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Color as a Brand

The Legal Landscape of Tiffany Blue and
Comparative Insights into Color Trademark
Protection

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Contents

Abstract	5
Abbreviations	6
1 Introduction	7
1.1 Background	7
1.2 Purpose and research questions	7
1.3 Delimitations	7
1.4 Method and materials	8
1.5 Outline	9
2 Color as a Brand: The Symbolism of "Tiffany Blue"	10
2.1 Historical background and significance of "Tiffany Blue" in branding	10
2.2 Consumers' cognitive and emotional associations with "Tiffany Blue" and the use of "Tiffany Blue" in brand strategy	10
3 Legal protection of color trademarks: comparative analysis	12
3.1 Overview of Trademark Law and Principles	12
3.2 The Legal and Artistic Implications of Color Trademarks	13
3.3 Legal criteria for registering color trademarks in the US, EU, and China ..	14
3.3.1 United States	15
3.3.2 European Union	17
3.3.3 China	18
3.4 Enforcement of Color Trade marks in Different Jurisdictions	22
3.4.1 United States	22
3.4.2 European Union	23
3.4.3 China	24
4 Case Study: Tiffany & Co. and the Protection of "Tiffany Blue"	28
4.1 International attitude and challenges faced by Tiffany & Co. in protecting their color trademark	28
4.2 Broader Implications for Color Trademark Protection	29
5 Challenges and Future Directions	31
5.1 Emerging issues in color trademark	31
5.2 Potential reforms or adjustments needed in the legal framework	33
5.3 Future trends and implications for businesses and trademark owners	34
6 Conclusion	36
References	38

Abstract

This paper explores the complex dynamics of color trademarks, with a particular focus on the legal environment of "Tiffany Blue." This study examines the symbolic significance of this iconic color and compares the legal frameworks for color trademark protection in the United States, the European Union, and China. The main research questions relate to the challenges and controversies surrounding the protection of "Tiffany Blue" and similar color trademarks, the legal standards governing their registration and protection, and the impact of recent legal developments on their recognition and enforcement.

Through a comprehensive comparative legal analysis, this study examines different approaches in each jurisdiction, highlighting the nuances and complexities of ensuring color trademark protection. Tiffany's case study is a key example of what these legal principles mean in practice and the broader challenges that international brands face in protecting their color trademarks in different legal systems.

Key findings indicate that while color marks are increasingly recognized, the path to obtaining and maintaining protection is fraught with legal, cultural, and procedural obstacles. The study highlights the need for substantial evidence of acquired distinctiveness, particularly in jurisdictions such as the European Union and China, where stringent requirements present significant challenges. The paper concludes by proposing potential reforms and future trends in trademark law in order to provide greater clarity and predictability for brand owners.

Keywords: Color trademark, Tiffany Blue, legal protection, United States, European Union, China, trademark law

Abbreviations

CJEU	Court of Justice of the European Union
CMYK	Cyan, Magenta, Yellow, Key (black) (color model)
CNIPA	State Intellectual Property Office of China
CTM	Community Trade Mark
EU	European Union
EUIPO	European Union Intellectual Property Office
OHIM	Office for Harmonization in the Internal Market (now EUIPO, European Union Intellectual Property Office)
PMS	Pantone Matching System
RCD	Registered Community Design
RGB	Red, Green, Blue (color model)
TRIPS	Trade-Related Aspects of Intellectual Property Rights
USPTO	United States Patent and Trademark Office
WIPO	World Intellectual Property Organization
WTO	World Trade Organisation

1 Introduction

1.1 Background

In the modern marketplace, branding serves as a crucial component of business strategy, with color playing a significant role in brand identity and consumer perception.¹ Among the various elements of brand identity, color trademarks have emerged as a distinctive and powerful tool. "Tiffany Blue," a unique shade associated with the luxury jewelry retailer Tiffany & Co., exemplifies the symbolic and commercial significance of color in branding. This iconic color has not only distinguished Tiffany & Co. from its competitors but also become an integral part of its brand equity.² However, the legal landscape surrounding the protection of color trademarks, such as "Tiffany Blue," varies significantly across different jurisdictions.

1.2 Purpose and research questions

This study aims to explore the symbolic significance of "Tiffany Blue" as a trademark color and compare the legal protections for color trademarks across different jurisdictions, including the United States, the European Union, and China. Through comparative analysis, we seek to gain a deeper understanding of how color trademarks are protected globally, as well as any differences and challenges that may arise. The primary research questions guiding this study are:

1. What challenges and controversies surround the legal protection of "Tiffany Blue" and other color trademarks?
2. What are the legal principles and standards governing the registration and protection of color trademarks in the United States, the European Union, and China?

1.3 Delimitations

The scope of this study has been carefully divided to ensure a targeted and comprehensive analysis of the legal protection of color trademarks, particularly "Tiffany Blue." This study will be limited to examining the legal frameworks and challenges related to color trademarks in three jurisdictions: the United States, the European Union, and China. These regions were chosen because of their unique legal approach, which has a significant impact on global trademark law.

¹ Maybray, B. (2023) Color psychology: How to use it in marketing and branding, The Hustle. Available at: <https://blog.hubspot.com/the-hustle/psychology-of-color#:~:text=Consumers%20attach%20feelings%20they%20have,initial%20impression%20comes%20from%20color> (Accessed: 24 May 2024).

² The color Tiffany Blue | adobe express. Available at: <https://www.adobe.com/express/colors/tiffany-blue> (Accessed: 23 May 2024).

While color trademarks can cover a variety of hues and backgrounds, this paper will focus primarily on "Tiffany Blue" as a case study. This particular focus allows for an in-depth exploration of the legal complexities and broader implications associated with color trademark protection. This study will exclude broader marketing and branding strategies and instead emphasize the legal principles, case law, and regulatory standards governing color trademarks in the chosen jurisdiction. By narrowing it down in this way, this study aims to provide a detailed insight into the legal challenges and potential solutions to protect color trademarks worldwide.

1.4 Method and materials

The methodology of this study involves a detailed comparative legal analysis of trademark laws and regulations related to color trademarks in the United States, the European Union, and China. This section outlines specific steps and materials for conducting this comprehensive study.

The first step in the approach is a thorough review of the relevant legislation in each jurisdiction. For the United States, key legislative documents include the Lanham Act and relevant guidance from the United States Patent and Trademark Office. In the EU, the focus is on the EU Trademark Regulations and Directives,³ as well as the guidance provided by the European Union Intellectual Property Office (EUIPO). For China, this study analyzes the Chinese Trademark Law and regulations enacted by the State Intellectual Property Office of China (CNIPA). This legislative review provides the foundational legal texts necessary to understand the legal standards and practices of each jurisdiction.

A key component of this study is an examination of landmark court cases that have shaped the legal landscape of color trademarks. These include the *Qualitex Co. v. Jacobson Products Co., Inc.*⁴ in the United States, the *Libertel*⁵ case in the European Union, and the famous Chinese court decision on color trademarks. These cases provide practical insights into how various jurisdictions interpret and enforce the law. In addition, the study takes into account important decisions by regional trademark offices, including those of the United States Patent and Trademark Office, the European Union Intellectual Property Office, and the State Intellectual Property Office of China, which highlight how color marks are evaluated and registered.

In addition, the study combines detailed case studies with a special emphasis on Tiffany's efforts to preserve "Tiffany Blue." This involves analyzing the legal battles Tiffany & Company has faced in various jurisdictions, the strategies employed to establish and maintain trademark protection, and the outcomes of these legal challenges. These case studies illustrate the practical application of legal principles and the challenges of obtaining color trademark protection.

³ EU Trade mark legal texts - EUIPO.

⁴ *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159 (1995): This case established that a color can be registered as a trademark if it has acquired secondary meaning.

⁵ *Libertel Groep BV v. Benelux-Merkenbureau*, Case C-104/01 (2003): This European Court of Justice case discussed the requirements for registering a single color as a trademark in the EU.

1.5 Outline

This paper aims at a comprehensive analysis of the legal protection of color trademarks, with a special focus on "Tiffany blue". The introduction lays the foundation by outlining the background, purpose and research questions, delimitations, and methods and materials of the research. Then, in the second chapter, the paper deeply discusses the significance of "Tiffany blue" as a brand color, and studies its historical background, consumer association and brand strategic use. The third chapter makes a comparative legal analysis, introducing in detail the principles of trademark law and the specific standards of color trademark registration and protection in the United States, the European Union and China. This chapter highlights the complexity and differences in the legal frameworks of these jurisdictions. In Chapter 4, a case study of the Tiffany Company is presented to illustrate the practical challenges and international perspectives of preserving "Tiffany Blue." This section delves into the legal battles Tiffany & Company has faced and the strategies it has employed. Chapter 5 discusses issues that have arisen in color trademark law, potential reforms, and future trends that may affect businesses and trademark owners. Finally, the conclusions summarize the findings and highlight the implications of the study for legal practitioners, businesses and policy makers involved in trademark protection. By following this structured approach, the paper aims to provide insights into the ongoing discussion of color trademarks and their legal protection.

