he use of a mark does not count as noncommercial just because it parodies, or otherwise comments on, another's products."[176] Would instances of incorporating a trademark into a hashtag such as #WestElmCaleb and using it in some form even in advertising by competitors qualify as infringing or dilutive after *Jack Daniel's*, however? The next Section explores the state of trademark law both before and after the Supreme Court's latest pronouncement and expresses skepticism about trademark owners' general odds of success.

B. Implications and Analysis of Trademark Tarnishment

1. The Scope and Strength of Dilution Laws Pre–*Jack Daniel's*

Prior to *Jack Daniel's*, *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC* painted a less hopeful picture that trademark owners could turn to the dilution cause of action to protect their famous marks from tarnishment. In the said case, Louis Vuitton Malletier S.A. (Louis Vuitton), one of the most recognized luxury fashion

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[175] *See* Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp., 174 F.3d 1036, 1062 (9th Cir. 1999) ("Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using 'moviebuff.com' or 'MovieBuff' to divert people looking for 'MovieBuff' to its web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark.").

[176] *Jack Daniel's*, 599 U.S. at 145. It is not a stretch to imagine that consumers' views about a product are influenced by their opinion of a company or its employees, including allegedly misbehaving ones such as "West Elm Caleb." There is no question that *who* makes products matters to consumers, as one can perhaps see most strikingly in the context of consumers boycotting or protesting products made with child labor. *See, e.g.*, Katheryn Kattalia, *Retailers Such as Nike and Macy's Boycott Cotton from Uzbekistan to Protest Child Labor*, BUS. & HUM. RTS. RES. CTR. (July 7, 2011), https://www.business-humanrights.org/en/latest-news/retailers-such-as-nike-and-macys-boycott-cotton-from-uzbekistan-to-protest-child-labor/ [https://perma.cc/UHX8-PUMM]; Tom Polansek, *Tyson Food Workers, Activists Protest Child Labor in U.S. Meat Sector*, REUTERS (Oct. 17, 2023, 2:54 PM), https://www.reuters.com/world/us/tyson-foods-workers-activists-protest-child-labor-us-meat-sector-2023-10-16/ [https://perma.cc/J9WT-4YYD].

brands worldwide, famous for its high-end handbags and other fashion accessories, filed a lawsuit against Haute Diggity Dog, LLC, for trademark infringement and dilution of the Louis Vuitton marks.[177]

Haute Diggity Dog, LLC, a small, relatively low-level manufacturer of pet toys, thought it would be good business to design and sell a line of plush dog toys, "whose names parody elegant high-end brands."[178] For example, similar to VIP Products' items—the dog items of the defendant in *Jack Daniel's*—Haute Diggity Dog's products include "Chewnel No. 5 (Chanel No. 5), Furcedes (Mercedes), Jimmy Chew (Jimmy Choo), Dog Perignonn (Dom Perignon), Sniffany & Co. (Tiffany & Co.), and Dogior (Dior)."[179] The product at the center of this dispute, was "Chewy Vuiton," a plush toy designed to resemble a Louis Vuitton handbag.[180] It was not just any bag, but rather one of Louis Vuitton's most coveted designs at the time, the "Multicolor Murakami" bag, on which Louis Vuitton spent millions in advertising and protection against counterfeiting.[181]

The bag was featured in top magazines and adorned the hands of celebrities such as "Jennifer Lopez, Madonna, Eve, Elizabeth Hurley, Carmen Electra,"[182] and most recently Zendaya as it made its iconic return into the marketplace in 2025.[183] So, it is not hard to see why companies like Haute Diggity Dog would want to capitalize on the fame and fortune of the Louis Vuitton Malletier trademarks. This is one of many instances in which a company has tried to benefit from Louis Vuitton's good-will.[184] As the Supreme Court put it early on, "[i]f another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress."[185]

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[177] Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 464 F. Supp. 2d 495, 497–98 (E.D. Va. 2006).

[178] Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 258 (4th Cir. 2007).

[179] *Id.*

[180] *Id.* at 256.

[181] *Id.* at 257.

[182] *Id.*

[183] *See* Hannah Thompson, *Louis Vuitton Re-Launches Its Iconic Noughties Murakami Collection*, HARPER'S BAZAAR (Feb. 28, 2025), https://www.harpersbazaar.com/uk/fashion/fashion-news/a63303096/louis-vuitton-murakami-collection/ [https://perma.cc/42DL-A7QK].

[184] *See, e.g.*, Louis Vuitton Malletier, S.A. v. My Other Bag, Inc., 156 F. Supp. 3d 425, 430 (S.D.N.Y. 2016) (granting defendant's motion for summary judgment for parodic use of Louis Vuitton trademark on canvas tote bags); Patricia Hurtado, *U.S. Makes Biggest Seizure of Knock-Off Luxury Items at $1 Billion*, BLOOMBERG (Nov. 15, 2023), https://www.bloomberg.com/news/articles/2023-11-16/us-makes-biggest-seizure-of-knock-off-luxury-items-at-1-billion [https://perma.cc/TBA6-YENW] (describing massive seizure of counterfeits bearing the logos of Louis Vuitton and other luxury companies); *New Orleans Field Office Seizes $29.5 Million Worth of Counterfeits*, U.S. CUSTOMS & BORDER PROT. (May 18, 2023), https://www.cbp.gov/newsroom/local-media-release/new-orleans-field-office-seizes-295-million-worth-counterfeits [https://perma.cc/5AYQ-9BL6] (same).

[185] Mishawaka Rubber & Woolen Mfg. Co v. S.S. Kresge Co., 316 U.S. 203, 205 (1942).

Louis Vuitton argued that the "Chewy Vuiton" dog toy's design and name is likely to cause confusion and tarnish the reputation of its brand. In particular, it pointed out that Haute Diggity Dog was "using almost an exact imitation of the house mark VUITTON (merely omitting a second "T"), and they painstakingly copied Vuitton's Monogram design mark, right down to the exact arrangement and sequence of geometric symbols. . . . Moreover, HDD did not add any language to distinguish its products from Vuitton's."[186] Even the court (the Fourth Circuit Court of Appeals) acknowledged that the toys "undisputedly evoke LVM handbags of similar shape, design, and color."[187] Nevertheless, Haute Diggity Dog argued that their "Chewy Vuiton" dog toy was a parody and that consumers would not mistake their dog toy for an actual Louis Vuitton product.[188] It stated that "there is no evidence of confusion, nor could a reasonable factfinder conclude that there is a likelihood of confusion, because it successfully markets its products as parodies of famous marks such as those of LVM."[189] Additionally it claimed, "precisely because of the [famous] mark's fame and popularity . . . confusion is avoided."[190]

In the end, both the district court and the Fourth Circuit Court of Appeals ruled for the defendant, holding that Haute Diggity Dog's parody is successful and that "Chewy Vuiton" products do not create a likelihood of confusion.[191] It stated that "[n]o one can doubt that LVM handbags are the target of the imitation by Haute Diggity Dog's 'Chewy Vuiton' dog toys. At the same time, no one can doubt also that the 'Chewy Vuiton' dog toy is not the 'idealized image' of the mark created by LVM."[192] Yet, it went on to say that "('Chewy' is not 'LOUIS' and 'Vuiton' is not 'VUITTON,' with its two Ts); CV is not LV," referencing the mark designs on the dog toy and, that the satire of the "furry little 'Chewy Vuiton' imitation" is unmistakable.[193] Surely, those looking at this from the perspective of Louis Vuitton would beg to differ. Nonetheless, the Fourth Circuit's ruling on the infringement claim was a loss for the fashion giant.

Then, with regards to the claim of trademark dilution, the Fourth Circuit also held for the defendant in this case. Despite Louis Vuitton's argument that allowing the defendants to become the first to use imitations of the famous VUITTON marks will cause dilution of its famous marks as a matter of law, and despite the company contending that the lower court "utterly ignore[d] the substantial goodwill VUITTON has established in its famous marks through more than a century of *exclusive* use," the court held that such use "will not blur the distinctiveness of the famous mark as

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[186] *Louis Vuitton Malletier*, 507 F.3d at 259.
[187] *Id.* at 258.
[188] *Id.* at 256.
[189] *Id.* at 259.
[190] *Id.* (alterations in original).
[191] *Id.* at 262.
[192] *Id.* at 260.
[193] *Id.* at 260–61.

a unique identifier of its source."[194] The Fourth Circuit stated that since the defendant's uses of the marks were "not so similar," they would not likely impair "the distinctiveness of LVM's famous marks."[195] Even more disappointing from the perspective of trademark owners is the court's ruling that Louis Vuitton "failed to demonstrate a claim for dilution by tarnishment."[196] It called the argument put forth by Louis Vuitton "that a pet may some day choke on a Chewy Vuiton squeaky toy and incite the wrath of a confused consumer against LOUIS VUITTON" flimsy and unsupported.[197] Perhaps surprisingly, the inferior quality of the toy, its $10 price point, and its made-in-China tag[198] had no obvious bearing on the court's decision that this could dilute the aura of luxury surrounding the famous Louis Vuitton brand. Consequently, this ruling served a hard blow for owners of famous marks and thus, when the *Jack Daniel's* case was decided, it was met with a sigh of relief because it was seen as a big win for companies trying to protect their famous marks against infringement and dilution (and even the federal government expressed its approval of it).[199]

2. The Scope and Strength of Dilution Laws Post–*Jack Daniel's*

The Supreme Court's decision in *Jack Daniel's Properties v. VIP Products LLC* is remarkable on many grounds for companies seeking to protect their trademarks against infringement and dilution, but it is especially powerful in bolstering companies' ability to assert successful claims against third-party defendants for trademark tarnishment. In *Jack Daniel's Properties v. VIP Products LLC*, VIP Products (VIP) brought suit against Jack Daniel's, but things did not go as planned. VIP Products is a dog toy company that makes and sells chewable rubber toys for dogs.[200] "Most of the toys in the line are designed to look like—and to parody—popular beverage

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[194] *Id.* at 264–67.

