

“Trademarks, Commoditization, Gender and the Color Pink”

by Ann Bartow¹



Introduction

Trademark law can be used to monopolistically harness the aesthetic appeal or preexisting social meaning of a color. The Supreme Court was wrong to facilitate this abuse of trademark powers when it decided in *Qualitex* that colors alone could constitute protectable trademarks. Long ago a differently constituted Supreme Court held in the *Sears* and *Compco* cases that the Intellectual Property Clause of the Constitution preserves a right to copy any product feature that is unrestricted by patents or copyrights.² Ruling in favor of color alone trademarks abrogated this important principle for no good

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² See generally David E. Shipley, What do Flexible Road Signs, Children’s Clothes and the Allied Campaign in Europe During WWII Have In Common? The Public Domain and the Supreme Court’s Intellectual Property Jurisprudence, 13 U. Balt. Intell. Prop. L.J. 57 (2005).

reason. The *Qualitex* holding didn't lessen color related consumer confusion, because there wasn't evidence of any. Instead it reduced competition and consumer choice by creating illegitimate aesthetic and communicative cartels

The specific doctrinal arguments against recognizing color alone trademarks raised below include lack of trademark utility, functionality, aesthetic functionality, communicative functionality, uncertainty about scope, and color exhaustion. It is further argued that if any court attempted to declare a color "famous" for dilution purposes, thereby granting a commercial entity broad rights to monopolize the color well beyond the context in which it is used in commerce, there would be a furious backlash against this ill advised doctrine.

The second part of this article posits that the theoretical case for color alone marks is broadly destabilized by an analysis of the ways colors and commodities actually intersect in commerce. The example chosen to illustrate this confluence is the color pink. Pink is used as a signifier of femaleness by many disparate vendors. Products and packaging are pink to telegraph gendered attributes of targeted consumers, or of the product itself: the object for sale is for women, or women are the objects for sale. That pink is used so effectively and pervasively in connection with such a wide variety of goods and services undermines the case not only for affording trademark protection to colors alone, but also the theoretical underpinnings of trademark dilution doctrine, as it is clear that the trademarks of multiple goods and services can utilize the same color to communicate the same message without confusing consumers or degrading the distinctiveness of specific textual marks or unique logos.

Finally, this article asserts that the pervasive gender specific deployment of the color pink in commerce raises broader questions about the role of trademark driven aspects of consumer culture in maintaining the second class status of women. There is nothing inherently female about pink, or inherently pink about females. The connection is socially constructed, and trademarks play an important and nefarious role in making and sustaining this association.

I. Color Marks And Their Discontents

Congress never made a principled inquiry into the desirability of color alone trademarks. The decision to recognize colors alone as protectable, defensible trademarks is an iconic example of reflexive expansion of trademark rights by members of the judiciary. There is a robust presumption among many judges that any signifier can be a trademark if consumers can be manipulated into connecting it with a unitary source, even if the name and nature of the source itself are unknown. At first blush, this appears to give corporations expansive liberties to devise diverse and creative trademarks with which to communicate with consumers. It is, however, a false freedom of corporate speech. Valid trademarks must be chosen or developed outside of the boundaries of established trademarks held by competitors. Because the scope of trademark rights expands beyond the literal marks into the indeterminate realm of the confusingly similar, or potentially dilutive, these boundaries are fluid. To avoid drowning in fluid boundaries floated litigation, the construction of a new enforceable, non-infringing trademark requires some modicum of originality *vis a vis* preexisting marks, especially the marks of similar or related products or services.³ The words, symbols and colors used by

³ E.g. Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach To Trademark Law*, 84 Iowa L. Rev. 611, 736 (May 1999) (“In the context of trademark law, the test of consumer confusion is

competitors to mark competing goods or services are best avoided as widely as possible from a legal standpoint, but some mark attributes are so irresistible from a marketing perspective that an entity is willing to risk trademark litigation. In other instances, the practical scope of a mark used by a competitor can be ambiguous and difficult to discern.

A. The Limitations of a Linguistic Palette

Some types of signifiers are simply better suited to serving as simultaneously effective and distinctive trademarks than others. Words, alone or grouped as phrases or slogans, can be transmitted and recreated by writers and speakers with a high degree of faithfulness. Symbols can be visually communicated where circumstances allow, or reproduced with drawings or described by words where access to a copy of the mark itself is not available, though some diminution in accuracy might be expected where humans reproduce the marks from memory or by hand. Sounds can be aurally conveyed using sound transmitting technologies, or via simple singing, humming, or instrumental improvisation as necessary, with attendant tonal and lyrical imprecisions.

Smells, however, present descriptive challenges. Odor based marks can be textually described (e.g. “the thread smells like plumeria blossoms,”⁴) but aromas can be difficult to efficiently reproduce. Unless the scented product or package or a reasonable facsimile is available, the metes and bounds of a trademarked stench are conceptually amorphous. Two people might agree that their noses detect the fragrance of baking bread, or the stink of rotting fruit, but beyond these general descriptions, reducing an airborne bouquet to language is tricky.

only partly within the competitor’s control. She cannot foreclose a claim through independent creation, but she can limit potential liability through clear differentiation of source packaging and marketing”).

⁴ In re Clarke, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990).

Beyond obvious umbrella designations like “red” or “blue,” colors can also be difficult to accurately convey in words, and challenging to casually reproduce. Yellow can mean sunflower petals, egg yolks, legal paper or lemons. Referencing “the color of grass” does a poor job of telegraphing a precise shade of green. Even when two people are staring at the same object, they may perceive its color somewhat differently,⁵ as eyes and brains process colors with surprising ambiguity.⁶

Like odors, colors alone can legally function as trademarks if they are deemed to reflect an established but nonfunctional semiotic link between the color and the source of the color-bearing goods or services. Occasionally, color alone will be used in an advertisement, or on product packaging. However, rare indeed is the company that relies solely on color alone to consistently identify its products in the stream of commerce, without a companion symbol or textual mark. This author was unable to come up with a single example.

The Qualitex company may be able to protect green gold as a color alone trademark but it never uses green gold alone as a sole trademark. It marks its products with the words “Qualitex” and “Sun Glow” and these textual marks act as the primary source identifiers.⁷ Without a companion textual mark or a unique symbol, it is doubtful that green gold could effectively serve as a source identifier at all. Many corporations are happy to register and protect “color alone” trademarks, but they do not use them as standalone trademarks.

⁵ Cite science on this; *Minnesota Mining & Manufacturing Co. v. Beutone Specialties, Co.* 82 F. Supp. 2d 997 (D. Minn. 2000) (noting term “canary yellow” could encompass a broad range of color).

⁶ Cite, diversity? Grays/greens/browns, even among the non-colorblind.

⁷ <http://www.qualitexco.com/http/pads.html>

Color is most commonly and effectively used in conjunction with textual marks. Color marks often are pragmatically valued by holders because they provide mechanisms for commercially disadvantaging competitors. This is a misuse, and indeed abuse, of trademark power.

Commercial actors don't use color alone marks alone for the same reason the Court was wrong to deem colors alone protectable marks: Most people do not view colors alone as independent source identifiers. Color marks are not simply unable to perform as inherently distinctive trademarks, as the Supreme Court noted in *Qualitex*.⁸ By failing to deploy colors alone as sole trademarks, manufacturers and distributors behave as if they cannot be trusted to be singularly distinctive at all.

Mark holders typically use word marks in tandem with colors because language facilitates certainty in ways that are useful for commerce. Color marks are secondary, and generally play supporting roles to dominant textual marks. This sometimes means that in addition to marking products, product names also identify trademarked tints and shades: "UPS brown,"⁹ "Pepto Bismol pink,"¹⁰ and "Yellow Cab yellow" may all be familiar to the reader. "Kimberly-Clark orange," is probably a bit more obscure, unless one has reason to be familiar with disposable medical face masks.¹¹ In South Carolina,

⁸ *Qualitex* at ??? ("True, a product's color is unlike "fanciful, "arbitrary," or "suggestive" words or designs which almost automatically tell a customer they refer to a brand. ...But over time customers may come to treat a particular color on a product or its packaging (say, a color that in context seems unusual, such as pink on a firm's insulating material or red on the head of a large industrial bolt) as signifying a brand. ...Again, one might ask, if trademark law permits a descriptive word with secondary meaning to act as a mark, why would it not permit a color, under similar circumstances, to do the same? We cannot find in the basic objectives of trademark law any obvious theoretical objection to the use of color alone as a trademark, where that color has attained "secondary meaning" and therefore identifies and distinguishes a particular brand (and this indicates its "source).") See also *Samara Brothers* at 211-12.

⁹ UPS registered the color brown for the vehicles and uniforms used for its transportation and delivery services.

¹⁰ <http://www.pepto-bismol.com/>

¹¹ <http://www.ipfrontline.com/depts/article.asp?id=13290&deptid=7>

orange means Clemson,¹² while in Tennessee it signifies an allegiance with the U.T. Volunteers.¹³

If an observer saw a truck that was bright yellow from end to end, without a single textual indicator, she might recognize this as a Ryder/Hertz-Penske truck. Or she might assume the vehicle was part of the Yellow Freight fleet. Or she might think that it was simply painted yellow because someone felt this was a cheerful color for a truck

If a trucking company used a yellow sun symbol as its trademark, it is easy to understand that consumers would be likely to be confused if a competing company adopted a yellow sun icon as well, and both were employed on the sides of trucks. But the same would not be true of a yellow squiggle, or a yellow steering wheel icon, or a yellow house pictogram, or a two dimensional bouquet of yellow daisies or buttercups. Colors can make symbols more distinctive, but alone they signify too many things to function as effective trademarks.

It is true that with enough exposure via relentless advertising and expansive market permeation, any color can be linked with a product or a company in consumers' minds. This is not, however, an adequate justification for allowing commercial entities to monopolize particular colors through trademark law. Mere association does not mean a color is functioning as a trademark.¹⁴ And, there can be no trademark protection when a color has a function.¹⁵

¹² Clemson University is a public school in South Carolina that is far inferior to the University of South Carolina in every way, including but not limited to the fact that it does not have an associated law school. <http://www.clemson.edu/>

¹³ <http://www.utk.edu/>

¹⁴ See de factor secondary meaning cases in genericide cases in text.

¹⁵ *Infra*.

Similarly, companies are not allowed to register or protect generic terms as trademarks for the goods or services they identify, even if the company can make an evidentiary showing of secondary meaning as a result of market dominance.¹⁶ For example, though a huge proportion of the computer owning populace may associate the acronym DOS (which stands for Disk Operating System) with Microsoft due to that company's tremendous commercial success with its software, but as a doctrinal matter Microsoft should not be able to claim DOS alone as a trademark for the disc operating systems it markets. MSDOS can be, and is a protectable trademark for the company,¹⁷ but other software companies are free to use DOS to describe the disc operating systems that they produce. The rationale is that no manufacturer or service provider should be given exclusive right to use words that generically identify a product or service.¹⁸

1. All the Colors of the Rainbow

¹⁶ cite

¹⁷ Cite to MSDOS trademark

¹⁸ <http://www.uspto.gov/web/offices/tac/tmfaq.htm> ;
<http://207.41.19.15/web/sdocuments.nsf/6b42fae391e7c85d88256aae0064a9f1/7c0b6ddf5185d85288256ab6006771c6?OpenDocument>

("Generic Marks. The fourth category of trademarks is entitled to no protection at all. They are called generic trademarks and they give the general name of the product of the plaintiff. They are part of our common language that we need to identify all such similar products. They are the common name for the product to which they are affixed. It is the general name for which the particular product or service is an example.

It is generic if the term answers the question "what is the product being sold?" If the average [relevant] consumer would identify the term with all such similar products, regardless of the [manufacturer] [provider], the term is generic and not entitled to protection as a trademark.

