

**Texas Intellectual Property Law Journal**  
Spring, 1999

COLOR TRADEMARKS

James L. Vana<sup>a1</sup>

Copyright (C) 1999 by the State Bar of Texas, Intellectual Property Law Section; James L. Vana

*Table of Contents*

A. Introduction	387
B. Background	389
1. History	389
2. Traditional Theories Barring Use of Color as a Trademark	388
3. Criticism and Response	390
4. Circuit Split	391
C. The <i>Qualitex</i> Decision	391
1. Registrability Question Resolved	391
2. Secondary Meaning Question Not Resolved	393
D. Registration of Color Marks after <i>Qualitex</i>	394
1. Significant Nontrademark Function	395
2. Effect on Competition	395
3. Secondary Meaning	397
(a) Direct Evidence	398
(b) Circumstantial Evidence	399
E. Conclusion	402

## A. Introduction

A color, pure and simple, may serve as an indicator of source and therefore be entitled to trademark protection under the Trademark Act of 1946.<sup>1</sup> As the United States Supreme Court noted in the *Qualitex* case, “it is the source-distinguishing \*388 States Supreme Court noted in the *Qualitex* case, “it is the source-distinguishing ability of a mark—not its ontological status as color, shape, fragrance, word, or sign—that permits it to serve” as a trademark.<sup>2</sup>

## B. Background

### 1. History

Merchants have long sought to develop and protect colors, either alone or in combination, as trademarks.<sup>3</sup> Implicit in these attempts was the belief that a color, or a combination of colors, could in fact be recognized by consumers as an indicator of source, and could thus enhance the goodwill and reputation of the manufacturer or merchant.

Yet, until recently, some courts have held that a single color, and some color combinations,<sup>4</sup> could not serve as a valid trademark—the “mere color rule.”<sup>5</sup> Three principal arguments have been articulated as justification for the mere color rule. Each will be discussed below.

### 2. Traditional Theories Barring Use of Color as a Trademark

(a) *Color Depletion*. The first is known as the color depletion theory, and historically it has been the most popular.<sup>6</sup> Its premise is that the number of colors in the visible spectrum is finite and limited. If one manufacturer is allowed to appropriate one color for its goods, and others follow suit, later manufacturers will have no, or a very few, colors left for their own products.<sup>7</sup> In either case, since every \*389 product must be of some color, the later manufacturers are thought to be at a significant competitive disadvantage.<sup>8</sup>

(b) *Shade Confusion*. The second argument is known as “shade confusion.” This argument is rooted in the fundamental premise of trademark law that use of similar marks on the same or similar goods will not be allowed where it is likely to cause confusion among the public regarding the source of the goods.<sup>9</sup> Under “shade confusion,” making the determination regarding a “likelihood of confusion” between two color marks would degenerate into questions regarding shades of color, which the judiciary, or in the context of an application for registration, the Trademark Trial and Appeal Board (TTAB), is ill-equipped to handle.<sup>10</sup> The reason, most often posited by proponents of this theory, that shade confusion is more difficult to resolve than other types of confusion is that consumer perceptions of color are affected by a number of external considerations which a court cannot appropriately consider.<sup>11</sup>

(c) *Functionality*. Finally, color has also been rejected as a trademark based on a functionality argument.<sup>12</sup> That is, where a color is the natural color of a product, or where it affects the cost or quality of a product, then it is simply a naturally occurring or desirable characteristic of the product which should not be exclusive to one manufacturer.<sup>13</sup> These cases, either explicitly or implicitly, \*390 recognize that federal patent law is the sole source of protection for functional product developments or characteristics.<sup>14</sup>

### 3. Criticism and Response

Courts and commentators have responded to each of these three arguments. The shade confusion theory has been most severely criticized, with the response that subtle distinctions between competing marks must be made in every case involving a trademark infringement claim, regardless of the ontological status of the marks as words, symbols, colors or devices.<sup>15</sup> The alleged special properties of color have been considered and rejected. For example, the Supreme Court, in *Qualitex*, noted that courts could “replicate, if necessary, lighting conditions under which a colored product is sold.”<sup>16</sup> Thus, shade confusion does not appear to be a valid factor in determining protectability or registrability when a party seeks protection or registration of a color as a trademark.

The color depletion theory has also been the subject of extensive discussion. In the *Owens-Corning* case, the Court of

Appeals for the Federal Circuit held that, based on the broad revision of trademark law accomplished by the 1946 revisions in the Lanham Act, “courts have declined to perpetuate [the color depletion theory’s] *per se* prohibition” on registration or infringement protection.<sup>17</sup> Similarly, the *Qualitex* Court rejected the *per se* approach because “it relies on an occasional problem to justify a blanket prohibition.”<sup>18</sup>

Finally, the functionality doctrine has been rejected as a *per se* prohibition.<sup>19</sup> “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 \*391 create an absolute bar to the use of color alone as a mark.”<sup>20</sup> Yet, functionality has emerged as the most dominant single consideration for the protectability of color.<sup>21</sup> “The use of color—if functional—cannot serve as a trademark.”<sup>22</sup>

#### 4. Circuit Split

The *Owens-Corning* case represented a change from the categorical prohibition on the recognition of color as a trademark. Commentators claimed that the decision “reverberated throughout the legal and business communities and was thought to represent a major change in the law.”<sup>23</sup> Several courts faced with the color issue after the *Owens-Corning* decision agreed, rejecting the “mere color rule.”<sup>24</sup> But a number of courts did not follow the trend established by *Owens-Corning*.<sup>25</sup> This state of affairs resulted in a split among the federal courts of appeals with regards to the protectability of color as a trademark.