[195] *Id.* at 268.

[196] *Id.* at 269.

[197] *Id.*

[198] *See* Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT'L L. 64, 65 (2010) ("Made-in-China products are popularly associated not only with low prices but also low product quality and irresponsible production processes.").

[199] Blake Brittain, *Biden Admin Backs Jack Daniel's in Supreme Court Dog-Toy Trademark Fight*, REUTERS (Jan. 19, 2023, 6:40 PM), https://www.reuters.com/legal/litigation/biden-admin-backs-jack-daniels-supreme-court-dog-toy-trademark-fight-2023-01-19/ [https://perma.cc/WS49-8PGD]; Chloe Kim, *Jack Daniel's and Dog Toy in Supreme Court Showdown*, BBC (Mar. 22, 2023), https://www.bbc.com/news/world-us-canada-65043219 [https://perma.cc/DL4T-M6Q3]. *See generally* Brief for the United States as Amicus Curiae Supporting Petitioner, Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140 (2023) (No. 22-148).

[200] *See Jack Daniel's*, 599 U.S. at 144.

brands" from Dos Perros, Stella Artois and Johnnie Walker.[201] For example, it calls the line parodied after Johnnie Walker "Doggie Walker" and has a registered trademarks in all such names under the umbrella term "Silly Squeakers."[202]

Jack Daniel's on the other hand, needs not much of an introduction. The brand is famous and well-known for selling whiskey. Its website states that the founder, "Jasper Newton Daniel, more commonly known as Jack, introduce[d] the world to Old No. 7, his signature charcoal-mellowed Tennessee Whiskey."[203] Any bottle of Jack Daniel's (or rather, Jack Daniel's Old No. 7 Tennessee Sour Mash Whiskey) features quite a few trademarks.[204] The name "'Jack Daniel's' is a registered trademark, as is 'Old No. 7.' So too the arched Jack Daniel's logo," "the stylized label with filigree," and finally, even "the whiskey's distinctive square bottle—is itself registered."[205]

However, this did not stop VIP from adding the "Bad Spaniels" toy to the line in 2014.[206] While VIP "did not apply to register the name, or any other feature of, Bad Spaniels," it admitted to owning and using both the "'Bad Spaniels' trademark and trade dress," which closely resemble those of Jack Daniel's "distinctive square bottle" and its trademarked label.[207] For example, the Court noted that "Bad Spaniels is about the same size and shape as an ordinary bottle of Jack Daniel's," and the labeling is the same black and white colors with the "stylized white text and a white filigreed border."[208] Instead of the words "Jack Daniel's," it reads "Bad Spaniels," and instead of "Old No. 7 Tennessee Sour Mash Whiskey," the toy bottle reads, "The Old No. 2 On Your Tennessee Carpet," and further states "'43% poo by vol.' and '100% smelly.'"[209]

In no way, shape, or parody did Jack Daniel's find what VIP was attempting to do funny. The company viewed these actions as trademark infringement and tarnishment and took swift action to prevent its famous brand from being harmed. It first sent VIP a letter demanding for VIP to quit selling the product.[210] However, VIP did not comply; rather, it responded by initiating a suit against Jack Daniel's, asking for a declaratory judgment that Bad Spaniels had "neither infringed nor diluted Jack Daniel's trademarks."[211] Jack Daniel's responded by counterclaiming "under the Lanham Act for both trademark infringement and trademark dilution by

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[201] *Id.* at 148–49.

[202] *Id.*

[203] *Born to Make Whiskey: The Story of Jack Daniel's*, JACK DANIEL'S, https://www.jackdaniels.com/en-us/our-story [https://perma.cc/YGU2-29TK] (last visited Feb. 19, 2025).

[204] *Jack Daniel's*, 599 U.S. at 148.

[205] *Id.*

[206] *Id.* at 149.

[207] *Id.* at 148–49.

[208] *Id.* at 149.

[209] *Id.* at 149–50.

[210] *Id.* at 150.

[211] *Id.*

tarnishment."[212] VIP argued that "Jack Daniel's infringement claim failed under [the *Rogers v. Grimaldi*] threshold test derived from the First Amendment to protect 'expressive works,'" because Jack Daniel's could neither show that VIP's use of its mark "'has no artistic relevance to the underlying work' [n]or that it 'explicitly misleads as to the source or the content of the work'"; hence, since "the likelihood-of-confusion issue became irrelevant," Jack Daniel's could not prevail on its trademark infringement claim.[213] Secondly, VIP argued that Jack Daniel's could not succeed on a dilution claim because Bad Spaniels was a "'parody[]' of Jack Daniel's, and therefore made 'fair use' of its famous marks."[214] The Supreme Court did not agree.

In a unanimous decision, the Supreme Court held for Jack Daniel's.[215] The Court decided that the *Rogers* test lacks merit "when an alleged infringer uses a trademark in the way the Lanham Act most cares about: as a designation of source for the infringer's own goods," and given that "VIP used the marks derived from Jack Daniel's in that way . . . the infringement claim here rises or falls on likelihood of confusion."[216] Furthermore, the Court stated that with the issue of infringement, the threshold *Rogers* inquiry applied in the Court of Appeals on the grounds of First Amendment protection "is not appropriate when the accused infringer has used a trademark to designate the source of its own goods—in other words, has used a trademark as a trademark. That kind of use falls within the heartland of trademark law, and does not receive special First Amendment protection."[217]

As for VIP's argument against the claim of dilution by tarnishment, the Court stated, "[t]he use of a mark does not count as noncommercial just because it parodies, or otherwise comments on, another's products."[218] The Court elaborated that the "'fair use' exclusion specifically covers uses 'parodying, criticizing, or commenting upon' a famous mark owner. But not in every circumstance."[219] In other words, not every parody counts as fair use. The Court clarified further that "the fair-use exclusion has its own exclusion: It does not apply when the use is 'as a designation of source for the person's own goods or services.' In that event, no parody, criticism, or commentary will rescue the alleged dilutor. It will be subject to liability regardless."[220]

Both the proponents and the opponents of the outcome in *Jack Daniel's* would agree on one thing: the decision has strengthened the rights of trademark holders.[221]

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[212] *Id.* at 150–51.
[213] *Id.* at 151 (quoting Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989)).
[214] *Id.* (alteration in original).
[215] *Id.* at 140.
[216] *Id.* at 153.
[217] *Id.* at 145.
[218] *Id.*
[219] *Id.* at 162 (citation omitted).
[220] *Id.* (citation omitted).
[221] *See, e.g.*, Lemley & Tushnet, *supra* note 1, at 123 (lamenting the Supreme Court's endorsement of the "ever-expanding scope of copyright and trademark infringement" at the expense of First Amendment values that would trump in other contexts).

This both has direct implications, such as for source-related parodic uses, and opens up larger questions as to how conservatively future courts will draw the boundaries of third-party uses of trademarks more generally. There is little indication, however, that this expansion will lead courts to place stringent limits on social media related uses that it has tolerated for some years now.

3. The Scope and Strength of Dilution Laws Against Individual Social Media Users

Regardless of what a big win the *Jack Daniel's* ruling is for companies and what it might say about the expansion of trademark rights, it is unlikely to robustly protect companies from the overall harm to brands that can arise from the use of a company's trademark within a hashtag when third-party defendants are individual users, such as the women responsible for launching #WestElmCaleb. Imagine the alternative scenario in which West Elm decided to take action and brought a claim of dilution against not only the businesses that used its trademark without consent, but also against these individual social media users, such as those who started #WestElmCaleb and tagged West Elm. One can picture the backlash that West Elm would have faced.

West Elm would instantly have been perceived as a villain. Not only might the public, including social media citizens, view West Elm as a "bully," trying to suppress speech, but even worse, they may see West Elm's action as hurting Caleb's alleged victims all over again.[222] Thus, it might be a losing battle no matter which way a company attempts to protect its trademark against the negative effects of a trademark-containing hashtag on social media.[223] Furthermore, fair use exclusions that survive after *Jack Daniel's* would have likely been implicated and would have protected users from such claims brought by the corporation, especially if the hashtag or movement also did not seek any monetary benefit.

Specific uses of another's mark may constitute legal fair use.[224] The first type is "classic fair use," which is a defense to infringement that applies when the junior user merely uses the mark to describe its own goods or services.[225] The other type of fair use is "nominative fair use," which, while not considered an affirmative defense in most circuits,[226] is described as the use of another's trademark to identify

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[222] *See* Jessica M. Kiser, *To Bully or Not to Bully: Understanding the Role of Uncertainty in Trademark Enforcement Decisions*, 37 COLUM. J.L. & ARTS 211, 223–24 (2014).

[223] *Id.*

[224] 15 U.S.C. § 1115(b)(4) (2018).