Clearly, the word apple can be used in a generic way and not be entitled to any trademark protection. This occurs when the word is used to identify the fleshy, red fruit from any apple tree.

The computer maker who uses that same word to identify the personal computer, or the vitamin maker who uses that word on vitamins, has no claim for trademark infringement against the grocer who used that same word to indicate the fruit sold in a store. As used by the grocer, the word is generic and does not indicate any particular source of the product. As applied to the fruit, "apple" is simply the common name for what it is that is being sold.").

Green gold became the unassailably trademarked color of Qualitex dry-cleaning pads via a Supreme Court case¹⁹ that resolved a circuit split over whether a color could be accorded standalone trademark status, even though it never actually stood alone in commerce. Instead it is linked and duly subservient to the words “Qualitex,” and “Sun Gold,” especially at the point of sale. Though judges have decided that colors alone can serve as trademarks, commercial venders have been deeply reluctant to put this legal theory into commercial practice. None of the cases that comprise “color alone” jurisprudence involved color alone uses of color alone trademarks.

In 1985, a Federal Circuit opinion²⁰ accorded trademark status to the color pink when it is used as a source identifier in Owens Corning fiberglass building insulation.²¹ The backing paper of the insulation bore the trademarked words “Owens Corning” but the court was convinced that consumers independently recognized the pink color as a signifier of source, and that trademark law allowed Owens Corning to leverage this accrued recognition into a limited monopoly in the form of trademark rights. Other fiberglass insulation manufacturers were free to inject alternative colors into their products, but pink insulation became Owens Corning’s exclusive prerogative.

In 1990 the Seventh Circuit contrarily refused a vender of sugar substitutes trademark rights to the color blue itself, stating that blue packaging “used in connection with some symbol or design or impressed in a particular design” was adequate color-linked trademark protection.²² In 1993, however, the Eighth Circuit rejected this limiting principle, and saw no reason that the color blue couldn’t function as a fully protectable

¹⁹ Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995) <http://supct.law.cornell.edu/supct/html/93-1577.ZS.html>

²⁰ *In re Owens Corning Fiberglas Corp.*, 774 F. 2d 1116, 1128 (CA Fed. 1985).

²¹ <http://www.owenscorning.com/around/insulation/insulationhome.asp>

²² *NutraSweet Co. v. Stadt Corp.*, 917 F.2d 1024, 1028 (CA7 1990).

(in a trademark sense) source identifier for the Blue Max brand of splicing tape,²³ widening the Circuit split on this judicially contested issue enough to attract the Supreme Court's *certiorari* granting attentions.

In 1995 in *Qualitex v. Jacobson*, the Supreme Court ruled that: "Since human beings might use as a "symbol" or "device" almost anything at all that is capable of carrying meaning," a correct reading of the Lanham Act's definition of a trademark as "any word, name, symbol or device, or any combination thereof"²⁴ was both literal and liberal.²⁵ This opinion went on to observe that the courts and the Patent and Trademark Office had previously authorized shapes, sounds and scents for use as marks, in addition to more mundane and commonplace words and pictorial designs.²⁶ Colors, the Court decided, could reasonably serve as marks as well once they had attained acquired distinctiveness (also known as secondary meaning), as long as their use was nonfunctional. The Court framed the question presented as "why not?" arguably adapted the modern articulation of patentable subject matter²⁷ to trademarks: "Anything under the sun, perceived by man."

It is the position of this author that the *Qualitex* case was wrongly decided, and is endemically problematic because the opinion resulted in *de facto* law making that was expanded the scope of trademark law without adequately considering the competitive functional roles that product design features like color play. Though *amicus* briefs expanded the doctrinal and practical issues to an extent, the Court had full information about only one particular trademark dispute at its disposal when it decided to render

²³ *Master Distributors, Inc. v. Pako Corp.*, 986 F.2d 219, 224 (CA8 1993)

²⁴ Lanham Act Section 45, 15 U.S.C. 1127 (2000).

²⁵ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995).

²⁶ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162 (1995).

²⁷ Patent Act Section 101.

colors alone legally protectable trademarks. Important issues and evidence related to color alone trademarks that were not raised by the parties, who have no obligation or incentive to present information unrelated to their specific claims, nor by *amici*, and were not likely considered by the Court when it endorsed the concept of free floating color alone trademarks in *Qualitex*. This lead to poorly informed, and ill advised judicial lawmaking in this case.

B. The Arbitrariness and Functionality of Color

The Lanham Act makes it clear that functional attributes can not be protected as trademarks even if these are otherwise source identifying.²⁸ As Graeme Dinwoodie has observed:

...[T]rademark protection should depend upon whether the particular symbolic matter identifies the source of a product (i.e., whether the matter is “distinctive”), and upon whether protection of the particular symbol would accord a practical monopoly and prevent effective competition by others (i.e., whether the matter is “functional”).²⁹

A valid mark must be nonfunctional as well as source identifying. The functionality test articulated by the Supreme Court is whether “exclusive use of the [product] feature would put competitors at a significant non reputation related disadvantage.”³⁰ The Court seemed unconcerned that allowing color alone trademarks meant that competitors would be precluded from producing products in colors that consumers preferred to purchase for aesthetic reasons. Justice Breyer wrote:

Although sometimes color plays an important role (unrelated to source identification) in making a product more desirable, sometimes it does not.

²⁸ Cites to Lanham Act.

²⁹ Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach To Trademark Law*, 84 *Iowa L. Rev.* 611, 617 (May 1999).

³⁰ *Qualitex at X*, citing to *Inwood Laboratories, Inc. v. Ives Labs., Inc.* 456 U.S. 844, 850 n. 10, and putatively restating *Inwood*’s articulation of the functionality test: “whether a product feature “is essential to the use or purpose of the article or if it affects the cost or quality of the article.”

And, this latter fact – the fact that sometimes color is not essential to a product’s use or purpose and does not affect cost or quality – indicates that the doctrine of “functionality” does not create an absolute bar to the use of color alone as a mark.³¹

Colors used in relation to goods or services are employed either arbitrarily, or functionally, or both. For example, AstroTurf, a manufactured sod substitute often used on athletic fields, is often green because it replaces and it supposed to look like grass. The color green is therefore being used in a highly functional way.

In *Qualitex*, the Supreme Court gave little credence to the defendant’s functionality argument, not because they questioned the truth of the assertion that green gold did a good job of hiding stains on dry cleaning pads, but because of an espoused belief that other dark colors could accomplish the same purpose.³² Even though the Court acknowledged that “it is important to use *some* color on press pads to avoid noticeable stains,” it endorsed the view that there was “no competitive need in the press pad industry for the green gold color, since other colors are equally usable.”³³ This was an endorsement (despite oblique protestations to the contrary³⁴) of the questionable principle that if a competitor could design or work around a functional product attribute, that attribute was not precluded from serving as a protectable trademark or trade dress element, a doctrinally dubious precept the Court unequivocally rejected six years later in

³¹ *Qualitex* at X, citing *Owens Corning*, 774 F.2d, at 1123.

³² But see *Traffix Devices, Inc. v. Mktg. Displays, Inc.* 532 U.S. 23 (2001). (“As explained in *Qualitex*, *supra*, and *Inwood*, *supra*, a feature is also functional when it is essential to the use or purpose of the device or when it affects the cost or quality of the device. The *Qualitex* decision did not purport to displace this traditional rule. Instead, it quoted the rule as *Inwood* had set it forth. It is proper to inquire into a “significant non-reputation-related disadvantage” in cases of aesthetic functionality, the question involved in *Qualitex*. Where the design is functional under the *Inwood* formulation there is no need to proceed further to consider if there is a competitive necessity for the feature. In *Qualitex*, by contrast, aesthetic functionality was the central question, there having been no indication that the green-gold color of the laundry press pad had any bearing on the use or purpose of the product or its cost or quality.”)

³³ *Qualitex* at X, in part quoting from the Federal Circuit’s opinion at 21 U.S.P.Q. 2d at 1460.

³⁴ *Qualitex* at 164 (“The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm’s reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature.”)

*TraFFix Devices, Inc. v. Mktg. Displays, Inc.*³⁵ This facet of the *Qualitex* opinion was also in harmony with the Court's view that color exhaustion was unlikely to become a problem among dry cleaning pad producers.

C. Aesthetic Functionality

Clothing, furniture, tableware, kitchen accessories and other consumer goods are manufactured in various shades of green, including green gold, because consumers find green to be an appealing and desirable color. The use of green in these contexts is therefore aesthetically functional. It is also completely arbitrary, as the same manufactures may change the colors of their products to respond to changing tastes, and consumers may be just as willing to purchase an item in blue or red. Properly construed, aesthetic functionality concerns should preclude color alone trademarks in most consumer goods. Otherwise, consumers can be forced to forgo obtaining products in the colors they prefer, because a single company has a monopoly on a color, but may also charge higher prices or offer goods of lower quality, or fail to produce products with other desired features.

Some courts have properly placed the importance of allowing consumers the ability to obtain products in the colors they prefer above an entity's desire to make exclusive use of a color. Because farmers had an aesthetic preference for green farm equipment, and they liked their tractors to match their trailers, one district court refused to allow the John Deere Company to use trademark constructs to monopolize green with respect to farm machinery.³⁶ Because boat owners prefer outboard motors to be black for aesthetic reasons, the Federal Circuit ruled that a single outboard motor company could

³⁵ *TraFFix Devices, Inc. v. Mktg. Displays, Inc.* 532 U.S. 23 (2001).

³⁶ *Deere & Co. v. Farmhand, Inc.* 560 F. Supp. 85 (S.D. Iowa 1982).

not use trademark law to position itself as the exclusive purveyor of black outboard motors.³⁷

The Qualitex company's selection of green gold as its trademark color probably had an element of aesthetical functionality, as the company doubtlessly wanted dry cleaners to find Qualitex dry cleaning pads attractive. The adoption of green gold specifically also must have had an element of arbitrariness, as Qualitex could have chosen green gold from among alternative visually pleasing, stain hiding colors to monopolize as a commercial signifier. It seems plausible too that Qualitex undertook consumer preference research which ascertained that green gold was an aesthetically pleasing color to dry cleaning pad purchasers.

Qualitex, Inc. may have obtained a color alone trademark, but it never uses green gold as a trademark without appurtenant textual marks, usually "Qualitex" and "Sun Gold."³⁸ This is probably because as a savvy competitor, Qualitex recognized what the Supreme Court did not, which is that consumers generally do not view product colors as source identifiers.³⁹

The Court clearly viewed the trademark prerogatives of manufacturers as more important than the aesthetic preferences of consumers. Justice Breyer solicitously observed:

One can understand why a firm might find it difficult to place a usable symbol or word on a product (say, a large industrial bolt that customers normally see from a distance); and, in such instances, a firm might want to use color, pure and simple, instead of color as part of a design.⁴⁰

³⁷ Brunswick Corp. v. British Seagull Ltd., 35 F.3d 1527 (Fed. Cir. 1994).

³⁸ See Qualitex website.

³⁹ See e.g. Jerome Gilson & Anne Gilson LaLonde, Cinnamon Buns, Marching Ducks and Cherry-Scented Racecar Exhaust: Protecting Nontraditional Trademarks, 95 Trademark Rep. 773, 774-77 (2005).

⁴⁰ Qualitex at XX.

Justice Breyer’s assumption that customers of industrial bolts normally only see the bolts they purchase from a distance is somewhat questionable. Passersby and bystanders might only see the bolts from afar, but few courts ascribe passersby and bystanders important roles in driving trademark law.⁴¹ Moreover, in deciding *Qualitex* as it did, the Court chose to privilege a company’s desire to use trademark law to monopolize the market for, say, purple industrial bolts, over the price and quality oriented interests of consumers in having the widest possible range of purple industrial bolts to choose from, and over the commercial interests of competitors, who would reasonably prefer to meet their customers’ demands for purple industrial bolts. At least some of those consumers might prefer purple bolts because they found bolts in this nontraditional color quirky and aesthetically appealing.

