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Qualitex Co. v. Jacobson Products Co., 115 S. Ct. 1300 (1995): It is Possible to Trademark Color Alone*

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I. INTRODUCTION

The traditional rule was that it is impossible to trademark a color alone. The only way to trademark a color was as part of a distinctive design. Three principal arguments have been advanced for this rule: color depletion, shade confusion, and functionality. In 1985, however, the Court of Appeals for the Federal Circuit departed from the traditional rule and held that a corporation could trademark a color * Copyright © 1996 Peter Koebler.
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1. The term "color alone" refers simply to the color of the product itself, applied in an indiscriminate manner. It has long been the law that a color that is applied in a discriminate pattern or design can indeed receive trademark protection. See, e.g., Mishawaka Rubber & Woolen Mfg. v. S.S. Kresge Co., 119 F.2d 316 (6th Cir. 1941), rev'd on other grounds, 316 U.S. 203 (1942).
Color, except in connection with some definite arbitrary design which serves to distinguish the article as made or sold by a particular person, is not the subject of a trade-mark, but the owner of a valid trade-mark, otherwise distinctive, may be protected against appropriation by a rival through mere change in color. 119 F.2d at 325.
3. See infra notes 25-47 and accompanying text.
4. See infra notes 48-53 and accompanying text.
5. See infra notes 54-66 and accompanying text.
itself. While most circuit courts refused to follow the lead of the Federal Circuit, the Eighth Circuit was willing to do so. Hence, the stage was set for the Supreme Court to grant certiorari and resolve the conflict. In a unanimous decision, the Supreme Court reversed the Ninth Circuit's decision in Qualitex Co. v. Jacobson Products Co. and held that it is possible to trademark a color alone. To reach its decision, the Supreme Court dispensed with the shade confusion argument and discredited the color depletion theory. However, the functionality doctrine will continue to act as a potential bar to a color alone receiving trademark protection.

This case note will begin by providing some background information. Each of the three main theories behind the traditional rule against trademarking a color alone will be explored. The specific facts of Qualitex will then be discussed and a short analysis of the Court's decision will be offered. Finally, this note will conclude by summarizing the analysis and suggesting a method of choosing a color that is protectable as a trademark.

II. BACKGROUND

Trademark rights were first recognized at common law. Today in the United States, trademarks are registered by the Patent and Trademark Office, which maintains a public record of all registered trademarks. Before granting a trademark, the record is searched to ensure that no other merchant has already claimed the mark. Note, however, that the absence of a mark being registered with the Patent and Trademark Office does not necessarily mean that a mark is freely available for use, as common law rights to the trademark may nonetheless exist. Still, by registering a trademark, a rebuttable presumption of validity is created.

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6. In re Owens-Corning Fiberglas Corp., 774 F.2d 1116 (Fed. Cir. 1985) (holding that the color pink had no utilitarian purpose and that, upon a showing of secondary meaning in relation to fiberglass insulation, the color could be registered as a trademark).
10. Id. at 1305-06.
11. Id. at 1304.
14. Id.
The basis for the registration of trademarks with the U.S. Patent and Trademark office is found in the Lanham Act.\(^1\) For the purposes of this case note, the pertinent portion of the Lanham Act is 15 U.S.C. § 1127, which provides:

The term "trademark" includes any word, name, symbol, or device, or any combination thereof –

(1) used by a person, or

(2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.\(^2\)

Hence, Congress has not explicitly answered the question of whether a color alone can be trademarked.

In 1906, the Court expressed doubt that color alone could constitute a valid trademark.\(^3\) In *Leschen*, the plaintiff claimed that it had a trademark interest in the wire rope that it manufactured because one of the strands was colored differently than the rest of the rope.\(^4\) The plaintiff did not claim to have a trademark in a particular color, but rather in any colors that could have been woven into wire rope in the same distinctive manner.\(^5\) The Court openly questioned "whether mere color can constitute a valid trademark."\(^6\) However, because the Court was not actually confronted with the question of whether a particular color alone could serve as a valid trademark, the Court’s speculation on this point amounted to dicta. Moreover, the Court issued the decision long before the passage of the Lanham Act. Still, the dicta was enough to lead lower courts to forbid trademark protection for color alone.\(^7\)