[225] *See id.*

[226] 1 CHARLES E. MCKENNEY & GEORGE F. LONG III, FEDERAL UNFAIR COMPETITION: LANHAM ACT 43(A) § 3:35 (West 2024); *see, e.g.*, Swarovski Aktiengesellschaft v. Bldg. No. 19, Inc., 704 F.3d 44, 50 (1st Cir. 2013); Grand v. Schwarz, No. 15-CV-8799, 2016 WL 2733133, at *4 (S.D.N.Y. May 10, 2016); Int'l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC, 823 F.3d 153, 166–68 (2d Cir. 2016); Century 21 Real Estate Corp. v.

the junior user's own goods or services.[227] In instances such as #WestElmCaleb and #TinderSwindler, a court could find that they constitute legal fair use because the use of these companies' trademarks within those hashtags can be deemed descriptive (they describe where Caleb works and to what app the Swindler is connected).

As one can see, there are many different types of uses of trademarks within hashtags, and different types of effects that these uses can have on trademark owners. Some are serious negative effects, as discussed in Part II. In the case of West Elm, however, while the jury is out on the full effects of #WestElmCaleb, had the company brought tarnishment claims against noncompetitor third-party users, it would have likely lost on multiple grounds despite the potential strengthening of protection against dilution in the case of parodies after *Jack Daniel's*. At the most basic level, the users would have mounted a fair use argument that such noncompetitor third-party use is protected under the exclusion of trademark dilution for being commentary, and the court would have probably found that the use of the hashtag #WestElmCaleb was "merely descriptive."[228] Moreover, even if, for argument's sake, West Elm could have prevailed in a court of law, it would have lost immensely in the court of public opinion. Thus, it was wise on its part to not bring any such action. Would a product disparagement claim have fared any better? The next Section analyzes this question.

C. Implications and Analysis of Product Disparagement

Even with claims for product disparagement, there is no clear win for companies seeking recourse in the circumstances mentioned above. Under the Lanham Act, the required elements for a successful product disparagement claim according to a New York court

> are that the defendant: (1) made material misrepresentations or descriptions about the nature or characteristics of either defendant's or plaintiff's goods, services or commercial activities, (2) used the false or misleading misrepresentations in commerce, (3) made the representations in the context of commercial advertising

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Lendingtree, Inc., 425 F.3d 211, 232 (3d Cir. 2005); Bd. of Supervisors of LA State Univ. v. Smack Apparel Co., 550 F.3d 465, 489 (5th Cir. 2008); Luxottica Grp. S.P.A. v. Atl. Sunglasses LLC, No. 4:15-CV-1795, 2017 WL 6885602, at *9 (S.D. Tex. Mar. 27, 2017); New Kids on the Block v. News Am. Pub., Inc., 971 F.2d 302, 306, 308 (9th Cir. 1992); Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1182 (9th Cir. 2010).

[227] *New Kids on the Block*, 971 F.2d at 306. This Article does not discuss nominative fair use further because it focuses on instances of descriptive fair use.

[228] *See* Eksouzian v. Albanese, No. CV 13-00728-PSG-MAN, 2015 WL 4720478, at *8 (C.D. Cal. Aug. 7, 2015).

> or commercial promotion, and (4) made the pleading party believe that it is likely to be damaged by the representations.[229]

It should also be noted here that

> [a]lthough the Lanham Act encompasses more than the traditional advertising campaign, the language of the Act cannot be stretched so broadly as to encompass all commercial speech. The ordinary understanding of both "advertising" and "promotion" connotes activity designed to disseminate information to the public. Thus, the touchstone of whether a defendant's actions may be considered "commercial advertising or promotion" under the Lanham Act is that the contested representations are part of an organized campaign to penetrate the relevant market.[230]

That being the case, businesses harmed by isolated disparaging statements do not have redress under the Lanham Act—they must seek redress under state-law causes of action.[231]

Section 43(a) of the Lanham Act "creates a cause of action for conduct that had traditionally been covered under the tort theory of 'injurious falsehood,' more specifically referred to as trade libel or product disparagement."[232] The mere publication of a false or disparaging statement, or even a statement that is true but misleading, can be a violation of § 43(a).[233] This is the case even if the party making the statement did not know that it was false or misleading, since it is a strict liability statute with particular elements meant to ensure that the law does not violate the free speech provisions of the First Amendment.[234] Representations need not be made in a "classic

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[229] Natural Organics, Inc. v. OneBeacon Am. Ins. Co., 102 A.D.3d 756, 759–60 (N.Y. App. Div. 2013) (citing 15 U.S.C. § 1125(a)); *see also* Lexmark Int'l., Inc. v. Static Control Components, Inc., 572 U.S. 118, 131–34 (2014) (ruling that plaintiffs' injuries need to fall into the zone of interest protected by the Lanham Act's false advertising provision and that plaintiffs must meet the provision's proximate causation requirement). We would like to thank Eric Goldman and Rebecca Tushnet for the conversations on this topic.

[230] *See* Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 57 (2d Cir. 2002) (citations omitted) (explaining that isolated disparaging statements are not actionable under the Lanham Act, but widespread disparaging statements may be); *see also* 15 U.S.C. § 1125(a)(1)(B).

[231] *See, e.g.*, Am. Needle & Novelty, Inc. v. Drew Pearson Mktg., Inc., 820 F. Supp. 1072, 1078 (N.D. Ill. 1993).

[232] Bradley C. Rosen, *Proof of Facts Establishing a Claim for Trade Libel or Product Disparagement Under § 43(a) of the Lanham Act, 15 U.S.C.A. Section 1125(a)*, 79 AM. JUR. PROOF OF FACTS 3D 1, § 1 (Sept. 2024); Whetstone Candy Co., Inc. v. Nat'l Consumers League, 360 F. Supp. 2d 77, 81, 81 n.5 (D.D.C. 2004).

[233] Am. Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 165 (2d Cir. 1978).

[234] *See* Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 559 (5th Cir. 2001).

advertising campaign," but may consist instead of more informal types of "promotion," and the representations must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.[235]

The Supreme Court has noted that commercial speech is, at its core, "speech which does 'no more than propose a commercial transaction.'"[236] Since the Supreme Court has stated that commercial speech is an "expression related solely to the economic interests of the speaker and its audience," others have noted that commercial speech may have less to do with what is said than one's motive for saying it.[237] Limiting actions brought under Section 43(a) to claims made by competitors ensures that its application does not "limit political speech, consumer or editorial comment, parodies, satires, or other constitutionally protected material."[238]

Product disparagement by tarnishment is actionable when the trademark is "portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner's products," not when the trademark is used as parody.[239] This is because strong adverse opinions about the product are entitled to free speech protections of the First Amendment.[240] Indeed, allegedly defamatory remarks transmitted through the internet by disenchanted consumers have rarely been sufficient to satisfy the "prudential standing" requirements of false or deceptive advertising.[241] Hence, even if contested representations disseminated to the public by consumers present an injury to their commercial interests, unless these consumers "sought to divert the plaintiffs' business to themselves or to personally reap any financial benefit[s] from their actions," the courts will not sustain commercial competitive harm.[242]

Thus, when analogized to a parody or the expression of a particular viewpoint on the company, the argument for tarnishment may be trumped by a strong First Amendment claim.[243] This is not to say that the user of a mark in a hashtag would

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[235] *Fashion Boutique of Short Hills*, 314 F.3d at 56.

[236] *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

[237] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[238] Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics, 859 F. Supp. 1521, 1533 (S.D.N.Y. 1994), *holding modified by Fashion Boutique of Short Hills*, 314 F.3d at 65 (alteration in original).

[239] Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302, 1339 (N.D. Ga. 2008); *see also* Louis Vuitton Malletier, S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 260 (4th Cir. 2007) (defining a successful parody).

[240] *Smith*, 537 F. Supp. 2d at 1339.

[241] *See, e.g.*, Nevyas v. Morgan, 309 F. Supp. 2d 673, 673 (E.D. Pa. 2004).

[242] *Id.* at 680.

[243] The court in *Smith* held that:

> [A] reasonable juror could only find that Smith primarily intended to express himself with his Walocaust and Wal-Qaeda concepts and that commercial success was a secondary motive at most. Smith has strongly

be able to register the mark, but non-commercial use is often permitted. If groups sought to capitalize and monetize #WestElmCaleb and #TinderSwindler, the companies might have a greater argument under dilution. Similarly, if the groups sought to not only monetize #WestElmCaleb and #TinderSwindler but also chose to disparage the marks for the purposes of harming the business reputation of these companies by influencing consumers to stop purchasing goods from West Elm or Tinder, West Elm and Tinder may have a cause of action under the product disparagement doctrine. Unlike in the *Smith* case, which involved one individual selling bumper stickers and posters, the creators of #WestElmCaleb and #TinderSwindler could arguably start a *mass* movement to protest the companies in question that is also commercial in nature and thus tilts the legal test in favor of the businesses.[244]

However, absent these types of facts, the use would likely be deemed permissible. Additionally, while the fact patterns above may not fall perfectly under the "humorous" category, the use of a mark to usher in a social movement would likely fall under a similar category of "noncommercial use." Nevertheless, due to the complex nature of social movements involving bringing together masses of people and millions of dollars, an argument could be made that a trademark under the "social movement" theory would generate similar commercial prominence as a parody mark, which can avoid liability via communication of a humorous message.[245] "Consequently, as the importance and value of hashtags continue to rise, the intellectual property implications that accompany that rise come into ever-increasing focus."[246]

Would West Elm have been able to proceed legally against Hellman's, Ruggable, or Keepler for their references to "West Elm Caleb"?[247] The answer is not

> adverse opinions about Wal-Mart; he believes that it has a destructive effect on communities, treats workers badly and has a damaging influence on the United States as a whole. He invented the term "Walocaust" to encapsulate his feelings about Wal-Mart, and he created his Walocaust designs with the intent of calling attention to his beliefs and his cause. He never expected to have any exclusive rights to the word. He created the term "Wal-Qaeda" and designs incorporating it with similar expressive intent. The Court has found those designs to be successful parodies.