Unless the color trademark holding manufacturer of purple industrial bolts mounts a campaign urging consumers to focus only on the color, to the exclusion of any textual mark, no matter the strength of its acquired distinctiveness, the purpleness would probably be secondary to the linguistic name of the bolts or the bolt manufacturer. Similarly, while insulation purchasers may demand “the pink fiberglass stuff” from shopkeepers, chances are the store’s inventory software lists its stock of pink insulation as “Owen Corning,” a mark that would generally be necessary to know if one wished to make the purchase online, due to the textual basis of most Internet related e-commerce processes.

1. **Gauging Pink’s Appeal**

⁴¹ Cf post sale confusion cases like the Levi’s pocket arch.

Owens Corning's trademarked pink color makes its fiberglass insulation more aesthetically attractive, changing the natural dingy, off white color of the insulation to something reminiscent of cotton candy. Additionally, to some consumers pink might connote warmth, which in cold weather is a positive association for fiberglass insulation. Whether in the absence of Owens Corning's successful pink-linked advertising campaigns and extraordinary market share, any of its competitors would have any interest in dyeing its fiberglass insulation products pink is unclear. It is easy to see why use of pink by a rival company would be perceived as illegitimate free riding, and punished as trademark infringement. Yet it is also hard to conceive as an alternative color that would be equally appealing. Cotton candy comes in blue, but blue is culturally associated with cold. Yellow is the color of sunshine, but also of urine and cowardice. Green is the color of plant life, mold and decay. Brown is the color of dirt. The range of marketable, aesthetically appealing colors that can be effectively embedded in fiberglass insulation may be very limited indeed. Pink may be more valuable as a product attribute than as a trademark, in which case allowing its monopolization is doctrinally problematic.

The fact that the color pink may be source identifying with respect to fiberglass insulation does not trump or even mitigate its aesthetic functionality. Consumers may recognize that pink insulation is marketed exclusively by Owens Corning, but this doesn't mean they are purchasing it because it is produced by Owens Corning. Their only information about Owens Corning insulation probably comes from Owens Corning advertisements, which they may or may not credit. They may select Owens Corning insulation because it is pink, and the only pink insulation that can be obtained is Owens

Corning. Secondary meaning is properly subordinated to functionality, as it is with genericness.

Testing for aesthetic functionality in this situation using customer surveys wouldn't be that difficult.⁴² Consumers could be asked whether they are buying the insulation because it is pink, or because it is Owens Corning. An answer of pink would demonstrate aesthetic functionality. Those who answer "because it is Owens Corning" could also be asked whether they would purchase Owens Corning fiberglass insulation if it wasn't pink. An answer of "no" would also support a finding of aesthetic functionality.

This approach would also work in other product feature, product design, and product packing contexts. Consider the shape of the glass bottle that Coca-Cola is sometimes distributed in. Assuming consumers associate the bottle with Coca-Cola particularly rather than carbonated cola beverages generally, consumers could be queried as to whether, given identical cola contents at the same price, they would prefer the bottle over other types of packing such as cans or glass bottles with alternative configurations. Preferences based upon enjoyment of the appearance and tactile properties of the bottle would be indicative of its aesthetic functionality.⁴³ If aesthetic functionality was established through survey evidence, though other forms of intellectual property protections might be available such as copyrights and design patents, but the bottle shape

⁴² This assumes willingness by courts to solicit and rely on consumer survey evidence that is at present not much in evidence in contemporary trademark jurisprudence according to Barton Beebe, *Empirical Study* at 1640-42.

⁴³ But see Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach To Trademark Law*, 84 *Iowa L. Rev.* 611, 696-701 and 731- 746 (May 1999). Dinwoodie grounds the test for aesthetic functionality in competitive effects, rather than directly in consumer tastes and preferences. I would argue that even in the absence of demonstrable competitors' interest in utilizing a product design or feature, if there is persuasive evidence that it is performing aesthetically, it should not be protectable as a trademark, and that this view was adopted by the Supreme Court in two cases that postdate Dinwoodie's article, *Wal-Mart v. Samara Brothers* and *Traffix Devices*.

would not be eligible for monopolization through trademark law. This would lead to freer container based competition.

D. The Arbitrariness of Strength

Congress made functionality a barrier to enforcing all trademarks, even if they are “famous”⁴⁴ or have obtained “incontestable” status.⁴⁵ As a doctrinal matter, functional uses of color are not supposed to be susceptible to monopolization as trademarks.⁴⁶ Nor are functional uses of color by competitors properly deemed infringements of existing trademarks.⁴⁷ Arbitrariness, however, can be a very valuable designation for a trademark. Most trademark infringement adjudications require a court to make some assessment of the strength of the plaintiff mark. The most meaningful type of trademark strength is the extent of consumer recognition.⁴⁸ A mark that many consumers recognize due to heavy advertising and/or market dominance of the marked good or service, is both strong and, because it is commercially effective, likely to attract free riders. Where the free riding takes the form of counterfeiting, the mark holder is unequivocally entitled to a legal remedy. Where the free riding is alleged to be likely to cause confusion among consumers, whether the law should intervene is a far more complicated inquiry. Where the free riding is not confusing to consumers, but usurps ideas that are not protected by copyrights or patents, it can be otherwise described as legitimate competition, and

⁴⁴ Lanham Act

⁴⁵ Cite to Lanham Act.

⁴⁶ Lanham Act Section 2(e)(5), 15 U.S.C. Section 1052(3)(5) states that a mark cannot be registered if it “comprises any matter that, as a whole, is functional.” See also *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001) (“trade dress protection may not be claimed for product features that are functional”).

⁴⁷ Section 33(b) of the Lanham Act acknowledges functionality as a defense to infringement even when a plaintiff mark has incontestable status. In *Qualitex*, 514 U.S. at 164, the Supreme Court noted: “The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm’s reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature.”) See also Margreth Barret, *Consolidating the Diffuse Paths to Trade Dress Functionality: Encountering TrafFix on the Way to Sears*, 61 *Was. & Lee L. Rev.* 79 (2004).

⁴⁸ See e.g 2 McCarthy on Trademarks, Section 15.08, 1 McCarthy Sections 11.24 – 11.25.

trademark law should not interfere. The mark holder always has non-legal options to displace free riding competitors such as providing better products, charging lower prices, or leveraging its strong trademark with a persuasive advertising campaign.

A second concept sometimes referred to as strength, however, has to do with the conceptual category it is assigned by a court. The four categories a judge has to choose from are generic, descriptive, suggestive, and arbitrary or fanciful. There are really only two distinctions that are important. The line between generic and descriptive is critical because while descriptive marks are protectable if the holder can show that the mark has secondary meaning (which is sometimes referred to as “acquired distinctiveness”), generic marks can’t be protected at all.⁴⁹

The line between descriptive and suggestive is significant because the evidentiary burden falls heavier on the holder of a descriptive mark than it does on the holder of a suggestive mark. If its validity is challenged, the holder of a descriptive mark must convince the judicial fact finder that her mark has secondary meaning, which is usually accomplished in part by submitting consumer survey evidence, which can be arduous and expensive to compile. A suggestive mark, however, is presumed “inherently distinctive” and its holder doesn’t have to prove anything in this regard. A suggestive mark is therefore far cheaper and easier to defend for validity purposes in the context of infringement litigation than a descriptive one.

The line between suggestive and arbitrary or fanciful is only salient when judges decide to accord a broader scope of protection to arbitrary or fanciful marks. One might conclude that Congress set up the four categories to incentivize the use of suggestive, arbitrary and fanciful trademarks. One would be gravely mistaken. It was the courts,

⁴⁹ Lanham Act Section 33...

rather than Congress, that originated and instantiated the practice of sorting trademarks into categories that implicate the evidentiary burden on mark holders, and the amount of protection they receive. All the Lanham Act requires is that valid marks have a non-generic relationship to the associative product or service, and establish a “secondary meaning” connection between the mark and the product or service within the perceptions of the consuming public.

It was judges, rather than legislators, who decided to ascribe automatic secondary meaning to suggestive, arbitrary and fanciful marks, thus relieving holders of marks in these categories from the legal obligation to demonstrate any recognition of their marks whatsoever by consumers.⁵⁰ It was also the courts that began, in a somewhat less widely followed practice,⁵¹ to assert that suggestive marks were entitled to more protection than descriptive ones, and arbitrary and fanciful marks even more protection than suggestive ones.⁵² Although a federal registration provides a rebuttable presumption of trademark validity, reflecting a PTO examiner’s opinion that the mark is not generic,⁵³ the registration does not provide any other information about what category a court might

⁵⁰ See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4 (2d Cir. 1976) and its pervasive aftermath, which a knowledgeable commentator referred to as one of the worst blights on trademark law. See Beverly W. Pattishall, *The Lanham Trademark Act- Its Impact Over Four Decades*, 76 *Trademark Rep.* Section 24, at 57. See also *Scandia Down Corp. v. Euroquilt, Inc.* 772 F.2d 1423, 1431 n.3 (7th Cir. 1985)(criticizing use of *Abercrombie and Fitch* factors in analysis of trademark strength).

⁵¹ Barton Beebe, *Empirical Study* at 1633-40.

⁵² I reserve for another day a detailed interrogation of the judicially constructed practice of according some trademarks more protection from infringement than others. Suffice to say, in my view once a mark is determined to be valid, it should have the same scope as every other protectable trademark. In addition to the foibles and deficiencies of the categorical approach to strength, linking level of protection to consumer recognition strength is also logically problematic. Strong marks are sometimes accorded elevated protection because they have “earned it,” but if they are well known and well advertised, they hardly need it. The inability of most trademark holders to muster convincing evidence of actual confusion during the course of infringement litigation (see e.g. Barton Beebe, *Empirical Study* at 1640-42) suggests that rare indeed is a consumer so confused by similar trademarks or trade dress that she cannot distinguish between national brands and their competitors. If the goals of the Lanham Act are to foster fair competition while protecting the public from confusion, it makes more sense to accord enhanced levels of protection to weak marks, as the lack of familiarity that consumers have with them may create market conditions that make consumer confusion more plausible.

⁵³ Cites, case and Lanham Act

ascertain that a mark falls into in any given context.⁵⁴ This means that competitors don't know the strength or scope of the trademarks employed by companies they are competing with until they find themselves defendants in trademark infringement suits, and a court rules on the categorical and/or consumer recognition strength of the plaintiff mark or marks at issue.

In terms of categorical strength, context is everything.⁵⁵

The word "apple" is the generic word for a particular tree-growing fruit, so "apple" cannot be a valid trademark for apples. It is, however, an arbitrary or fanciful trademark for computers, or for musical sound recordings, hence Apple Computers⁷³ and Apple Records.⁷⁴ Similarly, "popcorn" is generic when it references eponymous kernels of snack food drenched in butter and salt, but was found suggestive when pertaining to a line of oddly shaped silver anodes.⁷⁵

The word "ice" is generic for cubes of frozen water, but was held to be a suggestive and therefore protectable mark with respect to chewing gum.⁷⁶ "Ice" also has been used as a trademark for beer, and in one lawsuit was asserted to be generic by one litigant, while the mark holder claimed that the relationship between ice and beer was "either arbitrary, fanciful or suggestive."⁷⁷ The keys to correctly categorizing the mark are consumer understanding and common usage of the term at the time the issue is presented to a court.⁷⁸

The categorical assignment reflects the relationship between the marked product or service, and the commercial and social meaning of the trademark itself. To illustrate further; the word "yoghurt" would be considered generic when used on the cultured dairy product commonly referred to as yoghurt, and therefore ineligible for trademark use. All makers of yoghurt are free to call their product yoghurt, because no one is able to

⁵⁴ Nor does a trademark registration address the fact that when a mark is used for disparate products, it can fall into multiple categories simultaneously. For example, while Coca-cola has been adjudicated a descriptive mark for a well known carbonated beverage (case site), it could reasonably be said to be an arbitrary mark for clothing.

