

MPC MAJOR RESEARCH PAPER

Colour Court:  
The Communicative Value of Single-Colour Trademark

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## **Abstract**

While corporations regularly use trademarked logos and slogans, the use of colour trademarks to solidify and separate a brand from its marketplace is a recent development. This MRP explores legal conceptualizations of the communicative functions of colour in the judicial opinions of three influential colour trademark lawsuits: *Norwich Pharmacal Company v. Sterling Drug, Inc.* (1959), *Qualitex Co. v. Jacobson Products Co.* (1995), and *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.* (2012). The following questions guide my analysis of the court decisions: How do judges determine the communicative value of colour in single-colour trademark cases? How do the different levels of meaning present in colour, as described by Gunther Kress and Theo van Leeuwen (2002), affect the way judges assess the communicative value of colours in single-colour trademark cases? Which levels of meaning in colour, as described by Kress and van Leeuwen (2002), are most important in judges' assessments of single-colour trademark claims? The communicative value of colour, for the purposes of this research project proposal, is defined as colour acting in one or more of the three functions defined by Kress and van Leeuwen (2002). Through qualitative content analysis of three legal documents involving single-colour trademarks, this MRP seeks to explore the challenges of claiming and maintaining legal ownership of a colour. This paper suggests that courts play a major role in developing single-colour trademarks as communicative and organizational branding tools.

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## **Introduction**

In a world full of advertisements for organizations, brands, and products, it is hard to escape the colourful display of media vying for attention. As they develop distinguishing marks, companies often seek legal protection for their individual brands through trademark law. This study explores the cultural and communicative implications of the recent trend toward single-colour trademarks. This MRP focuses on American cases because the United States has the most developed single-colour trademark case law in North America and because American trademark law has implications for Canada and many other signatories to trade agreements such as North American Free Trade Agreement (NAFTA) and the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Howse & Trebilcock, 2005).

Like patents and copyrights, trademarks are a form of intellectual property. According to the United States Patent and Trademark Office (2013), a trademark is a legally-protected "mark," otherwise known as a "word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others" (para. 1). Trademarks do not necessarily have to be registered to have protection, though doing so ensures public notice of trademark ownership "and the exclusive right to use the mark on or in connection with the goods or services set forth in the registration" (United States Patent and Trademark Office, 2013, para. 2).

Trademark was established in the United States Constitution under the intellectual property clause that allowed for legal registration of marks as of 1870 under United States federal law (Petty, 2012). However, as Ross Petty (2012) explains, design patents served as judicially enforced trademarks. In 1905, the Trade-Mark Act allowed

for registration of trademarks, though it did not completely establish ownership or validity of the registered mark (Diggins, 1947). Until the passage of the Lanham Act in 1946, American courts enforced trademark claims through many individual acts and treaties “designed to meet particular problems rather than carry out any comprehensive, consistent plan or policy” (Petty, p. 149). Beyond amalgamating these singular acts and statutes to clarify trademark law, the main purposes of the Lanham Act, according to the Senate Committee statute, are to “simplify trade-mark practice, to secure trade-mark owners the goodwill which they have built up, and to protect the public from imposition by the use of counterfeit and imitated marks and false trade descriptions” (Petty, p. 149-150). These imitated marks lead to “dilution” or loss of brand distinctiveness in the marketplace. The ability to register these distinguishable marks enables organizations to maintain their “goodwill” or reputation.

The Lanham Act also provides terms on which courts may deny trademark claims. If judges deem the mark to be “merely descriptive,” “deceptively misdescriptive,” or “merely a surname,” then the trademark claim can be denied, unless the mark is associated with the brand more than with the product (Diggins, 1947). The soap brand “Ivory” is used as an example of a deceptively misdescriptive mark that qualified for trademark. While the mark, “Ivory,” does not describe the product accurately, the public is not deceived into believing the bar of soap is made of ivory and recognizes that the name describes the brand instead (Diggins, 1947). In preparation for the North American Free Trade Agreement (NAFTA), the United States amended the Lanham Act’s section on misdescriptive marks in 1989 (LaFrance, 2004, p. 131). Prior to the amendment of the Lanham Act, courts recognized trademark claims to geographic marks, for example “Seattle’s Best” (even though such marks were considered to be deceptively

misdescriptive), provided the geographic marks had acquired a second meaning. In other words, consumers must be able to associate the geographic mark with the brand producing the product. The amendment forced these marks into a separate category and effectively banned them, regardless of their established second meaning (LaFrance, 2004, p. 132). While courts generally refused to grant exclusive rights to these marks (especially without proof of a second meaning), the amendment moved such marks from the “defeasibly unregistrable category to the conclusively unregistrable category” (LaFrance, 2004, p. 142). This move arguably limits the marks legally available to corporations to use as trademarks in the name of enhancing North American trade.

Another important change to the Lanham Act relates to the use of colour. While the original Act sought to protect marks that exclusively identify a brand from imitative competition, branding has expanded beyond simple logos and slogans and now includes personalized typefaces and compositional and design elements such as colour. To recognize these changes in the communication practices of organizations, Congress amended the Lanham Act in 1989 with inclusive language explicitly allowing colour trademark. The legal protection of colour as a distinctive mark was a contentious issue, and many courts, including the Seventh and Ninth Circuits in the United States, prohibited the trademarking of colour even after the Lanham Act’s amendment. In 1996, the United States Supreme Court was drawn into the debate and issued a landmark decision that formally allowed colour to be considered for trademark.

From the perspective of communication scholars, the regulation of meaning and implications of trademark law have important consequences for communication and culture. Colour has always functioned on several levels of understanding, with different meanings attached to certain colours depending on the geographic location, the context

in which it is used, and the other communicative features or modes that are paired with colour (Kress & van Leeuwen, 2002). Whether they are instructive, representative, or used as an organizational or identifying tool, colours can operate beyond shades in a rainbow and hold several meanings at the same time (Kress & van Leeuwen, 2002).

As Gunther Kress and Leo van Leeuwen remind us, words and symbols are not the only form of communication capable of expressing thoughts and feelings. In recent years, organizations have attempted to claim ownership of various colours as part of their brands, and courts have played a key role in this process through the validation (and denial) of colour trademark claims. In doing so, I argue, courts are regulating the meaning of these colours in the American marketplace, and it is becoming increasingly important to understand the courts' actions, assumptions, and decisions regarding the communicative qualities of colour. This study explores the use of single-colour trademarks and the manner in which American courts assess and regulate the communicative value of colours in representing a certain brand or corporation.

## **Literature Review**

This paper will examine the regulation of single-colour trademarks as communicative and organizational branding tools. Organizations use specific colours across different platforms, including print advertisements, branding campaigns, and physical product design. To understand how these texts produce meaning through colour and how trademark law regulates the meanings attached to colour, this section begins with a discussion of the literature on multimodality, focusing in particular on the Kress and van Leeuwen's "grammar of colour" and colour's various levels of meaning. I then discuss literature related to the uses and functions of colour in corporate branding, colour's functionality, and the process of trademarking colour. Finally, I will draw from the literature reviewed here to discuss the limitations and problems associated with juridical attempts to assess the communicative value of colour and assign meaning to a single colour.

### **The science of colour**

From computer science to psychology to communication studies, scholars in a wide range of fields have addressed the way human interactions with the world are affected by colour. Nathaniel Jacobson and Walter Bender (1996), researchers at the MIT Media Lab, explored the "experience of colour" through the science of human vision and perception and found that colour "stimulates and excites" the viewer but that too much colour muddles the meaning and message in the stimulus or image (Jacobson & Bender, 1996, p. 528). In understanding the various elements of colour, Aleksandra Mojsilović et al. (2000) build on the idea of a hierarchy of colour comprised of five dimensions of

colour that humans assess in identifying a colour: overall color, directionality and orientation, regularity and placement, color purity and complexity and heaviness (Mojsilović et al., 2000, p. 429). Mojsilović et al. highlight the manner in which colour patterns act as a set of vocabulary and grammars but one limitation of this type of research on colour is that the authors do not address the manner in which single colours may be also communicate meaning.

Colour has also been proven to have psychological effects, with some wavelengths and shades having more of an effect than others. Through experimental research, Simon Valdez and Robert Mehrabian (1994) found that saturation and brightness could impact the colour's emotional reaction in people (p. 407). They found that saturated colours generally elicited more excitement or feelings of arousal than less saturated colours, and brighter colours were “more pleasant” than darker colours such as dark greys and blacks. Valdez and Mehrabian also found that participants who read about upsetting topics such as murder or rape written on pink paper exhibited less anxiety and anger than those who read the same text on white paper (p. 408). Although Valdez and Mehrabian focus on the impact of colour on emotion, their findings provide insight into the communicative aspects of colour beyond aesthetics and suggest that colours can influence consumers.

As discussed below in relation to problems with colour, many scholars agree that the perception of colour differs from person to person, which makes the idea of a “universal language of understanding” improbable (Adams & Osgood, 1973; Özgen, 2004; Kay & Regier, 2006). It is important to recognize that the frameworks for studying the meaning of colour may be limited to North American or European culture. Paul Kay and Terry Regier (2006) found that while there may never be a universal understanding of colours or how and why they were named, there are universal similarities in the

constraints placed on naming colours (p. 53). While the research on colour's emotional impact and the broader science of colour are important for understanding the effects of colour on the public, many of the frameworks provided above are limited either to certain colour combinations or to a particular culture. Kress and van Leeuwen provide a general framework encompassing many of the ideas of functionality and impact provided while recognizing the importance of the social and cultural context of the production of meaning. Consequently, this MRP will focus around the functions of language provided by Kress and van Leeuwen.