\(^3\) A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co., 201 U.S. 166 (1906) (holding that plaintiff rope company’s trademark registration was too broad because it claimed a "red or other distinctively colored streak" (emphasis added). "Whether mere color can constitute a valid trade-mark may admit of doubt. Doubtless it may, if it be impressed in a particular design, as a circle, square, triangle, a cross, or a star. But the authorities do not go farther than this." Id. at 171.
\(^4\) Id. at 170.
\(^5\) Id.
\(^6\) Id.
\(^7\) See, e.g., Campbell Soup Co. v. Armour & Co., 175 F.2d 795, 798 (3d Cir. 1949), cert. denied, 338 U.S. 847 (1949); Life Savers Corp. v. Curtiss Candy Co., 182 F.2d 4, 9 (7th Cir. 1950).
Three principal arguments have been advanced in support of a rule prohibiting trademark protection of a color: color depletion, shade confusion, and functionality. A brief explanation of each of these theories will illuminate the Court's reasoning in Qualitex.

A. The Color Depletion Theory

The color depletion theory assumes there are a limited number of colors that companies can use on their products. If companies are allowed to monopolize the use of particular colors, then the list of available colors will run out. Once the possible colors have been exhausted by earlier entrants, it will be impossible for later competitors to manufacture a product without infringing on someone's trademark. Two cases in particular helped to establish this theory, Diamond Match Co. v. Saginaw and Campbell Soup Co. v. Armour & Co.

In Diamond Match, the Court of Appeals for the Sixth Circuit used this theory as the basis for its decision. The plaintiff manufactured a match with a two-colored head: red with a blue tip. The defendant followed the plaintiff's lead and also began manufacturing a match with a multicolored head, including some with a red and blue head. The district court granted the plaintiff's suit for an injunction prohibiting the defendant from selling matches with red and blue matches. The Sixth Circuit reversed. It reasoned that if Diamond were allowed to monopolize the colors of red and blue, then others would soon follow and appropriate other colors for their own products. Competition would be inhibited because there would be no colors left for new entrants to the match market.

The Third Circuit reached the same conclusion in Campbell Soup. Campbell sought to enjoin Armour from using red and white

25. See, e.g., Campbell Soup, 175 F.2d at 798.
27. 142 F. 727.
28. 175 F.2d 795.
29. 142. F. at 728.
30. Id.
31. Id.
32. Id. at 729.
33. Id. at 730 (citing Marvel Co. v. Pearl, 133 F. 160, 162 (2d Cir. 1904)).
labels.\textsuperscript{35} The district court denied the requested injunction and the Third Circuit affirmed.\textsuperscript{36} The Third Circuit Court felt that if one company were allowed to monopolize a color, others would soon follow and deplete the number of available colors.\textsuperscript{37}

This doctrine was finally challenged in \textit{Owens-Corning}.\textsuperscript{38} The plaintiff manufactured pink insulation for residential use.\textsuperscript{39} After both a trademark examiner and the Trademark Trial and Appeals Board (TTAB) denied the application to register the color pink, the plaintiff appealed to the Court of Appeals for the Federal Circuit.\textsuperscript{40} In overruling the TTAB the Federal Circuit held that each case should be decided on its own facts.\textsuperscript{41} The court stated that if, as in \textit{Owens-Corning}, the number of remaining colors vastly exceeded the number of existing competitors, then the color depletion theory should not act as an automatic bar to trademark registration.\textsuperscript{42} This case marked the first time that a color alone received trademark protection.

In \textit{Master Distributors v. Pako},\textsuperscript{43} the Eighth Circuit cited \textit{Owens-Corning} with approval.\textsuperscript{44} The \textit{Master Distributors} court pointed out that it would be quite difficult for companies to actually deplete all the colors in the spectrum because a color can have hundreds, if not thousands, of distinguishable shades.\textsuperscript{45} In \textit{NutraSweet v. Stadt},\textsuperscript{46} on the other hand, the Court of Appeals for the Seventh Circuit made a point of rejecting \textit{Owens-Corning} because, in its view: holding otherwise would undermine the reliability of lawyers' advice to their clients on the subject; a trademark of a color in connection with a particular design affords adequate protection; it will be difficult to distinguish various shades; and allowing a color to be protected might create a barrier to competition.\textsuperscript{47}