### C. The *Qualitex* Decision

#### 1. Registrability Question Resolved

In 1995, the United States Supreme Court resolved the split on the issue of the registrability of color trademarks.<sup>26</sup> *Qualitex* Company (*Qualitex*) registered the green-gold color of its dry cleaning press pads as a trademark and sued Jacobson Products (*Jacobson*) for unfair competition and trademark infringement based on *Jacobson*’s use of similar coloring on its press pads.<sup>27</sup> After surveying the historical opposition to trademark protection for colors and the existing circuit split regarding the issue, the Court focused on the language of and policy behind the Lanham Act.<sup>28</sup> \*392 Noting that “human beings might use as a ‘symbol’ or ‘device’ almost anything at all that is capable of carrying meaning,” the Court found that Section 45 of the Lanham Act<sup>29</sup> does not exclude color.<sup>30</sup>

The dual principles underlying trademark law are also important. First, customers receive the benefit of reduced shopping costs and time spent in making purchasing decisions,<sup>31</sup> because a trademark “quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.”<sup>32</sup> Second, trademark law secures to trademark owners the benefits of their goodwill and reputation established by developing in consumers an association between trademarks and goods.<sup>33</sup> “The law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product.”<sup>34</sup>

While rejecting each of the traditional theories advanced as absolute bars to the protection of colors as trademarks, the Court did affirm a number of requirements which must be met before a color will be recognized as a trademark.<sup>35</sup> First, the functionality analysis was identified as key to the protectability of color as a trademark.<sup>36</sup> Applying the test of functionality, the Court noted that the color used by *Qualitex* “serves no other function” than as a source indicator.<sup>37</sup> Where a color does serve some other function, courts must examine the effect that granting trademark protection would have on competition.<sup>38</sup>

\*393 Second, color depletion was not dismissed entirely, but rather was subsumed by the functionality analysis. “[I]f a ‘color depletion’ or ‘color scarcity’ problem does arise—the trademark doctrine of ‘functionality’ normally would seem available to prevent the anticompetitive consequences” of trademark protection for color.<sup>39</sup> Functionality is the “appropriate application” of the theory of color depletion discussed in the *Owens-Corning* case.<sup>40</sup>

#### 2. Secondary Meaning Question Not Resolved

On the other hand, it is not clear if the Court resolved the issue of whether a proposed mark, consisting only of a color, can ever be inherently distinctive and thus entitled to protection without a showing of secondary meaning. The Court twice used

language which suggests that the answer, were the question squarely before the Court, would be “no.”<sup>41</sup> First, referring to the traditional distinction between inherently distinctive matter and that which is not, the Court noted that “a product’s color is unlike ‘fanciful,’ ‘arbitrary’ or ‘suggestive’ words or designs, which almost *automatically* tell a customer that they refer to a brand.”<sup>42</sup> Second, no theoretical objection to color as a mark was found “where that color has attained ‘secondary meaning.’”<sup>43</sup> These statements suggest that secondary meaning may be necessary to establish protection for color only marks.

The difficulty of this issue, and the lack of clarity in the Court’s holding in *Qualitex*, are apparent from the different interpretations the decision has received from courts and commentators. Most courts, for example, have taken the language noted in the previous paragraph to indicate that secondary meaning is required. For example, the court in *Sazerac Co. v. Skyy Spirits, Inc.*,<sup>44</sup> focused on the *Qualitex* language that “a product’s color is not fanciful, arbitrary or suggestive” when requiring secondary meaning. The Court of Appeals for the Second Circuit has twice followed a similar course.<sup>45</sup>

\*394 However, while the statements in *Qualitex* regarding secondary meaning suggest the need in all cases to demonstrate acquired distinctiveness,<sup>46</sup> they are less conclusive in the *context* of the *Qualitex* case. Because *Qualitex* did not claim that its green-gold color was inherently distinctive,<sup>47</sup> that issue was not before the Court. As a result, most commentators and the TTAB have read *Qualitex* as avoiding the secondary meaning question.<sup>48</sup>

Thus, in the Second Circuit, and in at least two other federal district courts, a showing of *acquired* distinctiveness is required. But the outcome is less clear in other circuits and before the TTAB.<sup>49</sup> Given this lack of clarity, the holding in *Qualitex* can perhaps be summarized as—where a party claims and can demonstrate that a proposed mark, consisting solely of a color and not claimed to be inherently distinctive, is not functional and has acquired secondary meaning, the proposed mark is entitled to protection.

#### **D. Registration of Color Marks after *Qualitex***

In the wake of the *Qualitex* decision, it appears that the Patent and Trademark Office (PTO) must apply a three-step analysis in determining the registrability of a proposed trademark consisting entirely of a color. First, is the mark functional; that is, does it perform a “significant nontrademark function?”<sup>50</sup> If the answer is no, the applicant must only demonstrate that the mark is distinctive, either inherently or because distinctiveness has been acquired. If, however, the answer is yes, the next question is whether if registration is granted, that significant nontrademark function would allow its owner to interfere with legitimate business competition?<sup>51</sup> If it would, the proposed mark is *de jure* functional and trademark registration is \*395 inappropriate.<sup>52</sup> If not, the proposed mark is only *de facto* functional, and the applicant will be allowed to demonstrate the distinctiveness of the color as a source indicator.<sup>53</sup> Each of these three steps will be discussed below.

##### **1. Significant Nontrademark Function**

The *Qualitex* Court stated that “where a color performs a significant nontrademark function,” courts must engage in the functionality analysis.<sup>54</sup> The first step in determining the registrability of color is therefore to decide whether a significant nontrademark function is served.<sup>55</sup> While the *Qualitex* court did not define the kind of nontrademark functions which would be “significant,” it did list, as examples, the ease of distinguishing different medical pills and “aesthetic functionality.”<sup>56</sup> Thus, it appears that “significant” means almost any function which is not a source indicator and which a court, or the PTO, can articulate. Indeed, the Court of Appeals for the Federal Circuit in *Owens-Corning* noted that “color is usually perceived as ornamentation.”<sup>57</sup> Thus, nearly all color applications will require analysis of the “competitive effect” factor.

