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THE QUALITEX MONSTER: THE COLOR TRADEMARK DISASTER

I. INTRODUCTION

Traditionally, colors were not granted trademark protection unless combined with a distinctive design. In 1985, the Federal Circuit departed from the majority rule in *In re Owens-Corning Fiberglas Corp.* to hold that the corporation could register the pink color of its insulation as a trademark. Thereafter, the Seventh Circuit declined to follow the *Owens-Corning* decision in *NutraSweet Co. v. Stadt Corp.* Although deciding *Master Distributors, Inc. v. Pako Corp.* on another issue, the Eighth Circuit announced its willingness to follow *Owens-Corning*. Following the majority rule among the circuits, the Ninth Circuit, in *Qualitex Co. v. Jacobson Products Co.*, held in January 1994 that color alone was not protectible. The Supreme Court granted certiorari to resolve this conflict within the circuits and unanimously reversed the Ninth Circuit, thus abandoning the traditional rule of no protection for color alone.

II. STATEMENT OF FACTS

The Qualitex Company (Qualitex) has manufactured and sold
"SUN GLOW" press pads for dry cleaning presses since 1957.\textsuperscript{10} In 1989, Jacobson Products Company, Inc. (Jacobson) began selling "MAGIC GLOW" press pads dyed the same green-gold color as those made by Qualitex.\textsuperscript{11} Qualitex's press pads have been prominently advertised in trade publications in color since 1970.\textsuperscript{12} Additionally, Qualitex distributes materials picturing its green-gold press pad at trade shows and through mailings.\textsuperscript{13} Until Jacobson introduced its "MAGIC GLOW" press pads, no company other than Qualitex made green-gold press pads, although other press pads were sold in a variety of colors.\textsuperscript{14}

Press pads function as padding on machines that press clothes in the dry cleaning and garment manufacturing industries.\textsuperscript{15} An outer layer of cloth treated to resist heat covers the padding, which is made from fiberglass, rubber, and insulating materials.\textsuperscript{16} During the pressing process, the pads become scorched and are "rendered unsightly if color is not present to mute or disguise the inevitable scorch marks."\textsuperscript{17} Thus, "[t]here is a competitive need in the press pad industry for color."\textsuperscript{18}

Qualitex brought suit against Jacobson for trademark infringement and for unfair competition in violation of § 43 of the Lanham Act, seeking both an injunction and damages.\textsuperscript{19} In 1991, while the suit was pending, the Patent and Trademark Office granted

\textsuperscript{11} Id.
\textsuperscript{12} Qualitex Co. v. Jacobson Prods. Co., 21 U.S.P.Q.2d (BNA) 1457, 1458 (C.D. Cal. 1991). "No other advertiser ever ran an ad with that color" in American Drycleaner Magazine, the leading trade publication. Id.
\textsuperscript{13} Id. "Qualitex also drapes its booths at trade shows with green-gold cover material. Id.
\textsuperscript{14} Id. Jacobson has sold dark green and two-tone grey and green press pads since 1988.
\textsuperscript{15} Junda Woo, Product's Color Alone Can't Get Trademark Protection, Court Says, WALL ST. J., Jan. 5, 1994, at B8.
\textsuperscript{16} Qualitex, 21 U.S.P.Q.2d at 1457.
\textsuperscript{17} Appellee's Brief in Opposition to Petition for Writ of Certiorari at 11, Qualitex Co. v. Jacobson Prods. Co., 13 F.3d 1297 (9th Cir. 1994) (No. 93-1577).
\textsuperscript{18} Qualitex Co. v. Jacobson Prods. Co., 21 U.S.P.Q.2d (BNA) 1457, 1460 (C.D. Cal. 1991) (finding that number of available colors was "in the hundreds, if not thousands").
\textsuperscript{19} Qualitex Co. v. Jacobson Prods. Co., 13 F.3d 1297, 1300 (9th Cir. 1994), rev'd, 115 S. Ct. 1300 (1995). Qualitex sought damages for Jacobson's profits from the sale of "MAGIC GLOW" press pads and an injunction against their further manufacture and marketing. Id.
registration of Qualitex's green-gold color. The District Court for the Central District of California held that Jacobson was guilty of trademark infringement and unfair competition and granted the injunction and awarded damages to Qualitex.

Jacobson counterclaimed, seeking a declaration that Qualitex's trademark was invalid, arguing that color alone cannot be protected. The district court held that the existence of a registered trademark is "prima facie evidence" of validity and determined that Jacobson failed to prove that the mark was invalid.

The Ninth Circuit unanimously reversed the district court's finding that Jacobson was guilty of trademark infringement and held that color alone could not receive trademark protection. Since the trademark for color was found invalid, the Ninth Circuit directed the district court to enter judgment cancelling the trademark. In addition, the court affirmed the judgment of unfair competition for Qualitex, the award of monetary damages for the unfair competition claim and the injunction against Jacobson.

III. BACKGROUND OF THE APPLICABLE LAW

A. TRADITIONAL RULE PROHIBITING PROTECTION OF COLOR ALONE

The majority of courts have held that color alone was not protectible. Three major reasons have been given to deny

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20 Id. Qualitex's registration was issued February 5, 1991 as No. 1,633,711. Id.
21 Id. Jacobson was ordered to pay $82,013.13 plus costs to Qualitex. Also, Jacobson and its agents were "permanently enjoined from manufacturing, marketing or selling press pads" in the same green-gold color or any closely similar shade. Qualitex, 21 U.S.P.Q.2d at 1462.
25 Id. at 1305.
26 Id.
27 See, e.g., id. at 1302 (listing rules in the courts of appeals); NutraSweet Co. v. Stadt Corp., 917 F.2d 1024, 1027 (7th Cir. 1990), cert. denied, 499 U.S. 983 (1991) (noting general rule barred trademark protection for color); J. THOMAS McCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7.16(1) (3d ed. 1993) (stating that only Eighth Circuit follows Federal Circuit's holding "that the overall color of a product was not precluded from
trademark protection for color alone: the color depletion theory,\textsuperscript{28} the shade confusion theory,\textsuperscript{29} and the functionality doctrine.\textsuperscript{30}