2 Color as a Brand: The Symbolism of "Tiffany Blue"

2.1 Historical background and significance of "Tiffany Blue" in branding

"Tiffany Blue" has been the brand's identifying colour since 1845, and is the colloquial name for the light robin-egg blue associated with the company created by Charles Tiffany and John Young in 1837.⁶

The colour was chosen by Tiffany for the cover of their Blue Book, first published in 1845,⁷ which documented some of the world's most precious and rare stones — including diamonds obtained from French and Spanish aristocracy. Since then, Tiffany & Co. have used the colour extensively on promotional materials — including their now signature blue jewellery box.

Since 1998, Tiffany Blue® has been registered as a color trademark by Tiffany and, in 2001, was standardized as a custom color created by Pantone® exclusively for Tiffany and not publicly available. It is a private custom colour of Tiffany & Co. ⁸which bears the same number (1837) on the Pantone Matching System (PMS) of the year the company was founded. Also known as "1837 Blue", it is protected as a colour trademark by Tiffany & Co., and therefore not publicly available, which is why you can't find it printed in the Pantone Matching System swatch books. Tiffany & Co. wanted to ensure that no matter where it was in the world, and no matter what medium the colour was reproduced in, it would be instantly recognisable.^{9,10}

2.2 Consumers' cognitive and emotional associations with "Tiffany Blue" and the use of "Tiffany Blue" in brand strategy

In the RGB color space, HEX #0abab5, known as "Tiffany Blue," is composed of 3.9% red, 72.9% green, and 71% blue. In the CMYK color space, it comprises 94.6% cyan, 0% magenta, 2.7% yellow, and 27.1% black. Additionally, it has a hue angle of 178.3 degrees, a saturation of 89.8%, and a lightness of 38.4% .¹¹

⁶ "About Tiffany & Co.: Tiffany Blue". Tiffany & Co. Retrieved May 20, 2024.

⁷ "Tiffany's legacy (2020) Tiffany". Tiffany & Co. Retrieved May 20, 2024.

⁸ Pressman, Lauri (2016-02-19). "Crazy about Tiffany's: The story behind an iconic brand color". www.pantone.com. Pantone, LLC. Retrieved May 20, 2024. The custom color we created for Tiffany is called "1837 Blue". It was given this name as the year 1837 marks the founding of Tiffany.

⁹ "Trademarks and copyright". www.tiffany.com. Tiffany & Co. Retrieved May 20, 2024.

¹⁰ Klara, Robert (2014-09-22). "How Tiffany's iconic box became the world's most popular package". www.adweek.com. Adweek, LLC. Retrieved May 20, 2024.

¹¹ Everything about the color tiffany blue. Available at: <https://www.canva.com/colors/color-meanings/tiffany-blue/> Retrieved May 20, 2024.

Often mistaken for teal, Tiffany Blue is more green than blue, as indicated by the RGB readings.

Visual cues, especially colors, play a crucial role in brand communication, with around 80% of human experience being visual. The complexity and distinctiveness of Tiffany Blue have made it globally recognized as an iconic brand color. Laurie Pressman, Vice President of Pantone Color Institute, emphasizes that color commands attention and enables companies to establish a strong brand identity.¹² Thoughtful color choices are essential for broadcasting a company's image effectively.

Tiffany & Co. exemplifies how a color can evoke powerful emotions and create a mood that transcends the physical product. Color is deeply emotive, resonating with the spiritual aspects of the human psyche, creating timeless connections. The psychological impact of Tiffany Blue, which evokes tranquility, trust, and sophistication, has been leveraged by Tiffany & Co. to distinguish itself in the luxury market.¹³ From the iconic Tiffany Blue Box to advertising and store design, the color consistently creates an instantly recognizable brand aesthetic. This distinctive color does more than identify products as Tiffany & Co.; it conveys inherent brand-specific messaging and values such as quality craftsmanship, exclusivity, and elegance, which positively influence consumer purchasing decisions and enhance Tiffany & Co.'s pricing power.¹⁴

¹² Pressman, L. (2017) Color in the Digital World, LinkedIn. Retrieved May 20, 2024.

¹³ The color Tiffany Blue | adobe express. Available at: <https://www.adobe.com/express/colors/tiffany-blue>. Retrieved May 20, 2024.

¹⁴ Id.

3 Legal protection of color trademarks: comparative analysis

3.1 Overview of Trademark Law and Principles

According to the Court of Justice of the European Union (CJEU), a trademark is a distinctive sign that is the property of a company and whose function allows the consumer or end-user to identify products of other origin without confusion or confusion. It guarantees the identity of origin of products on the market by distinguishing them from services.¹⁵ Additionally, a trademark communicates to consumers that the source of all products or services carrying it can be traced back to the specific entity accountable for their quality. Indeed, a trade mark is one of the most valuable assets of every well known company.¹⁶

Due to this influence and the relentless market competition that tolerates no interruptions, traders must continuously engage in activities to compete for consumer preferences. Consequently, the concept of trademarks has expanded to encompass areas initially not covered, such as shapes, sounds, colors, holograms, and even smells and tastes. These types of trademarks are commonly referred to as non-traditional or unconventional trademarks. Technological advancements have enabled the effective use and protection of such trademarks, making the trademark registration and enforcement system more flexible.¹⁷

To date, the most successful non-traditional trademarks, in terms of the number of registered trademarks, are color trademarks where at least one color is used to uniquely identify the commercial origin of products or services.¹⁸ Recently, the use of colors as trademarks has become more prevalent in the marketplace. Traditionally, however, registering color trademarks was challenging because colors were not considered inherently distinctive as trademarks.

Despite the recognition of color trademarks in most countries, the graphical representation of such marks can pose challenges for trademark owners. Different countries have adopted various approaches to address this issue. Color trademarks can be classified into single-color trademarks and color combination trademarks. Article 15 of the TRIPS Agreement¹⁹ states that "any sign or combination of signs capable of distinguishing the goods or services of one enterprise from those of other enterprises shall constitute a trademark." This includes words, personal names, letters, numerals, elements of designs, combinations of colors, and any combination thereof. If a mark lacks inherent distinctiveness for the specified goods or services, registration may be conditioned on acquired distinctiveness

¹⁵ Case C-39/97 Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc., [1998] ECR I-05507, para. 28.

¹⁶ L. Bently, B. Shreman, Intellectual Property law, 2nd edition, Oxford, Oxford University Press, 2004, p. 694.

¹⁷ V.K. Ahuja, "Non-traditional trade marks: new dimension of trade marks law", E.I.P.R.(European Intellectual Property Review) 2010, 32(11), 575-581, 575.

¹⁸ OHIM, Statistics of Community Trade Marks on 03/04/2012, SSC009, at [p. 47].

¹⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 15.

through use. Additionally, members may require that marks be visually perceptible for registration.

The TRIPS Agreement mandates the protection of color combination marks as a minimum standard in member countries' trademark laws. Although Article 15 of the TRIPS Agreement does not explicitly mention single-color trademarks, it does not exclude them from protection. The provision ensures that any mark or combination of marks distinguishing the goods and services of one enterprise from those of others may qualify as a trademark, thereby implicitly allowing for the protection of single-color trademarks.

In conclusion, while the protection of color trademarks is broadly supported under international frameworks such as the TRIPS Agreement, the specific requirements and challenges associated with registering these trademarks can vary significantly across different jurisdictions.

3.2 The Legal and Artistic Implications of Color Trademarks

In April 2016, British artist Stuart Semple²⁰ initiated the 'FreeTiffany' campaign on social media, igniting a debate by challenging Tiffany & Co.'s perceived monopoly over their signature color. Semple recreated a "stunning ultra-flat matte premium" blue pigment, naming it 'TIFF BLUE.' He markets this robin's egg blue hue as his version of 'Tiffany Blue' for \$29.99²¹ a bottle on his website, making it available to artists and color enthusiasts.

This raises the question: Can commercial companies and individual artists truly 'own' a color? Many people wonder if Tiffany & Co.'s trademark on Tiffany Blue genuinely restricts its use by others. If companies can trademark specific colors, what does that mean for our everyday use of these colors?

The concept of legally protecting a single color is not new. 'International Klein Blue' (IKB), known for its deep, pure hue, was developed by French artist Yves Klein and art supplier Edward Adam.²² First exhibited in Milan in 1960, this color is created using ultramarine powder mixed with the synthetic resin Rhodopas M60A, ensuring its saturation and purity over time. Klein patented the technique for producing Klein Blue, protecting the process rather than the color itself.²³ This allowed other artists and pigment manufacturers to replicate similar colors without infringing on Klein's rights. Today, Klein Blue remains a staple in interior design, home decor, and fashion.

Stuart Semple's challenge to color monopolies is not an isolated case. In 2014, Surrey NanoSystems developed a super-black paint, Vantablack, which absorbs

²⁰ Beach, C. (2021) Robin Hood of the rainbow, Stuart Semple, liberates Tiffany Blue, PRINT Magazine. Available at: <https://www.printmag.com/color-design/stuart-semple-liberates-tiffany-blue/>. Retrieved May 20, 2024.

²¹ TIFF blue, super matte acrylic, 5.1 fl oz (150ML) Culture Hustle USA. Available at: <https://www.culturehustleusa.com/products/tiff-blue>. Retrieved May 20, 2024.

²² Christa Haiml (2007). "Restoring the Immaterial: Study and Treatment of Yves Klein's Blue Monochrome (IKB42)". In Learner, Tom (ed.). *Modern Paints Uncovered: Proceedings from the Modern Paints Uncovered Symposium*. Getty Conservation Institute. Los Angeles: Getty Publications. ISBN 9780892369065.