⁵⁵ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=544923

monopolize the word via trademark law precepts. If a hammock maker wanted to call her product “yoghurt” for some odd reason, because there is no socially meaningful connection between hammocks and cultured dairy products, this trademark use would be arbitrary. It is true that any linkage in the public consciousness between yoghurt and hammocks could be reasonably attributed to trademark use by the vender, but that doesn’t mean the mark is or will become strong in the marketplace. If “Yoghurt Hammocks” were widely marketed, the mark might attain consumer recognition strength. If they were not advertised, and only a few units were sold, the mark would be commercially weak.⁵⁶

Why a categorical distinction should lead a court to provide an evidentiary free pass, and the highest level of protection to little used or poorly recognized marks that happen to be arbitrary or fanciful, is one of the confounding perplexities of trademark law.⁵⁷ It is contrary to the precept that trademark holders have to earn their rights by building the secondary meanings of their marks through advertising and distribution of quality goods and services.

Dispensing with the requirement of evidentiary showings to prove secondary meaning when the plaintiff mark can be categorized as suggestive, arbitrary or fanciful saves courts time and effort during the course of trademark infringement litigation, which may be at least part of the explanation for so many judges decided to develop and adopt this doctrinal innovation. Why courts might also want to accord enhanced levels of protection to suggestive marks, and higher levels of protection still to arbitrary and fanciful marks, is a little more difficult to discern. Providing an incentive for companies

⁵⁶ In Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 *California L. Rev.* 1581, 1635-36 (2006), Barton Beebe asserts that trial courts weigh commercial recognition strength more heavily than categorical strength.

⁵⁷ Cf Beebe, *Empirical Study*, at 1639 (“...the goal is [to] encourage the use of inherently distinctive rather than descriptive marks. These are both worthy objectives...”).

to coined fanciful trademarks makes a certain kind of sense if one is concerned about language depletion. Suggestive and arbitrary textual marks, however, monopolize existing words or phrases just as readily as descriptive marks do, and even more rigorously than descriptive marks if they are given broader swaths of protection from infringement.

Because the four iterated trademark categories are conceptualized as a hierarchy or pyramid,⁵⁸ some judges attribute inappropriate significance to trademarks that are arbitrary, especially when the mark is non-textual. Color marks are especially susceptible to overprotection in this regard. Although the Supreme Court observed in *Qualitex* that a color alone trademark could never be inherently distinctive,⁵⁹ once secondary meaning was established, the temptation to view colors as arbitrary would understandably be a strong one. If the unadorned color of fiberglass insulation is off white, then any color that is injected into it is arbitrary. It makes little doctrinal sense to elevate the quantum of trademark protection this color receives above descriptive and suggestive marks on this basis alone.⁶⁰ The proper analytical focus is on the strength of a mark's secondary

⁵⁸ Leval? Barton Beebe points out (Empirical Study at 1637-39) that grouping arbitrary and fanciful marks into the same category is incorrect, and asserts that fanciful marks deserve “a heightened degree of protection over arbitrary marks.”

⁵⁹ *Qualitex* at ??? (“True, a product’s color is unlike “fanciful, “arbitrary,” or “suggestive” words or designs which almost automatically tell a customer they refer to a brand. ...But over time customers may come to treat a particular color on a product or its packaging (say, a color that in context seems unusual, such as pink on a firm’s insulating material or red on the head of a large industrial bolt) as signifying a brand. ...Again, one might ask, if trademark law permits a descriptive word with secondary meaning to act as a mark, why would it not permit a color, under similar circumstances, to do the same? We cannot find in the basic objectives of trademark law any obvious theoretical objection to the use of color alone as a trademark, where that color has attained “secondary meaning” and therefore identifies and distinguishes a particular brand (and this indicates its “source”). See also *Samara Brothers* at 211-12.

⁶⁰ Writing for a unanimous Court, Justice Scalia noted in *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.* 529 U.S. 205 (2000) that the hierarchical four category trademark taxonomy derived from *Abercrombie* could not be usefully or legitimately applied to trade dress elements such as color or shape.

meaning, the cognitive link between the mark and its source.⁶¹ And of course, as explained above, if a color is function, it shouldn't be protected as a mark at all.

E. Communicative Functionality

Communicative functionality is one more complicating aspect of colors that ought to render color alone trademarks unenforceable. Loyal alumni often wear their school colors while attending collegiate athletic events to communicate their affinity for a particular team. Colloquially one might accurately say that garnet and black are the trademark colors of the University of South Carolina, but wearing these colors to University sports events communicates support for the USC Gamecocks outside the linear realm of commercial trademark use.

In *Qualitex* Justice Stevens wrote that where a color serves a significant non-trademark function, courts should examine whether its use as a mark would permit interference “with legitimate (nontrademark related) competition through actual or potential exclusive use of an important product ingredient.”⁶² Obviously the definitions of “significant” and “legitimate” are critical to giving this limiting principle practical meaning. Why if a color is serving a significant non-trademark function, it should be protectable as mark **at all** is never satisfactorily articulated, and seems inconsistent with the functionality language in Sections 2 and 14 of the Lanham Act.

The Court did not address communicative functionality in its *Qualitex* opinion, most likely because the issue was not specifically raised by Jacobson in either its Respondent's Brief or during oral argument, or by the sole amicus brief filed in support

⁶¹ Rebecca Tushnet's neuroscience article?

⁶² *Qualitex* at ____

of Jacobson's position.⁶³ Yet it is at least possible that the Qualitex company tries to signal a non-trademark related message through its use of the color green, which in some contexts is used to subtly telegraph an ecological commitment or environmental friendliness, a message that retailer dry cleaners might desire to reassure customers that the chemicals used in dry cleaning are not harmful.

The Court's subsequent holding in *TrafFix Devices*⁶⁴ suggests that one a color is shown to serve a non-trademark function, it isn't eligible to be legally recognized as a mark at all. However, the Court confused matters by explicitly distinguishing *Qualitex* as a case about aesthetic functionality only, in a way that implied that aesthetics don't affect the marketability of a product,⁶⁵ a highly questionable conclusion. This decision did not, however, consider communicative functionality independently either.

There are many ways that significant, arbitrary, non-aesthetic uses of color in commerce can be made, that are not trademark or trademark infringing uses. Some judicial decisions have recognized that colors can signify a product's attributes, rather than its source. For example, in *McNeil Nutritionals, LLC v. Heartland*,⁶⁶ a district court considering a trade dress claim held that the colors of packages of artificial sweeteners helped consumers identify the chemical composition of the sweeteners they contained. It noted that Sweet'N Low made red and pink the recognized color of saccharin, and

⁶³ See Respondent's brief: 1993 U.S. Briefs 1577; 1994 U.S. S. Ct. Briefs LEXIS 647 Oral Argument Transcript: 1995 U.S. TRANS LEXIS 61 and Amicus Brief: 1993 U.S. Briefs 1577; 1994 U.S. S. Ct. Briefs LEXIS 645

⁶⁴ *TrafFix Devices, Inc. v. Mktg. Displays, Inc.* 532 U.S. 23 (2001).

⁶⁵ In *TrafFix Devices, Inc. v. Mktg. Displays, Inc.* 532 U.S. 23 (2001) Justice Kennedy rather astonishingly wrote: "In *Qualitex*, by contrast, aesthetic functionality was the central question, there having been no indication that the green-gold color of the laundry press pad had any bearing on the use or purpose of the product or its cost or quality." This despite the arguments about the stain hiding properties of green gold by Jacobsen, and without any explanation of why aesthetics do not effect a product's "quality."

⁶⁶ *McNeil Nutritionals, LLC v. Heartland Sweeteners LLC*, 2007 WL 1520101 (E.D. Pa. 2007); *affi'd in part and reduced in part, McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, --- F.3d ----, 2007 WL 4478981 (3d Cir.).

competing house brands of saccharin reasonably used red and/or pink packaging to communicate their chemical composition to saccharin customers. Equal's aggressive advertising associated aspartame with blue in the public consciousness, so house brands of aspartame appropriately used blue packaging as well. The successful marketing of Splenda made yellow the recognized color of sucralose, and therefore the company that manufactured and marketed Splenda into a 60% market share of artificial sweeteners couldn't obtain a preliminary injunction to prevent house brands from using yellow packaging too.⁶⁷ Although the court did not use this term, it recognized the communicative functionality of the colors employed by sugar substitute vendors.

In *Nor Am Chemical v. O.M. Scott & Sons Co.*⁶⁸ another district court ruled that the blue color of fertilizer was functional because it signaled the presence of nitrogen. In its 1982 opinion in *Inwood Laboratories v. Ives Labs, Inc.*,⁶⁹ the Supreme Court ruled that competitors should be free to copy the color of a medical pill because the color communicated the type of medication it contained, even though it might also serve source identifying functions.

The Hershey Company's use of brown in the wrapper of its famous Hershey Bar, and in the packaging of so many of its other products, communicates chocolate. Color can also communicate messages other than product ingredients *per se*. Continuing in the context of candy, the color red is associated with certain flavor: fruits such as strawberry and cherry, which are red as they are when ripened on the tree or vine, and cinnamon, which is a far duller brown in its natural state. Red can also signal peppermint, such as in a traditional striped candy cane, even though the peppermint leaves from which the flavor

⁶⁷ Id.

⁶⁸ *Am Chemical v. O.M. Scott & Sons Co.*, 4 U.S.P.Q. 2d 1316, 1320 (E.D. Pa. 1987)

⁶⁹ *Inwood Laboratories, Inc. v. Ives Labs., Inc.* 456 U.S. 844 (1982) at 853 and 858 n.20.

is derived are bright green. Wintergreen flavored Lifesaver candies, however, are white.⁷⁰ Colors provide information the consumers want (green candies are unlikely to be orange or grape flavored) even if it is imperfect or incomplete (green candies may be spearmint flavored, or the color may denote lime). The interference with this communication that can be caused by color alone trademarks is one more argument against having them.

F. Color Exhaustion, Scope Uncertainty, and the Analytic Collapse of Trademark Dilution

The Supreme Court concluded in *Qualitex* that concerns about color exhaustion and uncertainty of scope were outweighed by a directive Congress embedded within the wording of the Lanham Act to broadly construe the pool of signifiers from which federally registerable trademarks could be drawn.⁷¹ The color exhaustion argument was an articulation of the possibility that there would be enough companies in a single market monopolizing color based trademarks that all of the appealing colors would be taken, creating a barrier to entry by additional competitors. The uncertainty of scope argument referenced the fact that the likelihood of confusion standard for trademark infringement meant that the holder of a color trademark had a monopoly that extended beyond the registered color itself to any similar color or shade that was likely to be confusing to some cohort of the product consuming populace.⁷²

⁷⁰ Cite to Lifesavers WintOgreen website.

⁷¹ A comprehensive list of Jacobson's arguments opposing *Qualitex*'s color-alone trademark is as follows: 1. Color alone trademarks would produce uncertainty and unresolvable court disputes about what shades of a color a competitor may lawfully use; 2. a color-alone regime is unworkable in light of the limited supply of colors that will soon be depleted by competitors; 3. allowing color alone trademarks was contrary to many older cases, including decisions of the Supreme Court interpreting pre-Lanham Act trademark law; and 4. allowing color alone trademarks was unnecessary because companies could use color as components of protectable trademarks and trade dress.