The color depletion theory rests on the assumption that a limited number of possible colors exist, and if manufacturers can monopolize colors for a product, the "list of colors will soon run out."\textsuperscript{31} It was understood originally that registration of a color would encompass all of its shades; thus, monopolization of a primary color has been prohibited for almost ninety years.\textsuperscript{32} Modern courts have applied the color depletion theory to bar protection for one shade of a color.\textsuperscript{33}

Additionally, the available color palette for some products is quite restricted due to the nature of the product itself.\textsuperscript{34} In \textit{R.L. Winston Rod Co. v. Sage Manufacturing Co.},\textsuperscript{35} only a few colors were shown to cover successfully black graphite fishing rods and the court held that allowing one company to monopolize green would "severely restrict competition."\textsuperscript{36} In these industries, there is a "competitive need" for color and even under a rule allowing color trademarks, protection would be denied.\textsuperscript{37}

The color depletion theory has been criticized because thousands


\textsuperscript{29}NutraSweet Co. v. Stadt Corp., 917 F.2d 1024, 1027 (7th Cir. 1990), \textit{cert. denied}, 499 U.S. 983 (1991).


\textsuperscript{31}\textit{Campbell Soup}, 175 F.2d at 798.


\textsuperscript{33}See First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1382-83, 1 U.S.P.Q.2d (BNA) 1779 (9th Cir. 1987) (denying protection of color yellow for antifreeze bottles).


\textsuperscript{35}Id.

\textsuperscript{36}Id. at 1400.

\textsuperscript{37}774 F.2d at 1121-22 (finding no competitive need for color in fiberglass industry and holding color pink protectible).
of shades exist through modern technology. However, others have noted that most consumers are unable to identify between products colored with different shades of the same primary color; thus, the existence of almost infinite shades of colors does not warrant trademark registration of colors.

A similar argument against protecting color per se is the shade confusion theory. Under this theory, the contention is that litigation over trademarks would become focused on whether the colors were genuinely different. Proponents of shade confusion theory argue that courts would face difficulties in distinguishing between colors, particularly because registrations of marks do not contain color samples.

However, courts had to make these shade determinations even in jurisdictions that barred protection of mere color, thus weakening the shade confusion theory. In addition, even if consumers cannot identify different shades, courts can employ scientific evidence to precisely differentiate colors. Moreover, courts already distinguish between other marks, such as words, which require more problematic inquiries.

A final argument traditionally given to deny protection rested on functionality. Under the functionality doctrine, features, such as color, cannot be protected if they are functional. The functional-

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39 E.g., MCCARTHY, supra note 27, § 7.16(1) (arguing that it is "naive view" to assume "fine variations in shade" will be distinguishable); Craig Summerfield, Note, Color as a Trademark and the Mere Color Rule: The Circuit Split for Color Alone, 68 CHI.-KENT L. REV. 973, 996 (1993) ("merely listing the number of colors . . . provides little insight").
40 NutraSweet Co. v. Stadt Corp., 917 F.2d 1024, 1027 (7th Cir. 1990), cert. denied, 499 U.S. 983 (1991); In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1131 (Fed. Cir. 1985) (Bissell, J., dissenting).
41 37 C.F.R. § 2.52(e) (1994) (requiring submission of drawing with trademark application with colors indicated by patterns of lines). Note that only eight line patterns are available and four of these patterns can each represent two colors.
42 E.g., Master Distrib., Inc. v. Pako Corp., 986 F.2d 219, 223 (8th Cir. 1993) ("questions regarding shade confusion are already being answered"); MCCARTHY, supra note 27, § 7.16(1) ("even under the present state of the law, such questions will still arise to a limited extent").
43 MCCARTHY, supra note 27, § 7.16(1).
44 In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1123 (Fed. Cir. 1985).
45 Brunswick Corp. v. British Seagull Ltd., 35 F.3d 1527, 1530, 1533, 32 U.S.P.Q.2d (BNA) 1120 (Fed. Cir. 1994) (finding that color black of outboard motors was functional because it was compatible in color with boats and made motor appear smaller in size), cert.
The functionality doctrine was derived judicially to prevent one manufacturer from having a monopoly over "an advance in effectiveness of operation, or in simplicity of form, or in utility of color." The functionality doctrine outweighs the manufacturer's "right to protect symbols which identify the source of particular goods" because protecting functional features, including color, would deter or eliminate competition. The United States Supreme Court has said that "a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article." All the circuits recognize the doctrine of utilitarian functionality, but define functionality in different ways. If protecting a product feature, such as color, would "hinder competition" because it would be costly for other manufacturers "to design around or do without," then that feature is functional and cannot be protected. Some of the circuits also recognize aesthetic functionality as a

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46 Pope Automatic Merchandising Co. v. McCrum-Howell Co., 191 F. 979, 982 (7th Cir. 1911), cert. denied, 223 U.S. 730 (1912); see Sylvania Elec. Prod., Inc. v. Dura Elec. Lamp Co., 247 F.2d 730, 732 (3d Cir. 1957) (stating that functionality doctrine "prevent[s] the grant of perpetual monopoly by the issuance of a trade-mark in the situation where a patent has either expired, or for one reason or another, cannot be granted").


48 Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 850 n.10, 214 U.S.P.Q. (BNA) 1 (1982); see Kellogg Co. v. National Biscuit Co., 305 U.S. 111 (1938) (holding that shape of product was functional because its cost would increase and its quality decrease if another shape had to be used instead).

"McCarthy, supra note 27, § 7.26[3][a] (noting that "[m]any agree that the 'ultimate question is whether the copier is able to 'compete effectively' without copying" the first product's feature).