²³ Denys Riout, Yves Klein: L'aventure monochrome (Paris: Gallimard, 2006), pp. 36–37.

99.965% of visible light. In 2016, British sculptor Anish Kapoor secured exclusive rights to use Vantablack in art, creating works that garnered global attention. This exclusivity sparked criticism from other artists, including Semple, who viewed Kapoor's control over the material as contrary to artistic openness.²⁴

However, Kapoor's rights pertain to the use of Vantablack paint, not ownership of the color itself. In response, Semple and his team developed 'Better Black,' a matte black pigment with low light reflection, as a more accessible alternative to Vantablack.²⁵ Subsequent iterations, including BLINK 2.0, 3.0, and BLINK Dark Ink,²⁶ have come close to replicating the visual effect of Vantablack, demonstrating that innovation can challenge perceived monopolies.

These cases illustrate that while color trademarks can grant exclusive rights within specific contexts, they do not prevent others from creating similar colors through different methods or for different purposes. The legal status of color trademarks continues to evolve, balancing the interests of trademark holders with broader creative freedoms.

It's crucial to understand that color trademarks apply to specific contexts. Tiffany & Co. holds the trademark for "Tiffany Blue" in contexts where it could be confused with their products, specifically for their boxes and bags. Painting a house this color, for example, would not infringe on their trademark. The trademark allows the company to use a particular combination and shade of color within its industry, without claiming ownership of the color itself.

3.3 Legal criteria for registering color trademarks in the US, EU, and China

In daily life, many times 'colour' is 'brand', when we see a robin's egg blue small square box, we will rightly think that it is packaged with Tiffany & Co. jewellery; when we see purple packaged chocolate on the shelves in the United States, people will know that it is the best-selling brand 'Cadbury' chocolate candy; and in the Chinese supermarket, when we see red packaged canned herbal tea, we will subconsciously think of 'Gadobao'.

The history of color trademarks is extensive, with the US recognizing single-color trademarks as early as the 1980s.²⁷ The European Union followed suit with the Trademarks Directive in 1988,²⁸ while China incorporated color trademark protection in its 2001 Trademark Law reform.²⁹ Initially, the relevant authorities

²⁴ Corvette, M.N.A. (2016) Consuming colour: A critical theory of colour concerning the legality and implications of colour in public space, *Consuming Colour: A Critical Theory of Colour Concerning the Legality and Implications of Colour in Public Space - Goldsmiths*. Available at: <https://research.gold.ac.uk/id/eprint/18804/>. Retrieved May 20, 2024.

²⁵ Cascone, S. (2023) Anish Kapoor owns the rights to the blackest color ever made. now another artist is making his own-and it's even Blacker, *Artnet News*. Available at: <https://news.artnet.com/art-world/stuart-semple-blackest-black-anish-kapoor-1452259>. Retrieved May 20, 2024.

²⁶ Id.

²⁷ *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116 (Fed. Cir. 1985).

²⁸ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

²⁹ Trademark Law of the People's Republic of China (2001 Amendment) [Revised], Article 8.

were reluctant to allow registration of colour marks mostly for reasons of certainty. As registration journals were printed in black and white, there was no technology to enable colour marks to be reprinted³⁰ and described appropriately. Nowadays, technology has made it possible to represent the most sophisticated shades of any colour; moreover, each shade is provided with its own unique code in order to minimise the risk of confusion. Despite these developments, the legal frameworks and criteria for color trademarks vary significantly across these regions.

3.3.1 United States

The legal history of colour trademarks in the United States is fraught with tension between recognising investments in brand protection and safeguarding a competitive environment that protects market entrants and customers. Unlike patents, which bestow on inventors a time-limited monopoly, trademarks can be perpetually renewed.³¹ Where it would be appropriate that a patent owner hold a competitive functional advantage over industry rivals, such an advantage in a trademark would – by virtue of its perpetuity – severely constrain the market for relevant goods. Fear over the monopolisation of colours has led to a lengthy development of colour trademark doctrine.

Before the 1946 passage of the Lanham Act, which codified federal trademark law, US courts generally upheld the notion that colours were ineligible for trademark protection. Precedent for this view was routinely traced to the Supreme Court’s opinion in *Leschen & Sons Rope Co v Broderick & Bascom Rope Co*: “Whether mere color can constitute a valid trade-mark may admit of doubt. Doubtless

it may, if it be impressed in a particular design, as a circle, square, triangle, a cross, or a star. But the authorities do not go farther than this”.³²

There were exceptions to this pre-Lanham general rule, notably among them the Sixth Circuit’s extension of protection to the yellow colour scheme for taxicabs by virtue of the colour’s secondary meaning in that context.³³ However, for the most part, *Leschen* stood for the rejection of colour trademarks.

The Lanham Act widened the passageway for colour trademark protection by stating that “No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature”.³⁴ Nevertheless, the Lanham Act’s impact

was not immediately felt and US courts were reticent to extend protection to colours. The Second Circuit, for example, expressed in 1949 the traditional worry

³⁰ Bently and Shreman, supra note 3, p. 771.

³¹ Kappos, D.J. and Völker, S. (2014) Colour marks in the United States and the European Union: history, landmarks and evolution, World trademark review. Available at: <https://www.worldtrademarkreview.com/article/1859586E19E2F704FC8A9E7690D7D639DD361D74/download>. Retrieved May 20, 2024.

³² 201 US 166, 171 (1906).

³³ *Yellow Cab Transit Co v Louisville Taxicab & Transfer Co*, 147 F 2d 407 (6th Cir 1945).

³⁴ 15 USC §1052.

in that allowing one company to “monopolize red in all of its shades” would hinder competition in the soup industry.³⁵

In the United States, the protection of single colors as trademarks began to gain recognition in the 1980s.³⁶ In the United States, color marks can be registered and protected under the Lanham Act if it meets two key criteria:

1. Non-functionality: The color must not serve a functional purpose. For example, orange and yellow for safety equipment or green for apple-flavored candy are considered functional and cannot be trademarked. This principle ensures that competitors are not disadvantaged by being unable to use necessary colors for functional purposes.

For example, in 1999, Wrigley's application to register its light green colour for chewing gum was rejected³⁷ on the grounds that it was not sufficiently ‘distinctive and unusual’, that it was environmentally and ecologically friendly, and that other manufacturers of similarly flavoured chewing gums, such as apple, lemon and mint, would need to express their tastes in this colour. The colour is also used by other manufacturers of apple, lemon and mint flavoured gums to express their tastes.

It is important to note that if a brand's representative colour is a functional single colour, it can apply for trade mark protection by means of a ‘colour combination’, e.g. ‘John Deere green and yellow’, but the brand cannot register a trade mark for green alone, as green is a symbol of vegetation - grass. The brand cannot trademark the colour green alone, as green symbolises vegetation - grass, fields, farmland, crops, etc. - and is a functional colour. By adding yellow, however, John Deere can prevent any competing brand from using both shades on competing equipment.³⁸ John Deere produces a tractor product whose signature colour is green + yellow.

2. Secondary Meaning: The color must have acquired distinctiveness, meaning that the public associates the color with a particular brand or source. This was solidified in the landmark Supreme Court case, *Qualitex Co. v. Jacobson Products Co., Inc.* (1995),³⁹ where the Court ruled that the green-gold color of dry cleaning press pads could be trademarked because it identified the product's source without serving any other function.

For instance, United Parcel Service (UPS) has trademarked the distinctive brown hue of its trucks and uniforms since 1998;⁴⁰ Fiskars, the famous Finnish brand of gardening tools and scissors, has pumpkin orange-handled scissors as one of its best-known and best-selling products, and the colour Fiskars Orange™ was

³⁵ *Campbell Soup Co v Armour & Co*, 175 F 2d 795 (2d Cir 1949).

³⁶ Carraway, J.C. (1994) ‘Color as a trademark under the Lanham Act: Confusion in the circuits and the need for uniformity’, *Law and Contemporary Problems*, 57(4), p. 243. doi:10.2307/1192064.

³⁷ Trade Mark Application Decision (0/282/02).

³⁸ *Deere & Co. v. Fimco Inc.*, W.D. Ky., No. 15-105 (10/13/17).

³⁹ *Qualitex Co. v. Jacobson Products Co., Inc.* (1995).

⁴⁰ Bartow, A. (2008) The true colors of trademark law: Greenlighting a Red Tide of Anti Competition Blues, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314951. Retrieved May 20, 2024.

introduced in Finland in 2003. ‘The colour Fiskars Orange™ was officially registered as a trademark in Finland in 2003 and in the USA in 2007.’⁴¹

The most iconic colour, Tiffany Blue, is trademarked for jewellery, perfumes, leather goods, luxury boxes, handbags and catalogue covers. That is to say, when artists use Tiffany blue for creative work, or furniture, automobile, restaurant, digital and other industry manufacturers use Tiffany blue as their product decoration colour, does not constitute trademark infringement. It is worth mentioning that the car brand NISSAN once launched a new car in Tiffany blue, but Tiffany did not sue for infringement at that time. The boundary of color as a trademark is that it can only protect the same or similar goods and services.