### **Multimodality**

In order to explain how colour communicates, Kress and van Leeuwen (2002) situate colour in the broader context of their multimodal framework (p. 345). Multimodality refers to the social-semiotic view that multiple modes, or functions of meaning, are present in texts and work together to form cohesive messages (Kress, 2010, p. 1). For example, a sign illustrating how to get into a parking lot may use writing to name the streets and stores and an image of the surrounding area with each street colour-coded to contrast from the rest of the image (Kress & van Leeuwen, 2002). In this example, the image and words work on one level, representing the streets and surrounding area, while colour operates on another level, highlighting and categorizing the nearby shops and parking lots. Together, these pieces form a cohesive, multimodal message (Kress & van Leeuwen, 2002).

Although Kress and van Leeuwen emphasize cohesion in messaging across multiple platforms, their framework does not imply a formulaic method for

communicating with colour. Kress (2010), working within this multimodal framework, identifies “grammar” as “resources for representation” rather than absolute rules and recognizes that, just as the language of colour evolves, so too does its meaning (p. 8). Along with other semiotic resources, the grammar of colour is constantly remade and is never fixed. Nevertheless, it is possible for message producers to use colours ungrammatically or out of their implied context (Kress & van Leeuwen, 2002, p. 346).

In comparison to other semiotic resources such as spoken or written language, the meanings associated with colour may seem unstable. While a given colour may have many possible meanings, which change over time, these meanings can be regulated to some extent in our multimodal society through, for example, colour trademark. Though Kress and van Leeuwen (2002) are hesitant to address colour as an independent semiotic mode within this multimodal framework, they argue that colour has tremendous communicative value because it fulfills key functions that allow for a wide range of levels of communication (p. 350).

### **The grammar of colour**

Before discussing colour as a communicative tool, the idea of the “grammar” and levels of meaning in colour must be explored briefly. The various levels of a colour’s meaning help to explain the variety of meanings and associations attached to colour.

As Kress and van Leeuwen (2002) discuss, the meaning of colour is often seen as uncertain or “anarchic” (p. 343). They assert there are two levels of meaning within colours: the micro level and macro level (p. 345). The macro level involves meanings that are understood internationally, including colour as a design element taught to students in visual design and composition courses, as well as products, such as paint, that are

distributed internationally. The micro level recognizes that small, specialized groups of individuals use colour to produce meaningful texts. Considering both micro and macro levels of meaning, colour can take on a variety of meanings and associations through the interaction of these two levels. Just as a word may have very specific meanings in specific cultural contexts, such as using the phrase, “killed it,” to describe an excellent performance, so too colour can acquire a cultural meaning that overrides other meanings. For example, in North America, a pink ribbon can function as a display of support to breast cancer sufferers, but only when the ribbon is posed in a particular shape.

In order to be considered a language, according to Kress and van Leeuwen (1996), colour must fulfill three functions simultaneously: the textual function, the interpersonal function, and the ideational function. Since colour performs these three functions of language, it must be understood as more than a design element or simple decoration.

First, the *textual function* marshals “communicative acts into larger wholes, into the communicative events or texts that realize specific social practices, such as conversations” (Kress & van Leeuwen, 2002, p. 346). For example, at the textual level, colour helps to distinguish different departmental documents from each other by colour coding text, files, or even paperwork (p. 349). As Kress and van Leeuwen point out, “textual cohesion can also be promoted by ‘colour coordination’ rather than by the repetition of a single colour” (p. 349). They also stress the use of colour schemes to assist in this cohesion, with colours that work well together creating harmony in texts such as PowerPoint presentations.

Second, the *interpersonal function* enacts, or helps to enact, “interactions characterized by specific social purposes and specific social relations” (Kress & van

Leeuwen, 2002, p. 346). Colour can also function at the interpersonal level by affecting people emotionally (p. 348). For example, the Seattle Naval Correctional Centre addressed the interpersonal level when it found that “pink, properly applied, relaxes hostile and aggressive individuals within 15 minutes” (Lacy, 1996, p. 89). This calming effect is also discussed in studies aiming to increase workplace productivity through the use of colour. The interpersonal function thus highlights the emotional and physical effects that colour can have on humans as well as the social uses of those effects (Kress & van Leeuwen, 2002, p. 348).

Third, the *ideational function* refers to the use of colour to create representations of the world. Through its ideational function, colour can clearly represent and signify people, things, and places (Kress & van Leeuwen, 2002, p. 346). It can also represent broader emotional or cultural themes, such as blue to signify sadness or black for mourning.

Kress and van Leeuwen’s levels of meaning can be used to identify different functions of single-colour trademarks and to explore the manner in which courts attempt to regulate those functions. For example, the textual level of meaning refers to the way the mark denotes the brand or the producer of the product. The interpersonal level, however, works in colours that affect consumers or users beyond direct denotation of a brand. For example, blue plastic boxes on the side of the street represent and encourage the act of recycling. The ideational level is particularly important for corporate trademark. It is at this level of meaning that flags and the colours that make them up become indicative of their corresponding countries, just as certain colours can refer to specific corporations (Kress & van Leeuwen, 2002, p. 346). All three levels of a colour’s

meaning can be extended to the macro-level of the international marketplace when those meanings are understood and enforced through trademark law.

### **Branding and corporate identity**

In logos, typography and packaging, colour plays an important role in corporate branding and marketing strategies. Colour not only facilitates communication but also shapes the way consumers view and remember the corporation, product or brand identity. Simon Knox and David Bickerton (2003) argue that branding creates and maintains distinction in a particular market, a function they believe is a response to changes in business environment (p. 999). According to Knox and Bickerton, the focus of branding began with brand image in the 1950s and has shifted over the years to position, identity, association, and corporate branding (p. 1002). Whereas marketing strategies have traditionally focused on brand image, or “the integrity of the product brand,” contemporary marketing focuses on the corporate brand, or “the organisation and the people behind the brand” (Knox & Bickerton, 2003, p. 1003).

The corporate brand is the external part of an organization, which is comprised of two factors: corporate expression and stakeholder views of the corporation (Abratt & Kleyn, 2012, p. 1050). The corporate identity is the organization’s internal, strategic choices and the organization’s expression, including its mission, vision, values, as well as corporate communication directed at the public (Abratt & Kleyn, 2012, p. 1050). Russell Abratt and Nicola Kleyn (2012) see visual corporate identity as an important part of both the corporate identity and the corporate brand. Ultimately, as Abratt and Kleyn explain, the corporate brand and identity make up the overall corporate reputation, or the public perception of the entity (p. 1050).

In the field of corporate branding, visual identity is recognized as a crucial part of corporate expression within an organization. Corporate expression includes several internally manageable and regulated components: visual identity, or the manner in which a brand presents itself to the public; brand promise, or the types of claims made by the organization; brand personality, or how the organization phrases its claims, and; brand communication, or the manner in which the organization communicates with the public (Abratt & Kleyn, 2012, p. 1050). As Abratt and Kleyn explain, “Corporate expression links the organization’s corporate identity with its corporate brand and accordingly is classified as part of both constructs” (p. 1050). With public demand for organizations to be more transparent and accountable, corporate expression is increasingly important for maintaining a positive corporate brand (Knox & Bickerton, 2003, p. 1001).

The second aspect of corporate branding deals with how stakeholders perceive the corporation. As outsiders to the internal structures and practices of a corporation, stakeholders can only analyze what they see. “A stakeholder can never interact with an organisation’s corporate identity in its entirety – they interact with aspects of the organisation’s identity and in so doing build their perception of the corporate brand” (Abratt & Kleyn, 2012, p. 1050). This perception is built around visual aspects, such as logos, slogans, and even colours. As Abratt and Kleyn explain, “Organisations are identified by their name, symbols, colours, assets and the people who work for them” (p. 1051). The aim of branding is to build an association between these aspects and the larger corporate identity or brand. To Kress and van Leeuwen (2002), this is typical of the ideational function of language, as branding encourages the public to understand corporate reputation based on the corporation’s outward appearance. The brand’s logo and corporate colour carry this association and can come to represent the entire

corporate entity and not just the product sitting on a shelf. The concepts of brand distinctiveness, brand association, and the capacity of colour to communicate these ideas inform my analysis of the legal decisions on trademark.

## **Trademarks**

In order for a colour to belong exclusively to a corporation, it must first be registered as a trademark. As defined by the American Marketing Society a trademark is, “A name, term, design, symbol, or any other feature that identifies one seller’s good or service as distinct from those of other sellers. The legal term for brand is trademark” (Petty 2012, p. 129). The Lanham Act (1946) provides a similarly broad definition, encompassing all things that could be viewed as “distinctive.” As Clifford Scott (2013) explains, trademark is a broad legal term extending across various platforms.