50 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 17 cmt. a (1995); see Sylvania Elec. Prod., Inc. v. Dura Elec. Lamp Co., 247 F.2d 730 (3d Cir. 1957) (holding that chemical air leakage indicator on photographic flashbulbs which changed color to indicate leak was functional as color is necessary for its purpose).

means of finding color functional.\textsuperscript{52} In \textit{Deere \& Co. v. Farmhand, Inc.},\textsuperscript{53} the color John Deere green was held to be functional for farm equipment because “farmers prefer to match their loaders to their tractor” and protection of the color would harm competition.\textsuperscript{54} If the color of a product is a significant element of its success, even if for purely aesthetic reasons, the color should also be available for imitation by competitors.\textsuperscript{55}

B. \textit{IN RE OWENS-CORNING FIBERGLASS CORP.: DEPARTURE FROM THE TRADITIONAL RULE}

In 1985, a divided Federal Circuit held that the Owens-Corning Fiberglas Corporation (Owens-Corning) was entitled to registration of the color pink in manufacturing fiberglass insulation.\textsuperscript{56} The court found that the color pink was not functional and had acquired secondary meaning, and thus could be protected.\textsuperscript{57} This decision marked the first time a color alone received trademark protection.\textsuperscript{58} Only one other circuit treated the \textit{Owens-Corning} decision with approval.\textsuperscript{59}

The Federal Circuit noted that the Lanham Act provided for a

\textsuperscript{52} MCCARTHY, \textit{supra}, note 27, § 7.26(4)[b] (noting that many circuits reject or limit doctrine); see First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1382 n.3 (9th Cir. 1987) (stating that “the ‘aesthetic’ functionality test has been limited . . . in favor of the ‘utilitarian’ functionality test” in the Ninth Circuit).

\textsuperscript{53} 560 F. Supp. 85 (S.D. Iowa 1982), \textit{aff’d per curiam}, 721 F.2d 253 (8th Cir. 1983).

\textsuperscript{54} Id. at 98.

\textsuperscript{55} \textit{Id.} (“The doctrine of aesthetic functionality defines functionality in terms of consumer acceptance.”); \textit{e.g.}, R.L. Winston Rod Co. v. Sage Mfg. Co., 838 F. Supp. 1396, 1400 (D. Mont. 1993) (finding consumers preferred color of their fly rods to “evolve the natural colors of the outdoor environment in which they are used,” thus green, black, and brown are functional); Black & Decker Mfg. Co. v. Ever-Ready Appliance Mfg. Co., 518 F. Supp. 607, 617 (E.D. Mo. 1981) (finding that both manufacturers chose color almond because “it was the most popular color for kitchen accessories”), \textit{aff’d}, 684 F.2d 546 (8th Cir. 1982).

\textsuperscript{56} \textit{In re Owens-Corning Fiberglas Corp.}, 774 F.2d 1116, 1128 (Fed. Cir. 1985). The Trademark Trial and Appeal Board had held that “[a]nalysis of color trademarks should . . . be subject to the same analysis as any other sort of ornamentation,” but Owens-Corning had not shown that “pink functions as a trademark for . . . insulation.” 221 U.S.P.Q. 1195, 1198-99 (T.T.A.B. 1984).

\textsuperscript{57} Owens-Corning, 774 F.2d at 1122.

\textsuperscript{58} MCCARTHY, \textit{supra} note 27, § 7.16[2].

\textsuperscript{59} Master Distribs., Inc. v. Pako Corp., 986 F.2d 219, 224 (8th Cir. 1993); MCCARTHY, \textit{supra} note 27, § 7.16[2].
broad policy of granting trademarks unless an express exception covers the type of mark. The court emphasized that no exception is given for color and that analogous protection now exists for other "previously excluded indicia," such as product configurations, slogans, and sounds. The Federal Circuit found that color mark cases are decided on a case-by-case basis consistent with the intent of Congress in enacting the Lanham Act.

The Federal Circuit discounted or diluted the customary arguments against protection of color alone. First, the court stated that the color depletion theory is no longer applicable as a "per se prohibition" on the protection of color marks after the enactment of the Lanham Act. However, the examples the court cited in support of its proposition are concerned with protection for color as part of a design, not for color alone. Since "each case is decided upon its facts," the color depletion theory cannot bar all protection of color, but the court left open the possibility that the theory could be applied in appropriate situations.

Second, the court reaffirmed the rule that "when the color applied to goods serves a primarily utilitarian purpose it is not subject to protection as a trademark." If a color is found to be functional, it cannot be protected because to do so would eliminate competition. The question of functionality was not raised in opposition to registration, but Owens-Corning was the only manufacturer to apply any color to insulation; thus, pink did not appear to be

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60 Owens-Corning, 774 F.2d at 1119; 15 U.S.C. § 1052 (1988) ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration. . . .").
61 Owens-Corning, 774 F.2d at 1119-1120.
62 Id. at 1120.
63 Id. (finding color depletion theory to be "in conflict with the liberating purposes of the Act").
65 In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1120 (Fed. Cir. 1985); see First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1382 (9th Cir. 1987) (holding that "Owens-Corning continues to apply the color depletion theory unless there is no competitive need for the color in a particular industry").
66 Owens-Corning, 774 F.2d at 1120-21.
67 Id. at 1121.
functional and other manufacturers had no "competitive need" for the color pink. The Federal Circuit also rejected the shade confusion theory as a reason to prohibit protection for color marks. The court agreed with the Trademark Trial and Appeal Board that courts already make harder and more confusing determinations based on distinctions between word marks. The court noted that previous cases have drawn distinctions between shades. However, in support of this proposition, the court cited a comparison between a dual-colored product and a product colored in only one shade.

Having found that there was no competitive need for the color pink, the court then considered whether the color pink had acquired secondary meaning. The court held that due to the large amount of money spent on advertising pink insulation, the color pink had obtained secondary meaning. The Lanham Act provides that a mark "which has become distinctive of applicant's goods in commerce" can be registered. In order to demonstrate secondary meaning, the court required evidence of the "method of using the mark" and effectiveness of that method in "caus[ing] the purchasing public to identify the mark with the source of the product."