3.3.2 European Union

Until the early 1990s, it was generally not possible to register colors as trademarks in most European countries. In Germany, for example, colors received protection only in exceptional circumstances, either as trade dress under trademark law (requiring the color to have achieved significant public recognition) or under unfair competition law.⁴²

The European Union initiated modernization 36 years ago with the first Trademark Harmonisation Directive.⁴³ This directive significantly broadened the definition of what constitutes a trademark, encompassing “any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, and the shape of goods or their packaging”.⁴⁴

Subsequently, national trademark laws of EU member states were reformed accordingly. For instance, the new German Trademark Act of 1995 expanded the directive’s definition of protectable trademarks to explicitly include colors and color combinations: “All signs, particularly words, including personal names, depictions, letters, numerals, sound marks, three-dimensional designs including the shape of goods or their packaging, as well as other get-up elements including colors and color combinations, may be protected as trademarks if they are capable of distinguishing the goods or services of one enterprise from those of other enterprises”.⁴⁵

In 1996, the Community trademark (CTM) was introduced, offering protection across all member states with a definition of permissible trademark forms as broad as that of the directive.⁴⁶ However, during the initial years following the introduction of this modern legal framework, trademark authorities and courts in

⁴¹ 1967 - Fiskars manufactures the world’s first plastic-handled scissors (no date) Fiskars. Available at: <https://www.fiskars.com/en-gb/about-us/our-heritage#:~:text=An%20internal%20vote%20was%20taken.and%20in%20the%20US%202007>. Retrieved May 20, 2024.

⁴² Kappos, D.J. and Völker, S. (2014) Colour marks in the United States and the European Union: history, landmarks and evolution, World trademark review. Available at: <https://www.worldtrademarkreview.com/article/1859586E19E2F704FC8A9E7690D7D639DD361D74/download>. Retrieved May 20, 2024.

⁴³ 9/104/EEC, later replaced by Directive 2008/95/EC.

⁴⁴ 9/104/EEC, later replaced by Directive 2008/95/EC, Article 2.

⁴⁵ German Trademark Act of 1995, Section 3.

⁴⁶ see Section 4 of the CTM Regulation.

member states struggled to establish consistent principles for determining the protectability of colors as trademarks. For example, the German Patent and Trademark Office initially refused to register abstract colors, arguing that submitting a color sample or specifying a color code number was merely descriptive and did not constitute a reproduction of the mark. In its first ruling on a color trademark application, the German Federal Patent Court denied registration due to insufficient definition of the subject matter.⁴⁷

The registration of color trademarks faces challenges due to the requirements for graphical representation and distinctiveness. In *Libertel Groep BV v. Benelux Merkenbureau* (2003),⁴⁸ the Court of Justice of the European Union clarified that color trademarks must be represented graphically and possess distinctive character. This decision highlighted the difficulties in proving distinctiveness for color trademarks. An example is Nivea's parent company, Beiersdorf AG, which faced a prolonged legal battle to trademark a dark blue color. It has been the subject of several years of litigation between Dove and Nivea in 2013⁴⁹ for the purpose of trademarking the dark blue colour of their own brand portfolios. According to a market survey released by Nivea's parent company, Beiersdorf AG, only 57.9% of the German consumers surveyed associated the dark blue colour with Nivea, which did not meet the 75% required by the German Federal Court of Justice, and the German Federal Patent Court therefore rejected Nivea's application for registration of the trademark for the dark blue colour. In 2015, the Federal Supreme Court lowered the percentage to 50 per cent, with Beiersdorf board member Ralph Gusko saying in a statement: 'For a long time now, consumers around the world have associated the dark blue colour with Nivea due to the extensive use of the Nivea basket in the brand's portfolio. For this reason, we will do everything in our power to protect this colour and other brand design rights.' At this point, 'Nivea Blue' was officially registered. The case exemplifies the stringent requirements and the necessity for a strong association between the color and the brand in the minds of consumers.

3.3.3 China

In China, the reform of the Trademark Law in 2001 introduced protection for color trademarks, which was further confirmed by the 2014 amendment.⁵⁰ The Legal Committee of the National People's Congress, after study, concluded that, in practice, there is no demand for Chinese enterprises to register a single colour as a commodity, and there is a lack of corresponding practice in the registration and management of trademarks, so that it may be left out of the law for the time being. Accordingly, the provision of the original draft that a single colour can be registered as a trademark was deleted.

China's current Trademark Law, a single colour is not explicitly listed as a registered trademark, but in practice there are examples of single-colour

⁴⁷ *Libertel Groep BV v. Benelux Merkenbureau* (2003).

⁴⁸ *Id.*

⁴⁹ German Federal Supreme Court, is I ZB 65/13.

⁵⁰ China's new trademark law WIPO. Available at: https://www.wipo.int/wipo_magazine/en/2014/05/article_0009.html. Retrieved May 20, 2024.

trademarks that have been successfully applied for registration. China's Trademark Office has accepted some single-colour trademark cross-border registration applications. For example, the British Cadbury Company filed an application for registration of a single-colour trademark in July 2003,⁵¹ in which it declared that 'the application mark is a colour trademark and consists of a single purple colour'. The applicant submitted to the Trademark Office evidence that the trademark had gained distinctiveness through long-term use. In the process of substantive examination, the Trademark Office considered that the evidence provided by the applicant was sufficient to prove that the trademark had gained distinctiveness, and granted preliminary examination and publication.

However, in general, it is very difficult to register a single colour as a trademark in China, and most of the applications for registration of single-colour trademarks have been rejected. However, according to the Anti-Unfair Competition Law,⁵² the design of the product or its packaging can be protected as 'special decorations', which includes the protection of a single colour.

At the same time, there are precedents in China where courts have supported applications for the extension of protection in Chinese territory of single-colour trademarks that have been successfully registered abroad, in accordance with the Madrid Agreement Concerning the International Registration of Marks.

In 1992, the famous French shoe designer Christian Louboutin through the assistant's red nail polish for inspiration, creative use of red to the bottom of the high heels, designed the first pair of red-soled high heels.⁵³ Once the red soled heels were launched, it led to a fashion trend, and Christian Louboutin also registered the trademark of 'red soles' in many countries.

In April 2010, Christian Louboutin filed an application for territorial extension of the protection of the trademark 'Red Sole' in China with the Trademark Office of China,⁵⁴ and the description of the trademark states that 'the trademark consists of the red colour used for the soles of the shoes as shown in the drawing (Pantone No. 18.1663TP) (the shape of the heels does not form part of the trademark, but is only used to indicate the position of the trademark)'. (the shape of the high heel is not part of the mark, but is only used to indicate the position of the mark), and is designated for use in Class 25: Women's high-heeled shoes.

In this case, the original Trademark Office rejected the application for international registration on the ground that the applied-for mark lacked distinctiveness. The 'red sole' mark then went through the review, first, second and reexamination by the original TRAB. Among other things, the original TRAB found that the applied-for

⁵¹ Cadbury Ltd. filed an application for registration of a single-color trademark in July 2003, which declared that 'the application mark is a color trademark and consists of a single purple color' (International Registration No. 3636258).

⁵² See Chapter 5 of the Anti-Unfair Competition Law.

⁵³ The iconic Red Soles - Christian louboutin United States (no date) The iconic red soles - Christian Louboutin United States. Available at: https://us.christianlouboutin.com/us_en/red-sole. Retrieved May 20, 2024.

⁵⁴ Xu, J. and Liu, X. 'The Trademark Law Enumerates Elements Without Restricting the Types of Trademarks That Can Be Registered' - Christian Louboutin v. State Administration for Industry and Commerce Trademark Review and Adjudication Board, Trademark Rejection Review Administrative Litigation Case. Available at: <https://www.kwm.com/cn/zh/insights/latest-thinking/types-of-registrable-trademarks-are-not-limited-to-elements-enum.html>. Retrieved May 20, 2024.

mark consisted of a common high-heeled shoe graphic and a single colour designated as the sole of the shoe. The Beijing Intellectual Property Court found the applied-for mark to be a three-dimensional sign indicating the shape of the high-heeled shoe goods themselves, with a partial part filled in red. The Beijing Municipal Higher People's Court issued a judgment of the second instance, finding that the applied-for mark consisted of the colour red in the designated place of use, and that it was a single-colour mark with a limited place of use. The Supreme People's Court also held that the applied-for mark was a single-colour mark with a limited position.⁵⁵

The decision of the Supreme People's Court is of great significance to CL and the development of China's trademark law, which not only means that 'high heels with red soles' can finally be protected by exclusive intellectual property rights in China, but also means that for the first time, China has judicially protected a single colour with a limited position of the goods, and that 'positional trademarks' can be protected by the trademark law. A 'position mark' can be protected by trademark law, and a 'single colour' may also be protected by trademark law under certain conditions.

China's trademark law recognises and protects 'colour combination trademarks' consisting of two or more colours. According to Article 8 of the newly amended Trademark Law in April 2019, 'Any sign that can distinguish the goods of a natural person, legal person or other organisation from those of others, including words, graphics, letters, numbers, three-dimensional signs, colour combinations and sounds, as well as combinations of the above elements, may be applied for registration as a trademark. 'Colour combination trademarks, as an important part of non-traditional trademarks, can be protected by trademark law as long as they meet the characteristics of distinctiveness, legality and precedence.