##### **2. Effect on Competition**

The functionality doctrine is used to determine whether granting a trademark on a product feature, in this case color, will have any anticompetitive effects.<sup>58</sup> If not, that feature is *de facto* functional and may be entitled to trademark protection \*396 upon a showing of distinctiveness, either inherent or acquired.<sup>59</sup> If so, however, the design is *de jure* functional and not entitled to protection.<sup>60</sup> The *Qualitex* Court indicated that a product feature is functional, i.e., *de jure* functional, if the feature “is essential to the use or purpose of the article or if it affects the cost or quality of the article.”<sup>61</sup> The *Owens-Corning* court added a third factor to consider—the existence of alternative designs that competitors can use.<sup>62</sup>

A color is essential to the use or purpose of an article if the article would not function effectively without it.<sup>63</sup> For example,

bright colors—orange, yellow, etc.—are often used on safety items because brighter colors are easier to see.<sup>64</sup> In a nonsafety context, the court in *Sylvania Electronic* found that blue for a flash bulb dot is functional because its purpose was to indicate an air seal leak, a function which could not be accomplished by any other color.<sup>65</sup> Similarly, black for a soft drink bottle is the only color which excludes light completely, thus performing one of the bottle's functions—keeping the contents of the bottle fresh.<sup>66</sup> Furthermore, a color which is the natural color of the product would affect the cost of the product because, if trademark protection were granted for that naturally occurring color, every other competitor would need to add the expense of coloring its products.<sup>67</sup> Thus, a natural color is functional and cannot be protected.

In addition, product quality is affected when a product can function *better* with the addition of a specific color, although the product does not *need* that particular \*397 color simply to function.<sup>68</sup> For example, while bags hold material regardless of color, orange for bags used to contain biohazardous material was found to be functional because it alerted users to the hazardous contents of the bags and thus promoted cautious handling of dangerous material.<sup>69</sup>

Finally, the color depletion theory finds its continued existence in the inquiry regarding the availability of alternative designs, in this case, other colors. In *R.L. Winston Rod*, for example, the court held that green was functional for graphite fly fishing rods because “the color palette available for the manufacture of fly rods is extremely limited” since “[t]he rod is made in part of graphite, which is a carbon and so is naturally black,” a color which “[o]nly a few dark shades successfully mask.”<sup>70</sup> Conversely, as noted by the TTAB in another case, “the fact that there are a variety of colors which competitors have utilized ... is evidence that applicant's color is primarily nonfunctional.”<sup>71</sup>

### 3. Secondary Meaning

Even where a color is found not to be *de jure* functional in relation to the recited goods, an applicant must still demonstrate that the mark is distinctive; that is, that it serves as an indicator of source.<sup>72</sup> Where the mark is not inherently distinctive, the applicant must show that it has acquired distinctiveness.<sup>73</sup>

\*398 While the exact type and amount of evidence required for a showing of secondary meaning have not been defined,<sup>74</sup> the evidence submitted by the applicant must be substantial because “by their very nature color marks carry a difficult burden in demonstrating distinctiveness and trademark character.”<sup>75</sup> Evidence relevant to the issue includes both direct evidence such as survey evidence, letters and testimony from customers, and circumstantial evidence, including the amount and type of advertising in which the applicant has engaged and the length of time the mark has been used.<sup>76</sup>

#### (a) Direct Evidence

##### (i) Customer Testimony

Testimony directly from customers, in the form of letters and other submissions, is probative of the association customers make between the proposed mark and the source of the goods bearing the mark. So, for example, in *In re Ideal Industries, Inc.*,<sup>77</sup> the court was favorably impressed with letters from professional customers of the applicant that tended to show customers recognize the proposed mark as a trademark. Similarly, in *Federal Glass Co. v. Corning Glass Works*,<sup>78</sup> the applicant submitted direct testimony of thirty-two consumers showing that the CORNING WARE design logo in fact served as an indicator of source.

In addition, the TTAB discussed the use of customer testimony in an unpublished decision reviewing the examining attorney's refusal to register the color red as a trademark for hand-held vacuum cleaners.<sup>79</sup> The TTAB found probative value in declarations of purchasing managers which indicated that when these individuals “see the color red on hand-held vacuum cleaners, they know that these hand-held vacuum cleaners have been manufactured and sold by applicant.”<sup>80</sup> The TTAB also considered logs of unsolicited consumer calls in which the callers \*399 identified the applicant's product as “the red one,” or variations thereof (e.g. ‘red sweeper,’ ‘red piece of junk’) as evidence which can establish distinctiveness.<sup>81</sup>

##### (ii) Survey Evidence

Courts have also looked favorably upon survey evidence submitted as evidence that a proposed color mark has acquired

distinctiveness.<sup>82</sup> For example, Owens-Corning demonstrated through a survey that, in 1981, following a particularly intensive advertising campaign, over fifty percent of male homeowners were able to identify Owens-Corning as the maker of pink insulation.<sup>83</sup> Similarly, in *Royal Appliance*, the TTAB detailed a survey done by applicant in which purchasers of hand-held vacuum cleaners were shown five vacuums of five brands, each painted a different color with any trademarks or trade names removed.<sup>84</sup> The TTAB considered the “fact that nearly one-third of the survey’s respondents *incorrectly* named DIRT DEVIL or applicant Royal as the brand and/or manufacturer of an EUREKA hand-held vacuum cleaner painted red (31%) and a HOOVER hand-held vacuum cleaner painted red (30%)” one of the most important facts of the survey.<sup>85</sup> The survey’s critical finding was that the “the color red is an important element in helping consumers identify a hand-held vacuum cleaner as a DIRT DEVIL or Royal product.”<sup>86</sup>