The court acknowledged that "by their nature color marks carry a difficult burden in demonstrating distinctiveness and trademark character," but found that Owens-Corning presented enough evidence to be granted registration. The corporation demonstrat-

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68 Id. at 1121-22; see also Summerfield, supra note 39, at 975 ("The Owens-Corning court established a 'competitive need' test for granting rights in color alone.").
69 Owens-Corning, 774 F.2d at 1123.
70 In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1123 (Fed. Cir. 1985).
71 Id. (citing Youngstown Sheet and Tube Co. v. Armco Steel Corp., 170 U.S.P.Q. (BNA) 162 (T.T.A.B. 1971) (comparing grey and orange banded fence post and orange banded pipe)).
72 Owens-Corning, 774 F.2d at 1124.
73 Id. at 1127.
74 15 U.S.C. § 1052(f) (Supp V. 1993); Owens-Corning, 774 F.2d at 1124 (stating that Lanham Act "codifies the common-law doctrine of secondary meaning").
75 In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1125 (Fed. Cir. 1985); see 15 U.S.C. § 1052(f) (1988) (stating that "proof of substantially exclusive and continuous use... for the five years" prior could be "prima facie evidence that the mark has become distinctive").
76 Owens-Corning, 774 F.2d at 1127-28. The court also noted that an increased level of evidence was needed to find ornamentation, such as color, distinctive. Id. at 1124.
ed that from 1972 to 1981 it spent over forty-two million dollars in advertising its pink insulation and it presented surveys showing that fifty percent of homeowners knew that Owens-Corning Corporation made pink insulation. Since "the size of advertising expenditures alone has been found to serve as strong evidence of secondary meaning," the court found that Owens-Corning established secondary meaning of the color pink.

Thus, the Federal Circuit held that Owens-Corning was allowed to register the color pink because it was not functional, there was no competitive need for pink in the insulation market, and it had acquired secondary meaning.

Judge Bissell dissented from the majority in Owens-Corning, arguing that the traditional prohibition against trademarks for color alone should remain as law. Although the majority discussed whether color could receive trademark protection, the dissent stated that the single issue litigated was whether secondary meaning had been demonstrated. The dissent took issue with the majority's position that the passage of the Lanham Act caused courts to abandon the traditional rule, noting that numerous decisions had continued to prohibit protection of color alone.

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77 Id. at 1125, 1127. The Trademark Trial and Appeals Board noted that these survey results do "not establish that those respondents associate pink insulation with a single source . . ." 221 U.S.P.Q. (BNA) 1195, 1199 (T.T.A.B. 1984).

78 Id. at 1125 (quoting Roux Lab., Inc. v. Clairol, Inc., 427 F.2d 823, 831 n.10, 166 U.S.P.Q. (BNA) 94, 41 n.10 (C.C.P.A. 1970)).

79 Owens-Corning, 774 F.2d at 1122, 1128; Thomas A. Schmidt, Creating Protectible Color Trademarks, 81 TRADEMARK REP. 285, 301 (1991).

80 In re Owens-Corning Fiberglas Corp., 774 F.2d 1116, 1128 (Fed. Cir. 1985) (Bissell, J., dissenting); Keating, supra note 3, at 12-13 ("While dissenting opinions frequently have limited precedential value, a strong dissenting opinion in the federal Circuit is analogous to a five to four decision in the United States Supreme Court" because the court "has such a concentrated scope of subject matter jurisdiction.").

81 Owens-Corning, 774 F.2d at 1128 n.1.

The dissent gave four reasons why the majority's position in rejecting the traditional rule was in error. First, the majority opinion "ignore[d] the principle of comity." The Federal Circuit's jurisdiction over trademark law is not exclusive, but is shared with the regional circuits. Although the decisions of other circuits do not bind the Federal Circuit, the dissent declared, "they are entitled to at least a modicum of respect and deference," particularly since their jurisdiction is concurrent. The majority's decision rejected the ideals of predictability and consistency and encouraged forum-shopping.

Second, the majority's rejection of the traditional rule was unnecessary since other protections within the Lanham Act serve to protect color when it is an element in a trademark. Courts have long held that a color combined with "an arbitrary or distinctive design" can be protected. The dissent concluded that the color pink was not an element of a design, but rather the overall color of the insulation, and therefore not protectible under the traditional rule.
Third, the dissent determined that the decision "create[d] a barrier to otherwise lawful competition in the home insulation trade."91 Judge Bissell noted that Owens-Corning was the only manufacturer that colored its insulation and "its advertising claim[ed] a 75 percent market share," making Owens-Corning's pink insulation "virtually synonymous with home insulation."92 As a result of Owens-Corning's registration of such a well-advertised product, "new entrants may be unable to effectively compete if barred from making pink insulation."93

The dissent stated the purpose of trademark law is to grant "the right to prevent confusion, but not to bar new entrants into the market."94 Judge Bissell argued that when trademark protection is not available, manufacturers can be required to label their products "to prevent customers from being misled as to the source."95 Therefore, Owens-Corning might have other relief available without the court granting a monopoly in the color pink.96

The dissent's final attack on the majority's rejection of the traditional rule was grounded in a fear that "infringement actions could soon denigrate into questions of shade confusion."97 The dissent argued that confusion between shades of colors would...
present practical problems. Since registrations are not printed in color and show colors by one of eight patterns of lines with some patterns representing more than one color, the dissent feared that "registration will add only greater imprecision." Then, in Master Distributors, Inc. v. Pako Corp., 100 the Eighth Circuit approved of the Owens-Corning majority but refused to "establish a per se prohibition against protecting color alone as a trademark." 101 However, since the case was on appeal from a grant of summary judgment, the Eighth Circuit did not hold conclusively that Master Distributors was entitled to protection of the color blue. 102 According to the Eighth Circuit, a showing that all "the normal trademark requirements" had been met would be sufficient to establish a common-law color mark. 103

IV. THE NINTH CIRCUIT'S REASONING IN QUALITEX CO. v. JACOBSON PRODUCTS CO. 104

In Qualitex, the Ninth Circuit unanimously followed the traditional rule that color per se is not protectible. 105 The court based its decision on the language of the Lanham Act, Ninth Circuit precedent, and arguments given for the denial of color protection in other circuits.

