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Who owns color? The future scenario of color trademarks

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ABSTRACT

This paper will discuss how color trademark has evolved in recent years and how these changes might impact a designer's ability to freely express color choice in their work. The first section involves defining what a trademark is, its purpose and what the basic requirements are for legally registering a color. The second section covers literature regarding previous theories that disagree with this process. The third part introduces the Owens-Corning Fiberglas case where this company played a key role in defining color trademark precedence in the United States. Following this, insights from several studies concerning the significance of color and its impact on sales are reviewed. The paper also considers the Christian Louboutin vs. Yves Saint Laurent lawsuit, which centered on the use of the color red. In the discussion section considers how color as a trademark could lead to a limitation in design freedoms and how a battle for color protections could develop. Finally a call to regulate the progress of color protections is voiced.

KEYWORDS

Color, design, trademark, intellectual property

INTRODUCTION

Who owns color? Well, nowadays many companies do so. Color trademarks entitle brands to legally protect and own a color. Today we only see a few problems with color protection, but what will happen twenty years from now if trademarking color becomes a common concern and basic requirement for all companies? This would lead to the possibility that some day the majority of common colors will be legally protected in every industry. This means that designers who are developing new brands, products and communications will have limited options in color selection and that selecting a protected color could lead to litigation and some type of new color war.

STATE OF THE ART

In the recent past companies were able to protect assets such as their logo and slogan. But current trademark law has become more flexible in the United States, the European Union and Australia, where registration of more unusual things like sounds and colors are permitted.

The main purpose of a trademark is to protect valuable assets in the commercial market by claiming its legal ownership and therefore preventing others from using it. These assets can include a particular color used in a product, package, or solely, a color used to identify the brand. It can be said that a color trademark is a sign used to distinguish products and services and indicate their origin (Sader, 2007). Furthermore, the objective of filing a trademark is to avoid possible consumer confusions among similar products in the same category.

Several requirements need to be fulfilled in order to trademark color. Protecting a color is feasible when it is either (1) inherently distinctive, or has (2) acquired distinctiveness through secondary meaning and is (3) not functional (Moir, 2011). Distinctiveness and secondary meaning (1 and 2) of the color depend merely on the consumer awareness of the existing relationship a particular color has with its source. This color-brand connection is established and strengthens over time. Nonfunctional (3) discusses the fact that sometimes color is not essential to a product's use or purpose and does not affect cost or quality

(Moir, 2011). As a result the proper functionality of the product is not dependent on the color.

All of this sounds pretty valid, but what has stopped countries such as Japan, South Korea, China, Mexico and Brazil to refuse color as a trademark? Color registration has been a debatable issue in the legal industry ever since designers and marketers realized the impact and power it has in sales. Theories such as color depletion and shade confusion have been the primary cause of the prolonged dispute among courts all over the globe. Color depletion theory labels color as a finite resource, which means that for every manufacturer who owns a color, less available options of colors are left for designers to choose from. Shade confusion theory also supports this belief; it states that, assuming protection is granted to color, the existence of only a limited number of colors leads to constant uncertainty about whether a given shade infringed on another shade (Snowden, 2002). This potential of confusion should be taken into reflection because if similar shades cannot be used; the quantity of untaken colors is narrowed down. The human eye is able to distinguish around 7,000,000 colors, but from this number, colors that look alike must be subtracted in order to avoid confusion, which means that the amount of colors available to trademark per industry is less than 7,000,000.

Color as a trademark is somewhat a recent matter; an important case in the US was the Owens-Corning Fiberglas Corporation in 1985. The company claimed that the color Pink of their fibrous glass insulation panels had no utilitarian purpose; in fact the resulting color of the manufacturing process is a light yellow. The case evidence presented them as the first manufacturers to dye this type of product another color; moreover it revealed that the color pink did not fulfill any functional aspects. Tangible consequences of color as trademark to multiple corporations are not noticeable now, but how will this affect the next generation of designers? Will they be able to have the same freedom of color expression that is currently available?

Interest in this specific subject is increasing at a relatively fast rate; The USPTO (United States Patent and Trademark Office) register reflects a growing number of color registrations (Belinda, 2012). This high demand on color trademarks is a direct result of the current need of brands to protect their most dear

possessions. But why is color so precious? According to a Maryland study performed by the University of Loyola, color increases brand recognition by up to 80 percent (Jill, 2013). Additional study conducted by the Institute for Color Research reveals people make a subconscious judgment about a person, environment, or product within 90 seconds of initial viewing and that between 62% and 90% of that assessment is based on color alone (Jill, 2013). A research done by the Secretariat of the Seoul International Color Expo 2004 revealed that when participants were asked to approximate the importance of color when buying products, 84.7 percent of the total respondents think that color accounts for more than half among the various factors important for choosing products (Jill, 2013). Overall it can be seen how color impacts customer retention of brand identity and influences their purchasing behavior. Likewise it can be said that color has a direct influence on sales, which indeed explains why an enormous amount of capital is invested in earning exclusivity.