⁷² A good discussion of the uncertainties associated with color trademarks can be found in Melissa E. Roth, Note: Something Old, Something New, Something Borrowed, Something Blue: A New Tradition in Nontraditional Trademark Registrations, 27 *Cardozo L. Rev.* 457 (2005).

Uncertainty about whether another shade of green would be deemed confusingly similar to Qualitex's trademarked green gold would cause risk-adverse competitors to avoid every permutation of green altogether. If another dry cleaning pad manufacturer trademarked one shade of blue, for all practical purposes this company would then have a monopoly over a huge swath of the blue spectrum. It wouldn't take too many color trademarks before the use of all of the colors that customers would find attractive were chilled by uncertainty, which in turn would synergistically exacerbate the color exhaustion phenomena.

Writing for a unanimous Court, Justice Breyer rather cavalierly dismissed these arguments, asserting that there were large numbers of color trademarks available for use, and if color exhaustion actually did begin to interfere with competition, the issue could be revisited in the future. He wrote: "When a color serves as a mark, normally alternative colors will likely be available for similar use by others."⁷³

In addition, the *Qualitex* Court sanguinely touted the option of revisiting the color exhaustion issue by either successfully lobbying Congress to amend the Lanham Act, or attempting to re-argue it all the way up to the Supreme Court and convincing nine Justices to abrogate the *stare decisis* doctrine⁷⁴ and overrule *Qualitex*, which is certainly a theoretical possibility. Realistically, however, it would be prohibitively expensive and far too uncertain for even a wealthy and well established company to undertake. Because it is probably new or hopeful market entrants that are most negatively affected by enforceable color marks, the most motivated objectors may well lack the resources to mount an effective campaign for legislative or judicial change.

⁷³ Qualitex as XX.

⁷⁴ Jacobson argued that the Court would do this if it overturned the Ninth Circuit's ruling in *Qualitex*. See Respondent's Brief at ___.

When color exhaustion and scope uncertainty are mixed into a trademark dilution dispute, the anticompetitive aspects of the doctrine are painted in stark relief. The *Qualitex* Court's belief that the many visually observable colors in the world afford an almost unbounded trademark palette did not anticipate the limiting difficulties that the trademark dilution would soon pose by according almost absolute trademark rights to qualifying mark holders. The Federal Trademark Dilution Act was passed the year after *Qualitex* was decided, and granted the holders of famous marks expansive, close to absolute rights that transcend the "use in commerce" limiting principles of traditional trademark law.⁷⁵

If non-famous within the meaning of Section 43(c)(1) of the Lanham Act, *Qualitex's* green gold is not entitled to protection from dilution, and can be infringed only by uses likely to be confusing to consumers, which are generally understood to be uses of the same or similar mark, on the same or similar (or "related") products,⁷⁶ which would be dry cleaning pads and auxiliary dry cleaning goods or services. However, if a court found it to be a "famous" mark, *Qualitex, Inc.* would have cognizable dilution causes of action against a broad range of uses of the color in contexts in which there was no danger of consumer confusion. This is because dilution protection gives trademark holders (in addition to traditional protection against acts by competitors that might confuse consumers) the ability to prevent use of the mark by others in association with non-competing products. *Delta Airlines*, *Delta Faucets* and *Delta Dental* are three different companies that peacefully coexist with the same trademark. Dilution doctrine says that once a company's trademark is famous, no one else can use the mark for any

⁷⁵ Lanham Act Section 43(c)(1), 15 U.S.C. 1125 (c)(1)

⁷⁶ See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 *California L. Rev* 1581 (2006).

trademark purpose. Assuming away the grandparent provisions of the Lanham Act, this means that if the three companies had been formed after the FTDA took effect, and Delta Faucets convinced a court that it held a famous mark within the meaning of Section 43 of the Lanham Act, subsequent market entrants Delta Airlines and Delta Dental would have to come up with alternative names for their companies. It is understandable that Delta Faucet might prefer to be the sole commercial user of Delta as a trademark, but not at all clear as a commercial matter that they need to be, and tradition trademark protections never gave them a doctrinal tool with which to accomplish this.

If a court deemed the green gold mark famous within the meaning of the Federal Trademark Dilution Act,⁷⁷ even uses of green gold on disparate products such as lawn mowers or bicycles could be held dilutive of Qualitex's color mark. This would restrict competition without a cognizable commercial justification, however, and few jurists are likely to be convinced that Qualitex earned this extensive a monopoly simply by using the color in connection with dry cleaning products, even if the company dominates that market. It may be that Qualitex's color mark would be unable to achieve "fame" no matter how well recognized it was among consumers.

Concerns about according color marks dilution protection should not be limited to *Qualitex* type factual situations, either. Regardless of how well advertised and culturally familiar a color mark is among the populace, no judge who thinks through the ramifications of giving a trademark holder the power to control a color in the almost absolute sense that dilution protections facilitate is going to be very enthusiastic about

⁷⁷ FTDA citation.

finding a color mark famous.⁷⁸ This is because awarding dilution protection to any color alone trademark could spark a rush of color alone mark registrations by companies fearful that unless they acted to preserve grandparented rights to manufacture products in particular colors,⁷⁹ they would be seriously commercially disadvantaged in the future. That, in turn, would likely rapidly foment color exhaustion in many market sectors. Large companies would quickly become prohibitively constrained in the ways they could trademark, package and market their goods and services, and as chaos ensued, there would be rebellion and backlash against dilution precepts.

Given dilution's popularity among well funded mark holders, this is unlikely be enough to upend dilution laws generally. At most, *Qualitex* would be legislatively overruled, and color alone marks prohibited from registration on the principal registry or enforcement generally. Or, the more moderate step of deeming color alone marks ineligible for dilution protection would taken. However, the spectacle of Congress amending the dilution provisions of the Lanham Act yet again might helpfully telegraph the unsoundness of the ill advised doctrine in a manner that contributes to its ultimate and much hoped for (by this author, at least) demise. And if color alone marks are effectively ineligible for dilution protection regardless of fame, they are inherently second class marks.

⁷⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081339 ;
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012645 ;
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923164 ;
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=942673 but see
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=948576

⁷⁹ When a mark is found to be famous and deserving of dilution protection, pre-existing marks that are the same or similar but in use for unrelated goods or services (so they do not infringe nor are not infringed by the now famous mark) receive the benefit of a grandparent protection clause. Lanham Act section 43XX.

II. Pink and the Commoditization of Otherness

The elevation of color to stand alone trademark status illustrates the unbounded nature of trademarks within the judicial consciousness. It also facilitates the commoditization of color in ways that could complicate the development and distribution of products and services that use color for multiple purposes conterminously, especially if color alone marks were deemed famous and accorded protections against dilution. As explained above, however, this author believes that is unlikely, as doing so could jeopardize the dilution doctrine generally.

The case for color alone trademarks is severely undermined by careful observation of the ways that colors are actually deployed in commerce, which makes it clear that the trademarks of multiple goods and services can utilize the same color to communicate the same message without confusing anyone or diluting the commercial power of textual or symbolic trademarks.

Some colors have strong social significance that is simultaneously harnessed, reinforced, and strengthened when utilized in an unbounded way by commercial actors. This is powerfully illustrated by the interrelationship between the color pink, and the commoditization of the femaleness. In addition to acting as an exclusive mark for a particular brand of building insulation,⁸⁰ pink is the color of commoditized gender. It's for girls. It is the signifier of the femaleness (or sometimes, gayness or queerness) of goods and services.⁸¹

⁸⁰ Owens Corning also uses the Pink Panther as a trademark, and has successfully forced a gay rights group called the Pink Panther Patrol to change its name via trademark litigation.

<http://query.nytimes.com/gst/fullpage.html?res=9D0CE1DA1730F936A35753C1A967958260>

⁸¹ See, e.g., Beverly I. Fagot et al., *Qualities Underlying Definitions of Gender, Sex Roles*, July 1997, at 1, 5 (1997) (finding seventy percent or more of children surveyed defined pink as a feminine object; no other color was so gendered); Sharon Lamb & Lyn Mickel Brown, *Packaging Girlhood: Rescuing Our Daughters*

There is nothing inherently female about pink, or inherently pink about females. The connection is socially constructed, and trademarks both make and sustain this association. According to the USPTO's "New User Form Search" database, about 1,700 registered trademarks use the word "pink."⁸² The "Structured Form Search" of all search fields generated almost 8,000 results, while limiting the query to the "description of mark" listed well over 5,000 marks alone. An enormous proportion of these marks have some association with women as either consumers, or as products or services. All these pink marks are intended to signal otherness: (1) this is for women, (2) buying this helps women, or (3) this is a women-related product for men. Trademark owners free-ride on the existing meaning of symbols and appropriate them for private use. And every time pink is used to designate femaleness in some way, the semiotic attachment grows stronger, across marks.

A large number of studies show that across cultures and across gender, the most preferred color is blue.⁸³ It can hardly be a coincidence that in many nations, blue is the color associated with boys and men. However, while blue may indicate maleness among infants and small children lacking secondary sex characteristics, it is not strongly associated with adult males or masculinity generally. Consider the term "blue collar,"⁸⁴ at present a largely unisex term used to refer to people who lack college educations and/or perform manual labor for a living. Jobs that are disproportionately performed by

from Marketers' Schemes 210-213 (2006); Madeline Shakin et al., *Infant Clothing: Sex Labeling for Strangers*, 12 *Sex Roles* 955, 962 (1985).

⁸² <http://tess2.uspto.gov/bin/gate.exe?f=tess&state=t1esp1.1.1>

⁸³ E.g. Amitava Chattopadhyay, Gerald J. Gorn, Peter R. Darke, *Roses Are Red and Violets Are Blue – Everywhere? Cultural Differences and Universals in Color Preference and Choice Among Consumers and Marketing Managers* (April 7, 2002).

⁸⁴ http://en.wikipedia.org/wiki/Blue-collar_worker

women are sometimes referred to as “pink collar,”⁸⁵ as a way to categorize them separately from mainstream occupations offering higher salaries or more prestige. “Pink collar” is a more gendered expression than “blue collar.” In addition to maleness, blue’s strong societal associations are as the color of depression,⁸⁶ as an indicator of “off-color” humor,⁸⁷ and, in ribbon form, as a signifier of a first place winner.

A. Pink as a Signifier of Female

There is nothing inherently bad about pink as a color when it is freely chosen by women in exercises of agency, though how much agency individuals actually have, given the societal pressures that shape their actions, is debatable.⁸⁸ It is the invocation of pink as a proxy for inferiority based on its identification with females that is the most troubling.

Pink is deployed culturally as a way to encode gender in people, and also binds people to particular goods and services that have been gendered by instrumental uses of the color. Law professor Erin Buzuvis has explained:

Individuals who have internalized the gender binary are genuinely uncomfortable when they cannot decode an individual's sex. Even before it has any biological relevance, another individual's sex is the subject of scrutiny. Pre-adolescents (especially babies) present a particular challenge, because they do not yet have visible sex characteristics. To overcome this ambiguity and the discomfort that results, we rely on a color convention:

⁸⁵ http://en.wikipedia.org/wiki/Pink-collar_worker

⁸⁶ <http://www.girlshealth.gov/mind/help.depression.htm>

⁸⁷ http://en.wikipedia.org/wiki/Blue_humor

⁸⁸ <http://www.guardian.co.uk/g2/story/0,,2098154,00.html> (“Not so long ago, pink was a colour reserved for little girls. It was the colour of Barbie and bubblegum, of plastic tat that parents were pestered into buying, of pre-teen bedrooms and pocket-money accessories. Then, suddenly, it was everywhere - and being targeted at grown women. Next month, for instance, sees the launch of Fly Pink, a "boutique airline designed especially for women" which plans to operate from Liverpool's John Lennon airport. The airline will offer flights to Paris for "shopping breaks" in customised pink planes, and, to complete the experience, will also provide pink champagne and complementary manicures before take-off. Which just underlines the fact that it is now possible for women to experience their entire day in pink. You can work out with a pink yoga mat and weights; adorn your windscreen wipers with pink wiper wings; cook dinner on a pink George Foreman grill and style your hair with hot-pink hair straighteners. You can even see off would-be attackers with a powder-pink Taser gun.

pink for girls and blue for boys. This has become effective symbolism through widespread repetition over time. By dressing girls in pink, parents encode femininity onto their daughters who, at least when wearing clothes, would otherwise be gender-ambiguous (and thus, subversive). In other words, the color convention of pink-for-girls and blue-for-boys is one aspect of the cultural symbolism that interpellates the gender binary as the dominant ideology.