The court first looked at the language of the Lanham Act. The Lanham Act does not expressly prohibit trademark registration of
color.\textsuperscript{106} The statute provides that "[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration" unless one of the listed exceptions is applicable.\textsuperscript{107} Although none of the statute's express exceptions mention the color of the product, the Ninth Circuit noted that the majority rule in the circuit courts was to deny registration.\textsuperscript{108}

Next, the court looked at its own prior decision on trademark protection of color. In \textit{First Brands Corp. v. Fred Meyer, Inc.},\textsuperscript{109} the Ninth Circuit distinguished \textit{Owens-Corning}, stating that the Federal Circuit, "[c]onfronted with an unusual set of facts . . . [had] established a very limited rule that in certain situations a particular color could itself be registered as a trademark."\textsuperscript{110} The court emphasized that "vast sums had been expended in advertising" on the color of the product.\textsuperscript{111} The Ninth Circuit downplayed the case's persuasive value by noting that the Federal Circuit was divided in its decision.\textsuperscript{112}

Relying heavily on \textit{NutraSweet Co. v. Stadt Corp.}\textsuperscript{113} to discuss the detrimental effects of color protection, the court found merit in the shade confusion and harm to competition arguments.\textsuperscript{114} The "fact-driven standard" that would result from granting monopolies in certain shades on particular products would lead to increased time litigating infringement cases.\textsuperscript{115} Furthermore, courts would be forced to engage in speculative questions over the probabilities of future competition.\textsuperscript{116}

Finally, the Ninth Circuit found that other protections exist for manufacturers; and, therefore, registration of a color alone would

\textsuperscript{108} \textit{Qualitex}, 13 F.3d at 1301.
\textsuperscript{109} 809 F.2d 1378 (9th Cir. 1987).
\textsuperscript{110} \textit{First Brands}, 809 F.2d at 1382.
\textsuperscript{112} \textit{Id.} (noting 2-1 vote).
\textsuperscript{113} 917 F.2d 1024 (7th Cir. 1990), \textit{cert. denied}, 499 U.S. 983 (1991).
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
not be permitted.\textsuperscript{117} For example, trademark protection has been available for products with distinctive patterns or logos that are combined with colors.\textsuperscript{118} Additionally, manufacturers can still receive relief under the unfair competition and trade dress provisions of the Lanham Act.\textsuperscript{119} Ultimately, the Ninth Circuit held that Qualitex succeeded on the unfair competition claim and could thus receive damages.\textsuperscript{120}

V. THE SUPREME COURT’S REASONING IN \textit{QUALITEX CO. V. JACOBSON PRODUCTS CO.}\textsuperscript{121}

The Supreme Court reversed the Ninth Circuit in \textit{Qualitex} and held that when a color “meet[s] ordinary legal trademark requirements . . . no special rule prevents color alone from serving as a trademark.”\textsuperscript{122} Justice Breyer, writing for a unanimous court, considered the language of the Lanham Act and the principles of trademark law to find that color alone can be protectible.\textsuperscript{123}

The Court stated that under the Lanham Act a mark must act as a symbol, have acquired secondary meaning, and perform no other nontrademark function.\textsuperscript{124} Justice Breyer found that the Lanham Act’s provision for trademark protection for any “symbol, or device” also encompassed trademark protection for colors.\textsuperscript{125} He noted that since trademarks have been granted for particular shapes,
sounds, and scents, that colors ought to receive similar protection.\textsuperscript{126}

The Court also found that a color can develop secondary meaning in the same way that a descriptive word can “indicate a product’s origin.”\textsuperscript{127} If a color, after time, “identifies and distinguishes a particular brand,” then it has acquired secondary meaning.\textsuperscript{128} Justice Breyer emphasized that a color must identify the source of the product in order to warrant trademark protection.\textsuperscript{129}

Also, a color that does not perform a “significant nontrademark function” would be protectible.\textsuperscript{130} If a color acts to make “a product more desirable,” then it cannot receive trademark protection because the color would then be “essential to the use or purpose of the article or . . . affect the cost or quality” of the product.\textsuperscript{131}

The district court had found, and the Ninth Circuit had accepted, that the green-gold color met the trademark requirements of acting as a symbol, identifying the product’s source, and serving no other function.\textsuperscript{132} Therefore, the Court concluded that Qualitex’s color would be able to be protected.\textsuperscript{133} However, the Court did not hold that all colors meeting the basic trademark requirements would be granted registration. Instead, the Court stated that if there is a “reason that convincingly militates against the use of color alone as a trademark,” then no protection would be given.\textsuperscript{134}

The Court then considered and rejected four reasons offered by

\textsuperscript{126} Qualitex Co. v. Jacobson Prods. Co., 115 S. Ct. 1300, 1303 (1995) (“The courts and the Patent and Trademark Office have authorized for use as a mark a particular shape (of a Coca-Cola bottle), a particular sound (of NBC’s three chimes), and even a particular scent (of plumeria blossoms on sewing thread).”).

\textsuperscript{127} Id.

\textsuperscript{128} Id.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 1306.


\textsuperscript{134} Id.
Jacobson for denial of trademark protection for color. It first, Jacobson argued that allowing protection for color would produce problems of shade confusion. It asserted that the difficulties in determining whether similar shades are likely to confuse consumers will be compounded by differences in lighting conditions. Justice Breyer dismissed this concern stating that courts can decide whether similar words cause confusion and therefore can make these determinations between shades as well. He then noted that typically "'strong' marks, with greater secondary meaning, receive broader protection than 'weak' marks." Second, Jacobson offered the color depletion argument in support of the traditional bar against color trademarks. The Court quickly rejected the color depletion theory as "an occasional problem" that normally would be resolved by the functionality doctrine. In addition, Justice Breyer believed that other colors usually would be available for manufacturers to use.