In view of the fact that the current Chinese Trademark Law does not explicitly classify a single colour as a registrable trademark, if a market entity needs to register a single colour, it is recommended to make an international registration and then apply for a territorial extension of protection in China, as in the case of the trademark for the sole of a red shoe. Internationally registered trademarks are not subject to formal examination in China, only substantive examination. The substance of the examination is basically the same as that of the colour combination mark. On the other hand, the confirmation of a colour combination trademark filed in China has to go through formal examination and substantive examination. It is only after the examination is passed that it can be published in the first instance.

(I) Formal Examination of Color Combination Trademarks

The China National Intellectual Property Administration (CNIPA) conducts a formal examination of trademark applications. If the formalities are not met, it will affect the registration of the trademark. Therefore, when submitting trademark application documents, attention must be paid to meeting the formal requirements.

⁵⁵ Id.

The formal requirements for the application of color combination trademarks are detailed in the "Trademark Law Implementing Regulations" and the December 2016 version of the "Trademark Examination and Trial Standards."⁵⁶⁵⁷⁵⁸

(II) Substantive Examination of Color Trademarks

Similar to other trademarks, the substantive examination of color trademarks includes both absolute grounds examination and relative grounds examination. Absolute grounds examination is based on Articles 10 and 11 of the Trademark Law, which pertain to signs that cannot be used or registered as trademarks. Relative grounds examination is based on Articles 30 and 31, which prohibit trademarks that are identical or similar to prior registered, preliminarily approved, or earlier applied trademarks.⁵⁹⁶⁰

The December 2016 version of the "Trademark Examination and Trial Standards" states that, generally, color combination trademarks need long-term use to acquire distinctiveness. The Trademark Office may issue an examination opinion requiring the applicant to submit evidence of use and explain how the trademark has acquired distinctiveness through use. This implies that if the applicant cannot provide sufficient evidence of acquired distinctiveness, the registration of the color trademark may be rejected. For example, the registration application for the color trademark No. 4496717 was rejected by the Trademark Office due to lack of distinctiveness. After a review of the rejection, the applicant submitted substantial evidence proving that the trademark had acquired distinctiveness through use, and the trademark was then registered.⁶¹ Similarly, the color trademark No. 11915216 provided sufficient evidence of use and acquired distinctiveness during the application process, leading to its registration.⁶²

Recent judicial precedents show that if the submitted evidence is insufficient to prove that the color trademark has acquired distinctiveness, courts will not support the registration application. However, if the evidence is sufficient, the courts will support the registration. In the case (2017) Jing 73 Xing Chu 6150, the Beijing Intellectual Property Court stated that although more enterprises in modern commercial transactions are adopting color combinations as a means to distinguish goods or services, and color combinations are gradually becoming an important identification method for consumers, Chinese consumers are still not accustomed to recognizing color combinations directly as trademarks for distinguishing the source of goods or services. Therefore, the contested trademark (No. 17165071) itself lacked inherent distinctiveness. Nevertheless, the applicant submitted substantial evidence proving that the trademark had acquired distinctiveness through long-term and extensive use. This highlights the critical importance of

⁵⁶ "Trademark Law Implementing Regulations," China National Intellectual Property Administration.

⁵⁷ "Trademark Examination and Trial Standards," December 2016, China National Intellectual Property Administration.

⁵⁸ See Beijing Intellectual Property Court Administrative Judgment (2015) Jing Zhi Xing Chu Zi No. 1638.

⁵⁹ Dong Huijuan, Wu Jiaxin. "The Future of Position Trademarks in China: Insights from the 'Red Sole' Case" [J]. *China Invention and Patent*, 2019, 16(06): 26-27.

⁶⁰ Hu Xiaowei. "Study on the Registration Issues of Single Color Trademarks" [D]. North China University of Technology, 2019: 5.

⁶¹ See the civil judgment of Beijing High People's Court (2014) Gao Min Zhong Zi No. 382.

⁶² See the civil judgment of Beijing Intellectual Property Court (2019) Jing 73 Min Zhong No. 2736.

collecting and securing evidence to demonstrate the acquired distinctiveness of color trademarks.

While all three jurisdictions—U.S., EU, and China—acknowledge the possibility of color trademarks, their approaches to distinctiveness and registration requirements vary. The U.S. always requires proof of secondary meaning, the EU allows for inherent distinctiveness in rare cases but generally requires acquired distinctiveness, and China, similar to the EU, emphasizes acquired distinctiveness but does not exclude the possibility of inherent distinctiveness. In terms of graphical representation, the U.S. requires a clear description and color drawing without mandatory color codes, while the EU requires precise color codes for clarity and legal certainty, and China requires clear representation and adherence to non-functionality criteria. Despite these differences, all three regions agree that a color mark must not be functional, ensuring it does not provide a utilitarian advantage. These differences highlight the varying emphasis on consumer perception and legal formalities in the registration process, illustrating distinct legal landscapes that brand owners must navigate to secure color trademark protection.

3.4 Enforcement of Color Trade marks in Different Jurisdictions

3.4.1 United States

In the United States, the protection and enforcement of color trademarks are guided by the principles set forth in the Lanham Act. To register a color mark, the applicant must prove that the color has acquired a distinctive (second meaning) and can be used as a source identifier. The case *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159 (1995)⁶³ established that a single color can be registered as a trademark if it meets these criteria.

Color marks need to prove that they have a "second meaning." In addition to the above criteria that apply to all trademarks, colors can only be registered as trademarks with specific goods or services if they have a "second meaning," like "descriptive only" trademarks (which are not "inherently unique" and therefore do not qualify for immediate trademark protection). That is, if a color has been applied to a particular good or service over time and the public has associated that color with a particular source, then the color can be registered as a trademark along with that particular good or service.

General Mills recently received trademark protection for the yellow color of its Cheerios boxes,⁶⁴ a color the company has used since 1945. It can be difficult to determine secondary meaning when certain colors or color combinations are already in widespread use for a particular type of goods or services, or for specific elements therein. On the other hand, secondary meaning is more likely to be

⁶³ 514 U.S. 159 (1995)

⁶⁴ Bleeker, G.W. (2017) Can you trademark the color yellow for Cheerios? - IP blog, RSS. Available at: <https://www.lewisroca.com/blog/Can-You-Trademark-the-Color-Yellow-for-Cheerios-IP-Blog>. Retrieved May 20, 2024.

indicated when a color is not already in widespread use for certain goods or services in a particular market, or when the applicant's use of a particular color or color combination is unusual or complex, such as a box organizer with blue and yellow stripes.

In general, the second meaning is best represented in a large number of advertising campaigns involving color trademarks, as well as in consumer surveys that reflect highly relevant consumers associating a particular color or combination (associated with a certain good or service) with the applicant.

As with all trademarks, a color mark cannot be granted trademark protection if it has a utilitarian function, no matter how unique its use of color is or how many secondary meanings it has. The Supreme Court has said that if a mark is essential to a good or service or affects its cost or quality, the mark is functional and therefore cannot be granted trademark protection. Lower courts have refined tests to ask more broadly whether depriving competitors of the ability to use the feature puts them at a competitive disadvantage. In particular, for color marks, trademark protection may be denied if the color indicates a characteristic of the good or service, such as its size, strength or capacity.⁶⁵

3.4.2 European Union

The difficulty of registering a color as a trademark within the EU originates from the 2003 *Libertel* decision by the Court of Justice of the European Union (CJEU),⁶⁶ which has consistently maintained strict standards for color trademark registrations. The *Libertel* ruling established that the average consumer typically cannot recognize the source of a product or service by color alone.

Consequently, brands must satisfy stringent conditions to register a color as a trademark. These conditions include the use of an internationally recognized identification code, such as Pantone, Rex, or Hal. Applicants are also required to present substantial evidence demonstrating that the color mark is sufficiently distinctive or striking in relation to the specific goods or services, as outlined in the EUIPO's Guidelines for Examination,⁶⁷ Part B, Section 4, Chapter 3. Furthermore, the CJEU mandates that applicants provide proof of acquired distinctiveness through the use of the mark.

This evaluation of distinctiveness must consider the mark's overall context, including factors like market share, geographic reach, intensity and duration of use, and advertising investment. This requirement restricts color mark applications to those already recognized in the market and enjoying a reputation as a trademark among the relevant public throughout Europe.

⁶⁵ Michael Bernet is an attorney with Brutzkus Gubner Rozansky Seror Weber LLP. He handles complex intellectual property and general civil litigation matters on behalf of both plaintiffs and defendants. (2018) Can you trademark a color? - ipwatchdog.com: Patents & Intellectual Property Law, IPWatchdog.com | Patents & Intellectual Property Law. Available at: <https://ipwatchdog.com/2018/07/14/can-you-trademark-a-color/id=99237/>. Retrieved May 20, 2024.

⁶⁶ JUDGMENT OF THE COURT 6 May 2003 CURIA. Available at: <https://curia.europa.eu/juris/document/document.jsf?docid=48237&doclang=EN>. Retrieved May 20, 2024.

⁶⁷ 2.4 Colour marks EUIPO guidelines. Available at: <https://guidelines.euipo.europa.eu/1803468/1785598/trademark-guidelines/2-4-colour-marks>. Retrieved May 20, 2024.

