Bradley’s First Semester Paper

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As you drag your cursor across a virtual color palette on your computer you notice something strange. As you navigate the spectrum searching for that dazzling hue a few chromatic shades lack the usual pantone matching system allotted to most colors for organizational and convenience purposes. Instead the screen flashes Caterpillar yellow, Coke red, tiffany eggshell blue, Cadbury purple. Has something as all encompassing as color been privatized and branded? These colors are no longer at your disposal. More and more colors are grabbed as the once splendid panoply of vivid saturation begins to be diluted and drained leaving a meager assemblage of undesirable aphotic tones.

1995 was a rather innocuous year save O.J Simpson’s acquittal and the launch of Discovery. A decision was made that has continued to shape the application of identifying marks in the corporate world. Intended to disway “[misuse] in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description” the panoptic piece of legislation has left the responsibility of interpretation to federal judges. What constitutes a symbol? During a case calling in to question what symbol is appropriate to apply for a trademark. Previous to the Qualitex vs Jacobson case, color was not considered a mark independent of a logo or brand. Justice Breyer, in accordance with the accepted definition of a symbol, proposed that” the terms 'symbol, or device' . . . not be deleted or narrowed to preclude registration of such things as a color,” His decision has led to dozens of trademarked colors.

If not a facilitator for a monopolistic compliment for colors qualifying as an “[indicator of] the source of the goods or services and distinguish them from the commercial offerings of competitors.” these broad interpretations of a mark creating a “likelihood of confusion” leave this inherently suggestive deliberation to the volition of non consumers. A more concrete methodology in measuring the ostensible similarity between colors should be implemented rather than outright banning of color marks.

In order to own a color a company must establish a direct correlation between the chosen color and their product. “Color has the ability to increase credibility of the

advertiser and believability of ad claims, particularly if the ad claims are color related” accordingly in the case of Owens Corning's signature pink insulation is recognizable

without any ornamental items besides its color. The difficulty in assessing whether or not a plaintiff's request for trademarking is whether “ it is essential to the use or purpose of the article or if it affects the cost of quality of the article” if the color is inherently attached to a product per se yellow for lemonade cans then the color would be considered a functional attribute that if trademarked would “hinder competition among other participants.” similarly the “color royal blue connotes cold” in relation to frozen confectionery. Coca Cola managed to get their color trademarked and even solidified their attachment to the color that their “is no longer a PMS (Pantone Matching Sytem) colour match number for Coca-Cola Red.” The scramble for attractive colors is more rampant then ever which begs the question how much color is left.

During the seminal court case that galvanized a drastic shift in the commonly held interpretation of the Lanham act, The defendant in the Qualitex case proposed that once a company disposes of all colors that are “not usable, and adds the shades that competitors cannot use lest they risk infringing a similar, registered shade, then one is left with only a handful of possible colors.” indeed, the color spectrum is a finite structure and although "[hundreds of color pigments are manufactured and thousands of colors can be obtained by mixing." Certain products disqualify a large portion of colors that are not suitable for their trade like” kitchen appliances like coffee machines or toasters, [using] unexpected colors like neon green or dark purple could be arbitrary.” Assuming companies wish to utilize the psychological cues certain color can evoke from consumers like in the 1980s. [when] Ritz kept the red hue but used a higher Chroma level than in previous efforts” because as the Institute for operations research and management sciences demonstrated in their fake advertisement utilizing a swoosh with an application of many colors “higher levels of chroma and value influence feelings of excitement that color is no longer available for the usage of any competitor in the respective field.

In refutation of the unsubstantiated claim of color depletion, the recent highly publicized Louboutin Vs Yves Saint Laurent YVS was summoned on the grounds of utilizing a definitive mark recognized as their signature red under sole. Relying on the outdated and scientifically unfounded color depletion theory, the court found that in the circumstance of fashion where color could be considered aesthetically functional and a “monopoly on the color red would impermissibly hinder competition among other participants” unfortunately the court misinterpreted the trademark at hand. The trademark registered prior to the case was limited to the application of red lacquer on the underside of a shoe. This erroneous misconstruing of Louboutin's trademark under the application of the color depletion theory fails “to take into account the specific properties of color— including hue, saturation, and value—and therefore underestimates the thousands, if not millions, of different colors distinguishable to the human eye” the fact that courts are dismissing a precedent established in court cases

before it shows the lack of clarification and subjective bias that arise from the “likelihood of being confused” the fact that the court also overlooked the obvious qualification for louboutin's coloring reaching a secondary meaning further emphasizes the fact that “Judges escape the difficult task of precisely articulating how likely confusion has to be before “likelihood of confusion”