\textbf{B. The Shade Confusion Theory}

Proponents of the shade confusion theory argue that litigation over trademarks will become hopelessly confused if different shades

\begin{itemize}
\item \textsuperscript{35} 175 F.2d at 796.
\item \textsuperscript{36} \textit{Id.} at 796, 799.
\item \textsuperscript{37} \textit{Id.} at 798.
\item \textsuperscript{38} \textit{In re Owens-Corning Fiberglas Corp.}, 774 F.2d 1116 (Fed. Cir. 1985).
\item \textsuperscript{39} \textit{Id.} at 1118.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.} at 1120.
\item \textsuperscript{42} \textit{Id.} at 1122.
\item \textsuperscript{43} 986 F.2d 219 (8th Cir. 1993).
\item \textsuperscript{44} \textit{Id.} at 224.
\item \textsuperscript{45} \textit{Id.} at 223.
\item \textsuperscript{46} 917 F.2d 1024.
\item \textsuperscript{47} \textit{Id.} at 1027-28.
\end{itemize}
of the same color are trademarked.\textsuperscript{48} Moreover, litigation is the only way to settle a dispute over whether two colors are confusingly similar.\textsuperscript{49} That is to say, there is no color test that will allow potential litigants to predict whether a court will determine whether a valid trademark exists. Such confusion would arguably lead to a great deal of litigation as plaintiffs and defendants alike decided to take their chances in court. Courts are asked to distinguish between shades of the same color.\textsuperscript{50} For trademark rights that arise as a matter of trademark registration, the question of similarity is further confused because it is not clear whether a court should focus on how a color is described in its trademark registration or, instead, on how it appears in the marketplace.\textsuperscript{51} There will be a problem if courts rely on the PTO examination; the process of registering a trademark does not involve the submission of an actual color sample.\textsuperscript{52} Instead, colors are represented on trademark applications by one of eight line patterns, four of which can represent more than one color.\textsuperscript{53} One might query how a court decide between two shades of the color blue if one shade is simply represented by a pattern of lines on a trademark application that was intended by the Patent and Trademark Office to represent all shades of the color blue. If a court instead compares the products’ appearance in the marketplace, should a court replicate the lighting of the average store where the products are sold? Should the court compare the two colors from a distance, the way a consumer might view the products from across a store?

C. \textit{The Functionality Theory}

The functionality doctrine suggests that manufacturers must not be allowed to trademark a functional feature of a product because other manufacturers would not be able to compete effectively.\textsuperscript{54} Further, granting exclusive rights to a functional feature lies more prop-

\textsuperscript{48} Id. at 1027; Mitek Corp. v. Pyramid Sound Corp., 20 U.S.P.Q.2d 1389, 1391 (N.D. Ill. 1991).

\textsuperscript{49} NutraSweet, 917 F.2d at 1027. The "confusingly similar" standard is used to determine both the existence of trademark infringement and whether a trademark is eligible for federal registration.

\textsuperscript{50} Id.

\textsuperscript{51} See generally Amsted Indus., Inc. v. West Coast Wire, Rope & Rigging, 2 U.S.P.Q.2d 1755 (Trademark Trial and App. Bd. 1987).

\textsuperscript{52} 37 C.F.R. § 2.52(e) (1995).

\textsuperscript{53} Id.

\textsuperscript{54} Diamond Match Co. v. Saginaw Match Co., 142 F. 727, 729-30 (6th Cir. 1906).
erly within the purview of patent law rather than trademark law. The following factors tend to indicate functionality: 1) the existence of an expired utility patent that disclosed the utilitarian advantage of the design; 2) the touting of the utilitarian advantages of the design through advertising; 3) the availability of alternative designs; and 4) the fact that the design is accomplished by comparatively cheap or simple manufacturing methods. As a general rule, an element of a product is functional if it is necessary to the practical operation of the product itself, or allows the product to be more affordably produced. If a design's aesthetic value lies in its ability to confer a significant benefit that cannot practically be replicated by the use of alternative designs, then the design, or in this case color, is functional. The ultimate test for such aesthetic functionality is whether the recognition of trademark rights would significantly hinder competition.