537 F. Supp. 2d at 1340. The court reasoned that the First Amendment protects a parody that includes "noncommercial expression" if the primary purpose is expression. *Id.* at 1339.

[244] *See id.* at 1340.

[245] *See* Jack Daniel's Props., Inc. v. VIP Prods. LLC, 599 U.S. 140, 162 (2023).

[246] Sherwin, *supra* note 58, at 458.

[247] *See supra* Section II.B.3. Influencers and others who capitalize on virality present an interesting third category of entities in addition to private companies and social media users that do not seek out profit, to the extent that influencers indirectly profit from the virality of each post; while we are not aware of any cases that examined this question for the purposes of trademark analysis, it is plausible that any gain made would be considered too far removed to qualify as "commercial" for Lanham Act purposes. For a discussion of influencers and their business models, see Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 107–11 (2020); Leah Fowler et al., *Influencer Speech-Torts*, 113 GEO. L.J. (forthcoming 2025) (manuscript

clear-cut because, to our awareness, there have not been entirely analogous cases and because not every court has adopted the same test for the federal product disparagement claim. While nicknames of companies and individuals can be protected, "West Elm Caleb" does not stand for the West Elm company or brand *per se*.[248] One of the stronger claims might be against Hellman's tweeted claim that "West Elm Caleb thinks mayo is spicy," which is presumably a false claim that was arguably made on a commercial channel and that could harm West Elm (à la "West Elm employees are idiots").[249] Whether a court would deem the statement problematic enough to meet the materiality criterion, of it pertaining to the plaintiff's commercial activities, or that of the plaintiff believing it could damage him, remain open questions, but it is plausible that suggesting that one or more employees of a company are not very bright could qualify.[250] The company would likely have to show that the perception of the basic intelligence of its employees actually influences how consumers judge its products.[251] Meanwhile, a district court in Florida has defined the federal product disparagement test without requiring materiality, but limiting the claim to competitors, in which case West Elm would most definitely lose because Hellman's is not in the furniture market.[252]

This entire legal approach would, at best, be an uncertain and tedious route for West Elm, however, and one that risks drawing more negative attention to the actions of its employee and thus cast a longer shadow on the company than already exists in the public mind. This problem of negative attention may be present even for a stronger legal claim involving a direct competitor and criticism related to products (picture furniture store IKEA claiming that "West Elm Caleb thinks that mahogany is a plastic"—which a court could see as implying negative things about the furniture made by employee designers with such beliefs).

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at 47) (on file with authors), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4933788 [https://perma.cc/A859-L5NX] ("[D]espite the constitutional significance of categorization, the Court has not clearly articulated the commercial/non-commercial speech divide.").

[248] *See, e.g.*, Gronk Nation, LLC v. Sully's Tees, LLC, 37 F. Supp. 3d 495, 498 (D. Mass. 2014) (holding that the assignee of the "GRONK" trademark, which was the nickname of a professional football player, "GET GRONK'D" and "GRONK NATION" properly alleged claims including trademark infringement and dilution against the seller of T-shirts displaying the "GRONK" term).

[249] *See* Klein, *supra* note 110.

[250] *See* Nat. Organics, Inc. v. OneBeacon Am. Ins. Co., 102 A.D.3d 756, 759–60 (N.Y. App. Div. 2013) (citing 15 U.S.C. § 1125(a)).

[251] *See, e.g.*, Toro Co. v. Textron, Inc., 499 F. Supp. 241, 254 n.25 (D. Del. 1980).

[252] The full test there requires (1) commercial advertising or promotion, (2) by a defendant in commercial competition with the plaintiff, (3) to influence the consumer to buy the defendant's goods or services, and (4) that promotion has to be disseminated enough to the relevant purchasing public to provide advertising or promotion in that industry. *See* Fun Spot of Fla., Inc. v. Magical Midway of Cent. Fla., Ltd., 242 F. Supp. 2d 1183, 1203 n.3 (M.D. Fla. 2002).

D. Implications and Analysis of Trademark Genericide

Another issue that arises relating to hashtags on social media, accompanied by another challenge under the current framework of trademark law, is that of genericide.[253] The Lanham Act stipulates that if, at any time "the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered" registration of the mark can be cancelled.[254] Hence, the risk of trademark genericide, while not prominent, is still present, and given the current limitation of the law as it stands with few safeguards in place pertaining to trademark usage on social media, companies may occasionally have concerns about protecting their trademarks from the possibility of becoming generic. For example, a little while back, the LEGO® Group responded to comedian Seth Meyers' Late Night X (then-Twitter) account on the correct way to refer to their products, related to his using their trademark LEGO® as a plural noun.[255] Meyers shared that his viewers were trying to correct him that "the plural of Lego is Lego" not Legos as he had been saying, but he joked that it was "too late" for him and indicated that he would continue using the term "Legos" instead.[256] The LEGO® Group wasted no time in responding, posting the following morning, "Hey @SethMeyers, let us blow your mind . . . the plural is not 'LEGOS.' It's not even 'LEGO.' It's actually 'LEGO BRICKS!'"[257] The posting might have been mistaken as a joke, but for all intents and purposes, the company was probably very serious about protecting its trademark, given decades of long-standing court precedents on genericide.

In *King-Seeley Thermos Co. v. Aladdin Industries, Inc*., in 1963, the court stated that "[i]n order to become generic the principal significance of the word must be its indication of the nature or class of an article, rather than an indication of its origin."[258] Similarly, in *Murphy Door Bed Co. v. Interior Sleep Systems, Inc.*, the court reiterated that "[a] term or phrase is generic when it is commonly used to depict a genus or type of product, rather than a particular product."[259] Furthermore, the court stated, when the mark in question is generic, "[n]either statutory law, namely the Lanham Act, nor common law supports a claim for trademark infringement."[260] Consequently, as

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[253] Descriptive marks, however, do not encounter this problem as often as other types of marks do. *See* Lisa P. Ramsey, *Descriptive Trademarks and the First Amendment*, 70 TENN. L. REV. 1095, 1096–100 (2003).

[254] 15 U.S.C. § 1064(3).

[255] @LEGO_Group, X (Feb. 11, 2021, 8:26 AM), https://x.com/lego_group/status/1359856214591627269 [https://perma.cc/XCF9-VRMV].

[256] *Id.*

[257] *Id.* Similarly, the Velcro company issued a funny yet substantive music video to remind people not to use their name in a generic manner. VELCRO® Brand, *Don't Say Velcro*, YOUTUBE (Sept. 25, 2017), https://www.youtube.com/watch?v=rRi8LptvFZY [https://perma.cc/V3QR-L4F4].

[258] 321 F.2d 577, 580 (2d Cir. 1963) (emphasis removed).

[259] 874 F.2d 95, 100 (2d Cir. 1989).

[260] *Id.* at 101.

stated, trademark law bars registration of generic terms, since a term that is generic "cannot do the job of a trademark: to identify the applicant's goods or services and distinguish them from the goods or services of others."[261] Moreover, once "a trademark becomes generic, the brand's value becomes insignificant because anyone, including competitors, can use the mark."[262]

Hence, the importance of avoiding genericide for trademark owners is paramount, especially in litigation proceedings.[263] Genericism is subject to robust fact analyses and the "clearly erroneous" standard of review, making it difficult to reverse a lower court's damaging holding.[264] Courts typically examine several elements to determine whether a mark has become generic, including (1) competitor usage of the mark, (2) the trademark holder's usage of the mark, (3) dictionary and media usage, (4) testimony of members of the trade, and (5) surveys.[265] While none of these elements are dispositive, some elements hold great weight when assessing whether a mark has become generic.[266]

For example, once-famous marks, such as aspirin, yo-yo, and cellophane have all lost their federal protection due to genericide.[267] Previously, these terms were registered trademarks (and thus by necessity *not* generic), but after "gradually" being used by the public in a certain way, to describe a certain class of product, they could no longer serve the trademark function and became generic.[268] So too did Murphy bed, which was "appropriated by the public to designate generally a type of [folded-up

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[261] 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:57 (5th ed. 2024).

[262] Falconer, *supra* note 66, at 36.

[263] *See* 2 MCCARTHY, *supra* note 261, § 12:13.

[264] *See, e.g.*, Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 376 (1st Cir. 1980) (finding that generic determination is subject to Fed. R. Civ. P. 52(a) clearly erroneous rule); A.J. Canfield Co. v. Honickman, 808 F.2d 291, 307 n.24 (3d Cir. 1986) (finding that determination of genericness is a question of fact subject to review under the clearly erroneous test); *In re* Merrill Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 1570 (Fed. Cir. 1987) (finding that the term generic is a factual finding reviewed under the clearly erroneous rule); Mil-Mar Shoe Co. v. Shonac Corp., 75 F.3d 1153, 1153, 1156–57 (7th Cir. 1996) (finding that placement of a mark as not generic is a factual finding subject on appeal to review for clear error; district court finding that the designation "Warehouse Shoes" was not generic was reversed).