## **(b) Circumstantial Evidence**

### **(i) Duration**

The duration of use of a mark appears to be connected to the suggestion in Section 2(f) of the Lanham Act,<sup>87</sup> that substantially exclusive use of the mark for the five years immediately preceding the filing of an application for registration may be considered *prima facie* evidence of distinctiveness.<sup>88</sup> For example, Owens-Corning’s showing of twenty-nine years of continuous use weighed in favor of \*400 secondary meaning,<sup>89</sup> as did the thirty year use by Qualitex of its mark.<sup>90</sup> Although the TTAB did not find that secondary meaning had been shown, the TTAB appeared to look favorably on the opposer’s nine-year use in *Edward M. Weck*.<sup>91</sup>

### **(ii) Amount Spent on Advertising**

As the *Owens-Corning* court noted, “the size of advertising expenditures alone has been found to serve as strong evidence of secondary meaning.”<sup>92</sup> Owens-Corning demonstrated that, from 1956 to 1981, it had spent over \$42 million on consumer advertising for its pink insulation.<sup>93</sup> Similarly, at the district court level, Qualitex showed that it had spent more than \$1.6 million to advertise its green-gold dry cleaning pads.<sup>94</sup> In *In re Denticator International*,<sup>95</sup> the applicant submitted evidence of an annual advertising budget of \$120,000. Royal Appliance, in the DIRT DEVIL application, indicated that they spent over \$25 million from 1984 to 1990 in advertising the red colored hand-held vacuum cleaner.<sup>96</sup> On the other hand, the opposer in *Edward M. Weck*, demonstrated that it spent roughly \$250,000 per year advertising its color mark, but still did not demonstrate secondary meaning to the TTAB’s satisfaction.<sup>97</sup> The Board found that “the relatively small size of applicant’s advertising expenditures” contributed to this failure.<sup>98</sup> As a general rule, therefore, the greater the advertising budget, the better the chance of making the required secondary meaning showing.

### **(iii) Focus of Advertising**

However, proof of advertising of particular products is not enough. Rather, the advertising must show that the color itself was promoted, so that consumers would \*401 make the required association between the color trademark and the source of those goods.<sup>99</sup> In *Owens-Corning*, the court noted that Owens-Corning’s ads “emphasize the distinctive ‘pink’ color of Owens-Corning’s product and reinforce the image with the slogan ‘Put your house in the pink.’”<sup>100</sup> Similarly, the applicant in *Denticator International*, “focused on the color green” in its advertising by announcing “It’s Not Easy Being Green” and referring to its product as “The original green disposable angle.”<sup>101</sup> The TTAB was persuaded by the applicant’s advertising regarding DIRT DEVIL in *Royal Appliance* because “v irtually all of” Royal Appliance’s “advertising prominently features the color red, and many of the advertisements are specifically worded so as to draw attention to the color red.”<sup>102</sup> Finally, the TTAB, in *Edward M. Weck*, when denying protection noted that “the limited extent to which the opposer’s advertising is directed to the promotion of the color green as a trademark.”<sup>103</sup>

### **(iv) Type of Advertising**

Finally, the type of advertising is also important. Where the advertising is calculated and strategically placed to expose the greatest number of consumers to the mark in question, a finding of secondary meaning is more likely.<sup>104</sup> So, for example, Qualitex “advertised its press pad on a monthly basis in the *American Drycleaner Magazine*, the leading trade publication,”

and it “also places ads featuring its green-gold press pad in the *Korean Drycleaners Times*, the *Drycleaners News*, the *Bobbin*, and the *Agent* magazines which are distributed regularly to the dry cleaning and garment industries.”<sup>105</sup> Owens-Corning, because its potential customers are homeowners, advertised on television events which consumers would likely see when they are at home—purchasing “nearly two hundred separate blocks of network time during broadcasts of major sporting events such as the Super Bowl, the Rose Bowl, ... and the World Series; prime time network series including ‘Sixty Minutes’ \*402 ... and network showing of theatrical movies.”<sup>106</sup> Owens-Corning also “advertised in popular consumer magazines including *House & Garden*, ... *Popular Mechanics*, ... and *Home Energy Digest*.”<sup>107</sup>

## E. Conclusion

It is clear, following the United States Supreme Court’s decision in *Qualitex* that a color, applied to a product or products, may serve as a trademark.<sup>108</sup> The correct analysis in determining whether a proposed color mark in fact serves as an indication of source involves two steps. First, the *de facto/de jure* functionality analysis, reiterated most recently by the Court of Appeals for the Federal Circuit in *Brunswick*, must be applied.<sup>109</sup> If the color is *de jure* functional, trademark protection will not be granted. If the color is not *de jure* functional, the second step requires the applicant to demonstrate distinctiveness.<sup>110</sup>

It is less clear, following the *Qualitex* decision, whether a proposed mark, consisting of color which is not *de jure* functional, can ever be inherently distinctive.<sup>111</sup> Resolution of this issue will be important to those attempting to protect color marks because without inherent distinctiveness, the owner must demonstrate that the proposed mark has acquired distinctiveness.<sup>112</sup> As the *Owens-Corning* court noted, “ b y their very nature color marks carry a very difficult burden in demonstrating distinctiveness and trademark character.”<sup>113</sup> Where secondary meaning is required, either because a given party’s mark is found not to be inherently distinctive as a matter of fact, or because a given jurisdiction has found that color marks are never inherently distinctive as a matter of law, the applicant must make a substantial evidentiary showing, including direct and substantial evidence that consumers make the required goods-source connection.<sup>114</sup>

## Footnotes

<sup>a1</sup> James L. Vana, Foley & Lardner, Milwaukee, Wisconsin; former examining attorney with the United States Trademark Office.