Third, Jacobson argued that the majority of courts have refused to grant trademark protection for color alone, but the Court noted that all of the cited Supreme Court precedents were decided before the passage of the Lanham Act in 1946. In 1985, in the case of In re Owens-Corning Fiberglas Corp., the Federal Circuit interpreted the Lanham Act to allow trademark protection for color alone. Also, the Court relied upon the Patent and Trademark Office's explicit policy permitting colors as trademarks. The Court found that when Congress amended the Lanham Act in 1988, it intended to allow trademark protection for color because of the
United States Trademark Association's express recommendation that registration of color trademarks be included within the reach of the Lanham Act.¹⁴⁶

In its final argument, Jacobson noted that there are workable alternatives to a rule that color is protectible.¹⁴⁷ Specifically, manufacturers may use color as part of a design and can bring action under § 43(a) of the Lanham Act for unfair competition.¹⁴⁸ Justice Breyer responded that some products are "normally see[n] from a distance," and thus, manufacturers can use only a pure color to distinguish their products.¹⁴⁹ Finally, the Court noted that trademark law provides protections that are lacking under unfair competition laws.¹⁵⁰

VI. ANALYSIS

The Supreme Court properly granted certiorari in the case of Qualitex Co. v. Jacobson Products Co. because the current law regarding the availability and enforceability of trademark protection for color alone was inconsistent throughout the circuits.¹⁵¹ The Court, however, erred in holding that color alone could be granted trademark protection. The Ninth Circuit's judgment should have been upheld because manufacturers can obtain relief by other means when their products are copied.¹⁵² In addition,

¹⁴⁶ Qualitex, 115 S. Ct. at 1307; 133 CONG. REC. 32,812 (1987) (stating that bill was "based on the Commission's report"); see The United States Trademark Association Trademark Review Commission Report and Recommendations to USTA President and Board of Directors, 77 TRADEMARK REP. 375, 421 (1987) (recommending that "the terms 'symbol or device' should not be deleted or narrowed to preclude registration of such things as a color . . . which functions as a mark").

¹⁴⁷ Qualitex, 115 S. Ct. at 1308.


¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ See Jeffrey M. Samuels and Linda B. Samuels, Color Trademarks: Shades of Confusion, 83 TRADEMARK REP. 554, 570 (1993) (arguing that registration for color alone granted by Federal Circuit would not be enforced in other circuits, "creating a legal anomaly which should not be allowed to persist.").

although the Court dismissed color depletion and shade confusion as being "unpersuasive," these theories present practical concerns that may result in a reduction of judicial efficiency.\textsuperscript{153} Also, color serves the function of psychologically attracting consumers to a product and thus should not be trademarked.\textsuperscript{154} Finally, due to the American emphasis on free competition, manufacturers should not acquire exclusive rights in colors alone.\textsuperscript{155}

Under the traditional rule, manufacturers were not forced helplessly to watch other companies copy the colors of their products. Two methods existed for manufacturers to pursue relief: (1) combination of color with a distinctive pattern or design, and (2) unfair competition claims under § 43(a) of the Lanham Act.\textsuperscript{156} Either option provides the manufacturer with protection, while neither eliminates competition.

When color is considered along with a unique design or logo, courts have liberally granted protection.\textsuperscript{157} "The more distinctive and arbitrary the design upon which a color is imposed," the more

\begin{itemize}
\item \textsuperscript{153} *NutraSweet*, 917 F.2d at 1028; *Owens-Corning*, 774 F.2d at 1131 (Bissell, J., dissenting).
\item \textsuperscript{154} See *Louis Cheskin, Colors—What They Can Do For You* 213 (discussing psychological effects of color).
\item \textsuperscript{155} See *McCARTHY, supra* note 27, § 1.01(1).
\item \textsuperscript{156} *Qualitex*, 13 F.3d at 1302; 15 U.S.C. § 1125 (Supp. 1995) states:

\begin{itemize}
\item \textsuperscript{a} Civil action

\begin{itemize}
\item \textsuperscript{(1)} Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

\begin{itemize}
\item \textsuperscript{(A)} is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
\item \textsuperscript{(B)} in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
\end{itemize}

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

\item \textsuperscript{157} *E.g.*, *Bridge, supra* note 103, at 494 ("As much as the courts denied protection to color alone, courts granted protection to colors when used . . . as part of an arbitrary design.").
\end{itemize}
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likely that trademark protection will be found. Protection of color and arbitrary designs in combination does not deter competition as much as granting exclusive rights in a color alone.

The Court dismissed this alternative because manufacturers "might find it difficult to place a usable symbol or word on a product." Although this point may be relevant in some cases, it is not persuasive enough to justify a rule that severely limits competition. Producers of generic brands have been able to compete using similar colors as long as they refrain from using the distinctive design of the name brand. The Court's grant of trademark protection for color alone, however, significantly restricts the ability of such manufacturers to compete.

Also, as the Ninth Circuit ruled in Qualitex, a manufacturer can be held liable for unfair competition or trade dress infringement even when the color is not registered. To succeed on such a claim, the manufacturer must show that the product's "trade dress is nonfunctional," that "it has acquired secondary meaning," and that "there is a likelihood of confusion between the products." Since trade dress is composed of "the total impression of the package, size, shape, color, design, and name," trade dress infringement claims do not harm competition to the same extent as granting exclusive protection in only the color of a product.

The Supreme Court pointed out that manufacturers would prefer trademarks to "trade dress" protection. While it is true that trademark law provides greater protection, it sets a dangerous

158 McCARTHY, supra note 27, § 7.17.
159 E.g., Bridge, supra note 103, at 494 (arguing that "possibility of color combinations and designs is limitless in contrast to color alone and therefore protection is less likely to hinder competition.
161 See Paul M. Barrett, Supreme Court Says a Distinctive Color Can Be Basis for a Product Trademark, WALL ST. J., Mar. 29, 1995, at B10 (stating decision is "a defeat for makers of generic brands"); David G. Savage, High Court Rules Color of Money Can Be Pepto-Bismol Pink, L.A. TIMES, Mar. 29, 1995, at D1 (calling decision "a setback for store-brand products that often imitate the basic look, including the color of the leading brands").
163 Id. at 1303.
precedent for extending the bounds of trademark law to limit competition.