It will usually refer to brand names or logos officially registered with the United States Patent and Trademark Office (USPTO), virtually anything that a consumer might use to identify the source (manufacturer or marketer) of a product or service may be used as that source’s trademark.  
(p. 176)

By registering a trademark, organizations acquire legal protection for the identifying features of their brands and can prevent competition from using similar features (Petty, 2012, p. 130). While other legal avenues such as copyright and patents could be used to protect features of the brand, these other forms of intellectual property have a time limit as to how long that legal protection can be applied. When a patent expires, there is no chance for renewal, and competitors in the relevant market are free to use the formerly-

protected colour. Trademarks, on the other hand, can be renewed as long as they are in use, granting much longer-term protection against competition (Kappos and Völker, 2014).

As Petty (2012) explains, while legally-protected trademarks emerged in the late 1800s, the practice of brand marketing “pre-dates this modern literature,” and some believe it goes as far back as ancient times (p. 129). Charlene Elliott (2003) also cites the Middle Ages as the beginning of trademarks when distinguishing features were used to establish the source of goods as well as their quality (p. 306). Rosemary Coombe (2005) argues that trademarks function today as a form of “cultural management” which attempts to increase distinctiveness and marketability while maintaining a uniform “look and feel” (Coombe, 2005, p. 43). Frequently, these marks communicate not only the organizational source of the product but also their geographic source (Coombe, 2005). As corporations continue to invest in their own images and brand personas, there will be more on the line in maintaining and validating corporate marks, which are multimillion dollar assets. Yet, reducing customer confusion and maintaining brand credibility are still a large part of the protection provided with modern trademark law and, in this sense, the use of trademarks has not changed much over time.

Legal cases involving ownership claims to colour trademarks are not always clear-cut. Until 1985, there was a “categorical prohibition” in recognizing colour as a trademark as courts in the United States refused the right of organizations to trademark colour on its own (Vana, 1999, p. 391). After the fiberglass insulation company, Owens-Corning, was allowed a colour trademark on its iconic pink hue that year, the benefits of protecting colour through trademark became clearer and the floodgates were opened to colour trademark claims (Vana, 1999).

In 1988, the Lanham Act (1946) was amended to include unrestrictive language that did not exclude colour from being owned as a trademark (Cameron, 1997, p. 269). Emilie Winckel (2013) notes that the issue remained contentious in judicial decisions, which ranged “from absolutely prohibiting protection, to allowing protection in limited circumstances and finally to declining to establish per se prohibition against protecting color alone” (p. 1024). By expanding the definition of trademark, the Lanham Act made it easier for organizations to use of colour as a branding tool. Not all courts agreed with the concept of colour trademarks. As my analysis shows, trial and appeal courts often disagree on the validity of particular single-colour trademark claims, which reflects the broader uncertainty about of regulating colour on the macro-level.

### **Functionality**

Historically, there have been two qualifiers the courts must consider when assessing a single-colour trademark claim: the distinctiveness and the nonfunctionality of the mark (Samuels & Samuels, 1996, p. 306). As Linda Samuels and Jeffrey Samuels (1996) explain, the colour must have established a distinctive second meaning, which identifies and separates the goods from the rest of the market (p. 306). To evaluate the distinctiveness of a colour trademark, courts consider the length of time the company has used the colour, the amount of money spent on advertising with said colour, the manner in which the company used the colour on packaging and in symbols, and the degree to which consumers recognize the colour (Samuels & Samuels, 1996, p. 306). Of course, with the various levels of meaning described by Kress and van Leeuwen (2002) and the many ways judges can interpret case law, single-colour trademark cases involve different

types of evidence and requirements necessary to prove a claim. The varying types of evidence in judicial decisions will be explored in the findings and discussion.

As for nonfunctionality, the brand owners must prove that the colour does not “improve the product’s utility” and that “protection will not negatively affect competition” (Samuels & Samuels, 1996, p. 306). This includes denying claims that the colour is the natural colour of the product, that other colours are not available, or that the colour trademark would affect the cost or quality of competing products (Samuels & Samuels, 1996, p. 306). Samuels and Samuels (1996) explain, “Pepto-Bismol, for example, was held to have no rights to the color pink for such products. The court, in finding pink functional, referred to its purported soothing psychosomatic effect” (p. 307). While the pink colour did not always work to soothe people with upset stomachs, the court agreed that the colour was used purposefully to have such an effect (Norwich Pharmacal Company v. Sterling Drug Inc., 1959).

David Kappos and Stefan Völker (2014) provide a list of questions, many of which have been used as qualifiers in single-colour trademark cases to determine whether a colour can be considered functional and thus ineligible for trademark. These questions include whether the colour works better than other colours in certain situations, especially for visibility. Also, courts must consider whether the colour has a cultural connotation in certain contexts, such as green in the context of environmentalism and white in the context of a wedding (Kappos & Völker, 2014, p. 53). In this way, courts examine what Kress and van Leeuwen would call the macro-level meanings of colour that are understood by a culture or community. These macro-level meanings must be taken into account when determining functionality, since colour may already be widely used to indicate that the product falls into a certain category of objects or that it has a particular

use. If the colour communicates on this macro level, it cannot be considered a trademark, as exclusive rights to the colour would provide an unfair advantage to the corporation in that particular market.

Courts must also consider whether the colour fulfills what Kress and van Leeuwen call the interpersonal function of language by, for example, instructing people to take specific actions or affecting consumers emotionally or psychologically. The court may exclude the mark from legal protection if the mark's colours perform interpersonal functions (Kappos & Völker, 2014, p. 53). For example, in the medical field, orange signals a medical device intended for internal-use (Kappos & Völker, 2014, p. 53). It is important to maintain fair access to colours that communicate interpersonally in certain contexts.

To maintain a fair market, the court must also ensure that colour trademarks do not affect the price of production. The key question in this regard is whether the colour allows for a lower manufacturing cost, as in cases "where a certain colour is a natural by-product of the manufacturing process and producing the same product in another colour would incur additional costs" (p. 53). Also, in order to assert nonfunctionality of a colour, the colour must not have an aesthetic appeal that would sway consumers' decisions. As Kappos and Völker (2014) discuss, this includes things such as limiting which car manufacturers can produce cars in certain colours. Finally, Kappos and Völker assert that a colour trademark must not result in a lack of available colours for new entrants to the market (p. 53). If the colour in question does not meet the qualifications above, whereby trademarking the colour would limit or hinder the rest of the competitive market, then the colour should not be granted trademark protection. In other words, the colour must not exhibit the interpersonal function of language, whereby the colour functions beyond

denotation, such as the use of pink's soothing quality, in order to maintain a fair marketplace (Kress & van Leeuwen, 2002). Of course, even if the court deems the colour to be nonfunctional, the case for trademarking the colour in question is not guaranteed, as I discuss below.

### **Problems with colour**

Reflecting back on colour and its use of the three functions of language, Kress and van Leeuwen (2002) assert that "colour itself is metafunctional" in the sense that it can fulfill the three communicative functions simultaneously and should therefore be seen as a language (Kress & van Leeuwen, 2002, p. 347). However, due to colour's occasional "anarchic" instability of meaning and its multiple communicative functions, colour is often used in combination with other modes to communicate specific meanings. As Kress and van Leeuwen write,

maybe colour is a characteristic mode for the age of multimodality. It can combine freely with many other modes, in architecture, typography, product design, document design, etc., but not exist on its own. It can survive only in a multimodal environment. (p. 351)

Based on Kress and van Leeuwen's multimodal framework, it is clear that colour trademarks can only be meaningful within a particular context, or when combined with other modes. Without these other modes to anchor its meaning, a colour can have multiple meanings on the micro and macros levels. Protecting a single-colour trademark and its communicative value is not a straightforward matter of banning all other similar shades from the marketplace. As suggested by the literature, there are many factors a court must consider before granting a ruling of infringement in a single-colour trademark

lawsuit, especially when considering the implications of such a ruling to competition in the marketplace.

As colour has unstable, often anarchic meanings, a common defense in colour trademark cases is based on the idea of “shade confusion.” Since one of the aims of the Lanham Act is to reduce customer confusion regarding the source of goods, this defense argues that colour trademarks would be unable to reduce or prevent confusion stemming from the use of different shades of the same colour (Vana, 1999, p. 389). As Andrew Coleman (1992) discusses, “differences between shades are intellectually no different than minor changes in spelling, meaning, punctuation or sound between similar word marks; these are situations that courts often consider in trademark infringement cases” (p. 349). The Trademark Trial and Appeal Board would not be “equipped to handle” uses of different shades of the same colour and the many lawsuits that may result from those uses (Vana, 1999, p. 389). While words rely on an established language and grammatical boundaries enforced by alphabetical limitations, colour remains more abstract. While there are colour organization systems like Pantone, which isolates shades and identifies with unique names, human interpretation of colour can skew colour organization, naming, and even perception. Emre Özgen (2004) explains that environmental factors, such as culture and even language can affect the perception of colours, meaning that definitive colour labels such as “pink” and “purple” each have different meanings to different people, making shade differentiation difficult.

Applying for, validating and enforcing a colour trademark, especially a single-colour trademark, is a costly endeavor (Kappos & Völker, 2014). Corporations must hire specialty trademark attorneys familiar with the legalities and the procedures associated with registering a colour trademark (Kappos & Völker, 2014). As Kappos and Völker

(2014) explain, “A colour mark may serve as valuable intellectual property, but warrants a thorough cost analysis on a par with that of any tangible business asset” (p. 54). These limitations not only deter unreasonable single-colour trademark requests, but also tend to protect larger businesses that can afford the investment required to protect a colour for branding purposes; smaller organizations lacking the funds to go to court are at risk of brand confusion or copycat competition in the marketplace. With less pervasive uses of colour, a smaller presence in the marketplace, and a smaller geographic region in which to develop the ideational function of colour branding, smaller firms are more at risk of falling prey to the anarchic meaning of colour.