<sup>1</sup> See 15 U.S.C.A. §§ 1051-1127 (1997); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162, 34 U.S.P.Q.2d (BNA) 1161, 1162 (1995) (“there is no rule absolutely barring the use of color alone” as a trademark); *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1122, 227 U.S.P.Q. (BNA) 417, 420 (Fed. Cir. 1985) (“the color of goods ... may serve as a trademark”); *Edward M. Weck, Inc. v. IM, Inc.*, 17 U.S.P.Q.2d (BNA) 1142, 1145 (T.T.A.B. 1990) (“[t]here is no inherent bar to trademark registration of the overall color of goods”).

<sup>2</sup> *Qualitex*, 514 U.S. at 164, 34 U.S.P.Q.2d at 1163.

<sup>3</sup> See *A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U.S. 166, 167 (1906), *superseded by statute*, 15 U.S.C.A. § 1052(f) (Supp. 1999) (color for one strand of five-strand wire rope); *Yellow Cab Transit Co. v. Louisville Taxicab & Transfer Co.*, 147 F.2d 407, 409, 64 U.S.P.Q. (BNA) 348, 349 (6th Cir. 1945) (yellow for taxicabs); *Diamond Match Co. v. Saginaw Match Co.*, 142 F. 727, 728 (6th Cir. 1906), *superseded by statute*, 15 U.S.C.A. §§ 1051-1127 (1997) (blue and red for match tips); *Clifton Mfg. Co. v. Crawford-Austin Mfg. Co.*, 12 S.W.2d 1098, 1098-99 (Tex. Civ. App. 1929) (reddish-brown for tents and tarpaulins).

<sup>4</sup> See, e.g., *Diamond Match*, 142 F. at 729-30.

<sup>5</sup> See, e.g., *A Leschen & Sons Rope*, 201 U.S. at 171-72; *NutraSweet Co. v. Stadt Corp.*, 917 F.2d 1024, 1025-26, 16 U.S.P.Q.2d (BNA) 1959, 1960 (7th Cir. 1990) (blue for artificial sweetener packets); *James Heddon’s Sons v. Millsite Steel & Wire Works Inc.*, 128 F.2d 6, 8, 53 U.S.P.Q. (BNA) 579, 581 (6th Cir. 1942) (red stripe on packages); *Fleischmann v. Starkey*, 25 F. 127, 127 (C.C.D.R.I. 1902) (yellow for packaging for compressed yeast).

- 6        *See, e.g.*, Thomas A. Schmidt, *Creating Protectible Color Trademarks*, 81 TRADEMARK REP. 285, 286 (1991).
- 7        *See* *Campbell Soup Co. v. Armour & Co.*, 81 F. Supp. 114, 119, 79 U.S.P.Q. (BNA) 14, 18-19 (E.D. Pa. 1948), *superseded by statute*, 15 U.S.C.A. §§ 1051-1127 (1997); Brian R. Henry, *Right Hat, Wrong Peg: In re Owens-Corning Fiberglas Corporation and the Demise of the Mere Color Rule*, 76 TRADEMARK REP. 389, 391 (1986).
- 8        *See Campbell Soup*, 81 F. Supp. at 119, 79 U.S.P.Q. at 18-19.
- 9        *See* 15 U.S.C.A. § 1052(d) (1997); *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. (BNA) 749, 750 (Fed. Cir. 1985) (“marks must be considered in their entirety and must be considered in connection with the particular goods or services for which they are used”).
- 10       *See* *W.H. Brady Co. v. Lem Prods., Inc.*, 659 F. Supp. 1355, 1366, 3 U.S.P.Q.2d (BNA) 1258, 1263 (N.D. Ill. 1987) (basing refusal to extend trademark rights to a color in part on its “desire that infringement actions not denigrate [sic] into questions of shade confusion”); Henry, *supra* note 7, at 393; Jeffrey M. Samuels & Linda B. Samuels, *Color Trademarks: Shades of Confusion*, 83 TRADEMARK REP. 554, 555 (1993).
- 11       *See, e.g.*, *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 167, 34 U.S.P.Q.2d (BNA) 1161, 1164 (1995) (the defendant argued that “lighting (morning sun, twilight mist) will affect perceptions of protected color”).
- 12       *See, e.g.*, *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1120-21, 227 U.S.P.Q. (BNA) 417, 421 (Fed. Cir. 1985).
- 13       *See* *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 529 (1924) (brown color of a quinine preparation functional because it occurred naturally as a result of the presence of chocolate as a masking agent); *Sylvania Elec. Prods., Inc. v. Dura Elec. Lamp Co.*, 247 F.2d 730, 731-32, 114 U.S.P.Q. (BNA) 434, 436 (3d Cir. 1957) (the blue dot in a flashbulb was functional because blue was the color of the chemical necessary to indicate a defective bulb); *American Hosp. Supply Corp. v. Fischer Scientific Co.*, No. 84 C 8634, 1988 U.S. Dist. LEXIS 11000, \*30-31 (N.D. Ill. 1988) (orange for biohazard bags is functional because it alerts the user that the contents of the bag are biohazardous).
- 14       *See, e.g.*, *Qualitex*, 514 U.S. at 164, 34 U.S.P.Q.2d at 1163 (“[i]t is the province of patent law, not trademark law, to encourage invention by granting to inventors a monopoly over new product designs or functions for a limited time”).
- 15       *See Owens-Corning*, 774 F.2d at 1123, 227 U.S.P.Q. at 421 (“[d]eciding likelihood of confusion among color shades ... is no more difficult or subtle than deciding likelihood of confusion where word marks are involved”); Schmidt, *supra* note 6, at 288.
- 16       *Qualitex*, 514 U.S. at 167-168, 34 U.S.P.Q.2d at 1164. This solution has not been free from criticism. *See* Elizabeth A. Overcamp, *Recent Developments: The Qualitex Monster: The Color Trademark Disaster*, 2 J. INTELL. PROP. L. 595, 615-616 (1995).
- 17       *Owens-Corning*, 774 F.2d at 1120, 227 U.S.P.Q. at 419; *see also* *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 1531, 32 U.S.P.Q.2d (BNA) 1120, 1123 (Fed. Cir. 1994). Color depletion, of course, remains an appropriate consideration in determining trademark validity. *See Owens-Corning*, 774 F.2d at 1120, 227 U.S.P.Q. at 419 (color depletion “is not faulted for appropriate application”). The specific components of this application are discussed below. *See infra* Part C1.
- 18       *Qualitex*, 514 U.S. at 168, 34 U.S.P.Q.2d at 1165.
- 19       *See id.* at 161-62, 34 U.S.P.Q.2d at 1162.
- 20       *Id.* at 165, 34 U.S.P.Q.2d at 1164.