A second reason for adhering to the traditional rule relies upon the color depletion and shade confusion theories. Even with current technology, color depletion and shade confusion are valid reasons to prohibit registration of colors alone, due to the resulting practical problems of trademarking colors. When different shades of products are indistinguishable to the human eye, the consumer becomes confused and the function of trademark as a method for protecting the public from confusion is not served.

The Court analogized distinctions between shades of colors to distinctions between words and concluded that courts will be capable of easily determining differences in colors. Justice Breyer asserted that "[l]egal standards exist to guide courts," but beyond mentioning degrees of secondary meaning, which are irrelevant to distinguishing between shades, he gave no clarification as to what those standards are. Trademark registrations do not contain specific details of the color of a product, leaving courts with little information to distinguish between imperceptibly different shades.

Increasingly, courts will be forced to determine more shade confusion questions. Further, the Court stated that courts can replicate "lighting conditions under which a colored product is sold." Since lighting conditions can vary depending on the type of store, time of day, and latitude of the selling area, replicating

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166 See Qualitex, 13 F.3d at 1302 ("We recognize that there are countless shades of colors . . . but then, we could well become involved in 'shade confusion.'"); NutraSweet Co. v. Stadt Corp., 917 F.2d 1024, 1027 (7th Cir. 1990), cert. denied, 499 U.S. 983 (1991) ("[I]nfringement actions could soon degenerate into questions of shade confusion.").

167 See McCARTHY, supra note 27, § 7.16 (arguing that "the ordinary person can probably distinguish only a few basic primary colors."); S. REP. No. 1333, 79th Cong., 2d Sess. 5 (1946), reprinted in 1946 U.S.C.C.A.N. 1274 (stating that one purpose of Lanham Act was "to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get.").


169 Id.

170 See supra text accompanying note 41.


172 Id.
lighting, while necessary to make a valid determination, will cause difficulties for the lower courts.

Justice Breyer held that the functionality doctrine will prevent color depletion from occurring, but he then set a high burden that effectively would allow most colors to receive protection.\(^{173}\) The Court also noted that some colors are undesirable or are not usable which causes the supply of colors to be depleted even more.\(^{174}\) As the number of available colors becomes depleted, particularly in some industries, competitors will be deterred from entering the market.\(^{175}\)

Additionally, color should not receive trademark protection because of the powerful psychological effect colors may have on individuals.\(^{176}\) Since people are not aware of the influence color has upon them, it is even more harmful to grant exclusive use of a color to only one manufacturer.\(^{177}\)

"People have marked preferences for certain colors while other colors are less appreciated."\(^{178}\) Some preferences result from traditionally symbolic associations, such as "the use of black to symbolize evil and wickedness and white to symbolize goodness and

\(^{173}\) Qualitex Co. v. Jacobson Prods. Co., 115 S. Ct. 1300, 1306 (1995) (stating that test of functionality is whether "a color serves a significant nontrademark function").

\(^{174}\) Id. at 4229-30.

\(^{175}\) See R.L. Winston Rod Co. v. Sage Mfg. Co., 838 F. Supp. 1396, 1400 (D.Mont. 1993) (holding that "granting exclusive use of a color . . . would severely restrict competition; there would be little left for the rest of the world."); Summerfield, supra note 39, at 996-97 (discussing other industries with limited range of colors available); see also Qualitex, 115 S. Ct. 1300, 1306-07 (1995) (acknowledging shades similar to protected color will be unavailable for use by competitors).

\(^{176}\) E.g., JEAN-PAUL FAVRE, COLOR SELLS YOUR PACKAGE 13 (1969) (discussing psychological effects of color); CHESKIN, supra note 154, at 55 (stating that color has "inherent psychological power"); see James Parton, Foreword to HOWARD KETCHAM, COLOR PLANNING FOR BUSINESS AND INDUSTRY xi-xii (1958) ("Knute Rockne kept his gridmen keyed up during the half in a red dressing room, while the visiting team was lulled with a soporific blue.").

\(^{177}\) See CHESKIN, supra note 154, at 35-36 (stating that color affects people without consciousness of effects); DEBORAH T. SHARPE, THE PSYCHOLOGY OF COLOR AND DESIGN 51 (1974) (finding people may have "an innate or biologically mandated response to various colors").

\(^{178}\) FAVRE, supra note 176, at 21; see Lynn M. Walsh et al., Color Preference and Food Choice Among Children, 124 J. PSYCHOL., 645, 650 (1990) (stating that "nearly half . . . of the children could give no reason beyond personal preference for their choices"); see also SHARPE, supra note 177, at 3 (noting that color preferences were documented by research as early as 1894).
purity." Also, color preferences are influenced by demographic factors, such as gender, race, and socioeconomic class.\(^{180}\)

The color of a product or its packaging can have a significant effect on sales.\(^{181}\) Color and its psychological effects can create consumer interest in a product.\(^{182}\) As a result of color's importance in marketing, manufacturers try to choose colors with "maximum psychological appeal," that are "symbolic of the contents of the package and have highest visibility."\(^{183}\) It is not enough to select a color, but the right shade or tint needs to be chosen to attract the most customers.\(^{184}\)

In addition to attracting customers to a product, package color can serve other functions. The color of a product can communicate the product's use to the consumer.\(^{185}\) Manufacturers often use color to "characterize the different products of the same firm."\(^{186}\) Certain colors have become so connected with a particular product

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\(^{179}\) Sharpe, supra note 177, at 47; see Eric M. Karp & H. B. Karp, Color Associations of Male and Female Fourth-Grade School Children, 122 J. PSYCHOL., 383, 388 (1988) (finding that children of both genders associated same emotions with traditionally symbolic colors); Randall Lane, Does Orange Mean Cheap?, FORBES, Dec. 23, 1991, at 146 (discussing how Ford Motor Company's use of different shades of red to target buyers by gender).

\(^{180}\) E.g., Sharpe, supra note 177, at 51 (finding that research shows "definite cultural and racial differences" in effects of color); Karp, supra note 179, at 388 ("The neutral stimuli which had no symbolic colors attached evoked responses that significantly distinguished between the sexes."); Cheskin, supra note 176, at 73 (stating that socioeconomic class influenced color preferences); Robert G. Smith, Color as a Marketing Tool, COLOR RES. AND APPLICATION, Summer 1979, at 78 (arguing that "our culture, traditions, nationality, mood, and income" affect how color is perceived).