Lately color trademark has received a lot of attention from the media with the Christian Louboutin versus Yves Saint Laurent (YSL) case. Louboutin is a highly recognized French designer in the fashion industry; a red-sole in every set of heels he designs has become his famous signature. The battle started when YSL launched a product line called Monochromatic. As Figure 1 exhibits, the heels were entirely made out of one single color, meaning the upper part and the sole matched. Several colors were released; blue, green, red, yellow etc. Since Christian had already trademarked the color red in this specific area it was no surprise when he filed a lawsuit against YSL. After years of dispute the court decided that YSL was not violating the Louboutin trademark, as there was no clear distinction between the sole and the rest of the shoe. In other words the trademark was not infringed because the whole shoe has the same color, so there is no contrast between the sole and the upper part.

Other examples of well known color trademarks are: baby blue in the brand communications of Tiffany & Co. (Figure 2), magenta for T-Mobile, orange in Veuve Cliquot and purple in the Cadbury Chocolate packaging.



figure 1 Contrary to the Louboutin Shoes (left), the YSL shoe (right) does not show contrast between the sole and the rest of the shoe



figure 2 The Tiffany & Co. trademarked color for brand communications

DISCUSSION

Cases like Louboutin vs. YSL make us wonder to what extent color trademark a positive thing for designers or the market.

Looking at the situation with a more general overview, many concerns float to the surface. Why is the right of owning a color restricted to only one brand? When you look at this case from a different perspective, unfairness and injustice are the first words that come up to mind. Designers all over the world in the fashion industry will no longer be able to use the color red in the sole of a heel because of a fear they will get sued. Here is where we get the feeling of how color trademarks are going to possibly limit the designs of the future.

Protection of color has become more and more popular; the principle that a single color may receive trademark protection is now the law of the land (Jill, 2013). Ownership of a color means a reasonable advantage over your competitors. Preventing other companies in the same market category from using a protected color, is definitely a biased benefit, therefore it should not be legal.

Developments in relation to color trademarks, in most countries where their registration is now permissible, have begun quite recently, from the 1990s (Kudrjavceva, 2012) said, consequences of color trademarks are not yet noticeable enough to label them as a major problem. Effects will only be visible in the next years to come, when most likely trademarks will be cluttering.

The future of color trademarks is on a slippery slope. If courts continue to accept a multitude of company's claims on certain colors, twenty years from now, the magnitude of this movement might be irreversible.

If this trend doesn't reverse, designers will have numerous color limitations when designing a product because so many colors will be protected in their area of trade. Before choosing which colors to use in their products or packaging, designers will first have to do extensive research of what colors are available in that specific industry and which ones are not. Today designers select color based a variety of reasons such as, user needs or wants, taste, design intention and conveyed emotion. In the future color choices may be mainly made top-down, implying that they will depend firstly on what colors are available and then building from

there on. As a result products will reflect a lack of color options. Product evolution will switch from the color options we see today to a more minimalistic world. Minimalistic is not a bad thing at all when a designer decides that minimal is the best option, but it is unquestionably wrong when a designer is forced into a choice due to external constraints. As long as color trademarks are permitted, infinite restrictions for designing new products will increase and the design color world as currently exercised will never be the same.

Companies will also be setback by this battle for color. Ultimately they will have to spend more money to know what colors are available at for use and which ones are not. They will have to monitor the color use of other companies in their domain and perhaps bring the to court to protect their rightful colors. Legal issues will ultimately grow and become a resource drain. As a result of this scarcity though a monopoly of legally protected colors, a color war will likely take place in the future. Numerous fights over a color as observed in the Louboutin vs. YSL case will be more common. This brings us once more to the same question, who has the right to own color? As designers, we feel color should be a resource people freely use to design with. It should be viewed as a resource like any other material such as wood, plastic or metal.

CONCLUSION

In conclusion there is no certainty of what will happen in the future concerning the topic of color as a trademark. Forecasts of how it will affect the design world in general are limited due to the little research that has been done regarding this matter. Further monitoring on the speed and quantity of color as a trademark is required in order to project when this issue will become overwhelming. Although no prediction of the future is completely reliable because a lot of variables have to be taken into account, the scenario envisioned in this paper has the possibility of becoming real if no regulations regarding this subject are made.

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