Intuitively, the use of a particular color will rarely increase the utility of a product or decrease its cost. Nonetheless, there are those exceptional cases where color is functional. For example, the Seventh Circuit has held that the multicolored stripes on a Lifesaver candy package are functional because it allows a consumer to know what is in the package. A district court has held that white knife handles are functional, as they allow a customer to notice if the handles are dirty. Other courts have focused on the issue of cost. If it would cost more for competitors to use another color, then the color in question creates a competitive advantage and is, therefore, functional.

Finally, a minority of courts have even found functionality on the basis of a customer's preference for a particular color. In John Deere

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56. Hill, supra note 55, at 1003-04 (citing In re Morton-Norwich Prods., 671 F.2d 1332 (C.C.P.A. 1982)).
60. Id. (quoting Restatement (Third) of Unfair Competition, § 17, cmt. c, at 176 (1995)).
61. But see Pagliero v. Wallace China Co., 198 F.2d 339, 343-44 (9th Cir. 1952) (referring to color creating aesthetic functionality).
62. Life Savers Corp. v. Curtiss Candy Co., 182 F.2d 4, 8-9 (7th Cir. 1950).
64. Schwinn Bicycle, 870 F.2d at 1189. See also Inwood Labs., Inc., v. Ives Labs., 456 U.S. 844, 850-51 n.10 (1982).
v. Farmhand, for example, the Eighth Circuit affirmed a holding that the color green is functional when applied to certain farm equipment, as farmers are generally attracted to the color green and would naturally want the color of their new farm equipment to match the color of the green tractors they already own.

III. PRIOR HISTORY

Since the 1950s, the Qualitex Company (Qualitex) has been in the business of manufacturing dry cleaning press pads that are a special shade of green-gold. In 1989, Jacobson Products, a rival of Qualitex, began selling press pads that were a similar green-gold color. Qualitex sued Jacobson in 1991. Qualitex also applied to register its green-gold color as a trademark and added a trademark infringement claim to its unfair competition claim. While the suit was pending, the Patent and Trademark Office granted trademark registration to Qualitex's green-gold color.

There is a competitive need in the press pad industry for colored pads – colored pads hide scorch marks. Before Qualitex began using its green-gold color, however, no other press pad manufacturer had used this particular color. Since 1970, Qualitex used the color in its advertisements. Further, Qualitex distributed materials at trade shows that pictured its press pads and draped its booths in the same green-gold color.

The District Court for the Central District of California held that Jacobson was guilty of both trademark infringement and unfair competition. Jacobson was, therefore, ordered to pay over $8,000 plus costs, as well as being permanently enjoined from using the same or

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65. 560 F. Supp. 85 (S.D. Iowa 1982), aff’d per curiam, 721 F.2d 253 (8th Cir. 1983).
66. 560 F. Supp. at 98.
68. 115 S. Ct. at 1302.
69. Id. at 1301.
71. Overcamp, supra note 24, at 596 (citing Appellee’s Brief in Opposition to Petition for Writ of Certiorari, at 11, Qualitex Co. v. Jacobson Prods., 13 F.3d 1297 (9th Cir. 1994) (No. 93-1577).
73. Id.
74. Id.
75. Id. at 1462.
similar green-gold color.76 Jacobson then appealed, seeking a declaration pursuant to its original counterclaim that color alone could not be trademarked.77 In a unanimous decision, the Ninth Circuit reversed the district court's finding and held that color alone cannot be trademarked.78 However, because the court affirmed the unfair competition claim, the award of damages and the injunction against Jacobson were allowed to stand.79

The Ninth Circuit's decision added to the conflict among the circuits regarding this issue. The Supreme Court granted certiorari to resolve the conflicts among the circuits.80

IV. ANALYSIS ON APPEAL

Justice Breyer, writing for the Court, began with a discussion of the Lanham Act.81 Under its provisions, a mark must act as a symbol, have secondary meaning and perform no nontrademark function.82 The Court reasoned that since a shape, a sound, and even a scent could meet the above criteria, so could a color.83 The Court held that: "Both the language of the Act and the basic underlying principles of trademark law would seem to include color within the universe of things that can qualify as a trademark." The Court also found that color satisfied the "more important" portion of the statutory definition of a trademark, which requires a one's use of the mark to distinguish one's goods from other competitors.85 This portion of the test addresses whether or not a feature of a product has acquired secondary meaning. Secondary meaning exists if, in the minds of the public, the primary significance of a feature is to identify the source of the product instead of the product itself.86 Hence, where color alone has attained secon-