21 *See, e.g., Brunswick*, 35 F.3d at 1530-31, 32 U.S.P.Q.2d at 1120-21.

22 *Id.* at 1530, 32 U.S.P.Q.2d at 1122.

23 *Samuels & Samuels*, *supra* note 10, at 556.

24 *See Master Distrib., Inc. v. Pako Corp.*, 986 F.2d 219, 224-25, 25 U.S.P.Q.2d (BNA) 1794, 1798 (8th Cir. 1993); *R.L. Winston Rod Co. v. Sage Mfg. Co.*, 838 F. Supp. 1396, 1402, 29 U.S.P.Q.2d (BNA) 1779, 1783 (D. Mont. 1993).

25 *See Qualitex Co. v. Jacobson Prods. Co.*, 13 F.3d 1297, 1302, 29 U.S.P.Q.2d (BNA) 1277, 1280 (9th Cir. 1994), *rev'd* 514 U.S. 159, 34 U.S.P.Q.2d (BNA) 1161 (1995); *NutraSweet Co. v. Stadt Corp.*, 917 F.2d 1024, 1025, 16 U.S.P.Q.2d (BNA) 1959, 1960 (7th Cir. 1990); *Nor-Am Chem. Co. v. O.M. Scott & Sons Co.*, 4 U.S.P.Q.2d (BNA) 1316, 1314-20 (E.D. Pa. 1987).

26 *See Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 159, 34 U.S.P.Q.2d (BNA) 1161, 1161 (1995).

27 *See id.* at 161, 34 U.S.P.Q.2d at 1162.

28 *See id.* at 161-62, 34 U.S.P.Q.2d at 1162.

29 15 U.S.C.A. § 1127 (1997).

30 *Qualitex*, 514 U.S. at 162, 34 U.S.P.Q.2d at 1162. 15 U.S.C. § 1127 defines a trademark to include “any word, name, symbol or device, or any combination thereof [] used by a person ... to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C.A. § 1127.

31 *Qualitex*, 514 U.S. at 163-64, 34 U.S.P.Q.2d at 1163 (citing 1 J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.01[2] (3d ed. 1994)).

32 *Id.* at 164, 34 U.S.P.Q.2d at 1163.

33 *See id.*

34 *Id.*

35 Some commentators argue that while *Qualitex* is important for its rejection of the mere color rule, its impact has proved to be less than originally expected. *See* Kevin M. Jordan & Lynn M. Jordan, *Qualitex Co. v. Jacobson Products Co., The Unanswered Question—Can Color Ever be Inherently Distinctive?*, 85 TRADEMARK REP. 371, 388 (1995) (“very little trademark law has actually changed”).

36 *See Qualitex*, 514 U.S. at 164, 34 U.S.P.Q.2d at 1163.

37 *Id.* at 166, 34 U.S.P.Q.2d at 1164.

38 *See id.* at 166, 34 U.S.P.Q.2d at 1164 (citing U.S. DEPT. OF COMMERCE, PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINATION PROCEDURE § 1202.04(e) (2d ed. 1993)).

39 *Id.* at 169, 34 U.S.P.Q.2d at 1165.

40 *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1120, 227 U.S.P.Q. (BNA) 417, 419 (Fed. Cir. 1985).

41 *Qualitex*, 514 U.S. at 162-63, 34 U.S.P.Q.2d at 1162.

42 *Id.* at 162-63, 34 U.S.P.Q.2d at 1162.

43 *Id.* at 163, 34 U.S.P.Q.2d at 1163.

44 37 U.S.P.Q.2d (BNA) 1731, 1733 (E.D. La. 1995).

45 *See* *Mana Prods., Inc. v. Columbia Cosmetics Mfg., Inc.*, 65 F.3d 1063, 1071, 36 U.S.P.Q.2d (BNA) 1176, 1181 (2d Cir. 1995) (following *Qualitex*, “color is today capable of obtaining trademark status in the same manner that a descriptive mark satisfies the statutory definition of a trademark, by acting as a symbol and attaining secondary meaning”); *Fabrication Enters., Inc. v. Hygenic Corp.*, 64 F.3d 53, 58 n.3, 35 U.S.P.Q.2d (BNA) 1753, 1756 n.3 (2d Cir. 1995) (“[p]ursuant to *Qualitex*, Lanham Act protection for a single color may be garnered only upon a showing of secondary meaning”); *see also* *Carillon Importers Ltd. v. Frank Pesce Group, Inc.*, 913 F. Supp. 1559, 1563, 38 U.S.P.Q.2d (BNA) 1118, 1121-1122 (S.D. Fla. 1996) (“[a]s a matter of policy, color alone is not protected as trade dress, unless it has acquired a secondary meaning”).