Beyond legal cases and Supreme Court rulings, studies of the use of colour trademarking, the success rates of colour trademark lawsuits, and consumers’ views of colour branding are few and far between (e.g., Abratt & Kleyn, 2012; Elliott, 2003; Petty, 2012; Scott, 2013). This forces judges to assess the validity of these defenses based on an interpretation of the limited body of case law on the issue of single-colour trademark.

With the recent *Louboutin* case bringing colour trademark to the forefront and with organizations using colour in branding and rebranding initiatives, the question of how colour trademarks are regulated is important in both marketing and communications. This study explores Kress and van Leeuwen’s multimodal view of colour as functional communication and bridges the many levels of meaning within colour and the laws governing the trademark of these colours for use in the marketplace. These protected and established definitions of colour serve to regulate meaning and this study explores how American judges assess the validity of these claims and prevent the monopolization of colour.

## **Research Questions and Methodology**

In their efforts to differentiate themselves in the marketplace, organizations frequently use colour in brand communication. To assess the validity of single-colour trademark claims, courts examine the communicative value of the colours used by brands. In evaluating the validity of these claims, the judge presiding over the case is making a decision about the communicative value of a particular colour. More specifically, the judge must decide whether the colour effectively communicates the brand in question and must consider the implications of trademarking that colour for competition in the marketplace. Using emergent coding and drawing techniques from Johnny Saldaña (2009), this study provides a qualitative content analysis of three legal documents involving single-colour trademarks. The analysis offers insight into the way courts interpret and in turn shape the meaning of colours used in brand communication.

The following research questions guide my analysis of court decisions in single-colour trademark lawsuits:

1. How do judges in the United States determine the communicative value of colour in single-colour trademark cases?
2. How does the metafunctional nature of colour, as described by Gunther Kress and Theo van Leeuwen, affect the way judges assess the communicative value of colours in single-colour trademark cases?
3. In establishing how much importance judges place on the metafunctions of colour, which functions, as described by Kress and van Leeuwen, are most prominent in single-colour trademark cases, if any?

For the purposes of this study, the communicative value of colour is defined as the capacity of colour to perform one or more of the functions (textual, interpersonal, or ideational), as theorized by Kress and van Leeuwen (2002).

In each of the three lawsuits, I focus on either the decision of the Court of Appeals or the appeal judge's case analysis. Case analyses differ from decisions in that the former typically provide more detailed background information regarding the companies involved in the cases, as well as overviews of the companies' previous cases. The first document analyzed in this study is the decision by the Court of Appeals for the Second Circuit in *Norwich Pharmacal Company v. Sterling Drug Inc.*, 271 F.2d 569 (1959) ("*Norwich*"), which contains a 3-page overview of the lower court's decision as well as references to previous cases. The case focused on Norwich Pharmacal Company's claim to the pink hue used in its product Pepto-Bismol. Norwich claimed trademark infringement against rival company Sterling Drug Inc. for marketing their stomach-settling product, Pepsomar, using a similar shade of pink. The lower court granted Norwich the single-colour trademark, including the exclusive right to use pink-coloured liquid in stomach-settling products. The lower court also ordered Sterling Drug Inc. to sell their pink-coloured product in a different coloured glass container to distinguish the two products. The Court of Appeals reversed the decision and revoked the single-colour trademark because the judge found that the colour pink used in the product had a functional purpose. *Norwich* provides a glimpse into the relationship between functionality and other levels of meaning in single-colour trademarks and highlights the manner in which courts sometimes reject single-colour trademark claims even if the brand has a strong presence in the market.

The second document analyzed in this study is the 16-page opinion of the Court of Appeals for the Ninth Circuit in *Qualitex Co. v. Jacobson Products Co.*, 514 US 159 (1995) (“*Qualitex*”). In this case, Qualitex Company claimed trademark rights in the green-gold shade of its dry cleaning press pads and sought an injunction to bar Jacobson Products from using the same or a similar shade for their dry cleaning press pads. The claim to single-colour trademark was initially denied and the court refused to grant Qualitex a single-colour trademark, but the Ninth Circuit appeals court found that consumers associate the colour with Qualitex. *Qualitex* is a pivotal single-colour trademark case that was eventually sent to the Supreme Court, which finally validated Qualitex’s single-colour trademark claims.

The third and final case discussed in this MRP is *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.* (2d Cir. Sept. 5, 2012) (“*Louboutin*”). My analysis focuses specifically on the 31-page judicial opinion from the Second Circuit. Christian Louboutin sued Yves Saint Laurent for trademark infringement after the latter released a monochrome red shoe featuring a red sole. Louboutin previously held a trademark for red-soled shoes and it is in the dispute with Yves Saint Laurent that the trademark was revoked. The lower court carefully considered Yves Saint Laurent’s defenses, which are detailed throughout the judicial opinion. Even on the appeal, the court did not entirely side with Louboutin. Yves Saint Laurent was not found to have infringed upon Louboutin’s trademark because the shoe produced by the defendant was monochrome. The Second Circuit only partially upheld the trademark claim and found Louboutin rightfully held a trademark only to shoes with red soles and contrasting uppers (i.e., apart from the soles, the shoes would need to be a colour other than red to be subject to Louboutin’s trademark rights). *Louboutin* provides insight into the implications of asserting

a single-colour trademark in the fashion industry, where colour is an integral part of fashion design, production, and consumption. This case also introduced important changes to the United States legal system's stance on single-colour trademark legalities.

### **Methodological limitations**

This analysis focuses on American trademark law due to the rich history of high profile single-colour trademark cases and the availability of judicial opinions. Furthermore, the case law around single-colour trademarks is more developed in the United States than in Canada and there is a wider pool of potential single-colour trademark cases from which to draw. American law also influences Canadian trademark law through the North American Free Trade Agreement (NAFTA), which asserts the importance of intellectual property rights (Cameron & Watkins, 1993, p. 94). NAFTA also sets out minimum standards for the protection of intellectual property and principles for the enforcement of trademark, copyright and patents (Howse & Trebilcock, 2005). Through NAFTA and other international trade agreements such as the WTO's Trade-Related Aspects of Intellectual Property (TRIPS), American trademark law exerts influence far beyond the borders of the United States.

The MRP also focuses on the decisions written by the Court of Appeals. By analyzing appeals, this study highlights the broad range of perspectives of single-colour trademark expressed in judicial opinions, particularly when the Court of Appeals assesses the decisions of lower courts. All three cases involve arguments that were completely or partially defeated on appeal. This underscores the different understandings of how to correctly apply the Lanham Act in single-colour trademark, as well as the difficulties of

proving colour to be a distinguishable and valid trademark. These cases were also chosen due the time interval between each of the decisions, potentially highlighting trends in the handling of single-colour trademark cases.

## **Findings**

My analysis of the judicial opinions began by identifying themes in the texts related to the use, interpretation, and judgment of colour. The themes include colour as representative of an established brand, colour as influential in purchasing decisions, colour as a functional element, colour as a limited resource, and conflicting interpretations of previous case law and the Lanham Act. The themes and categories used in this analysis are described in detail in Appendix 1.

### **Themes**

#### *Colour as representative of an established brand*

This theme emerged from the decisions because judges presiding over these cases frequently considered the representational function of colour – what Kress and van Leeuwen call the ideational function – to be a necessity in single-colour trademark cases. This suggests that colour can signify a specific brand or corporation to consumers only when the branding and the associated organization are sufficiently established to be recognized by a wider public. This representational or ideational function of colour is a critical component in the validation of single-colour trademark claims in court because the distinctiveness of the colour cannot be convincingly demonstrated without it.

Though the Lanham Act was amended in 1988, it was not until *Qualitex* (1995) that the United States Supreme Court explicitly allowed protection of a single-colour trademark (Kearns, 1996; Vana, 1999). *Qualitex*, the manufacturer of dry cleaning press pads discussed in the previous section, registered the green-gold colour of its pads and sued Jacobson Products for infringement after they began producing press pads in the

same colour (Kearns, 1996; Vana, 1999). As Reske (1995) explains, “Qualitex has manufactured its ‘Sun Glow’ commercial dry-cleaning press pads for more than 30 years, spending some \$1.6 million to promote them” (p. 28). Whereas the Court of Appeals held that colour on its own could be trademarked, the United States Supreme Court asserted that colour could indeed communicate: “human beings might use as a ‘symbol’ or ‘device’ almost anything at all that is capable of carrying meaning” (*Qualitex*, 1995, p. 162). Prior to the Supreme Court decision in *Qualitex*, the Ninth and Seventh Circuits had prohibited the registration of colour altogether while the Eighth and Federal Circuits found no such cause (Bass, 1996, p. 193). This rare unanimous decision from the United States Supreme Court in *Qualitex* clarified the rights of organizations to legally claim a colour under the Lanham Act (Bass, 1996). After establishing the context in which the colour trademark would least impact the rest of the market, *Qualitex* was granted trademark rights to its signature colour within its market and no other dry cleaner press pad manufacturer could create product with that colour.