\(^{181}\) See Favre, supra note 176, at 27 ("[Color] stamps itself better than any other factor in our memory and makes the package more easily recognizable"); Lane, supra note 179, at 144 (discussing fifteen percent increase in sales when Igloo changed color of coolers).

\(^{182}\) E.g., Cheskin, supra note 154, at 213 (listing functions color performs in advertising); Seonsu Lee & James H. Barnes, Jr., Using Color Preferences in Magazine Advertising, J. ADVERTISING RES., Dec. 1989 - Jan. 1990, at 25 (stating that color "attract[s] attention"); see Ketcham, supra note 176, at 74 (discussing how color sells products).

\(^{183}\) Cheskin, supra note 154, at 180.

\(^{184}\) E.g., id. at 184-85 ("One kind of red may succeed where another shade or tint of red will fail."). See also Ketcham, supra note 176, at 76 (discussing psychological associations resulting from different shades of colors).

\(^{185}\) See Favre, supra note 176, at 62 (discussing how selecting wrong color will suggest different type of product to consumers); Lane, supra note 179, at 145 (stating that vitamin manufacturer changed colors of package when consumers mistook yellow label with black and white lettering for ant poison).

\(^{186}\) E.g., Favre, supra note 176, at 89 (giving example of kinds of shampoo).
that marketers find it hard not to use the traditional color scheme.\textsuperscript{187} Also, the color of a package may have been chosen to protect the product from the harmful effects of light.\textsuperscript{188} The manufacturer also considers the combination of colors for lettering and background to find the most legible and attractive result.\textsuperscript{189} Finally, in selecting packaging color, the conditions in which the product will be displayed and handled are important.\textsuperscript{190}

Due to the influence of product color on sales, companies are spending more time and money researching what colors will be the most successful.\textsuperscript{191} Since "[m]arketers will use whatever tools they think might give them a slight edge,"\textsuperscript{192} colors should not receive trademark protection because a particular color that is psychologically attractive can give a manufacturer a competitive advantage.

The Court suggested that the psychological appeal of a product's color could make the color functional.\textsuperscript{193} Color, through its attractiveness to consumers on a psychological level, can affect the "cost or quality of the product" or even be regarded as "essential to a product's use or purpose," but showing that this functionality is

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\item[	extsuperscript{187}] Ronald Alsop, \textit{Color Grows More Important in Catching Consumers' Eyes}, \textit{WALL ST. J.}, Nov. 29, 1984, at 38 ("It's unwise to sell whole milk in anything but a red carton. And thanks to McDonald's, many consumers don't believe a restaurant serves fast food if its signs don't have a smidgen of red and yellow.").
\item[	extsuperscript{188}] \textit{E.g.}, FAVRE, \textit{supra} note 176, at 88-89 (explaining that bottles are colored green and brown to filter light rays that would harm beer).
\item[	extsuperscript{189}] See KETCHAM, \textit{supra} note 176, at 78-79 (stating that colors should be chosen so that writing can be read from distance); FAVRE, \textit{supra} note 176, at 48-53 (demonstrating legibility of various color combinations).
\item[	extsuperscript{190}] See Smith, \textit{supra} note 180, at 78 (arguing that lighting conditions and circumstances of sale influence how color of product is perceived); KETCHAM, \textit{supra} note 176, at 77-78 (discussing how white colored packages become discolored from handling by consumers and consequently are not saleable).
\item[	extsuperscript{191}] Carroll M. Gantz, \textit{Mass-Market Color Selection}, \textit{COLOR RES. AND APPLICATION}, Fall 1978, at 137-40 (explaining how selection of product colors is objective and lengthy process); Lane, \textit{supra} note 179, at 144 (stating that selection of colors is frequently done by well-paid color consultant).
\item[	extsuperscript{192}] Lane, \textit{supra} note 179, at 146.
\item[	extsuperscript{193}] Qualitex Co. v. Jacobson Prods. Co., 115 S. Ct. 1300, 1304 (1995) ("sometimes color plays an important role... in making a product more desirable... ").
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significant may be impossible for many products. For this reason, the traditional rule barring trademarks of colors should have been retained.

Finally, policy arguments require a per se rule of no protection for color. One of the basic principles underlying American law is the “promotion and encouragement of competition.” Trademarks are an exception to the policy of free competition, granted to prevent “confusion, mistake and deception in commerce,” as well as benefit the manufacturer. However, the pervasive fear of monopolies limits the extent of any grant of an exclusive right. Thus, granting protection to a color alone “create[s] a barrier to otherwise lawful competition.”

VII. CONCLUSION

The Supreme Court erred in holding that color can receive trademark protection. The Court should have upheld the traditional bar on protection for color that was asserted in the Ninth Circuit decision. Congress needs to revisit the issue and amend the Lanham Act to expressly bar trademark protection for color alone.

Arguments in favor of continuing the prohibition on color trademarks include the color depletion theory, the shade confusion theory, the functionality doctrine, the availability of other remedies, the psychological effects of color, and the American emphasis on free competition.

The Court’s holding in *Qualitex* sweeps too broadly and leaves lower courts with the responsibility for answering unresolved questions. Under the new rule, companies can easily register colors. A higher standard should have been required because of the need for colors in industry, the psychological impact of color, and

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194 Id. Note that six days after announcing the *Qualitex* decision, the Court declined to review a Federal Circuit case holding that aesthetically functional color could not receive trademark protection. Brunswick Corp. v. British Seagull Ltd., 35 F.3d 1527 (Fed. Cir. 1994), cert. denied, 115 S. Ct. 1426 (1995).

195 McCarthy, supra note 27, § 1.01(1).

196 Id. at § 1.01(2).

197 Id.

the longstanding tradition of denial of color protection. Although the first cases under the Qualitex rule may be easy, the problems of shade confusion and color depletion will likely clog the courts. The Court truly has created a monster.

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