46 *See, e.g.*, *Jordan & Jordan*, *supra* note 35, at 395 (this “implies that color will always be descriptive and therefore subject to protection only upon a showing of secondary meaning”).

47 Oral argument before the United States Supreme Court unearths this point. *See* Karin S. Schwartz, *It Had to be Hue: The Meaning of Color “Pure and Simple,”* 6 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 59, 93 (1995) (counsel for *Qualitex*, noting that the issue was not before the court, stated that “[w]e’re not taking it that far as to say, this color is inherently distinctive”).

48 *See In re Hudson News Co.*, 39 U.S.P.Q.2d (BNA) 1915, 1923 n.17 (T.T.A.B. 1996) (“the debate centers on ... whether or not secondary meaning must be demonstrated for ... [color] marks”); Jonathan Hudis, *Removing the Boundaries of Color*, 86 TRADEMARK REP. 1, 2 (1996); Laura R. Visintine, Note, *The Registrability of Color Per Se as a Trademark After Qualitex Co. v. Jacobson Products Co.*, 40 ST. LOUIS L.J. 611, 642 (1996); Susan Douglass, *Color Me Happy: The Supreme Court Rules on the Trademark Registrability of Color*, 7 NO. 5 J. PROPRIETARY RTS. 2, 7-8 (1995); *Jordan & Jordan*, *supra* note 35, at 393; Schwartz, *supra* note 47, at 92.

49 Ironically, a decision by any other federal court of appeals holding that color marks may be inherently distinctive would create a circuit split similar to that resolved by the *Qualitex* decision. *See* *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 160-62, 34 U.S.P.Q.2d (BNA) 1161, 1162 (1995).

50 *See, e.g., id.* at 169-70, 34 U.S.P.Q.2d at 1165-66.

51 *See, e.g., id.*

52 There is an apparent lack of clarity among the several cases discussing the functionality doctrine as to the doctrine's impact. *See id.* at 170, 34 U.S.P.Q.2d at 1165-1166 ("where a color serves a significant nontrademark function ... courts will examine whether its use as a mark would permit one competitor ... to interfere with legitimate ... competition"); *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1120-21, 227 U.S.P.Q. (BNA) 417, 419 (Fed. Cir. 1985) ("when the color applied to goods serves a primarily utilitarian purpose it is not subject to protection as a trademark"); *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 1530, 32 U.S.P.Q.2d (BNA) 1120, 1122 (Fed. Cir. 1994) ("the use of color—if functional—cannot serve as a trademark"). However, this lack of clarity stems from the use of different terminology rather than any inconsistency of application. Because the *de facto/de jure* functionality vocabulary and analysis have been applied in the registration context both before and after the *Qualitex* decision, the same will be used in the present discussion. *See, e.g., Brunswick*, 35 F.3d at 1530, 32 U.S.P.Q.2d at 1122; *In re Orange Communications, Inc.*, 41 U.S.P.Q.2d (BNA) 1036, 1041-42 (T.T.A.B. 1996).

53 *See Qualitex*, 514 U.S. at 166, 34 U.S.P.Q.2d at 1164, *Brunswick*, 35 F.3d at 1330, 32 U.S.P.Q.2d at 1122; *Owens-Corning*, 774 F.2d at 1124, 227 U.S.P.Q. at 422.

54 *Qualitex*, 514 U.S. at 170, 34 U.S.P.Q.2d at 1165-66.

55 *See generally id.*

56 *Id.*

57 *Owens-Corning*, 774 F.2d at 1124, 227 U.S.P.Q. at 422; *see also In re Deere & Co.*, 7 U.S.P.Q.2d (BNA) 1401, 1403 (T.T.A.B. 1988) ("[w]hat is involved here is merely a question of ornamentation").

58 *See Qualitex*, 514 U.S. at 164-66, 34 U.S.P.Q.2d at 1162-64.

59 *See Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 1531, 32 U.S.P.Q.2d (BNA) 1120, 1122 (Fed. Cir. 1994). *See also In re Royal Appliance Mfg. Co.*, No. 74/156,648, 3 (T.T.A.B. Oct. 25, 1996) (unpublished decision) (color red for vacuums not *de jure* functional because "the color of a hand-held vacuum cleaner in no way increases the ability of the vacuum to pick up dirt or decreases the cost to manufacture the vacuum").

60 *See Brunswick*, 35 F.3d at 1531, 32 U.S.P.Q.2d at 1122. This is true regardless of any claim of distinctiveness because "evidence of distinctiveness is of no avail to counter a *de jure* functionality rejection." *Id.* at 1543, 32 U.S.P.Q.2d at 1125 (citations omitted).

61 *Qualitex*, 514 U.S. at 165, 34 U.S.P.Q.2d at 1164 (citing *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 850 n.10, 214 U.S.P.Q. (BNA) 1, 4 n.10 (1982)).

62 *See Owens-Corning*, 774 F.2d at 1121, 227 U.S.P.Q. at 419-420 (citing *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 1340-1341, 213 U.S.P.Q. (BNA) 9, 15-16 (C.C.P.A. 1982)).

63 *See Qualitex*, 514 U.S. at 165, 34 U.S.P.Q.2d at 1163-64.

64 *See, e.g., In re Orange Communications, Inc.*, 41 U.S.P.Q.2d (BNA) 1036, 1041 (T.T.A.B. 1996).