Observers, in turn, will rely on pink to decode with certainty that those children are of the female sex. From this practice derives the related, common preference for pink as the color delineating girls' space (e.g., bedrooms) and possessions (e.g., toys). Girls themselves internalize this constructed preference, which gives way to a self-reinforcing loop between the encoders/decoders of cultural texts. A toy manufacturer, for example, makes girls' toys pink because girls ostensibly prefer pink toys; girls prefer pink toys because that is the color in which they are made.⁸⁹

The Disney Company markets a very successful line of clothing and toys under its “Princess” imprimatur.⁹⁰ A significant proportion of the Princess products are pink, and the targeted consumers are clearly female. Disney didn't create the demand for pink among girls, but it exploits the affinity for pink among females quite deftly. The desires of girls who would prefer Princess toys in colors other than pink may be ignored by Disney, and girls who dislike pink may have to forgo the Princess line altogether. Disney doesn't have any obligation to cater to the pink adverse consumer, but the societal messages it sends by not doing so are strong one. *Every girl wants to be a princess. Princesses surround themselves with pinkness. If you don't want to be a pink princess, something is wrong with you.* Staying afloat in mainstream girlhood requires one to embrace pink products. Forgoing pink requires self-denial or cultural nonconformity by females. Pink is for girls, and girls are supposed to be for pink. Except of course when

⁸⁹ Erin K. Buzuvis, Reading the Pink Locker Room: On Football Culture and Title IX, 14 William & Mary J. of Women and the Law 1, 15-17 (2007).

⁹⁰ http://disney.go.com/princess/html/main_iframe.html

they prefer black with pink trim, and therefore embrace “Dark Tink,”⁹¹ a way to seem edgy and rebellious while still remaining within the Disney Princess fold.

Writer Peggy Orenstein expressed confusion and concern about the popularity of Disney princess merchandise and the princess meme generally that is apparently wildly popular with girls in this country, observing:

To call princesses a “trend” among girls is like calling Harry Potter a book. Sales at Disney Consumer Products, which started the craze six years ago by packaging nine of its female characters under one royal rubric, have shot up to \$3 billion, globally, this year, from \$300 million in 2001. There are now more than 25,000 Disney Princess items. “Princess,” as some Disney execs call it, is not only the fastest-growing brand the company has ever created; they say it is on its way to becoming the largest girls’ franchise on the planet.⁹²

Orenstein theorized that the princess phenomenon may be a backlash against feminism, and an effort to embrace traditional femininity. Orenstein described, in rather convoluted fashion, the classic double bind for feminists: Women who embrace “princessism” are vapid and materialistic and rejecting feminism while embracing their shallow, fragile feminine femaleness. However, women who reject “princessism” are actually rejecting women-identified things and are therefore being sexist themselves, which is hypocritical and self-hating, and also drives women away from feminism. No matter what, feminism is apparently on the wrong side of the princess issue.⁹³

Similarly, it’s hard for feminists to ever be correct about sex segregation. To insulate women suing public transportation from the exasperating reality of groping and verbal harassment, Mexico City announced that it had “rolled out ‘ladies only’ buses,

⁹¹ <http://feministlawprofs.law.sc.edu/?p=1332>

⁹² http://www.nytimes.com/2006/12/24/magazine/24princess.t.html?_r=1&pagewanted=print&oref=login

⁹³ See, e.g., Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 *S. Cal. L. Rev.* 1699, 1699-1704 (1990) (describing the dual problem of the commoditization of women as one where if women are prohibited from marketing their sexual services it threatens the personhood of these women but if they are allowed, the personhood of the woman becomes a commodity); see also Martha Chamallas, *Introduction to Feminist Legal Theory* 9 (2d ed. 2003).

complete with pink signs in the windshields to wave off the men.”⁹⁴ In response, men complained about the special treatment that women were receiving, while one putative feminist lamented that women only mass transit facilities “raise[ed] questions of just how equal the sexes are if women's safety relies on us being separated.”⁹⁵ She also asked: “What happens when a woman is groped - or worse - in a train car that isn't women-only? Will she be blamed for not taking advantage of the "safe" space provided?”⁹⁶ Thus a woman is either playing the gender card or capitulating to the patriarchy if she takes advantage of segregated buses, and groped and harassed or worse, and potentially blamed for it too, if she doesn't. In her book “Pink Think: Becoming a Woman in Many Uneasy Lessons,” author Lynn Peril described a related phenomenon she labeled “pink think” as “a set of ideas and attitudes about what constitutes proper female behavior” which “assumes there is a standard of behavior to which all women, no matter their age, race or body type, must aspire.”⁹⁷ Peril wrote:

...[P]ink think is more than a stereotypes vision of girls and women as poor drivers who are afraid of mice and snakes, adore babies and small dogs, talk incessantly on the phone and are incapable of keeping secrets. Integral to pink think is the belief that one's success as a woman is grounded in one's allegiance to such behavior. For example, a woman who fears mice isn't necessarily following the dictates of pink think. On the other hand, a woman who isn't afraid of mice but pretends to be because she thinks such helplessness adds to her appearance of femininity is toeing the pink think party line.⁹⁸

To follow that analysis out to one logical conclusion, some women may pretend to prefer pink products, even though they might actually prefer other colors, because

⁹⁴ http://ap.google.com/article/ALeqM5gpJafdrYvdUJdSR0FejJ_GuGpvWAD8UCF85G0

⁹⁵ <http://www.thenation.com/blogs/passingthrough?bid=769&pid=276567> ; <http://www.guardian.co.uk/women/story/0,,2140903,00.html>

⁹⁶ <http://www.thenation.com/blogs/passingthrough?bid=769&pid=276567>

⁹⁷ Lynn Peril, “Pink Think: Becoming a Woman in Many Uneasy Lessons,” (W.W. Norton & Company, Inc NY 2002) at 7.

⁹⁸ Peril at 7-8.

wearing pink and owning pink things is expected of her. Choosing pink against her own inner wishes constitutes consummate pink think by a female, reflecting self sacrifice, conformity to gender norms, and acquiescence to the dictates of mainstream consumer culture.⁹⁹

To some observers, pink signifies not simply the female, but young girls in particular. One publishing consultant observed:

Pink is a softer, less violent red. Pink is the sweet side of red. It's cotton candy and bubble gum and babies, especially little girls. ... In some cultures, such as the US, pink is the color of little girls. It represents *sugar and spice and everything nice*. Pink for men goes in and out of style. Most people still think of pink as a feminine, delicate color.¹⁰⁰

Pink is a color widely associated with pornography¹⁰¹ and prostitution.¹⁰²

Given its status as the color of commoditized sex, the fact that the color simultaneously signifies “little girls” as well as femaleness generally is no coincidence, given the “barely legal” or “Lolita” emphases of significant sectors of the sex industries.

B. The Default and the Other

In her groundbreaking book *The Second Sex*, feminist philosopher Simone de Beauvoir described the way in which men are the standard of all things, and women are

⁹⁹ See e.g. <http://www.thestate.com/125/story/58535.html> (“Think pink: This Mother’s Day, give mom a plate full of feminine color (and good health)”).

¹⁰⁰ <http://desktoppub.about.com/cs/colorselection/p/pink.htm>

¹⁰¹ <http://www.pinkpornstars.com/> <http://www.pinkworld.com/>
<http://www.mypinkporn.com/>

http://www.carolqueenblog.com/goodvibrationsblog/2007/01/whats_pink_and_white_and_porn.html

<http://threadingwater.wordpress.com/2006/10/03/pink-porn/>

<http://www.pinknews.co.uk/news/articles/2005-3848.html>

¹⁰² <http://www.pinkboxjapan.com/book.html> <http://www.amazon.com/Pink-Box-Inside-Japans-Clubs/dp/0810992590>

the Other,¹⁰³ deviating from the proper way of being, and therefore assumed deserving of second class treatment. The answer to the question “Why can’t a woman be more like a man,” may be in some part biological, but the reply proffered by Beauvoir is “because men will not allow it.” Agency, the power to think and do for oneself, is taken for granted by the Default group in a society, usually heterosexual white men, but it is less available to the Other. Standards are centered around the Default so ubiquitously, this is perceived by Default group members as the natural state of things. Feminist legal scholar Catharine MacKinnon has written.

Men’s physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.¹⁰⁴

Consider clothing. The Default owns comfort and control, while the Other’s role is to be decorative and ornamental. Think about the last formal social function you attended. The men’s legs were loosely covered by pants and their arms were covered by shirt sleeves and spot coats or suit jackets. Their shoes fit the shapes of their feet. Most of the women, however, had bare arms, wore body conscious dresses, and stockings that revealed the contours, if not the skin on their legs, and wore high heeled shoes that

¹⁰³ <http://www.marxists.org/reference/subject/ethics/de-beauvoir/2nd-sex/introduction.htm> (“Now, what peculiarly signalises the situation of woman is that she – a free and autonomous being like all human creatures – nevertheless finds herself living in a world where men compel her to assume the status of the Other.”)

¹⁰⁴ Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 81, 84 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

damaged their bodies with every step.¹⁰⁵ The garments people wear signal gender, and women are normatively expected to wear uncomfortable outfits that reveal a lot more about body shape than comparable men's attire.

Pink gives gender to otherwise asexual goods and services, linking them semiotically to women. Pink is the color marker of the Other, an outsider who is normatively expected to buy and use marked, specially designated consumer products, such as Pink magazine,¹⁰⁶ Victoria's Secret's "Pink" line of underwear and other clothing items (which come in a variety of colors),¹⁰⁷ Camel cigarettes in pink packaging,¹⁰⁸ and Tab Energy, "The deliciously pink 5 calorie energy drink created specially for women with a sense of style and purpose."¹⁰⁹ Pink denotes femaleness, and often girlishness as well.¹¹⁰

There are certainly contexts in which the use of pink, while still othering, may persuade some girls to participate in activities from which they might otherwise feel excluded. For example, sporting goods stores feature child sized pink batting helmets and bright pastel fielding gloves. The availability of these accoutrements in what are unequivocally "girl colors" may signal that baseball is a "girls' sport" in a way that attracts participation by people who guide their behavior by societal expectations and their perceptions of prevailing gender norms.¹¹¹ If pink draws girls into sports, and pink

¹⁰⁵

<http://www.healthatoz.com/healthatoz/Atoz/common/standard/transform.jsp?requestURI=/healthatoz/Atoz/dc/caz/bone/foot/alert10022001.jsp> ; <http://www.boingboing.net/2008/01/06/high-heels-tottery-k.html>

¹⁰⁶ <http://pinkmagazine.com/index.html>

¹⁰⁷ <http://www2.victoriasecret.com/category/?cgnbr=OSPNKZZZZZZ>

¹⁰⁸ <http://feministlawprofs.law.sc.edu/?p=1550> ;

<http://www.nytimes.com/2007/02/15/business/media/15adco.html?ex=1329195600&en=c045bad9ce514593&ei=5090&partner=rssuserland&emc=rss>

¹⁰⁹ <http://feministlawprofs.law.sc.edu/?p=1218> ; <http://www.tabenergy.com/home.jsp>