For instance, Veuve Clicquot successfully registered its distinctive orange color due to its significant market share across EU member states and extensive advertising and media coverage explicitly linking the color to its Champagne.⁶⁸ In contrast, the state-owned public transport operator RATP was denied registration of its historic jade green, as the mark was only used in France and lacked EU-wide recognition.⁶⁹

The EUIPO maintains similarly strict standards for color combinations, requiring precise specifications of the position and proportion of the colors in a systematic arrangement. Applications that merely list two or more colors without specifying their arrangement are likely to be rejected, as seen in the case of Red Bull. Applicants must clearly describe how the color combination will be used on the goods or services.

At the national level within the EU, registration requirements remain rigorous, with national courts adhering to EU guidelines. However, for acquired distinctiveness, national applications need only demonstrate recognition within the relevant territory, making it somewhat easier to register a color mark nationally. For example, in France, the Lyon Court of Appeal approved the registration of AS Clermont Auvergne rugby club's blue and yellow color combination.⁷⁰ The court limited its assessment to the recognition of the colors by rugby supporters, indicating a more flexible approach by French courts.

3.4.3 China

In China, safeguarding the rights foundation is paramount for the protection of color trademarks. Without a solid rights foundation, color trademarks may risk being declared invalid in response to invalidation claims raised by infringers due to unstable rights foundation. The primary grounds for invalidation claims against color trademarks typically revolve around a lack of distinctiveness. Therefore, to fortify the trademark rights of color trademarks, the collection and preservation of usage evidence are critical. It is evident that the collection of usage evidence for color trademarks should be a concern from the moment the applicant intends to apply for a color trademark. Moreover, the evidence requires continual updating to address scrutiny from trademark authorities, challenges of invalidation by others, and to demonstrate the stability of rights foundation in enforcement actions.

Based on an analysis of existing precedents, it is suggested that the collection of usage evidence should focus primarily on five aspects: operational sales evidence, advertising promotional evidence, records of awards, protected records, and certifications or reports issued by third-party organizations. These evidence categories should demonstrate that the color trademark has been extensively and widely used in China over an extended period, enabling consumers to identify it as a source indicator for goods. Thus, meeting the requirements of Article 11(2) of the Trademark Law, it should be protected. The evidence is categorized as follows:

⁶⁸ EUIPO cancellation 12033, November 2018.

⁶⁹ EUIPO rejection 009766312, November 2011

⁷⁰ May 2018, No. 16/04791: JurisData No. 2018-012623.

A. Operational Sales Evidence

1. Operational status, profit situation, tax contributions, market share, etc., of the trademark.
2. Financial statements and audit reports or certificates in China.
3. Product manuals and images using the color trademark.
4. Lists and photos of stores selling products with the color trademark.
5. Directories of dealers, franchisees, or partners.
6. Sales contracts, invoices, sales documents, and sales amounts and scales for products with the color trademark.

B. Advertising Promotional Evidence

1. Contracts, invoices, and documentation of advertising content, time span, amount spent, and geographical coverage for products with the color trademark.
2. Reports from industry magazines, journals, newspapers, or online sources.
3. Exhibition agreements, contracts, photos, invoices, etc., for products with the color trademark.

C. Records of Awards

1. Honors and awards, including records of awards, received by the color trademark.

D. Protected Records

1. Favorable court rulings, administrative penalties, arbitration decisions, etc., involving the color trademark.

E. Certifications or Reports Issued by Third-Party Organizations

1. Declarations issued by industry associations.
2. Rankings of the color trademark's recognition based on statistical data within the industry issued by research companies.
3. Reports from market research companies showing whether consumers can establish a relationship between products with the color trademark and their source, as well as the level of brand recognition by consumers.⁷¹

With a solid rights foundation in place, rights holders are entitled to enforce against acts that infringe their color trademark rights in the market. Unauthorized use of a trademark identical or similar to the registered trademark on identical or similar

⁷¹ Evidence analysis and summary drawn from the administrative judgment of Beijing Intellectual Property Court (2017) Jing 73 Xing Chu 6150, the civil judgment of Beijing Intellectual Property Court (2019) Jing 73 Min Zhong 2736, the civil judgment of Guangzhou Intellectual Property Court (2017) Yue 73 Min Zhong 258, and the civil judgment of Beijing High People's Court (2014) Gao Min Zhong Zi No. 382.

goods without the trademark owner's permission constitutes infringement of the exclusive rights to a registered trademark.

In determining whether a color combination trademark and the accused infringing trademark constitute identical or similar trademarks, the general attention of consumers should be the standard. Observation should focus on aspects such as the use of color combinations, arrangement methods, color differences, and overall visual effects. If the use on identical or similar goods is likely to cause confusion among relevant consumers about the source of the goods or services, it should be determined as identical or similar trademarks.⁷² Even if the accused infringer indicates their own textual trademark on the accused infringing goods, as long as the color mark used is identical or similar to the color trademark of the trademark owner, and its use on identical or similar goods easily confuses consumers, leading relevant consumers to mistakenly believe that the provider of the accused infringing goods has a specific connection with the color trademark owner in terms of operation, organization, or law, trademark infringement is established.⁷³

As a non-traditional trademark, color trademarks in China have been legislatively protected for less than twenty years, facing challenges in rights confirmation and enforcement not commonly encountered by traditional trademarks, particularly regarding the issue of distinctiveness. Each color trademark undergoes a rigorous examination during the application process by the trademark registration authority to ascertain its distinctiveness. Both the trademark registration authority and the courts generally consider that color trademarks themselves do not possess distinctiveness and must acquire distinctiveness through use to be registered. Even if registered after examination, color trademarks face invalidation claims raised by others on the grounds of lacking distinctiveness. In the enforcement process, the competent authorities also need to confirm that the color trademark has distinctiveness before taking enforcement measures. The acquisition of distinctiveness requires extensive and long-term usage evidence for proof. Given these circumstances, it is essential to periodically preserve and fix the usage evidence of color trademarks to enable them to be registered smoothly and alleviate concerns about their commercial value in enforcement.

Although the United States, European Union, and China all recognize color trademarks, their approaches to distinctiveness and registration requirements differ considerably. In the United States, it is necessary to prove secondary meaning, indicating that the color has become distinctive through its use in the marketplace. The U.S. also requires a clear description and a color drawing, but does not insist on specific color codes. In contrast, the European Union, while occasionally accepting inherent distinctiveness, generally demands evidence of acquired distinctiveness. The EU also requires precise color codes for clarity and legal certainty. China, on the other hand, focuses on acquired distinctiveness but does not completely rule out inherent distinctiveness, although the evidentiary standards are usually stricter. Like the other jurisdictions, China demands clear representation

⁷² See the civil judgment of Beijing No. 2 Intermediate People's Court (2013) Er Zhong Min Chu Zi No. 10668.

⁷³ See the infringement analysis section in the civil judgment of Beijing Dongcheng District People's Court (2017) Jing 0101 Min Chu No. 20603, the civil judgment of Beijing Intellectual Property Court (2019) Jing 73 Min Zhong No. 2736, and the civil judgment of Beijing High People's Court (2014) Gao Min Zhong Zi No. 382.

and ensures the color is not functional. Despite these differences, all three jurisdictions agree that a color mark must not be functional, to prevent any utilitarian advantage. These differences highlight the importance of understanding the legal nuances in each region, demonstrating the need for brand owners to carefully navigate these variations to secure and enforce color trademark protection. This comparison sheds light on the different priorities each jurisdiction places on consumer perception and legal formalities in the registration process, offering a clear perspective on the distinct legal environments that brand owners must understand to protect their color trademarks effectively.

4 Case Study: Tiffany & Co. and the Protection of "Tiffany Blue"

4.1 International attitude and challenges faced by Tiffany & Co. in protecting their color trademark

The protection of color trademarks, such as "Tiffany Blue," varies significantly across different jurisdictions. Generally, the legal frameworks in the United States, the European Union, and China reflect divergent attitudes towards the registrability and enforcement of color trademarks.

In the United States, color trademarks can be registered if they acquire secondary meaning, as established in the landmark case *Qualitex Co. v. Jacobson Products Co.*, where the Supreme Court recognized that a color could serve as a trademark if it distinguished the goods and indicated their source. "Tiffany Blue" has been successfully registered and protected under this principle, highlighting the U.S. system's relatively flexible approach towards color trademarks. Tiffany & Co. faces numerous legal disputes and actively defends its rights to protect "Tiffany Blue". For instance, in *Tiffany (NJ) LLC v. Costco Wholesale Corp.*,⁷⁴ Tiffany sued Costco for selling rings described as "Tiffany" rings, alleging trademark infringement. Although this case primarily involved the word mark "Tiffany," it underscores the company's proactive stance in protecting its brand identity, including its color trademark.

Although Tiffany & Co. has registered Tiffany Blue as a trademark in the United States since 1998, the European Union has stricter standards for color trademarks. According to the EUIPO guidelines, single color trademarks must show that they have acquired distinctiveness through extensive use and recognition in the marketplace, which is often difficult to prove.⁷⁵ This high threshold poses challenges for companies like Tiffany & Co., requiring substantial evidence to prove the color's distinctiveness across the EU.

China's approach is more restrictive. The Chinese Trademark Office (CTMO) and subsequent administrative bodies often demand a higher level of evidence to prove the distinctiveness and fame of the color mark. However, the implementation often results in stricter scrutiny compared to Western jurisdictions. Tiffany & Co.'s attempts to protect "Tiffany Blue" in China demonstrate the hurdles posed by these stringent requirements.⁷⁶ Despite these obstacles, Tiffany & Co. continues to pursue its rights aggressively, engaging in legal battles to prevent unauthorized use of "Tiffany Blue" by local businesses.