76. 21 U.S.P.Q.2d at 1462.
78. 13 F.3d at 1305.
79. Id.
82. 115 S. Ct. at 1302-04.
83. Id. at 1303.
84. Id. at 1302.
85. Id. at 1303. See also 15 U.S.C. § 1127.
86. Inwood Labs, Inc. v. Ives Labs, Inc., 456 U.S. 844, 851 n.11 (1982). Note, however, that not all marks require secondary meaning to be valid trademarks. Trademark law recognizes four different categories of terms, in descending order or strength: arbitrary or fanciful, suggestive, descriptive, and generic. Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F.2d 4, 9 (2d Cir. 1976). Fanciful, arbitrary, and suggestive marks do not require secondary meaning because their use does not limit how other manufacturers will mark their products. Id. at 11. Moreover, since such marks have no natural connection to the product, they receive the broadest
dary meaning, thereby identifying a product with a particular brand, it can be trademarked.87

The Court also agreed with the minority of courts who have suggested that customers' preference for a particular color could make that color functional and bar trademark protection.88 The Court explained that if a color acts to make a product desirable, it cannot receive trademark protection because the color would then be “essential to the use or purpose” of the product.89 Not even Jacobson, however, had the audacity to suggest that customers found Qualitex’s green-gold color attractive.90 So, while the functionality doctrine may continue to be used as a potential bar to color alone receiving a trademark, it did not apply it the facts of Qualitex.

Jacobson gave four reasons why the Court should prohibit the protection of color alone.91 The Court found all of them unpersuasive.92 Jacobson began by arguing in favor of the shade confusion theory.93 Writing for the court, Justice Breyer quickly dispensed with this argument. He explained that however confusing it might be to engage in shade analysis, it would be no more confusing than deciding the difficult questions surrounding whether two words, phrases, or symbols are sufficiently similar to warrant trademark protection.94 The Court even suggested that lower courts should consider replicating the relevant lighting conditions, stating, “We do not see why courts could not apply those standards to a color, replicating, if necessary, lighting conditions under which a colored product is normally sold.”95 The standards to which the Court refers are those legal standards that have traditionally been used to guide courts in comparing words, phrases, and symbols to determine if they are confusingly similar, e.g., strong marks with secondary meaning, receive greater protection than weak marks.96 Where marks are merely suggestive or

87. Id. 115 S. Ct. at 1304.
88. Id. at 1306.
89. Id. (quoting Inwood Labs., Inc., v. Ives Labs., 456 U.S. 844, 850 n.10 (1982)).
90. The district court specifically held that the green-gold color gives Qualitex no competitive advantage in the press pad market. Qualitex, 21 U.S.P.Q.2d at 1459.
91. 115 S. Ct. at 1305-08.
92. Id.
93. Id. at 1305.
94. Id.
95. Id.
96. Id. at 1305-07.
descriptive, they are weak marks that are afforded protection only in the narrow field in which they have been used.\textsuperscript{97}

Second, Jacobson tried advancing the color depletion theory in support of the traditional rule.\textsuperscript{98} The Court responded that this theory attempts to use an exceptional problem to justify a blanket prohibition and is unreasonable.\textsuperscript{99} In addition, the Court went on to suggest that in those few cases where the full spectrum of colors might be depleted by granting a trademark to color alone, the functionality doctrine could be applied to protect competitors from being disadvantaged.\textsuperscript{100} Therefore, while the color depletion theory has been substantially discredited, it may still apply by way of the functionality doctrine.