[265] *See, e.g.*, King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577, 578–79 (2d Cir. 1963) (competitor use of mark); Pilates, Inc. v. Current Concepts, Inc., 120 F. Supp. 2d. 286, 299 (S.D.N.Y. 2000) (trademark holder's user of the mark); Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 810 (2d Cir. 1999) (dictionary and media use); Murphy Door Bed Co. v. Interior Sleep Sys., Inc., 874 F.2d 95, 101 (2d Cir. 1989) (same); Self-Realization Fellowship Church v. Ananda Church of Self-Realization, 59 F.3d 902, 909 (9th Cir. 1995) (person in trade); Magic Wand, Inc. v. RDB, Inc., 940 F.2d 638, 639 (Fed. Cir. 1991) (surveys).

[266] *See* 2 MCCARTHY, *supra* note 261, § 12:13.

[267] William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 296 (1987).

[268] *Id.* at 294.

wall] bed" and as a result of genericide, lost its trademark.[269] In *Murphy Door Bed*, the defendant was able to produce several examples of the media using "murphy bed" as a means to describe a bed that folds up into the wall, rather than a particular brand itself.[270] Likewise, the court found that the term had been used as a dictionary definition for that particular type of bed, and noted that the mark had "entered the public domain beyond recall."[271] Now Google risks a similar fate of genericide.

While "Google is a well-known trademark . . . dictionaries often define the word 'google' as a verb, meaning to search something online. In addition, [it is] frequently used as a verb in both casual conversation and in the media" and thus, it is facing a very real possibility of losing its status as a trademark.[272] So is Kleenex, which has become a household name for facial tissues generally to some people.[273] Similarly, the risk of genericide that arises from the ubiquitous use of trademark hashtags on social media poses a unique challenge for trademark owners.[274]

"Although the Lanham Act does not explicitly require trademark owners to 'police' their marks, over a half-century's worth of court cases does appear to place some type of burden on an owner to ward against infringing uses of their trademark."[275] In addition, the "judicial statements such as this one from a 2003 Federal Circuit opinion, 'Trademark law requires that the trademark owner police the quality of the goods to which the mark is applied, on pain of losing the mark entirely'" add urgency to the call to protect one's mark.[276] Yet again, that produces another potential challenge. While a popular hashtag could, in theory, lead to genericide of that trademark, which is a valid reason for trademark owners to try and police their mark on social media, enforceability becomes a problem. Each platform has its own set of rules, and companies are subject to the policies and rules of each individual

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[269] *Murphy Door Bed Co.*, 874 F.2d at 97.

[270] *Id.* at 101.

[271] *Id.*

[272] Erica C. Hughes, Comment, *A Search by Any Other Name: Google, Genericism, and Primary Significance*, 7 AM. U. BUS. L. REV. 269, 270 (2018); *see also* Elliott v. Google, Inc., 860 F.3d 1151, 1161 (9th Cir. 2017) (suggesting that if the primary dictionary definition of "google" was "a generic name for internet search engines," the dictionary evidence would be sufficient to find for genericide).

[273] Neal A. Hoopes, *Reclaiming the Primary Significance Test: Dictionaries, Corpus Linguistics, and Trademark Genericide*, 54 TULSA L. REV. 407, 411 (2019).

[274] For a discussion of the nature of genericness as driven by consumer perception, and a challenge to the notion that genericness should never be overcome by consumer perception of new brand meaning, see generally Jake Linford, *Valuing Residual Goodwill After Trademark Forfeiture*, 93 NOTRE DAME L. REV. 811 (2017); Jake Linford, *A Linguistic Justification for Protecting "Generic" Trademarks*, 17 YALE J.L. & TECH. 110 (2015).

[275] Sonia K. Katyal & Leah Chan Grinvald, *Platform Law and the Brand Enterprise*, 32 BERKELEY TECH. L.J. 1135, 1177 (2017).

[276] *Id.* at 1178 (citing Nitro Leisure Prod., LLC v. Acushnet Co., 341 F.3d 1356, 1367 (Fed. Cir. 2003)).

platform where the hashtags are used. Moreover, on some platforms, removing infringing content falls on individual trademark holders' shoulders. For example, on Instagram, owned by Mark Zuckerberg, the policy states that:

> Instagram can't adjudicate disputes between third parties, and so we wouldn't be in a position to act on trademark reports that require an in-depth trademark analysis or a real-world dispute outside of Instagram. In these situations, rather than contacting Instagram, you may want to reach out directly to the party that you believe is infringing your rights, or seek any resolution in court or by other judicial means.[277]

Facebook, which is also owned by Zuckerberg, shares almost identical language.[278] Granted, companies oftentimes through their marketing department do have the tools to monitor their hashtags on social media platforms and track mentions of their brand, products, or specific hashtags, but to remove infringing content on such a large scale is simply not feasible. Fortunately for trademark owners, when it comes to claims of failure to police, "the actual loss of one's mark is extremely rare and is therefore not a valid reason for over-enforcement."[279] With the risk of genericide fairly small and hashtag-related litigation unwise in many other scenarios, as explained above, alternatives to enforcement of intellectual property rights may prove to be more valuable to preventing reputational loss to companies that could otherwise occur from hashtag uses of their trademarks.

IV. BRIDGING THE GAP AND PROTECTING BRAND REPUTATION

After a thorough analysis of the possibilities, and lack thereof, of protecting trademarks embedded in hashtags even after *Jack Daniel's*, Part IV forges a new path to show the options for brand protection outside of trademark law. To discourage behavior that could land a company in a "West Elm Caleb"–type scenario, the Article proposes the creation of employee policies and trainings that would clarify an employer's values to prevent viral scandals in ways that place employees on better notice. For users such as the "Tinder Swindler," it is a company's safety practices that need revision to avoid disrepute, as this Part will delineate as well.

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[277] *How Do I Report Trademark Infringement on Instagram?*, INSTAGRAM, https://help.instagram.com/1921828231475726 [https://perma.cc/2T4W-NQMQ] (last visited Feb. 19, 2025).

[278] *How Do I Report Trademark Infringement on Facebook?*, FACEBOOK, https://www.facebook.com/help/191999230901156 [https://perma.cc/9VYY-ZUSR] (last visited Feb. 19, 2025).

[279] Katyal & Grinvald, *supra* note 275, at 1178.

A. Preventing Employee Trouble: Discouraging "West Elm Caleb"

While the USPTO opened the door to federal registration of hashtags and *Jack Daniel's* potentially weakened the status of trademark parodies, a number of practical challenges exist in protecting hashtag marks on social media platforms. As we have made clear above, even after *Jack Daniel's*, companies will continue struggling to protect their marks when they are embedded in (viral or other) hashtags where there is no likelihood of confusion and the trademark is not used to identify a competitor's products. Even the advertising cases that reference a competitor or its employees that draw from the hashtag context, but do so in a descriptive manner (such as Ruggable's referencing of "West Elm Caleb" in its own ads),[280] are unlikely to fare well in the legal arena.

To strengthen brand protection in a world of social media dominance, companies need to leverage strategies beyond trademark regulation. One area in particular that might be tremendously useful for situations such as that involving #WestElmCaleb-type scenarios is employment law and employee training. While it might not be the answer to all the challenges that the current limitations of intellectual property law pose relating to trademark-related hashtags on social media, these other strategies may help to prevent harm to the company's brand and trademark.

For starters, it is imperative that companies nowadays include a social media and online activities policy in their contracts and handbooks for all employees, which could potentially include both posts to public platforms and other written communications.[281] By having a clear and well-defined such policy plus requiring a signed confirmation from its employees that they have in fact read all terms and conditions both when first employed and during contract renewals, companies can avoid possible litigation stemming from termination of an employee as a result of his online activity and behavior. It can prevent a situation such as the one in which Delta Air Lines found itself after firing a flight attendant for posting "inappropriate photographs" of herself in her uniform on her blog.[282] The former employee asserted that Delta "published no work rules or regulations concerning employee participation or appearance on websites" and claimed that the real reason for her termination was based on the fact that she was participating in union activity that her employer opposed.[283] While her discrimination lawsuit was closed because Delta Air Lines at

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[280] Wheless, *supra* note 109.

[281] From here on, when the Article refers to a "social media policy," it includes the possibility of other written communications that can be easily traced back to a specific employee, such as texts sent from the individual's cell phone. For a discussion of why written communications can be examined more easily for their veracity than other types of behavior and are therefore better actionable, see generally Irina D. Manta, *Tinder Lies*, 54 WAKE FOREST L. REV. 207 (2019).

[282] Complaint at 2, Simonetti v. Delta Air Lines, Inc., No. 1:05CV02321 (N.D. Ga. 2005).

[283] *Id.*

that time filed for bankruptcy, Delta could have avoided this entire scenario by clarifying its policies in advance.[284]

Secondly, a well-written social media policy should contain a provision that clarifies expectations that employees in the private sector might have associated with their free speech rights. Employees in the private sector often confuse the freedom of speech right granted in the public sector as being the same in the private sector.[285] Companies—for the sake of their reputation and the protection of their trademarks—should inform their employees that "[g]overnment employees enjoy much stronger free speech protections [than they do] because, unlike private sector employers, government employers are subject to the restraints of the U.S. Constitution."[286]

In addition, employment handbooks should also contain a provision that outlines the duty of loyalty that employees have to their employers. The United States generally operates under the fundamental labor law doctrine of "employment at-will," where an employer can terminate an employee at any time and for any reason (with some narrow legal exceptions), and an employee can leave a job at any time for any reason, without notice, when there is no contractual provision stating otherwise.[287] It is key, given the operation of this doctrine that governs the employment relationship, and in the interest of protecting their brands' reputations, for employers to inform their employees of the duty of loyalty. Under the *Restatement (Third) of Agency*, the general principle is that "[a]n agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."[288] This duty is high, and employees are supposed to refrain from acting in ways that would have an adverse impact on employer interests.[289] Accordingly, employees need to be educated on these fundamental points, especially given the fact that what they say on social media can have a direct impact on the company's reputation and lead to negative consequences that could affect the status of their own employment with the company.