¹¹⁰ E.g. <http://www.nzgirl.co.nz/articles/3669>

¹¹¹ see generally <http://afterata.blogspot.com/2007/12/can-polka-dots-build-confidence.html>

sports equipment legitimizes their participation in organized athletics to parents who encourage their children to conform to constricted visions of gendered behaviors, which is arguably a socially beneficial use of the pink trademark. On the other hand, the adoption of pink sports equipment tends to instantiate equipment in “regular” or “normal” colors in widespread use as being male, rather than gender neutral. When a group of parents, mothers specifically, noticed that available hockey equipment was “designed for boys,” they sought to remedy this by launching a company that made hockey equipment that was tailored to females.¹¹² The design “problem” was not one of sizing or fit, but of colors. Manufacturing hockey equipment in pink and purple was supposed to make girls feel more comfortable participating in a boy dominated sport, because they wouldn’t have to “dress like boys.”¹¹³ But as one feminist observer noted:

[This just reifies] the impossible dilemma women who have entered traditionally masculine or more physically aggressive sports constantly face: you can be girly *or* you can be sporty. Making pink socks and sticks is not going to eradicate that binary. Is this really the way we want to attract girls to ice hockey anyway? Telling them, don't worry, you can play hockey and still wear pink? That may work for a while with 5- and 6-year olds but those girls will still face the be girly or be sporty dilemma as they get older; except that "sporty" frequently slips into dyke-y as girls become teenagers.¹¹⁴

When pink is applied to a product, the product has been feminized, and this makes it perceptually inferior. Girls may prefer pink but will usually participate in sports with whatever equipment is available. Girls were already playing baseball and hockey before companies decided to market pink products to them. But it is the rare boy indeed who will select a pink bat, helmet or hockey stick. If only pink gear was available, many boys might forgo taking part altogether. Similarly, girls are empirically willing to take

¹¹² <http://www.iberkshires.com/story/25450/Hockey-Gear-Designed-with-Girls-in-Mind.html>

¹¹³ <http://www.iberkshires.com/story/25450/Hockey-Gear-Designed-with-Girls-in-Mind.html>

¹¹⁴ <http://afterata.blogspot.com/2007/12/can-polka-dots-build-confidence.html>

photographs with otherwise identical cameras regardless of whether they are black or pink. Boys, however, will generally be adverse to the pink cameras, unwilling to use or even touch a product designed for the second class second sex. When Vassar College began admitting men, by some accounts it changed the school colors from pink and gray (symbolizing "the rose light of the dawn of women's education breaking through the grey of former years") to maroon and gray, at the request of male students.¹¹⁵

When men adopt pink, it is often socially interpreted as either boldly transgressive¹¹⁶ or as a signifier, both positively and negatively, of homosexuality.¹¹⁷ When Major League Baseball players decided to use pink bats as a Mother's Day '06 effort to provide publicity to fundraising efforts of the Susan G. Komen Breast Cancer Foundation, media coverage included observations like: "The thought of these big macho men, swinging pink bats to help women with breast cancer ... what a novel idea," and "It takes a big man to swing a pink bat in a major league game."¹¹⁸ Using the Other's color was interpreted as an act of both charity and courage.

¹¹⁵

http://vcencyclopedia.vassar.edu/index.php/Vassar_Myths_&_Legends#School_Colors_Changed_at_Request_of_New_Male_Students ("In the early seventies, around the time that men were first admitted to the college, Vassar changed its school colors from "the rose light of the dawn of women's education breaking through the grey of former years" to a darker maroon and grey. The story goes that a group of male athletes, feeling too effeminate wearing pink athletic gear, circulated a petition to change the color, and the administration caved. Colton Johnson, Dean of Studies at the time of the switch, maintains that the colors were changed because of budget cuts; ordering custom-made pink uniforms was much more costly than the readily-available maroon, and so the school made the switch.")

¹¹⁶ <http://sports.espn.go.com/mlb/news/story?id=2439502> ; <http://www.wackyplanet.com/remewepit.html> ; but see

http://www.nytimes.com/2007/05/06/fashion/06bar.html?_r=1&oref=slogin

¹¹⁷ <http://sports.espn.go.com/mlb/news/story?id=2174828> ; <http://www.msnbc.msn.com/id/9517000/> ; <http://www.siouxcityjournal.com/articles/2005/09/25/news/iowa/27c028c39eaea70986257087000e5232.txt> <http://www.pinknews.co.uk/news/index.php> But see http://www.washingtonpost.com/wp-dyn/content/article/2005/09/30/AR2005093001975_pf.html ; and

<http://althouse.blogspot.com/2005/10/about-that-pink-locker-room.html> and http://iowahawk.typepad.com/iowahawk/2005/09/little_pink_foo.html

¹¹⁸ <http://sports.espn.go.com/mlb/news/story?id=2439502>

Pink is the color at the crossroads between misogyny and homophobia, both offensively and defensively. Pink is used to insinuate the undesirable trait of femininity. The locker room for visiting teams at the University of Iowa's Kinnick football stadium has pink paint on its brick walls, pink shower floors and pink metal lockers, carpeting, sinks, showers and urinals, in an effort to "soften" opponents.¹¹⁹ Pink clothing is frequently used to punish male prisoners,¹²⁰ to make them feel involuntarily feminized, and also because it may make them more vulnerable to sexual assault by other inmates.¹²¹

Sometimes pink is affirmatively re-signified.¹²² Pink triangles have become a symbol of gay liberation, through positive reclamation of the character used to denote homosexuality in the concentration camps of Hitler's Germany.¹²³ The color pink was probably chosen by the Nazis to signal "gay" because of its feminized associations in that culture.¹²⁴ It is now used by some advocacy groups to show gay pride.¹²⁵

Similarly, Code Pink¹²⁶ "is a women-initiated grassroots peace and social justice movement working to end the war in Iraq, stop new wars, and redirect our resources into healthcare, education and other life-affirming activities."¹²⁷ The name "Code Pink" was

¹¹⁹ <http://www.kcci.com/sports/5011621/detail.html> <http://www.msnbc.msn.com/id/9517000/>; Erin K. Buzuvis, Reading the Pink Locker Room: On Football Culture and Title IX, 14 William & Mary J. of Women and the Law 1 (2007).

¹²⁰ http://www.usatoday.com/news/nation/2007-09-13-prisonpinksuits_N.htm <http://www.guardian.co.uk/worldlatest/story/0,-6867031,00.html>; <http://www.foxnews.com/story/0,2933,294030,00.html>; <http://www.crimeraunt.com/?p=1349>; <http://www.pantagraph.com/articles/2007/12/17/wtf/doc475f74610ce03248652458.txt>; <http://www.nytimes.com/2007/08/07/world/asia/07cnd-thai.html>

¹²¹ <http://www.foxnews.com/story/0,2933,294030,00.html>; <http://abclocal.go.com/ktrk/story?section=bizarre&id=5593339>; http://www.charleston.net/news/2007/aug/21/its_not_easy_being_pink13565/; <http://blogs.thestate.com/bradwarthensblog/2007/08/crystal-pink-pe.html>

¹²² see generally http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015500

¹²³ <http://www.lambda.org/symbols.htm>; <http://www.channel4.com/history/microsites/H/history/n-s/pink.html>; <http://www.pinktrianglepark.net/>

¹²⁴ http://www.triangles-roses.org/inmate_buchenwald.htm

¹²⁵ <http://www.swade.net/gallery/ptri.html>; <http://www.stonewallsociety.com/gaysymb.htm>

¹²⁶ <http://www.codepink4peace.org/>

¹²⁷ <http://www.codepink4peace.org/article.php?list=type&type=3>

chosen in part as a play on the Bush Administration's Department of Homeland Security's color-coded "Threat Level" Advisory System.¹²⁸ Members participating in Code Pink events normally wear pink to identify themselves and declare their organizational association.¹²⁹ They also use alternative social meaning behind pink quite playfully, such as by issuing "pink slips" to politicians they would like to see fired.¹³⁰

Nevertheless, pink is firmly entrenched in the culture as the color of girl germs. It's also the color of a women's affliction, and it is deployed as a mechanism for extracting money from women in the guise of soliciting compassion and helpful awareness-raising.

C. Pink Ribbons and the Commoditization of Breast Cancer

The best known gendered, cause-related, trademark like icon is the pink ribbon. It is not exclusively held by any particular commercial or nonprofit entity. Instead, it is owned by an illness, and linked to a fundraising phenomenon. Pink is the color of female and pink ribbons are a symbol of breast cancer, a disease that primarily effects women.¹³¹ Massive advertising campaigns condition the populace to wear or display pink ribbons as a mechanism for signifying support for, and solidarity with, breast cancer sufferers. There is no social equivalent for heart disease or diabetes, two diseases that afflict women at high rates, nor for other uniquely women-identified diseases such as cervical cancer. Female breasts are more valued than cervixes, a social good in part because men like to look at them, and pink ribbons are a visual reminder that breasts can be disfigured or lost.

¹²⁸ http://www.dhs.gov/xinfoshare/programs/Copy_of_press_release_0046.shtm
<http://www.uic.edu/orgs/cwluherstory/jofreeman/photos/CodePink.html>

¹²⁹ Id.

¹³⁰

<http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/062307dnnatcodepink.34f0383.html>
¹³¹ <http://www.komen.org/marketplace/> , <http://www.cancersocietystore.com/> ,
<http://www.orientaltrading.com/application?origin=page.jsp&namespace=search&event=button.search&Nt=x=mode%2bmatchallpartial&Ntt=pink%20ribbon&N=0&Ntk=all> , <http://www.pinkribbonshop.com/>

The pink ribbon related logos and slogans promote products and services for sale. The emphasis on consuming as a way of raising money, “shopping for the cure,” arguably embraces a very conventional view of women. One fundraising organization, the Susan G. Komen Breast Cancer Foundation,¹³² claims a trademark in the phrase “Passionately Pink for the Cure™!” Komen is a dominant breast cancer charity, and the foundation’s name is often seen in conjunction with pink ribbons, but it does not “own” them beyond particular iterations it uses in fundraising, such as this one:



Komen solicits “corporate partners” to produce authorized products, and then donate money in return. The foundation’s pitch is as follows:

Our [corporate partners](#) provide Susan G. Komen for the Cure with an opportunity to reach out to a variety of audiences with important breast health and breast cancer information and to raise funds to support breast cancer research, education, screening and treatment. In addition, the initiatives provide corporate supporters an opportunity to make a positive impact on the fight against breast cancer-and involve employees and consumers in the cause.

In today's economy, Americans believe it's more important than ever for companies to be socially responsible ([Cone Corporate Citizenship Study, 2004](#)) In fact, when price and quality are equal, 86 percent of Americans will switch brands to support a cause they believe in (Cone Corporate Citizenship Study, 2004).¹³³

¹³² <http://cms.komen.org/komen/index.htm>

¹³³ <http://cms.komen.org/komen/Partners/BecomeaPartnerorSponsor/index.htm>

The rhetorical pitch is not subtle: give us money and we will bring you new customers. Examples of pink ribboned and pink ribbon related products with a Komen link include the Dyson pink vacuum cleaner,¹³⁴ Wilson golf clubs,¹³⁵ and the Little Pink Tool Kit.¹³⁶ The vacuum cleaner is a women's appliance rendered even more femininely, the golf clubs lose their unisex veneer, and the tool kit is framed as affirmatively transgressive, since females who don't usually own tools now have special pink ones made "just for them."