⁷⁴ *Tiffany (NJ) LLC v. Costco Wholesale Corp.*, 971 F.3d 74 (2d Cir. 2020): This case involved the use of the "Tiffany" mark by Costco and emphasized the proactive enforcement of trademark rights by Tiffany & Co.

⁷⁵ *Libertel Groep BV v. Benelux-Merkenbureau*

⁷⁶ Hfg (2019) Color trademarks: US, Europe and China, Home page. Available at: <https://www.hfgip.com/news/color-trademarks-us-europe-and-china>. Retrieved May 20, 2024.

4.2 Broader Implications for Color Trademark Protection

The Tiffany Company's experience in protecting the iconic "Tiffany Blue" hue offers insights into the broader landscape of color trademark protection around the world. These implications go beyond a company's current legal battles and delve into the fundamental challenges and complexities inherent in protecting color trademarks.

The different standards of proof required by different jurisdictions mentioned above highlight the significant obstacles that brands face when seeking uniform protection of color trademarks, which means that the process of brand globalization needs more consideration. In the US, where the focus is on establishing a second meaning, brands such as Tiffany enjoy easier access to trademark registration. However, while the EU insists on inherent uniqueness, China's strict requirements for proof of uniqueness pose a huge challenge. Companies must navigate these different standards with precision, often requiring significant resources and legal expertise to establish the uniqueness of their color trademarks. Differences in these standards not only complicate the registration process, but also affect strategies for enforcing color trademarks in different regions.

There is no doubt that companies will increase the complexity and cost of registering and enforcing color trademarks due to the differentiation of global regulations. This legal uncertainty can weigh heavily on a company's decision-making process, affecting its global brand strategy and resource allocation. The need to deal with multiple legal frameworks increases administrative burdens and legal costs, especially for multinational companies operating in different markets. As a result, companies may face a strategic dilemma when considering whether to apply for a color trademark, needing to weigh the potential benefits against the significant challenges and costs involved. In addition, the uncertainties created by changing legislative changes and court decisions in various regions further exacerbate these challenges, which trademark holders must constantly monitor and adapt to remain compliant and effectively protect their intellectual property.

Recent legislative reforms and judicial decisions continue to shape the landscape of color trademark protection, creating both opportunities and challenges for trademark holders. For example, the European Union has adopted the European Union Trademark Regulation (EUTMR)⁷⁷ to improve the standards for graphic representation of trademarks, which may affect future applications for color trademarks in the EU. Similarly, changing judicial interpretations in China and the United States demonstrate that the legal environment is rapidly changing and requires trademark owners to be vigilant and adaptable. These developments underscore the need for companies to stay informed of legal changes and adopt proactive strategies to effectively protect their color trademarks. By leveraging insights from past cases and predicting future trends, companies can improve their ability to navigate the complex field of color trademark protection and protect their brand image in an increasingly competitive global marketplace.

⁷⁷ Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, European Union (EU).

In summary, the Tiffany Company case and its efforts to protect "Tiffany Blue" as a color trademark provides valuable insight into the multifaceted challenges and opportunities inherent in color trademark protection. By examining the impact of evidentiary standards, legal uncertainty and recent developments, it can be found that achieving effective protection of colour marks requires a nuanced understanding of different legal frameworks and a proactive approach to adaptation and enforcement. As global brands continue to expand across borders, the importance of color trademarks as unique elements of brand identity will only grow, and strong legal strategies and vigilant protections will be important.

5 Challenges and Future Directions

5.1 Emerging issues in color trademark

Different countries have different views on color trademarks. Currently, trademark laws in the United States and the European Union allow companies to trademark a single color, such as Tiffany blue studied in this article and Louboutin Red mentioned. However, due to the limitations of human vision, visible colors are limited. As a result, the rise of monochrome logos has raised concerns that it could run out of available colors. This fear is often called color depletion. This worry is mainly experienced in the following aspects. First, it increases barriers to market entry. As incumbents use more and more single colors as trademarks, there are fewer color options left for new entrants to the market.⁷⁸ Second, color depletion increases search costs for consumers. When more single colors are used as trademarks, there is less differentiation between color trademarks. As a result, consumers may spend more time, attention, or false costs to distinguish between different color trademarks and determine what products are really needed.⁷⁹ Third, color depletion may also affect and limit the development of the public domain.⁸⁰ For example, an artist should be free to choose any color to convey her ideas. However, the color claimed by the company is often closely related to commercial significance, for example, Tiffany Blue has obvious brand influence and strong association with the Tiffany brand. In this case, if the artist doesn't want to convey anything to do with "bringing Tiffany," she may have to avoid using that color. Therefore, as more and more colors are used as trademarks, the public domain will be greatly limited.

Despite these theoretical problems, scholars and critics are divided on whether color depletion is a real problem in practice. A group of academics argues that color exhaustion doesn't happen or is negligible because, for one thing, there are millions of colors available to companies around the world.⁸¹ Second, a color must acquire a second meaning in order to become a trademark. This requirement raises the threshold for the registration of a single color trademark and reduces the level of color exhaustion alarm.⁸² However, there are also scholars who believe that color depletion is worse than we expected. While the entire spectrum contains millions of colors, the number of good colors in any given industry is limited.⁸³ In

⁷⁸ Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks: An Empirical Study of Trademark Depletion and Congestion*, 131 *Harv. L. Rev.* 945, 953 (2017).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Christopher Carraway, *Color as a Trademark under the Lanham Act: Confusion in the Circuits and the Need for Uniformity*, 57 *Law & Contemp. Probs.* 243 (1994).

⁸² *Id.* at 243-279; Christopher C. Larkin, *Qualitex Revisited*, 94 *TRADEMARK REP.* 1017 (2004); Lauren Traina, *Seeing Red, Spending Green: The Costly Process of Registering and Defending Color Trademarks*, 87 *S. Cal. L. Rev.* 1319 (2013).

⁸³ Bartow, Ann. "True Colors of Trademark Law: Greenlighting a Red Tide of Anti Competition Blues." *Ky. LJ* 97 (2008): 263; Brian R. Henry, *Right Hat, Wrong Peg: In re Owens-Coming Fiberglas Corporation and the Demise of the Mere Color Rule*, 76 *TRADEMARK REP.* 389, 391 (1986); Overcamp, Elizabeth A. "The Qualitex Monster: The Color Trademark Disaster." (1994): 595.

addition, once a certain color is protected by a trademark, other companies cannot claim the same common color, nor can they claim many similar colors, because similar color trademarks can cause consumer confusion.⁸⁴

The colour exhaustion theory is present and kept in mind while granting companies the right to trademark single colours.⁸⁵ From the influence of Tiffany blue, we can see in the Fashion industry the importance of colour surpasses that of any other industry. The colour depletion theory is a strong reason to prevent giving single colour trademarks to Fashion Brands. Fashion Industry has a unique case and considering the importance of colour if all shades begin to get trademarked it could limit the creativity of newer companies and their products.

Before adopting single colour trademarks as a norm, the shade confusion doctrine must be considered. This doctrine posits that courts may struggle to distinguish between various shades of the same colour, potentially leading to confusion. In many American jurisdictions, this is referred to as the likelihood of confusion test. This issue can be mitigated if the specific shade is officially protected and registered with an authority such as Pantone.

Another challenge with single colour trademarks is the inconsistency in international recognition. A trademark granted in one country or region might be rejected elsewhere, as evidenced by Christian Louboutin's ongoing battles to secure trademark protection for the colour red in different countries.

The decision to grant single colour trademarks internationally should hinge on distinctiveness. If a colour is so strongly associated with a brand that consumers immediately link the colour with the product, then single colour trademarks should be considered appropriate.

It is important to clarify that no company seeks to trademark an entire colour spectrum. Instead, the aim is to secure a trademark for a specific usage of the colour. For example, Christian Louboutin's trademark is specifically for the red sole of shoes, and Cadbury's trademark applies only to purple used in their packaging. This limited and particular usage was supported by amicus curiae briefs from INTA⁸⁶ and Tiffany & Co.⁸⁷ in favour of Christian Louboutin's single colour trademark request. Tiffany & Co. argued that denying protection to a colour that has achieved secondary meaning is unjust.⁸⁸ They also emphasized the need for distinct protection for fashion items.

The author believes that when it comes to trademark registration, the law should maintain a neutral stance. Trademark law originates from anti-unfair competition law, and protecting certain marks should not contradict the principles of free competition. Beyond indicating the origin of goods, trademarks also serve as a

⁸⁴ Id.

⁸⁵ Gorman, Danielle E., Protecting Single Color Trademarks in Fashion after Louboutin (April 2, 2012). *Cardozo Arts & Entertainment Law Journal*, Forthcoming, Cardozo Legal Studies Research Paper, Available at SSRN: <https://ssrn.com/abstract=2033880>

⁸⁶ Brief for International Trademark Association (INTA) as Amici Curiae.

⁸⁷ Brief for Tiffany as Amici Curiae.

⁸⁸ Issues surrounding registration of colour trademarks, JEKATERINA KUDRJAVCEVA, 2012, RGSL RESEARCH PAPERS.

guarantee of quality, a means of advertising, and they carry cultural significance.⁸⁹ Therefore, when determining whether a mark can be granted trademark status, public order and moral standards must also be considered.