A more recent and widely-publicized case involving single-colour trademark began when shoe designer Christian Louboutin sued Yves Saint Laurent for infringement of Louboutin’s trademarked red-soled shoes. Louboutin registered the trademark to his signature soles in 2008, though the soles had been featured in most of his shoes since 1992 (Luhrs, 2012, p. 242). In 2011, Yves Saint Laurent produced a pair of monochromatic red lacquer heels, with the shiny red extending to the soles for their cruise wear line (*Louboutin*, 2012). The capacity of the red sole to communicate the Louboutin brand was tested through consumer surveys submitted by both parties and through six other qualifying factors which the Second Circuit used to determine whether the colour held a secondary meaning: the amount spent on advertising, consumer studies that determined a

link between the mark and source, media coverage of the proposed trademark, sales success, attempts to plagiarize the mark, and the length and exclusivity of its use (Luhrs, 2012, p. 246). The red sole was seen to be a key identifier in public surveys featuring both the Yves Saint Laurent shoe in question and Louboutin's signature black patent heels with a contrasting red sole. Participants in the surveys were able to identify the brand associated with each shoe, stating that the very particular mark represented the Louboutin luxury brand (Louboutin, 2012, p. 29). Here, the red lacquer sole acted as a signifier for the Louboutin brand as the source of the shoe. This reflects Kress and van Leeuwen's (2002) ideational function of colour, as the colour not only represents the brand but also the corporate entity to which it is attached. In *Louboutin*, the judge recognized colour as an important part of the established brand: "Louboutin has created an identifying mark firmly associated with his brand which, 'to those in the know,' 'instantly' denotes his shoes' source" (Louboutin, 2011, p. 28). A heavily marketed and widely known corporate brand will likely have more evidence to prove a single-colour trademark claim, provided they have the funds to both invest in the colour and take legal action to protect the colour trademark.

While *Qualitex* and *Louboutin* hinged on the representational power of the individual colours to support their claims, communicating a brand is not sufficient to own a trademark. In *Norwich* (1959), the judge found that while the pink colour communicated the Pepto-Bismol brand, the use of a similar shade in Sterling's Pepsomar did not constitute trademark infringement. As the appeal judge explained in the judicial opinion, "The court was undoubtedly influenced by defendant's intentional copying of plaintiff's pink color, but, as pointed out, this factor alone cannot be determinative" (*Norwich*, p. 3). The decision in *Norwich* also reflects the fact that simply using a trademarked colour in

branding does not necessarily constitute infringement. If consumers do not associate the colour with the plaintiff's brand, then there is no basis for such a claim of infringement. Until such an association between the colour and the manufacturer can be demonstrated, that particular colour is available to any company that has established branding and can prove it.

There are also negative implications of the representational nature of colour. As Abratt and Kleyn (2012) explain, in trademarks that rely heavily on colour, the colour represents not only the brand but also brand identity. If the colour representing a brand acquires negative associations in the marketplace through, for example, a copycat product of inferior quality, these negative associations could affect the original brand.

#### *Colour as influential in purchasing decisions*

This theme highlights the implications for trademark of the ideational function of colour in the consumer marketplace. Since colour can represent a real-life entity such as a corporation or brand, colour can be an important resource for communicating that entity's reputation among consumers. Imitative corporate branding can increase the risk of customer confusion in the marketplace, possibly allowing consumers to attribute negative or off-brand elements of copycats to the original brand. Depending on how widely colour branding is used and the prevalence of lookalike brands, imitations can also weaken or dilute the original brand's established reputation.

While Qualitex's trademark colour was only established within a small group of consumers, the infringement lawsuit against Jacobson hinged on proving the gold-green shade was representative of the dry cleaning press pad manufacturing company. Though the infringement claim was denied at trial, the subsequent appeal resulted in a single-

colour trademark ruling in *Qualitex's* favour. Key to the decision of the appeals court was the finding that the colour had gained a secondary meaning to consumers. In other words, consumers came to understand that the colour represented the brand and organization. As such, Jacobson's dry cleaning press pads in a similar shade were found to be confusing, leading to an unfair market and infringing on *Qualitex's* goodwill, or the reputation *Qualitex* built around the product over time. As the colour was not functional, serving no purpose beyond distinguishing itself in the marketplace, it was a valid trademark claim. The single-colour trademark applied only to dry cleaning press pad manufacturers, forcing Jacobson Products to cease production of their press pads in a similar green-gold shade.

Context was also key in *Louboutin*. While *Louboutin* initially asserted trademark rights in all red soles, the Court of the Appeals reversed the decision and held that the trademark would only extend to red soles that contrast with the rest of the shoe. As Yves Saint Laurent's allegedly-infringing heels were solid red, the Court of Appeals found that the shoes did not infringe on *Louboutin's* single-colour trademark. *Louboutin* also established the importance of reputation and how that reputation can be tied to a trademark. As the District Court observed in its decision, "Louboutin invested substantial amounts of capital building a reputation and good will, as well as promoting and protecting *Louboutin's* claim to exclusive ownership of the mark as its signature in women's high fashion footwear" (*Louboutin*, p. 27). The red sole in this case denoted a high fashion heel with a luxurious reputation. By protecting this mark, and paying to enforce it if need be, *Louboutin* is attempting to maintain the links between its corporate identity and its red soles' luxury status.

It is evident in all three cases that companies seek to preserve their brand identity and reputation through colour trademarks. References to customer confusion regarding shades appear only in the plaintiff's submissions, as detailed in the judicial documents. This suggests that consumer confusion is not the deciding factor in single-colour trademark cases and that several other considerations beyond representational capacity are important in this context, including the six factors the Second Circuit court used in *Louboutin*. The ideational functions of colour also suggest that imitation is to some extent acceptable in the marketplace, especially in the fashion industry. This analysis suggests that Louboutin's claim of infringement could not be based entirely on the fact that Yves Saint Laurent used the red sole on a monochrome red shoe. For the claim to be deemed valid, Louboutin had to prove there was confusion in the marketplace due to the use of red and that "those in the know" would understand that the red sole denoted both the Louboutin brand (the textual function) and the luxury status of the Louboutin brand (the ideational function).

Louboutin's claim to the red sole as a sign of their luxury brand also reflects Kress and van Leeuwen's textual and ideational functions of colour. The colour not only represents the brand on a textual level, signifying the designer that produced it, but can also communicate the product's reputation or corporate brand to consumers who have come to associate the colour with a particular brand, made up of the corporate output or expression and the stakeholder images of the organization (Abratt & Kleyn, 2012, p. 1050). The colour also signifies the organization's corporate identity. However, demonstrating that the mark denotes a brand or designer to a particular demographic is not enough to make a single-colour trademark claim, as Kappos and Völker (2014) explain:

As long as there are organisations that have built customer goodwill through their brands, there will be enterprising newcomers attempting to exploit that goodwill and market leaders that overreach in their defence of it. Consumer confusion will always be a possibility, whether a mark is a colour, shape, symbol or even a phrase – words, after all, have their homonyms. (p. 51)

While colour can be reflective of a brand and its reputation in the market, courts may refuse to grant exclusive rights to the colour's use in order to maintain a fair and balanced competitive market. Just as Louboutin could not claim the colour red as a trademark in all shoes, Qualitex could not claim its green-gold colour in all markets. Courts see the potential monopolization of colour as a real danger and the various levels of evidence which the claimant is required to provide in any single-colour trademark case are the tools courts use to guard against this danger.

#### *Colour as a functional element*

This theme underlines the importance of the interpersonal function in weeding out invalid trademark claims. This theme supports Kress and van Leeuwen's assertions that colour can affect the public by, for example, guiding decisions or operating as a call-to-action. Discussions of functionality in the three cases examined here suggest that colours with purposes beyond communicating a brand identity to the public cannot be trademarked.

In the case of Pepto-Bismol and Pepsomar, the single-colour trademark claim made by Norwich Pharmacal Company was denied on the basis that the colour was functional (*Norwich*, 1959). The court found the pink colour of the liquid was intended to

calm the drinker and lessen the impact of the upset stomach (*Norwich*, 1959). As stated in the district court's opinion, "It is not necessary, however, to decide whether the pink color, because of its purported psycho-somatic effect, has a therapeutic value in upset stomach medicines" due to the broad definition of "functionality," which includes the producer's belief that colour would contribute to the product's functionality (Norwich, p. 573). The Court of Appeals found that the pink colour could not be trademarked due to the functional nature of the colour pink and due to the prevalence of the colour in the stomach-settling product marketplace. By affecting the consumer or user, the colour pink in this case took on the interpersonal function described by Kress and van Leeuwen. The colour not only denoted the brand but also provided a comforting, soothing effect on the consumer who would associate the colour with a stomach-settling product.

Concern about the potential impact of trademark rights in a functional colour was especially evident in *Louboutin*. Though the Southern District of New York initially denied the case and trademark infringement claim, the Second Circuit held up the soles' legal protection. While the mark met all of the Second Circuit's six requirements in the appeal, the decision was not cut-and-dried. Both courts held that Louboutin's claim to lacquer red was too broad to be trademarked (Luhrs, 2012, p. 246). In response, Louboutin revised its trademark claims to apply "only where the red sole contrasts to the upper of the shoe to preserve the distinguishing symbol" (Luhrs, 2012, p. 246). The narrower claims allowed the associations between the mark and the brand's reputation and luxury to remain intact distinctive mark of a Louboutin sole, as well as its implied reputation and luxury, to remain intact, while preventing other fashion designers from being adversely impacted or censored in their future creations (Luhrs, 2012, 231).