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[284] *See* Justin Rubner, *From Nasty to Useful, Web Logs Are Inescapable*, ATLANTA BUS. CHRON. (Apr. 3, 2006, 1:13 AM), https://www.bizjournals.com/atlanta/stories/2006/04/03/story8.html [https://perma.cc/5ZM5-E3L4].

[285] *See generally* Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1 (2013).

[286] Catherine Crane, *Social Networking v. the Employment-at-Will Doctrine: A Potential Defense for Employees Fired for Facebooking, Terminated for Twittering, Booted for Blogging, and Sacked for Social Networking*, 89 WASH. U. L. REV. 639, 644 (2012). Of course, there are some special categories of (private or other) employees that may have additional protection when it comes to speech, such as those with academic tenure.

[287] Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 67–68 (2000); KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM 4 (2021).

[288] RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

[289] Konrad S. Lee, *Hiding from the Boss Online: The Anti-Employer Blogger's Legal Quest for Anonymity*, 23 SANTA CLARA COMPUT. & HIGH TECH. L.J. 135, 140 (2006).

Take for instance, the recent fallouts that took place as a result of the "'inflammatory comments' about Hamas's attack that killed at least 1,200 Israelis," which were posted on social media and other written settings in the days following the events of October 7, 2023.[290] Some law students lost prestigious employment offers as a result of posting such comments.[291] One of the first such incidents involved a New York University (NYU) Law School student, who wrote that "Israel bears full responsibility for this tremendous loss of life."[292] The comment, which was initially shared in the University's newsletter, and then defended by that student on ABC News, quickly began circulating on social media, and encountered swift backlash.[293] Winston & Strawn LLP, the law firm that had previously employed the said NYU law student as a summer associate and extended an offer of full-time postgraduate employment, promptly rescinded its offer, stating that the comments "'profoundly conflict' with its values."[294] It further stated that it "stands in solidarity with Israel's right to exist in peace and condemns Hamas and the violence and destruction it has ignited in the strongest terms possible," and that it looks "forward to continuing to work together to eradicate anti-Semitism in all forms and to the day when hatred, bigotry, and violence against all people have been eliminated."[295]

Harvard Law School also had several of its students lose employment offers. Hours after the attack on Israel, students at Harvard Law took to social media (specifically to Facebook and Instagram) and released a letter that stated in part that "[w]e, the undersigned student organizations, hold the Israeli regime entirely responsible for all unfolding violence."[296] Although the letter did not identify the students that signed off on it, within days, their personal information was posted online and "Wall Street executives demanded a list of student names to ban their hiring."[297] Prestigious law firms such as Davis Polk "rescinded employment offers made to three students who the firm believed led organizations at Harvard and

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[290] *See, e.g.*, Vimal Patel & Anemona Hartocollis, *N.Y.U. Law Student Sends Anti-Israel Message and Loses a Job Offer*, N.Y. TIMES (Oct. 11, 2023), https://www.nytimes.com/2023/10/11/us/nyu-law-harvard-hamas-israel.html [https://perma.cc/PZ22-FRM9].

[291] *Id.*

[292] *Id.*

[293] Tesfaye Negussie & Aisha Frazier, *NYU Law Student Who Blamed Israel After Hamas Attack Defends Remarks*, ABC NEWS (Oct. 25, 2023, 5:18 PM), https://abcnews.go.com/US/nyu-student-criticized-lost-job-offer-israel-hamas/story?id=104235399 [https://perma.cc/BYF9-HTKM].

[294] Patel & Hartocollis, *supra* note 290.

[295] Meghan Tribe, *Winston Scraps NYU Student's Job Offer Over Israel*, BLOOMBERG L. (Oct. 11, 2023, 5:28 AM), https://news.bloomberglaw.com/business-and-practice/winston-scraps-nyu-law-students-job-offer-over-israel-email [https://perma.cc/9TC9-GNAH].

[296] Anemona Hartocollis, *After Writing an Anti-Israel Letter, Harvard Students Are Doxxed*, N.Y. TIMES (Oct. 18, 2023), https://www.nytimes.com/2023/10/18/us/harvard-students-israel-hamas-doxxing.html [https://perma.cc/7HQA-NZ8C].

[297] *Id.*

Columbia that issued statements blaming Israel for the Oct. 7 attack by Hamas."[298] The firm explained that "[t]he views expressed in certain of the statements signed by law school student organizations in recent days are in direct contravention of our firm's value system."[299] Furthermore, it stated, "[t]o ensure that 'we continue to maintain a supportive and inclusive work environment' . . . 'the student leaders responsible for signing on to these statements are no longer welcome in our firm.'"[300] And, as Davis Polk chair and managing partner Neil Barr put it, "the firm did not want employees who endorsed the atrocities of the Hamas attack working for it."[301]

These incidents suggest that companies should inform their current or soon-to-be employees about their expectations regarding public statements or social media use. The firms in question undoubtedly worried about their reputation in being associated with the expressions of the law students in question, and it is not at all clear that the students made the statements knowing that they could lose their (presumably highly lucrative) employment offers this way. In addition to potentially taking offense themselves, the firms may well have been worried about harm to the reputation of their brands and the loss of important clients, just like Harvard itself lost billionaire donors as a result of these events.[302]

The elite law firm Sullivan & Cromwell already took further steps in this area as part of its policies against hate speech, using a background check company to see if potential employees engaged in explicit anti-Semitism or used statements or slogans considered triggering to Jews; this would apply both to behavior by protesters themselves and that of other protesters surrounding them.[303] If the background check reveals concerning materials, potential employees "will have to explain their role, including what they did to stop other protesters from making offensive or harassing statements."[304] Activist and four-time presidential candidate Ralph Nader

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[298] Maureen Farrell, *A Prestigious Law Firm Rescinded Job Offers for Columbia and Harvard Students, But It May Reverse Itself*, N.Y. TIMES (Oct. 18, 2023), https://www.nytimes.com/2023/10/17/business/davis-polk-employment-columbia-harvard-israel-palestine.html [https://perma.cc/ALS7-JDC6].

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *See* Eren Orbey, *The Anguished Fallout from a Pro-Palestinian Letter at Harvard*, NEW YORKER (Oct. 20, 2023), https://www.newyorker.com/news/dispatch/the-anguished-fallout-from-a-pro-palestinian-letter-at-harvard [https://perma.cc/B38U-U2SW]; Matt Egan, *Israeli Billionaire Blasts Harvard Leadership and Quits Board in Protest*, CNN (Oct. 13, 2023, 9:05 AM), https://www.cnn.com/2023/10/13/business/harvard-idan-ofer-board/index.html [https://perma.cc/N6NQ-EUE9].

[303] *See* Emily Flitter, *A Wall Street Law Firm Wants to Define Consequences of Israel Protests*, N.Y. TIMES (July 11, 2024), https://www.nytimes.com/2024/07/08/business/sullivan-cromwell-israel-protests.html [https://perma.cc/9MDR-W74W]. Several competitors of Sullivan & Cromwell's were said to be considering similar measures. *See id.*

[304] *Id.*

criticized the policy in a letter cosigned with two others, raising due process concerns and warning against the policy being used as a "pretext for discriminating against Arab Americans" in contravention of federal antidiscrimination law.[305] The appeal to antidiscrimination principles here comes as a bit of a headscratcher (putting it generously) when the same letter states that "[t]here is no articulable definition of verbal antisemitism free from manipulation for ulterior purposes."[306]

It is also worth pointing out that employers are, otherwise, generally within their rights to terminate employees for social media postings as long as the postings do not involve work-related issues or information about pay, benefits, and working conditions.[307] In this context, the National Labor Relations Board (NLRB), which is an independent federal agency tasked with safeguarding employees' rights to organize and to engage with each other to create better working conditions, has unambiguously stated that while

> [f]ederal law protects [employees'] right to engage in not only union activity, but also "protected concerted" activity [and while their use of] social media can be a form of protected concerted activity [through which they] have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media[, such] activity is not protected if [an employee] say[s] things about [their] employer that are egregiously offensive or knowingly and deliberately false, or if [the employee] publicly disparage[s] [the] employer's products or services without relating [their] complaints to any labor controversy.[308]

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[305] Emily Flitter, *Ralph Nader Assails Law Firm's Vow to Exclude Some Campus Protesters*, N.Y. TIMES (July 30, 2024), https://www.nytimes.com/2024/07/30/business/sullivan-cromwell-israel-protests.html [https://perma.cc/8CBM-VFGS]. Interestingly, in a recent survey of potential employers of college graduates, essentially the same percentage of employers (22%) expressed being less willing to hire those who had participated in so-called pro-Palestine protests as that of employers being more willing to do so (21%). *See Due to Pro-Palestine Protests, 3 in 10 Business Leaders Are More Concerned About Hiring Recent College Graduates*, INTELLIGENT (May 23, 2024), https://www.intelligent.com/due-to-pro-palestine-protests-3-in-10-business-leaders-are-more-concerned-about-hiring-recent-college-graduates/ [https://perma.cc/S4UB-FF4T].