Every year the automotive company BMW organizes an "Ultimate Drive" event in which potential customers are invited to test drive various car models that are decorated with pink ribbons.¹³⁷ The only link to breast cancer is that the company donates some money in fairly transparent exchange for this goodwill soaked marketing opportunity. The Ford Motor Company offers a "Warriors in Pink Mustang Package."¹³⁸ Ford notes that: "Included with the package will be a pink ribbon and pony fender badge, pink Mustang rocker tape striping, charcoal leather seats with pink stitching, aluminum spoke steering wheel with pink stitching and charcoal floormats with pink ribbon and contrast stitching."¹³⁹

Food products can also be effectively adorned with pink ribbons, and their purveyors enthusiastically partake of the breast cancer marketing opportunities menu. For example, as part of its "Crunch for the Cure" promotion, "specially marked" SunChips¹⁴⁰ packages announced that SunChips was a "proud supporter" of the Komen Foundation,

¹³⁴ http://www.bcrfcure.org/part_cur_dyson.html

¹³⁵ <http://www.wilson.com/wilson/corp/hope/index.jsp>

¹³⁶ <http://www.littlepinktoolkit.com/>

¹³⁷ <http://www.bmwusa.com/BmwExperience/EventsandPrograms/UDSK/>

¹³⁸ <http://www.mustangblog.com/index.php/2007/ford-unveils-2008-warriors-in-pink-mustang-package/>

¹³⁹ <http://www.mustangblog.com/index.php/2007/ford-unveils-2008-warriors-in-pink-mustang-package/>

¹⁴⁰ http://www.fritolay.com/fl/flstore/cgi-bin/products_sunchips.htm

and if the purchaser spends 39 cents to mail in the UPC code from a “pink ribbon bag,” Sun Chips promised to donate 25 cents to Komen.¹⁴¹

Komen’s corporate affiliates also include products within the realm of traditional femininity.¹⁴² The Mattel toy company markets the \$39 Barbie Breast Cancer Pink Ribbon Barbie Fashion Doll as follows:

Join Barbie in the effort to make breast cancer a thing of the past with this breast cancer pink ribbon Barbie doll by Mattel. This collectible Barbie fashion doll, designed to make a contribution to this worthwhile breast cancer charity foundation, wears a flowing pink gown accented with pink ruffles and a signature pink ribbon pinned on the shoulder. Strong demand is expected, and you’ll want to support this important cause! Order now!¹⁴³

Breast Cancer Barbie has both of her plastic, nipple-less breasts intact, if you were wondering. Apparently Mattel’s solidarity with cancer survivors only goes so far.

Komen also advertises itself, Below is a sample billboard from one campaign:



The shirt says: “When we get our hands on breast cancer, we’re going to PUNCH IT STRANGLE IT KICK IT SPIT ON IT CHOKO IT AND PUMMEL IT UNTIL IT’S

¹⁴¹ <http://www.sunchips.com/komen/index.php>

<http://blog.iblamethepatriarchy.com/2006/09/19/crunch-for-the-cure/>

¹⁴² <http://www.thecancerblog.com/2006/08/18/breast-cancer-barbie-doll/>

¹⁴³ <http://www.collectiblestoday.com/ct/product/prdid-1601936001.jsp>

GOOD AND DEAD. And then we're going to tie a pink ribbon on it." One feminist commenter referred to this raising of awareness of breast cancer research by putting a violent message on a headless female torso as "Exploiting for the Cure."¹⁴⁴

Some corporations reap the goodwill of breast cancer charity without affiliating with Komen. The Hooters Restaurant chain used the occasion of its 10th Annual Hooters International Swimsuit Pageant in Las Vegas Hooters to announce a breast cancer research grant "in honor of former Hooters Calendar Cover Girl, Kelly Jo Dowd."¹⁴⁵ After she died the company issued a press release that featured the photo below¹⁴⁶ (note how the O's in Hooters have been turned into pink ribbons) and said in pertinent part:



"She is our Susan G. Komen," explained Mike McNeil, Vice President of Marketing for Hooters of America. "Kelly Jo helped us break through the barriers of political correctness for Hooters with respect to breast cancer and ignited a passion for this noble cause. Because of her we have been able to address this serious women's health concern without people thinking we are insincere or opportunistic."¹⁴⁷

¹⁴⁴ <http://blog.iblamethepatriarchy.com/2007/01/26/good-news-bad-news-2/> ("I might as well point out, while reiterating that Komen does not "stop" cancer, that even if the "intent" of this ad campaign were given the benefit of the doubt, its purported attempt to focus public anger on cancer *itself*, as though the disease were some cunning, adversarial arch-villain rather than clumps of insensible, indifferent mutant cells, is bogus misdirection. If there is going to be anger, it really ought to be directed at the true culprit: the megatheocorporatocracy which has loosed all these mutation-causing agents into the ecosphere in the first place.")

¹⁴⁵ http://www.hooters.com/news_and_events/news/2006/2006-08-04_kelly_jo.asp

¹⁴⁶ <http://prn.newscom.com/cgi-bin/pub/s?f=PRN/prnpub&p1=20070525/CLF060&xtag=PRN-prnphotos-62349&redir=detail&tr=1&row=1>

¹⁴⁷ <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/05-25-2007/0004596372&EDATE=>

What the “barriers of political correctness” were is never explained. Whether the company would ever hire a woman who had lost one or both breasts to the disease to work as servers is artfully avoided.

Other companies simply make money by selling products adorned with pink ribbons. The Oriental Trading catalog has a range of products that include “Pink Ribbon Rubber Duckies,”¹⁴⁸ “Breast Cancer Awareness Buttermints,”¹⁴⁹ and “Breast Cancer Awareness Can Insulators.”¹⁵⁰ If people purchasing the latter item make traditional trademark associations, they must think, “Wow, thanks to breast cancer, my beer has remained deliciously chilled.” All that the catalog promises on its pages is that the company will donate “a percentage of the profits” to “breast cancer research initiatives.”¹⁵¹

Breast cancer’s pink ribbonization has provoked scathing denunciations by Barbara Ehrenreich in “Welcome to Cancerland: A Mammogram Leads to a Cult of Pink

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<http://www.orientaltrading.com/application?namespace=browse&origin=catalogCategory.jsp&event=link.itemDetails&demandPrefix=null&sku=16/836&prodCatId=380580&mode=Browsing&erec=1&Ntt=pink%2BRibbons&Ntk=all&Ntx=mode%252bmatchallpartial&categoryFromSearch=true&y=0&N=380580&x=0&sd=Pink+Ribbon+Rubber+Duckies>

149

<http://www.orientaltrading.com/application?namespace=browse&origin=catalogCategory.jsp&event=link.itemDetails&demandPrefix=null&sku=/K828&prodCatId=380580&mode=Browsing&erec=1&Ntt=pink%2BRibbons&Ntk=all&Ntx=mode%252bmatchallpartial&categoryFromSearch=true&y=0&N=380580&x=0&sd=Breast+Cancer+Awareness+Buttermints>

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<http://www.orientaltrading.com/application?namespace=browse&origin=catalogProducts.jsp&event=link.itemDetails&demandPrefix=12&sku=3/807&prodCatId=381522&mode=Browsing&erec=14&Ne=90000&sp=true&Ntk=all&Ntx=mode%252bmatchallpartial&N=381522&tabId=Everyday&sd=Breast+Cancer+Awareness+Can+Insulators>

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<http://www.orientaltrading.com/application?origin=page.jsp&namespace=browse&event=catalog&categoryId=380580&categoryFromSearch=true&namespace=search&origin=searchMain.jsp&event=button.search&Ntt=pink+ribbons&x=0&y=0&Ntk=all&Ntx=mode%2Bmatchallpartial&N=0>

Kitch,”¹⁵² in the book “Pink Ribbons, Inc.: Breast Cancer and the Politics of Philanthropy” by Samantha King,¹⁵³ and via the Breast Cancer Action Network’s web-based admonition to “Think Before You Pink.”¹⁵⁴ The general theme of these critiques is that under the guise of pink philanthropy, corporations link product sales and self-promotion campaigns to the curing of the disease, while drawing attention away from public health prevention efforts, and squelching calls for investigations into why and how breast cancer rates are so high, and the extent to which these pink ribbon corporations themselves are placing carcinogens into our air, food and water supplies, and the environment generally.¹⁵⁵

D. Putting Fair Use in the Pink¹⁵⁶

Under widely accepted precepts of First Amendment law, commercial speech receives less constitutionally based shelter from government intervention than noncommercial speech, and political speech receives the most vigorous protection of all.¹⁵⁷ In consequence, people criticizing advertisements should have broader first amendment protections than the advertisements themselves. Once trademark laws are invoked, however, freedom of speech can become overpowered by solicitude for the commercial interests of mark holders.¹⁵⁸ One remedy is invocation of trademark fair use.

The term “fair use” is used here with some reservations, as it is a term appropriated from copyright law, where it has very different statutory and theoretical

¹⁵² Harper’s: <http://www.bcaction.org/Pages/LearnAboutUs/WelcomeToCancerland.html>

¹⁵³ http://www.upress.umn.edu/Books/K/king_pink.html#TOC

¹⁵⁴ <http://thinkbeforeyoupink.org/> ; see also <http://blog.iblamethepatriarchy.com/2006/09/19/crunch-for-the-cure/>

¹⁵⁵ E.g. <http://threadingwater.wordpress.com/2006/10/03/pink-porn/>

¹⁵⁶ <http://www.bartleby.com/59/4/inthepink.html>

¹⁵⁷ e.g. http://www.law.upenn.edu/cf/faculty/ebaker/workingpapers/54CaseWResLRev1161_2004.pdf

¹⁵⁸ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968721 ;

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928261 ;

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870465

underpinnings. More doctrinally appropriate expositions of First Amendment protections in the trademark law context would be “nominative use” or “the right to make nontrademark use of trademarks.” Nevertheless, fair use became the official term of art in trademark law when Congress embedded it, with little guidance as to how it might be defined or applied, into the Lanham Act.¹⁵⁹

The public domain like availability of gendered associations with the color pink, despite (or, arguably, because of) the plethora of registered pink marks reflects unofficial recognition of, and adherence to, a fair use doctrine. When a product, trademark or advertisement is sexist and derogates women, effective opposition can require powerful fair use as well, and a far more robust version than commercial actors informally employ, as the criticism is political in nature. Documenting the fair use norms implicit in the widespread and uncontrolled commoditization of pink supports the recognition and defense of a strong doctrine of trademark fair use.

Conclusion

Though thousands of registered trademarks make use of the cultural connection between femaleness and the color pink, no entity has succeeded (or even attempted) to own it in singular fashion. Nor is this likely to occur, absent a “famousness” finding that triggers color alone dilution protections. The color pink functions like a public domain

¹⁵⁹ § 43 (15 U.S.C. §1125) (“4) The following shall not be actionable under this section: (A) **Fair use** of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark. ... (d)(1)(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person-- ... IV) the person's bona fide noncommercial or **fair use** of the mark in a site accessible under the domain name; ... (ii) Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a **fair use** or otherwise lawful.”).

trademark that is copiously used by a multiplicity of companies and organizations to either feminize goods and services, or to commoditize women themselves. It is deployed by commercial actors in advertisements, and product packaging, embedded in products, and integrated into trademarks themselves with little apparent fear of consumer confusion or trademark dilution. Its omnipresence is powerfully illustrative of the strength that semiotic signifiers can have, and of how effectively they can be used in commerce without strong trademark protections.

Thinking about trademark law in connection with the color pink draws attention to the widely instantiated Othering of women, and how difficult it can be for individual consumers to avoid the double bind that pinkification presents. Embracing pink means you are proud of being a woman, and you care about breast cancer, but it also means you have succumbed to corporate and social manipulation. Eschewing pink means that you have liberated yourself from constricting and manipulative social norms, but it also suggests you are self-hating, ungrateful for “special treatment” accorded you based on your gender, judgmental and ungenerous toward women who freely choose to surround themselves with pink, and generally unsuccessful at womanhood.