Jacobson’s third argument, based on \textit{stare decisis}, was essentially that the Court should not allow a color to be trademarked.\textsuperscript{101} Jacobson cited many cases, including some Supreme Court opinions, demonstrating that the majority of the courts that had considered the issue had refused to allow trademark protection to be extended to color alone.\textsuperscript{102} The Court distinguished the cited Supreme Court cases because they were decided before the passage of the Lanham Act in 1946.\textsuperscript{103} Moreover, the Court noted that the Federal Circuit, at least, had concluded that trademark protection of color alone was consistent with the Lanham Act.\textsuperscript{104} The Court also highlighted the fact that it was the Patent and Trademark Office’s explicit policy to allow colors as trademarks.\textsuperscript{105} Further, the Court stated that when Congress amended the Lanham Act in 1988, it must have intended to allow a color alone to be trademarked, given the following additional factors: 1) the Federal Circuit had already held in \textit{Owens-Corning} that it was possible to trademark a color alone, and Congress did not take the opportunity to provide otherwise by statute; 2) the Trademark Association’s Trademark Review Commission had written a report recommending that trademark law not be narrowed to preclude the

\begin{itemize}
\item \textsuperscript{97} Majestic Mfg. Co. v. Majestic Elec. Appliance Co., 172 F.2d 862, 863 (6th Cir. 1949).
\item \textsuperscript{98} 115 S. Ct. at 1305.
\item \textsuperscript{99} \textit{id.} at 1306.
\item \textsuperscript{100} \textit{id.} A similar logic has been expressed by the Court of Appeals for the Ninth Circuit. Int’l Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 823 (9th Cir. 1993) (explaining the reasoning behind the court’s decision in First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378 (9th Cir. 1987)).
\item \textsuperscript{101} 115 S. Ct. at 1307-08.
\item \textsuperscript{102} \textit{id.} at 1307.
\item \textsuperscript{103} \textit{id.}
\item \textsuperscript{104} \textit{id.} at 1308-09.
\item \textsuperscript{105} The Court’s opinion noted that the Patent and Trademark Office recognizes color alone as trademarkable and brings this fact to the attention of examiners in its manual of procedures. Qualitex, 115 S. Ct. at 1304. See U.S. Dept of Commerce, Patent and Trademark Office, Trademark Manual of Examining Procedure § 1202.04(c) (2d ed. 1993).
\end{itemize}
registration of such things as color; and 3) the Congressional Record indicated that Lanham Act amendments were based upon the Trademark Review Commission’s report. Hence, the Court’s decision to allow a color alone to be trademarked gave effect to Congressional intent.

Fourth, Jacobson argued that a company’s use of color can be adequately protected without granting a trademark on the color. A plaintiff could bring an unfair competition claim or, so long as color is used as part of a greater design, the Lanham Act would clearly protect a company’s exclusive use of that color. The Court, however, recognized there might be products on which it is difficult to put designs, e.g., an industrial bolt that is usually seen from a distance. In such a case, a firm may simply desire to use a color alone to distinguish its products from the competition. The Court concluded that only by allowing protection of a color alone would the bolt manufacturer’s exclusive use of a particular color be adequately protected.

V. CONCLUSION

It is now possible to trademark color alone. However, the functionality doctrine can still act as a bar. The color depletion argument might also act as a bar if it can be used to convince a court to invoke the functionality rule, i.e., granting a trademark to a color alone would, because of color depletion, give a firm a competitive advantage and is therefore a function of the product itself. The shade confusion theory, on the other hand, has been put to rest.

Customer preference for a particular color can be enough to warrant the application of the functionality doctrine. The functionality doctrine can also be applied if using a particular color represents a cost advantage. A corporation wishing to trademark a color alone
will, therefore, want to consider selecting a color that is both unattrac-
tive, or at least is not a preferred color among one’s customers, and is
at least as expensive as other alternative colors.

As a practical matter, opponents of color trademarks will begin
by arguing that the color chosen is not inherently distinctive. This will
place a heavy burden on the proponent of the trademark to prove it has
acquired secondary meaning. Next, the opponent of the color trade-
mark will argue that the use of the particular color concerned amounts
to a competitive advantage either because it is aesthetically functional
or because its incorporation represents a cost savings.

Proponents of the color trademark, on the other hand, will argue
that their color has acquired secondary meaning. Further, the color in
question gives the proponent no competitive advantage. Because
strong marks will receive broader protection, the more outlandish —
and perhaps unattractive — colors are likely to qualify for protection.

118. In the case of Qualitex, this happened not to be a difficult task; some purchasers identi-
fied the press pads over the telephone merely by describing its color. Qualitex Co. v. Jacobson
Prods., 21 U.S.P.Q.2d 1457, 1459. In addition, purchasers were more likely to notice the color
of Qualitex’s pads, as they were known to be the best in the business. Id. at 1458.