[306] *See* Bruce Fein et al., *Read the Letter to Sullivan & Cromwell*, N.Y. TIMES (July 30, 2024), https://www.nytimes.com/interactive/2024/07/30/business/sullivan-letter.html [https://perma.cc/D6BV-3T3P].

[307] *Social Media*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/social-media-0 [https://perma.cc/HN9W-BF4V] (last visited Feb. 19, 2025).

[308] *Id.*

Outside of these limitations, some state laws provide further boundaries on employers' ability to narrow the social media activities of their employees, often pertaining to political activity on the part of employees.[309] Even the broadest such boundaries, however, are unlikely to cover activities such as those of "West Elm Caleb," meaning especially his allegedly sharing unsolicited nude pictures.[310] Hence, companies that are concerned with protecting their brands' reputations have the ability to include a fairly broad social media policy in their employment agreements and handbooks. This policy can restrain problematic activity on the part of employees on social media and related realms. Policies, however, are only as useful as employees' knowledge of them.

Companies should offer training to their employees on the hazards of social media and the proper protocol that should be followed to protect companies' reputations, including their brands and trademarks. Employers have experience developing and providing such trainings from other practices such as sexual harassment trainings. Indeed, the behavior of individuals such as "West Elm Caleb" either falls into or is related to a variety of sexual violations. And both the behaviors already covered by sexual harassment trainings and ones that take place outside the office have the potential to hurt employers' reputations. In a world of viral hashtags, companies should explain to employees that private behavior can quickly turn into wildfire hurting a company, and that employees should avoid instances where they behave harmfully in sexual and other arenas.

Sexual harassment training has become a staple for most reputable businesses today.[311] Although it was not widely accepted when the term sexual harassment was first introduced in the early 1970s, "the American legal system began slowly to yield to this challenge, and for the first time recognized women's right to work free of unwanted sexual advances."[312] Lawyers, advocates, and scholars (such as Catharine MacKinnon) had to convince the American judiciary that sexual harassment is indeed discrimination on the basis of sex and, therefore, legally actionable under Title VII of the Civil Rights Act of 1964.[313] "At that point, no court had held that

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[309] *See* Eugene Volokh, *May Private Employers Fire (or Refuse to Hire) Employees Because of Their Praise of Hamas (or Praise of Israel)?*, REASON: VOLOKH CONSPIRACY (Oct. 11, 2023, 5:24 PM), https://reason.com/volokh/2023/10/11/may-private-employers-fire-or-refuse-to-hire-employees-because-of-their-praise-of-hamas-or-praise-of-israel/ [https://perma.cc/TWM3-87B3].

[310] *See id.* Needless to say, nude pictures shared consensually should not generally be the object of employer policies. *See, e.g.*, Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2027–28 (2014).

[311] *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 44 (2016).

[312] Reva B. Siegel, *A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 8 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004).

[313] *Id.* at 8–9.

sexual harassment was sex discrimination; several had held that it was not."[314] However, in 1986, the Supreme Court ruled unanimously in *Meritor Savings Bank v. Vinson* that "a claim of 'hostile environment' sex discrimination is [indeed] actionable under Title VII [of the Civil Rights Act of 1964]."[315] Then, in 1998, the Supreme Court stated in two separate cases decided on the same day that a "defending employer may raise an affirmative defense to liability or damages [to sexual harassment claims], subject to proof by a preponderance of the evidence."[316] In both *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Court stated that:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.[317]

As a result, numerous businesses have heeded the warning and adopted such practices and procedures, and employers recognize that implementing such preemptive measures could "prevent harassment from occurring" in the first place.[318] Today, the implementation of a harassment prevention policy has even become a requirement under employment law in various states.[319] For example, in the state of

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[314] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN, at xi (1979).

[315] 477 U.S. 57, 73 (1986) (Stevens, J., concurring).

[316] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

[317] *Burlington Indus., Inc.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

[318] *Promising Practices for Preventing Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment [https://perma.cc/B8SW-MX6U] (last visited Feb. 19, 2025).

[319] Ann C. McGinley, *Laboratories of Democracy: State Law as a Partial Solution to Workplace Harassment*, 30 AM. U. J. GENDER SOC. POL'Y & L. 245, 283 (2022).

New York, every employer is "required to adopt a sexual harassment prevention policy."[320] Such policy must

> prohibit sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights[,] provide examples of prohibited conduct that would constitute unlawful sexual harassment[,] include information concerning the federal and state statutory provisions concerning sexual harassment, remedies available to victims of sexual harassment, and a statement that there may be applicable local laws[,] include a complaint form[,] include a procedure for the timely and confidential investigation of complaints that ensures due process for all parties[,] inform employees of their rights of redress and all available forums for adjudicating sexual harassment complaints administratively and judicially[,] clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals engaging in sexual harassment and against supervisory and managerial personnel who knowingly allow such behavior to continue[, and] clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any investigation or proceeding involving sexual harassment is unlawful.[321]

As for training, New York State requires that each employee receive training on an annual basis, and that it must

> be interactive[,] include an explanation of sexual harassment consistent with guidance issued by the Department of Labor in consultation with the Division of Human Rights[,] include examples of conduct that would constitute unlawful sexual harassment[,] include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment[,] include information concerning employees' rights of redress and all available forums

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[320] *See* N.Y. LAB. LAW § 201-g (McKinney 2025); *Sexual Harassment Prevention Model Policy and Training*, N.Y. STATE, https://www.ny.gov/combating-sexual-harassment-workplace/sexual-harassment-prevention-model-policy-and-training [https://perma.cc/29KW-DV3D] (last visited Feb. 19, 2025).

[321] *Sexual Harassment Prevention Model Policy and Training*, *supra* note 320.

> for adjudicating complaints[, and] include information addressing conduct by supervisors and any additional responsibilities for such supervisors.[322]

If companies were to use similar principles for their social media policies and implement training on at least a yearly basis, it could help to protect companies' brand images, reputations, and trademarks on social media.

Implementing clear and comprehensive policies for employees is essential to brand reputation in the age of social media, and educating employees about the potential impact that their social media activities can have on the company's reputation is key. In collaboration with their general counsels and other members of their legal teams, companies should craft policies and training procedures based on the sexual harassment ones outlined above. For example, in utilizing the New York State training model, a company can conduct interactive training sessions that emphasize the importance of protecting the company's reputation, including its trademarked brands, on social media. It can also stress the company's commitment to maintaining a positive brand image. Similar to how it implements sexual harassment training, it can provide its employees with a beginner's guide that highlights, at a very basic level, trademark law as defined by the Lanham Act, including the definition of a trademark, what constitutes trademark misuse, the difference between infringement and dilution, and the legal implications that can arise from unauthorized use of the company's trademark in hashtags they circulate themselves, plus it can have an in-depth discussion about brand harms that can be brought on by an employee's social media actions and severely impair the company's reputation. In addition, these training sessions should provide real-life examples and scenarios (illustrating various forms of brand harms as discussed throughout this Article), so that employees understand how to protect the company's reputation.

In creating a reputation-protective workplace culture, companies should also emphasize, as noted above, employees' responsibilities to their employers, including their duty to actively protect the company's goodwill on and off the clock. Training should outline the consequences of non-compliance with the social media policy. Like in the sexual harassment context, the companies should have proper procedures in place to report violations, and while discussing those, they should clearly reiterate employee rights to report social media misconduct without fear of retaliation. Clarity on these policies is also a matter of fairness to employees, who can choose whether to work for a particular company.

If doable, companies serious about brand protection should implement a system like that used for reporting misconduct under the New York Whistleblower Protection Law.[323] In attempting to protect whistleblowers from employer retaliation, New

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[322] *Id.*

[323] *See Office of the New York State Attorney General Whistleblower Portal*, N.Y. STATE

York State has created a "portal that allows anonymous submissions and two-way communications with [the Office of the New York State Attorney General through a] unique key code [that submitters can use to] send and retrieve messages."[324] Such a system of anonymous reporting can be advantageous also to private companies looking to protect their brands, as well as to employees who may be reluctant to file a report in person with a supervisor. Moreover, whether it is used to report misconduct on social media relating to brand harm or that of sexual harassment or other forms of discrimination, employees might be more willing to report a violation anonymously given the level of protection that such a portal provides. Nevertheless, if such a system is not feasible, companies should emphasize the steps involved in reporting and the investigation sequence, plus underline the confidentiality and carefulness with which any such reporting will be treated.

Furthermore, at least once a year, ongoing education should occur and should entail more than just sending out the social media policy to employees to read and sign. Again, trainings should specify guidelines on what employees can and cannot share on social media platforms regarding the company, its trademarks, and sensitive information, as well as provide tips on how to post and comment thoughtfully; most importantly, the training should include a question-and-answer portion to confirm that employees have read the policy. Also, should their correct answers fall below a certain percentage, company policy should mandate that they attend further training. While employment agreements and employee training cannot fully protect against the risk of all trademark-related problems that could arise relating to social media (including that of potential third-party trademark hashtag use), companies can still use these devices indirectly to protect their brands' reputations, meaning by essentially adopting the framework of sexual harassment training. This could provide a genuine incremental improvement when it comes to guarding against the threat of harm to brands that can arise from within the company.