As long as it does not violate free competition or public order and morals, the registration of a trademark should be based purely on technical considerations—namely, whether the trademark is distinctive and whether it directly represents the function of the product.⁹⁰ This means that if a mark used on a product does not contravene free competition or public order and morals, there is no legal reason to categorically exclude it from registration. This principle applies to single colour trademarks as well. The practical issues encountered in the registration of single colour trademarks should be addressed through improved technical service measures. These are technical operational issues in the practice of trademark registration and should not be grounds for denying the trademark status of single colours.

We often recognize brands by their logos: for instance, Apple is synonymous with the bitten apple logo, and Starbucks is instantly identified by its green mermaid emblem. Similarly, some brands are distinguished solely by a specific colour. The protection of single colour trademarks began in the 1990s, and this discussion is particularly relevant to the fashion industry, where colour plays a crucial role. If a brand is uniquely associated with a particular colour, it should receive international protection to maintain its identity and market presence.

5.2 Potential reforms or adjustments needed in the legal framework

Protecting color trademarks, especially monochrome ones like "Tiffany Blue," requires reforms and adjustments within the existing legal framework to address current challenges and promote consistency. The author believes that one of the most pressing problems is the lack of uniform standards for the registration and protection of color trademarks in different jurisdictions. The criteria for uniqueness, graphic representation and acquired secondary meaning vary widely, creating significant barriers to the globalization of international brands. Harmonizing these standards will facilitate smoother cross-border trademark protection and reduce legal uncertainty. International bodies such as the World Intellectual Property Organization (WIPO) should work to develop uniform guidelines that member states can adopt, including standardized standards to demonstrate uniqueness and a clearer definition of what constitutes a sufficient graphic representation.

While the United States allows the registration of monochrome trademarks with the ability to gain uniqueness, the European Union and China have more stringent requirements, which can hinder brands from obtaining protection. Jurisdictions should clarify and, as far as possible, relax the evidentiary requirements required to

⁸⁹ For the evolution and development of trademark functions, see Du Ying: *The Theory of Trademark Dilution and Its Application*, published in *Legal Studies*, Issue 6, 2007.

⁹⁰ For a discussion on trademark distinctiveness, see Du Ying: *Research on the Trademark Rights of Generic Names*, published in *Jurists Review*, Issue 3, 2006.

prove that a colour has acquired distinctiveness, accepting a wider range of types of evidence, such as consumer surveys, widespread commercial use and market acceptance.

The rise of digital platforms and virtual marketplaces has created new challenges for color trademarks, as current laws do not adequately address how to protect and enforce color trademarks in the digital space. It is essential to update trademark laws to include provisions on the use of colour marks in digital and virtual Spaces, and to develop guidelines on how to apply and protect colour marks in online advertising, websites and virtual products.⁹¹

In addition, to maintain the integrity of color trademarks, stronger enforcement mechanisms must be implemented to prevent abuse and counterfeiting, especially in jurisdictions with high rates of trademark infringement. Strengthening enforcement measures through enhanced monitoring, increased penalties for infringement, and enhanced cooperation between international trademark offices can help protect the rights of color trademark holders.

Finally, the concept of color exhaustion, whereby the range of available colors becomes limited due to the widespread registration of color trademarks, is a growing concern. This could lead to increased market entry barriers and increased search costs for consumers. It is necessary to implement a balanced approach that protects unique color trademarks while preventing the monopoly of basic colors. This may involve setting stricter standards for colors that can be protected and encouraging the use of unique color combinations rather than single colors.

Reforming the legal framework for color trademarks is essential to address the disparities and challenges currently facing brand owners around the world. By harmonizing standards, clarifying uniqueness requirements, adapting to digital change, strengthening protection mechanisms, and addressing color exhaustion, the legal environment can better support the changing needs of businesses and trademark owners. These reforms will not only provide greater legal certainty, but will also promote market innovation and fair competition.

5.3 Future trends and implications for businesses and trademark owners

In the United States, the future of color trademarks is likely to be shaped by ongoing legal battles and evolving standards for distinctiveness and secondary meaning. While the Lanham Act permits the registration of single-color trademarks upon acquiring secondary meaning, the burden of proof remains formidable. Moving forward, we anticipate heightened scrutiny on whether colors truly serve as distinctive brand identifiers or merely decorative elements. Moreover, as digital platforms continue to proliferate, there may arise a need for clearer guidelines

⁹¹ He, Q. (2024) 'Digital trademarks in the Global Marketplace: Navigating legal landscapes and technological challenges', Lecture Notes in Education Psychology and Public Media, 53(1), pp. 21–26. doi:10.54254/2753-7048/53/20240013.

regarding the application of color trademarks in virtual spaces and online marketplaces.

In the European Union, the approach towards color trademarks will continue to be influenced by pivotal rulings from the CJEU. Precedents set by cases like *Libertel* establish stringent requirements for color distinctiveness, and future developments may focus on refining criteria for such distinctiveness and harmonizing enforcement mechanisms across member states. There's a possibility of harmonization efforts to ensure more consistent application of rules across diverse jurisdictions within the EU.

China's stance on single-color trademarks is still evolving. Trademark law scholars have been studying the trademark protection of a single color for many years. However, unlike most countries and regions that have already established relatively complete protection systems for them, there are still some problems with the current status of single-color trademark protection in China. To establish a single-color trademark protection system, the first task is to establish criteria for determining the registrable requirements for a single color. As a type of non-traditional trademark, a single color has the characteristics of limiting the location and method of use. A single color is naturally descriptive and decorative. As a result, ordinary consumers do not have the cognitive habit of treating a single color as a trademark, and often do not have inherent significance.⁹² Presently, China's trademark law only recognizes color combination trademarks, not single-color ones. However, with globalization and the maturation of the socialist market economy, there's growing demand for the registration of single-color trademarks. The exclusion of single-color trademarks from the scope of protection might impede the healthy development of China's economy. Therefore, China must consider expanding the scope of protection of trademark law to include monochrome trademarks. Establishing a review mechanism and strengthening the recognition and protection of monochrome trademarks can make China's trademark law better in line with international standards and strengthen the protection of intellectual property rights.⁹³

In summary, trademark law in the United States, the European Union, and China is constantly evolving to address the complex issue of monochrome marks. Companies need to adapt their strategies to ensure that their color trademarks are unique, well-documented, and comply with local and international regulations. In addition, enhanced international cooperation and legal harmonization can promote better protection and enforcement of color trademarks worldwide. By understanding these future trends and implications, companies can effectively navigate the complexities of color trademark registration and protection, ensuring that their brands remain unique and legally protected in a competitive global marketplace.

⁹² Zhan, Qian. "Research on the Registration Issue of Monochromatic Trademarks."

⁹³ He, Fuxing. "Research on the Improvement of Monochromatic Trademark System in China." East China University of Political Science and Law.

6 Conclusion

The development of Tiffany Blue as a trademark color highlights the complex dynamics of color trademarks in modern trademark law. This article explores the symbolic significance of Tiffany Blue, exploring its historical roots and its powerful influence on consumer perception and brand identity. Through a comparative analysis of the legal frameworks of the United States, the European Union, and China, we gain valuable insights into the complexities and challenges associated with the registration and protection of color trademarks.

In the United States, protection of “Tiffany Blue” under the Lanham Act was relatively straightforward, largely due to precedents that recognized secondary meanings for color trademarks. The distinctiveness of Tiffany Blue has been well demonstrated through its widespread use and association with consumers, resulting in strong trademark protection for Tiffany. However, the requirement to prove acquired distinctiveness remains a significant barrier for many applicants seeking color trademark registration in the U.S. market.

The European Union has proposed a more nuanced approach, with the CJEU emphasizing that color trademarks must have either inherent or acquired distinctiveness. Strict graphic representation requirements and the need for accurate color codes ensure clarity and legal certainty, but also present significant challenges for brand owners. Tiffany’s experience in meeting these requirements highlights the rigorous scrutiny that color trademarks face in the EU and underscores the importance of comprehensive evidence to support distinctiveness claims.

China’s approach is similar to that of the EU in that both emphasize acquired distinctiveness, but cultural and legal differences present unique challenges. The rigorous scrutiny by China’s trademark authorities requires substantial evidence of long-term, extensive use. Tiffany’s efforts to protect Tiffany Blue in China reveal the complexity of aligning global brands with the specific requirements of the Chinese legal system. The challenges faced in this jurisdiction illustrate the broader difficulties that international brands face in achieving consistent trademark protection in different legal environments.

In summary, the protection of “Tiffany Blue” as a color trademark is representative of the broader challenges and complexities faced in protecting and enforcing color trademarks around the world. A comparative analysis of the legal frameworks of the United States, the European Union, and China suggests that while color trademarks are increasingly recognized, the path to achieving and maintaining protection is fraught with legal, cultural, and procedural obstacles. Future reforms to trademark law, particularly with respect to standardization of evidentiary requirements and recognition of inherent distinctiveness, may make things clearer and more predictable for brand owners. As the legal landscape evolves, the experience of Tiffany and similar brands will continue to influence the discussion

about color trademark protection, highlighting the dynamic interplay between legal principles, market realities, and consumer perceptions.

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