Echoing Kress and van Leeuwen's (2002) assertion that colour is language-like in that it performs many communicative functions simultaneously, each of these examples highlights the interpersonal function of colour as potentially influential upon consumers. This was particularly evident in *Norwich* where the Court recognized the potential harm in the monopolization of colours that had macro-level meanings and that functioned on the interpersonal level, which led the Court to reject the trademark claim on the basis of maintaining a fair market.

#### *Colour as a limited resource*

In the defenses presented in each of the three cases, the notion that colour is a limited resource appears many times. Colour is limited not only in the sense that the finite number of hues and shade variations available in the rainbow of colours, but also in the sense that how much content or meaning a single colour truly can communicate in the marketplace. Even after a claim is granted and the single-colour becomes a registered trademark, the use of similar shades in the marketplace does not necessarily constitute infringement. As evidenced by the *Qualitex* trial, there are many factors a court must consider before granting a ruling of infringement, since such a ruling would have major consequences for competition in the market.

In its defense in *Qualitex*, Jacobson Products raised two issues still prominent in the discussion of protecting colour: colour depletion and shade confusion (*Qualitex Co. v. Jacobson Products Co.*, 1995; Vana, 1999, p. 388). Colour depletion theory has historically been the most popular defense against colour trademarks (Vana, p. 388). As the colour spectrum is limited, granting manufacturers trademarks rights to certain colours narrows the palette available to the competition for use in their own products or

branding. This not only limits creativity and expression in the field, but also potentially puts other manufacturers at a “significant competitive disadvantage” (Vana, p. 389).

The second defense is the idea of shade confusion. As the Lanham Act’s premise is to reduce customer confusion about the source of goods, this defense is based on the argument that colour trademarks would perpetuate confusion around different shades of the same colour (*Qualitex*, 1995; Vana, 1999, p. 389). If a company were to trademark a bright red, or a specific Pantone shade corresponding to bright red, then companies may still be able to use a muted red for their products, which may not be significantly distinguishable in the marketplace.

Yet neither of these defenses held up in *Qualitex*, as *Qualitex* was granted trademark rights in the “sun gold” shade used on its dry cleaning press pads. Versions of these defenses were also mentioned in the more recent *Louboutin* case, as the implications of granting a single-colour trademark to a fashion house are immense if the claims to the marks are not properly regulated or limited. In *Louboutin*’s case, the defense attempted to assert that colour should not be trademarked because exclusive control of particular colours would limit creativity in the fashion community (p. 24).

#### *Conflicting interpretations of previous case law and the Lanham Act*

This emerging theme is present in each of the cases, not only explicitly through references to conflicting opinions of other courts, but also in the fact that the decisions in each of the three cases I have chosen were appealed. The appeals resulted in different and sometimes contradictory outcomes in the legal process. Of course, the diversity of opinion may be due in part to the fact that single-colour trademarks are relatively new to courts in the United States and elsewhere, with few legally protected colours currently in use.

The decision in *Louboutin* was especially controversial since it allowed a single-colour trademark in the fashion industry. As the Court of Appeals wrote, “We hold that the District Court’s conclusion that a single color can never serve as a trademark in the fashion industry was based on an incorrect understanding of the doctrine of aesthetic functionality and was therefore error” (p. 31). Aesthetic functionality is part of the broader functionality doctrine in American trademark law, whereby courts may consider any feature that contributes to the commercial success of a product to be ineligible for trademark (*Louboutin*, 2012). Not only did the Court of Appeals overturn the District Court’s ruling, but it also set a standard for identifying whether a colour holds a secondary meaning beyond the intended branding or purpose of the product. These types of meanings, which this MRP has discussed in terms of the interpersonal function of language, are often associated with functional elements of products in legal discourse and tend to be excluded from trademark.

This theme in the court decisions reflects the anarchic quality of the communicative value of colour identified by Kress and van Leeuwen as well as the difficulty in asserting the communicative value of colour in single-colour trademark cases. Nonetheless, as suggested in the discussion of *Louboutin*, courts are assessing single-colour trademark claims and judging their validity in an increasingly sophisticated and detailed manner, which may lead to greater consistency in future single-colour trademark decisions.

## **Discussion**

Trademark law is becoming a key site for the regulation of the various levels of meaning in colour. Just as Kress and Leeuwen (2002) explored the metafunctions of colour in day-to-day life, these functions (or legal concepts that address those functions) affect and guide the decisions made by judges in single-colour trademark cases. As the findings above suggest, the court's conceptualization of certain functions and levels of meaning can determine the success of a single-colour trademark case, making the judge's perception of functions or meanings more important. In understanding the importance of the functions of colour and the role of the courts in assessing and enforcing the validity of single-colour trademark cases, the question remains as to the relative importance attributed to these functions and the role each function plays in the courts' assessment of the meaning associated with colours. The themes explored above can now be discussed in relation to the research questions guiding this study.

*RQ1: How do judges determine the communicative value of colour in single-colour trademark cases?*

In *Qualitex* (1995), there were only two qualifiers that courts considered when assessing the validity of single-colour trademark claims: distinctiveness and nonfunctionality (Samuels & Samuels, 1996, p. 306). While colour could meet both requirements, many single-colour trademark claims were denied due to the judge's belief that the Lanham Act does not protect colour marks on their own, as seen in the Ninth and Seventh Circuits. As with most common law, the decisions in trademark lawsuits are left to the discretion of the judge, although decisions are expected to be consistent with precedents. In the area of single-colour trademark lawsuits, the case law is not sufficiently developed to provide a

clear set of guidelines as to how to evaluate the validity of claims, leaving most of the decision-making up to the judge.

In more recent cases, such as *Louboutin*, courts have used consumer surveys to gauge the single-colour trademark claim's validity. *Louboutin* also highlights the growing complexity of tests of validity for single-colour trademarks, which includes six qualifying factors: the amount spent on advertising, consumer studies that determined a link between the mark and source, media coverage of the proposed trademark, sales success, attempts to plagiarize the mark, and the length and exclusivity of its use (Luhrs, 2012, p. 246). While the courts in early single-colour trademark lawsuits such as *Qualitex* based their reasoning on two factors – the extent of the mark's use and sales – the judge in *Louboutin* was able to draw from a wider range of precedents such as *Polaroid Corp. v. Polarad Elecs. Corp.* (1961), in which the judge established the current multifactor-balancing test (*Louboutin*, p. 226). As trademark claims have developed and increased exponentially over time, courts have developed strategies and tests to prove trademark viability. This suggests that there is considerable progress not only in legal understandings of single-colour trademarks and their implications, but also a growing awareness of the importance of regulating these marks in a way that maintains goodwill and a fair market.

Above all, courts in the more recent decisions give greater consideration to the implications of the single-colour trademark on the rest of the competitive market by using factors adapted from previous decisions to test the validity of claims. Of course, not all judges interpret precedent or apply tests of validity in the same way, resulting in conflicting rulings. Before the United States Supreme Court stepped in to explicitly allow for colour trademarks, the Seventh and Ninth Circuits refused to allow single-colour trademarks, even after the Lanham Act's amendment. *Louboutin* referenced many

previous cases denying the right of fashion houses to own single-colour trademarks, none of which the presiding judge agreed with, thereby granting Louboutin the trademark. Each case I analyzed overturned the previous ruling in the respective single-colour trademark cases, paving the way for other lawsuits based on more detailed techniques for establishing ownership of single-colour trademarks and opening up the concept of single-colour trademarks to new industries. While testing the validity of trademark claims, each judge referenced, in his or her own words and legal terms, the three functions of language that Kress and van Leeuwen proposed, which supports the idea that colour can be metafunctional. Judges acted in these cases as the gatekeepers to single-colour trademark, each with their own interpretations of previous cases.

*RQ2: How does the metafunctional nature of colour, as described by Gunther Kress and Theo van Leeuwen, affect the way judges assess the communicative value of colours in single-colour trademark cases?*

As seen in each of the cases and appeals, the many layers of meaning within colour make it difficult for courts to assess the validity of claims; decision-making in this area is far more complex than simply determining whether or not one organization's colour branding is too similar to another organization's. As discussed in more depth below, the judge must determine whether the colour functions on both the textual and ideational level and whether the colour communicates the brand to the public and thus effectively creates a secondary meaning. If the court finds that the colour is functional or exhibits Kress and van Leeuwen's interpersonal function of meaning, then the claim must be deemed invalid, as trademark rights would give an unfair advantage to the trademark owner.

The many levels of meaning that must be addressed in order to validate claims make single-colour trademark lawsuits long and difficult, with both parties in each case offering conflicting arguments about colour. The metafunctional nature of colour, therefore, makes it much more difficult to claim ownership to a single-colour trademark since each level of meaning has to be assessed to ensure a valid corporate claim to a colour.

*RQ3: Which of Kress and van Leeuwen's metafunctions has the most impact in single-colour trademark cases, if any?*

Of the three metafunctions, Kress and van Leeuwen's (2002) textual function – the compositional and distinguishable quality of colour – was most prevalent in each of the cases analyzed here. This is not surprising, as the purpose of a single-colour trademark is to denote a specific brand or product to consumers. Of course, the mark itself must be distinguishable within the marketplace, which also makes the ideational level important in this context. Without a denotation of a brand, a corporation may not be able to successfully claim trademark of a specific colour.