Companies can also turn to the entertainment industry for guidance on the language of such social media policies, but there are drawbacks. In the majority of entertainment contracts, a provision known as a morality clause is included that outlines behaviors that will go to the breach of the contract. "Such clauses can prohibit a variety of behaviors and consequences depending on the breadth of the language used."[325] For example, "a narrowly drafted clause could cover behavior such as failing a drug test, an arrest, or conviction of a crime," whereas "[b]roader morality clauses may encompass any conduct that is outside of public morals or decency or acceptable social norms."[326]

ATT'Y GEN., https://ag.ny.gov/i-want/use-whistleblower-portal [https://perma.cc/BJJ7-D5HW] (last visited Feb. 19, 2025); *see also* N.Y. LAB. LAW §§ 740–41.

[324] *Office of the New York State Attorney General Whistleblower Portal*, *supra* note 323.

[325] Patricia Sánchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 10 (2017).

[326] *Id.* at 10–11.

For example, "CNN has a standard morality clause in their contract that says if the employee does anything of disrepute, they can be immediately fired."[327] Such clauses may pose some obstacles, however, given their "highly-subjective interpretations."[328] They may raise questions of what is disrepute, how it is exactly defined, and by whose standard and perspective will an employee be judged. Again, given these highly subjective interpretations, companies would be better served by adopting policies and training akin to those of sexual harassment to protect their reputations, rather than relying on a morality clause that may run an increased risk of leading to litigation.[329] While no training can cover every scenario, it provides a lot more information than a morality clause does.

B. Tapping the Brakes on Problematic User Behavior: Slowing Down the "Tinder Swindler"

The previous Section discussed possibilities for employers to rein in the behavior of employees that could damage their brands and general reputations. This Section deals with the problematic user, the "Tinder Swindler" type. When it comes to dating apps in particular, they have drawn a lot of negative attention for the frequency at which their (especially male) users engage in unethical or even criminal behavior. One sobering statistic is that, according to a study by Columbia Journalism Investigations, one in three women who have used dating apps report having been sexually assaulted by someone they encountered on an app.[330] Dating apps cannot impose as significant consequences on their users as employers can on their employees; at most, they can usually just remove the user.[331] The first step to protect

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[327] Ryan Saavedra, *Chris Cuomo Preparing to Take the Fight to CNN with Massive Lawsuit: Report*, DAILY WIRE (Dec. 7, 2021), https://www.dailywire.com/news/chris-cuomo-preparing-to-take-the-fight-to-cnn-with-massive-lawsuit-report [https://perma.cc/WF9E-GY42].

[328] Abril & Greene, *supra* note 325, at 5.

[329] *See, e.g.*, Andrew Zarriello, Note, *A Call to the Bullpen: Alternatives to the Morality Clause as Endorsement Companies' Main Protection Against Athletic Scandal*, 56 B.C. L. REV. 389, 401 n.80 (2015) ("Morality clauses not only fail to claw back investment, but subsequent litigation only tends to further stamp the association between the athlete and the company, undermining the purpose of the morality clause in the first place.").

[330] Hillary Flynn et al., *Tinder Lets Known Sex Offenders Use the App. It's Not the Only One.*, PROPUBLICA (Dec. 2, 2019, 5:00 AM), https://www.propublica.org/article/tinder-lets-known-sex-offenders-use-the-app-its-not-the-only-one#methodology [https://perma.cc/N3NX-W7KX].

[331] This is not to say that if Match Group, which controls most dating apps, does this to someone, the effect is insignificant. *See, e.g.*, Chris Stokel-Walker, *I've Been Banned from Almost Every Dating App*, VICE (Sept. 25, 2023, 3:45 AM), https://www.vice.com/en/article/g5yw4x/banned-from-dating-apps [https://perma.cc/BB6A-QW3M] (describing the impact on the lives of women whose dates removed them from dating apps via weaponized, in this case false, reports); *see also* Evan Michael Gilbert, Note, *Antitrust and Commitment Issues: Monopolization of the Dating App Industry*, 94 N.Y.U. L. REV. 862, 863 (2019) (discussing

(and indeed in this case, improve) their reputations will involve putting more safeguards in place so that dating apps stop being the playground of so many predators, be they of the sexual, financial, or other variety.

Shimon Hayut, the "Tinder Swindler," was expelled from dating apps such as Tinder and Hinge after the Netflix documentary came out.[332] By that point, he had accumulated untold damage, however. Match Group, by far the biggest player (no pun intended) on the dating app market, came under fire not long ago for employing insufficient safety personnel to tackle the problems associated with predators on the apps.[333] While some problems undoubtedly lie in either the lack of requisite laws or lack of enforcement,[334] scholar Marissa Meredith has proposed that dating apps adopt a uniform safety protocol to address some of their issues,[335] while online whisper networks try to provide safety of their own.[336] Safety manuals exist on dating apps, and while they can help possible victims to some extent, they are unlikely to deter predators due to the mentioned lack of profound consequences that dating apps can impose (unlike employers).[337] Indeed, when it comes to dating apps, more fundamental reform of their business model is necessary if they want to prevent further deterioration of their brands' reputations.[338]

These proposals about both employer and user policies will certainly not prevent every hashtag campaign against companies, given that these can arise in many different ways; rather, it is a matter of gradual improvement. The solutions here would have been unlikely to prevent the use of #SubwayJared, for example, when the sandwich chain's central advertising spokesperson was found guilty of sex with a minor and possession of child pornography—acts that Jared Fogle surely already

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the market power of Match Group). But comparatively speaking, it does not generally rise to the level of losing employment.

[332] Wong, *supra* note 127.

[333] *See* Brian Edwards et al., *Addressing Rape in Four Minutes or Less: Dating App Reps Left Unprepared to Respond to Assault Victims*, PROPUBLICA (May 17, 2021, 5:00 AM), https://www.propublica.org/article/addressing-rape-in-four-minutes-or-less-dating-app-reps-left-unprepared-to-respond-to-assault-victims [https://perma.cc/DNK4-BHJZ].

[334] *See, e.g.*, Manta, *supra* note 281, at 211; Irina D. Manta, *Tinder Backgrounds*, GA. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5220132 [https://perma.cc/E7J9-JZPE].

[335] *See generally* Marissa C. Meredith, *Tinder Love and Care: Proposing an Industry Self-Regulation Policy Implementing Safety Procedures for Dating App Companies*, 98 IND. L.J. 721 (2023).

[336] *See, e.g.*, Nancy Jo Sales, *Finally, Women Are Calling Out Toxic Online Dates. Now to Target the Apps Themselves*, THE GUARDIAN (Dec. 28, 2022, 5:00 AM), https://www.theguardian.com/commentisfree/2022/dec/28/women-toxic-online-dates-apps-facebook-groups-dating-platforms [https://perma.cc/6QWF-R5VA].

[337] *See, e.g.*, *Dating Safety Tips*, TINDER, https://policies.tinder.com/safety/intl/en/ [https://perma.cc/Y26X-VWGF] (last visited Feb. 19, 2025).

[338] For more details on comprehensive reform of dating app safety practices, see IRINA D. MANTA, STRANGERS ON THE INTERNET (unpublished manuscript) (on file with authors).

knew could have dire consequences without further explanation or policy.[339] Not everyone can be deterred, but some individuals can, and perhaps individuals such as "West Elm Caleb" are regularly part of that deterrable group.

To the extent that one might object to employers becoming involved in the activities of their employees outside of work and the risk of innocent speech being chilled, that concern should not sway the analysis here. The fact of the matter is that employers are *already* making hiring and firing decisions based on individuals' external activities. Some examples involve the withdrawn law firm offers mentioned above, or the tales of employees losing their jobs related to their relationship behavior.[340] Employees might be better protected than before in the sense of having clearer notice of their employers' values, while employers can prevent the reputational damage—including damage to their intellectual property—that can ensue from a single hashtag campaign.

CONCLUSION

Social media plays a crucial role in brand promotion. Its powerful hashtag tool boosts its success by enhancing visibility, fostering engagement, and creating a cohesive brand identity. When used strategically, hashtags can contribute to a brand's overall marketing and popularity. Nevertheless, despite these new opportunities presented, equally present are the challenges that hashtags create for trademark owners on social media.

Companies ought to be vigilant especially of the danger posed internally via potential brand damage that can indirectly arise from their employees' online conduct. Because trademark litigation is generally unlikely to succeed even post–*Jack Daniel's* in the courtroom or the public eye, companies should look to incorporating employment agreements and employee trainings as another layer of protection to safeguard their trademarks and brand reputation from the hazards that could rain down upon them from within their own walls. By having a well-developed social media policy in place, along with annual training on social media practices analogous to sexual harassment training, companies will be in a far superior position to protect their trademarks and overall brand reputations in the digital age of commerce.

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[339] Haven Orecchio-Egresitz, *Jared Fogle, Former Face of Subway and Admitted Child Abuser, Is Scheduled to Be Released from Prison a Year Early*, BUS. INSIDER (Nov. 25, 2023, 8:15 AM), https://www.businessinsider.com/jared-fogle-face-subway-is-scheduled-prison-release-in-2029-2023-11 [https://perma.cc/4EVQ-3BTF] (discussing the history of Jared Fogle, ending in a fifteen-year prison sentence).

[340] *See, e.g.*, Brittany Shammas & Marisa Iati, *Are We Dating the Same Guy? Facebook Groups Offer Intel but Upend Lives*, WASH. POST (Mar. 2, 2024, 6:00 AM), https://www.washingtonpost.com/technology/2024/03/02/dating-same-guy-facebook-groups/ [https://perma.cc/D3AB-HYGW] (describing a firing after an employer learned that a man had been accused of abusing his girlfriend).