However, the textual function alone cannot ensure a court ruling in the brand's favour. As discussed throughout this study, "Absent confusion, imitation of certain successful features in another's product is not unlawful and to that extent a 'free ride' is permitted" (*Norwich*, p. 6). Customer confusion in the marketplace does not make a trademark infringement case, as it may only serve to prove that the original brand's colour was not established or distinguishable enough to qualify as a trademark.

The ideational function is nearly as important as the textual function in assessing the validity of a single-colour trademark case. The entity's branding must be sufficiently

established to associate the specified colour with the brand in the minds of consumers. To be considered for trademark, a colour must not only set a product apart in the marketplace but must also communicate a corporate brand to consumers. As seen in *Qualitex* and *Louboutin*, the plaintiffs must prove that their product's colour widely communicates the entire corporate identity to consumers, including a clear visual identity, the brand promise, brand personality, and outward brand communication (Abratt & Kleyn, 2012, p. 1050). Unless the owners of the trademark can demonstrate that the whole set of brand components has been communicated effectively to the public, brands and corporate entities cannot prove the textual function of the colour, which in turn makes it difficult to convince the court that the mark is distinctive.

## **Limitations and Future Study**

While the judges' decisions and interpretations of the evidence and case law are important for the creation and use of single-colour trademarks, these legal texts are only part of the larger process of laying claim to a colour. One of the limitations of this paper is that the analysis could only consider information entered into the judicial opinion, which does not include varying levels of depth in arguments presented in court, explanations of previous case law, and even the judge's own thoughts regarding the appeal. Arguments, evidence and other information that were presented in court but were omitted from the judge's decision could not be analyzed in this study. Omitted information that may prove valuable to future research in this area includes specific information about the surveys presented in courts in *Louboutin*, particularly the survey questions, the group of people surveyed, and the manner in which the surveys were conducted.

Future study on the topic of single-colour trademark may include analyzing insights from marketing and branding professionals, analyzing case studies of companies' internal plans to implement single-colour trademark, and analyzing the issue from the perspective of trademark lawyers who have dealt with or are dealing with single-colour trademark cases. This could provide valuable information about how corporations view single-colour trademarks and about the difficulties or challenges expressed internally regarding the various levels of meaning in colour.

This MRP focused on decisions by courts of appeal in the United States and analyzed cases in relation to previous American single-colour trademark cases. The study of single-colour trademark could also be further explored by analyzing cases from the European Union (EU), which has its own Colour Trademark Regulation known as the

CTM Regulation. The means of proving the validity of a single-colour trademark claim are very different in the EU and include the use of public opinion polls to determine whether the colour actually signifies the corporation or product in question (Kappos and Völker, p. 55). Also unique to the EU's treatment of colour trademark is the requirement for the mark to be used and understood in a very large region, as the EU is comprised of 28 member states (Kappos and Völker, p. 55). This presents additional difficulties for colours recognizable in certain countries but not in others.

This study did not mention the Lanham Act's protection of unregistered colour trademarks, especially those of college sports teams' memorabilia (Frank, 2012). In *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.* (2008), Smack Apparel Co. was found to be infringing several American universities' trademarks by using team colours in their college-themed, witty apparel (Frank, 2012). There were no other identifying marks, such as logos or mascots, used on the apparel aside from the team colours (Frank, 2012). These colours were not formally trademarked before the ruling, making this an interesting example of colour trademark ruling and a unique application of the Lanham Act.

## **Conclusion**

Through analysis of three trademark infringement cases, this MRP explored the legal regulation of the communicative value of colour in corporate branding. When done successfully, the colour trademark signifies a product as well as a larger corporate brand. While this MRP has underlined the value of single-colour trademark as a communicative tool, there are still many issues that could be explored around both legal and scholarly understandings of colour related to colour's legal protection colour and regulating its legal protection. While corporations and judges could legally assert the meaning of a colour, the underlying textual, interpersonal, and ideational meanings could disrupt the legally-protected meaning intended by the trademark owner, as seen in the discussion of the various levels of meaning inherent in colour.

The themes identified in this study addressed the role of communicative metafunctions in determining the validity of single-colour trademark claims. The emphasis on the ideational metafunction became evident in all three of the cases, as the burden to prove that the single colour is representative of the brand is on the claimant. Depending on the judge's interpretation of previous cases, the other functions can play an important role as well, not only in the public's perception of the larger brand identity, but also in the judge's decision-making regarding the validity of single-colour trademark claims. As colour is a language, it can and does function on all three levels simultaneously and it is difficult for courts to effectively regulate all of the levels of meaning. In certain cultures, the use of the colour green signifies environmentally-friendly causes and performs the interpersonal function of meaning. Yet, this meaning may be negated by the fact that an oil company uses the colour in their logo. The meanings of any given colour

are constantly changing and this “anarchic instability” presents certain difficulties for the legal regulation of colour’s meanings.

My analysis highlighted the importance of the methods used in validating single-colour trademark claims, with a variety of factors considered in trademark application. Further, my analysis found inconsistencies in assessments of single-colour trademark claims and in interpretations of the Lanham Act, which stem from colour’s often-unstable meanings and the hesitation of courts to assign legally-binding communicative value to colour. Even after Congress amended the Lanham Act with inclusive language to allow colour trademarks, some judges refuse to give certain industries and corporations legal protection for their colour marks. As discussed in my analysis of *Louboutin*, some judges are willing to grant trademark rights in colour in certain contexts where the mark communicates the brand and corporate identity effectively without overly-constraining the use of colour by the rest of the market.

Viewed through Kress and van Leeuwen’s lens, the various functions of language affect the way consumers and corporations are able to utilize, understand and interact with colour. Judges in single-colour trademark cases must assess each level of meaning within colour. The legal act of enforcing trademark in single-colour cases is intended to complement and protect the already established meaning rather than forcibly overwrite one set of meanings with another. Of course, this process comes at a cost too high for many small businesses, making single-colour branding and trademark more accessible to larger corporations with larger audiences and legal budgets.

Finally, while strong evidence regarding the textual function of colour does not on its own guarantee a positive ruling, the textual function appears most often in case law and is necessary to prove a valid trademark. Without the textual function communicating

the larger corporate brand to consumers, a corporation cannot build a compelling case for ownership of a single-colour trademark. Each of the three pieces of the language of colour as theorized by Kress and van Leeuwen (2002) contribute to the larger meaning and use of colour and also limit the protection available to colour in trademark law. The courts' task in regulating these meanings for corporations who have claimed ownership of these marks is difficult due to the anarchic quality of colour. Nonetheless, judges are also clearly aware of the manner in which disallowing single-colour trademark may lead to greater risk of brand dilution and loss of brand identity. On the other hand, if courts do not permit any brand imitation, or if courts allow trademark owners to control uses of colour beyond the context of the original mark – if, for example, Louboutin held trademark to all red shoes in the fashion industry – then there would be a real risk of colour monopolization and these changes would not allow for a fair market.

Future studies can improve understanding of the importance of these often-costly trademarks by looking beyond judicial opinions to the expanding trade literature on colour branding and marketing. As corporations continue to establish unique brand identities in the marketplace, they will continue to pursue colour branding and single-colour trademarks to set themselves apart, and understanding the function of these trademarks will become increasingly vital.

## Appendix 1

Category	Example	Codes
<p>Colour as representational of an established brand.</p>	<p>“By placing the color red “in [a] context [that] seems unusual,” <i>Qualitex</i>, 514 U.S. at 162, and deliberately tying that color to his product, Louboutin has created an identifying mark firmly associated with his brand which, “to those in the know,” “instantly” denotes his shoes’ source, <i>Louboutin</i>, 778 F. Supp. 2d at 448” (Louboutin, p. 227)</p> <p>“Indeed, the District Court, in this case, entered findings (accepted by the Ninth Circuit) that show Qualitex's green-gold press pad color has met these requirements. The green-gold color acts as a symbol. Having developed secondary meaning (for customers identified the green-gold color as Qualitex's), it identifies the press pads' source.” (Qualitex, p. 166)</p>	<ul style="list-style-type: none"> <li>• Branding</li> <li>• Identity</li> <li>• Packaging</li> <li>• Representation</li> </ul>
<p>Colour as influential in purchasing decisions.</p>	<p>“The court was undoubtedly influenced by defendant's intentional copying of plaintiff's pink color” (Norwich, p. 573)</p> <p>“The law thereby "encourage[s] the production of quality products," <i>ibid.</i>, and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer's inability quickly to evaluate the quality of an item offered for sale.” (Qualitex, p. 164)</p> <p>“The principal purpose of federal trademark law is to "secure the public's interest in protection against deceit as to the sources of its</p>	<ul style="list-style-type: none"> <li>• Consumers</li> <li>• Differentiation</li> <li>• Intentional imitation</li> </ul>

	<p>purchases, [and] the businessman's right to enjoy business earned through investment in the good will and reputation attached to a trade name." <a href="#">Fabrication Enters., Inc. v. Hygenic Corp.</a>, 64 F.3d 53, 57 (2d Cir.1995)” (Louboutin, p. 216)</p>	
<p>Colour as a functional element</p>	<p>“Despite the fact that the trial court found "that the pink color has no functional value as the word is commonly used and understood," this conclusory finding rests upon too narrow a foundation. The function of a remedy "For Upset Stomach" is to quiet the upset. Hence, although the court found ‘that the pink color and the ingredients producing same have no healing value in themselves,’ yet it recognized that the pink color was ‘designed to present a pleasing appearance to the customer and to the sufferer.’” (Norwich, p. 573)</p> <p>“Although sometimes color plays an important role (unrelated to source identification) in making a product more desirable, sometimes it does not. 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.” (Qualitex, p. 165)</p> <p>“(holding that "in order for a court to find a product design functional, it must first find that certain features of the design are essential to effective competition in a particular market"). In making this determination, courts must carefully weigh "the competitive benefits of protecting the source-identifying aspects" of a mark against the "competitive costs</p>	<ul style="list-style-type: none"> <li>• Functional</li> <li>• Advantage</li> </ul>

	of precluding competitors from using the feature." <a href="#">Fabrication Enters., Inc., 64 F.3d at 59.</a> " (Louboutin, p. 222)	
Colour as a limited resource	<p>"As pointed out in James Heddon's Sons v. Millsite Steel &amp; Wire Works, D.C.E.D.Mich.1940, 35 F.Supp. 169, 174, "[t]here are only seven primary colors. These colors have been used ever since man first noticed the rainbow." (Norwich, p. 573)</p> <p>"By the time one discards colors that, say, for reasons of customer appeal, are not usable, and adds the shades that competitors cannot use lest they risk infringing a similar, registered shade, then one is left with only a handful of possible colors. And, under these circumstances, to permit one, or a few, producers to use colors as trademarks will "deplete" the supply of usable colors to the point where a competitor's inability to find a suitable color will put that competitor at a significant disadvantage. This argument is unpersuasive, however, largely because it relies on an occasional problem to justify a blanket prohibition." (Qualitex, p. 168)</p> <p>"Indeed, the case on appeal is particularly difficult precisely because, as the District Court well noted, in the fashion industry, color can serve as a tool in the palette of a designer, rather than as mere ornamentation. <a href="#">Louboutin, 778 F.Supp.2d at 452-53.</a>" (Louboutin, p.224)</p>	<ul style="list-style-type: none"> <li>• Limited</li> <li>• Monopolization</li> </ul>
Conflicting interpretation of previous case law and the Lanham Act.	"constitutes a misreading of Mastercrafters Clock & Radio Co. v. Vacheron & Constantin Le Coultre Watches, Inc., 2 Cir., 1955, 221 F.2d 464, certiorari denied"	<ul style="list-style-type: none"> <li>• Denial</li> <li>• Reversal</li> <li>• Misreading</li> <li>• Inconsistencies</li> </ul>

	<p>(Norwich, p. 573)</p> <p>“We now hold that there is no rule absolutely barring the use of color alone, and we reverse the judgment of the Ninth Circuit.” (Qualitex, p. 162)</p> <p>“We conclude that the District Court's holding that a single color can never serve as a trademark in the fashion industry, <u><i>Christian Louboutin S.A. v. Yves Saint Laurent America, Inc.</i></u>, 778 F.Supp.2d 445, 451, 457 (S.D.N.Y.2011) (<u><i>"Louboutin"</i></u>), is inconsistent with the Supreme Court's decision in <u><i>Qualitex Co. v. Jacobson Products Co.</i></u>, 514 U.S. 159, 162, 115 S.Ct. 1300, 131 L.Ed.2d 248 (1995) (<u><i>"Qualitex"</i></u>), and that the District Court therefore erred by resting its denial of Louboutin's preliminary injunction motion on that ground.”</p> <p>(Louboutin, p. 212)</p>	
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## References

- Abratt, R. & Kleyn, N. (2012). Corporate identity, corporate branding and corporate reputations. *European Journal of Marketing*, 46(7/8), 1048-1063.  
doi:10.1108/03090561211230197
- Adams, F. M., & Osgood, C. E. (1973). A Cross-Cultural Study Of The Affective Meanings Of Color. *Journal of Cross-Cultural Psychology*, 4(2), 135-156.
- Bass, P. S. (1996). Trademark Law: Qualitex Co. v. Jacobson Products Co. The Supreme Court Upholds Trademark Protection for a Color. *Oklahoma Law Review*. 193.
- Cameron, D. & Watkins, M. (1993). *Canada under free trade*. James Lorimer & Company Limited.
- Cameron, G. D.,III. (1997). Color alone can be protected as a trademark. *Academy of Marketing Science Journal*, 25(3), 269.
- Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc., No. 11-3303-CV, 2012 WL 3832285, at \*1 (2d Cir. Sept. 5, 2012).
- Coleman, A. W. (1992). Color as trademarks: Breaking down the barriers of the mere color rule. *Journal of the Patent and Trademark Office Society*, 74(5), 345.
- Colour as a semiotic mode: Notes for a grammar of colour. (2002). *Visual Communication*, 1(3), 343-368. doi:10.1177/147035720200100306

- Coombe, R. J. (2005). Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference. *Law, Culture and the Humanities*, 1(1), 35-52.
- Coppersmith, W. F., III. (1994). The color conundrum continues. *Cumberland Law Review*, 24(2), 299.
- Diggins, B. (1947). The Lanham Trade-Mark Act. *The Georgetown Law Journal* 35(2). 147-208.
- Elliott, C. (2003). Color Codification: Law, Culture And The Hue Of Communication. *Journal for Cultural Research*, 7(3), 297-319.
- Frank, S. (2012). Showing Your School Spirit: Why university color schemes and indicia do not deserve trademark protection. *Boston University Law Review*, 92.1, 329-368.
- Jacobson, N., & Bender, W. (1996). Color as a determined communication. *IBM Systems Journal*, 35(3.4), 526-538.
- Kappos, D., & Völker, S. (2014, Apr. - May.). Colour marks in the United States and the European Union: history, landmarks and evolution. *World Trademark Review*, 48, 49-55.
- Kearns, Jean H. (1996). Qualitex Co. v. Jacobson Products Co.: Orange you sorry the supreme court protected color? *St. John's Law Review*, 70(2), 337-358.
- Knox, S., & Bickerton, D. (2003). The Six Conventions Of Corporate Branding. *European Journal of Marketing*, 37(7/8), 998-1016.

- Kress, G. R. (2010). *Multimodality: a social semiotic approach to contemporary communication*.  
London: Routledge.
- Kress, G. R., & van Leeuwen, T. (1996). *Reading images: the grammar of visual design*. London:  
Routledge.
- Kress, G., & van Leeuwen, T. (2002). Colour as a semiotic mode: Notes for a grammar of  
colour. *Visual Communication*, 1(3), 343-368. doi:10.1177/147035720200100306
- The Lanham Act of 1946, 15 U.S.C.A. § 1051 et seq.
- Lacy, M.L. (1996) *The Power of Colour to Heal the Environment*. London:Rainbow Bridge  
Publications.
- LaFrance, M. (2004). Innovations Palpitations: The Confusing Status of Geographically  
Misdescriptive Trademarks. *J. Intell. Prop. L.*, 12, 125.
- Luhrs, Lauren E. (2012). When in doubt, wear red: Understanding trademark law's  
functionality doctrine and its application to single-color trademarks in the fashion  
industry. *Kansas Law Review*, 229-255.
- Mojsilovic, A., Kovacevic, J., Kall, D., Safranek, R., & Ganapathy, S. K. (2000). The  
vocabulary and grammar of color patterns. *IEEE Transactions on Image Processing*, 9(3),  
417-431.
- Norwich Pharmacal Company v. Sterling Drug, Inc. 271 F.2d 569 (1959)

- Özgen, E. (2004). Language, Learning, And Color Perception. *Current Directions in Psychological Science*, 13(3), 95-98.
- Petty, Ross D. (2012). From label to trademark. *Journal of Historical Research in Marketing*, 4(1), 129-153. doi:10.1108/17557501211195091
- Qualitex Co. v. Jacobson Products Co., 514 US 159 (1995)
- Reske, H. J. (1995, Jun 1995). Dye is cast: Color can be trademarked. *ABA Journal*, 81, 28.
- Saldaña, J. (2009). *The coding manual for qualitative researchers*. London: Sage.
- Saltzman, J. (2011). Smack Apparel, College Color Schemes and the Muddying of Trademark Law. *Brooklyn Law Review*, 76(4), 1635-1668.
- Samuels, L. B., & Samuels, J. M. (1996). Color trademarks: Protection under U.S. law. *Journal of Public Policy & Marketing*, 15(2), 303-307.
- Scott, C. D. (2013). *Trademark strategy in the internet age: Customer hijacking and the doctrine of initial interest confusion* Elsevier. doi:10.1016/j.jretai.2012.11.004
- United States Patent and Trademark Office. *Trademark, Patent, or Copyright?*. (n.d.). Retrieved July 6, 2014, from <http://www.uspto.gov/trademarks/basics/definitions.jsp>
- Trebilcock, M. J., & Howse, R. (2005). *The regulation of international trade* (3rd ed.). London: Routledge.

Valdez, P., & Mehrabian, A. (1994). Effects Of Color On Emotions. *Journal of Experimental Psychology: General*, 123(4), 394-409.

Vana, J. L. (1999). Color trademarks. *Texas Intellectual Property Law Journal*, 7(3), 387.

Winckel, E. (2013). Hardly a black-and-white matter: Analyzing the validity and protection of single-color trademarks within the fashion industry. *Vanderbilt Law Review*, 66(3), 1015-1052.