65 *See Sylvania Elec. Prods., Inc. v. Dura Elec. Lamp Co.*, 247 F.2d 730, 731-32, 114 U.S.P.Q. (BNA) 434, 435-36 (3d Cir. 1957).

66 *See California Crushed Fruit Corp. v. Taylor Beverage & Candy Co.*, 38 F.2d 885, 885 (D. Wis. 1930).

- 67 See *Owens-Corning*, 774 F.2d at 1122, 227 U.S.P.Q. at 421 (“[t]he record indicates that fibrous glass insulation ordinarily has a light yellow-white coloring”); *Edward M. Weck, Inc. v. IM, Inc.*, 17 U.S.P.Q.2d (BNA) 1142, 1144 (T.T.A.B. 1990) (testimony of record established that green “is not a natural color of plastic”).
- 68 See *Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 1531, 32 U.S.P.Q.2d (BNA) 1120, 1123 (Fed. Cir. 1994).
- 69 See *American Hosp. Supply Corp. v. Fischer Scientific Co.*, No. 84 C 8634, 1988 U.S. Dist. LEXIS 11000, \*32 (N.D. Ill. 1988); see also *Brunswick*, 35 F.3d at 1532, 32 U.S.P.Q.2d at 1123 (black is functional for outboard motors because it is compatible with a number of different colors for boats and components and because it decreases apparent object size, both of which are desirable to buyers). The TTAB, in *In re Royal*, distinguished between “objective evidence” of a color’s desirability, supporting a finding of *de jure* functionality in *British Seagull*, and “subjective judgment” of some people, even including the applicant, not supporting *de jure* functionality. *In re Royal Appliance Mfg.*, No. 74/156,648, 6-7 (T.T.A.B. Oct. 25, 1996) (unpublished decision). Given the Board’s efforts to call attention to the thorough job done by the examining attorney despite the limited resources available, one way to reconcile the conflicting *de jure* functionality findings in these two cases would be to conclude that, as a practical matter, only in an *inter partes* proceeding can objective evidence of a color’s desirability be presented to support a *de jure* functionality finding.
- 70 *R.L. Winston Rod Co. v. Sage Mfg. Co.*, 838 F. Supp. 1396, 1400, 29 U.S.P.Q.2d (BNA) 1779, 1781 (D. Mont. 1993).
- 71 *Edward M. Weck*, 17 U.S.P.Q.2d at 1145; see also *Qualitex Co. v. Jacobson Prods. Co.*, 21 U.S.P.Q.2d (BNA) 1457, 1458 (C.D. Cal. 1991), *rev’d* 514 U.S. 159, 34 U.S.P.Q.2d (BNA) 1161 (1995) (evidence established that other manufactures used a variety of other colors on similar products).
- 72 See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 U.S.P.Q.2d (BNA) 1081 (1992).
- 73 See *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163, 34 U.S.P.Q.2d (BNA) 1161, 1163 (1995) (no objection found to the use of color alone as a trademark “where that color has attained ‘secondary meaning’”); *Edward M. Weck*, 17 U.S.P.Q.2d at 1145-1146 (trademark protection not appropriate even though the color green was not functional for medical instruments because secondary meaning not established).
- 74 See, e.g., *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125, 227 U.S.P.Q. (BNA) 417, 422 (Fed. Cir. 1985) (the applicant may rely on Section 2(f) of the Lanham Act, 15 U.S.C. § 1052(f), which allows a showing of acquired distinctiveness to be made, yet that Section left the determination regarding types and amount of proof to the courts and the PTO).
- 75 *Owens-Corning*, 774 F.2d at 1127, 227 U.S.P.Q. at 424.
- 76 See 2 J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15.70 (4th ed. 1996).
- 77 508 F.2d 1336, 1340, 184 U.S.P.Q. (BNA) 487, 490 (C.C.P.A. 1975) (a non-color case).
- 78 162 U.S.P.Q. (BNA) 279, 287 (T.T.A.B. 1969) (a non-color case).
- 79 See *In re Royal Appliance Mfg. Co.*, No. 74/156,648, 1-2 (T.T.A.B. Oct. 25, 1996) (unpublished decision).
- 80 *Id.* at 9.
- 81 *Id.* at 9-10.

82     *See Owens-Corning*, 774 F.2d at 1127, 227 U.S.P.Q. at 424.

83     *See id.*; *Federal Glass*, 162 U.S.P.Q. at 286.

84     *See Royal Appliance*, No. 74/156,648 at 10.

85     *Id.* at 10-11. Respondents of the survey also correctly identified the applicant’s DIRT DEVIL product as the Royal Appliance red hand-held vacuum cleaner. *See id.* at 10.

86     *Id.* at 11-12.

87     15 U.S.C.A. § 1052(f) (Supp. 1999).

88     *See Owens-Corning*, 774 F.2d at 1125, 227 U.S.P.Q. at 422.

89     *See id.*

90     *Qualitex Co. v. Jacobson Prods. Co.*, 21 U.S.P.Q.2d (BNA) 1457, 1458 (C.D. Cal. 1991), *rev’d* 514 U.S. 159, 34 U.S.P.Q.2d (BNA) 1161 (1995).

91     *See Edward M. Weck, Inc. v. IM, Inc.*, 17 U.S.P.Q.2d (BNA) 1142, 1145-46 (T.T.A.B. 1990) (“while applicant has used the color green for approximately nine years ... [other factors] militate against the finding of distinctiveness”).

92     *Owens-Corning*, 774 F.2d at 1125, 227 U.S.P.Q. at 423.

93     *Id.*

94     *See Qualitex*, 21 U.S.P.Q.2d at 1458.

95     38 U.S.P.Q.2d (BNA) 1218, 1219 (T.T.A.B. 1995) (unpublished decision). There is a suggestion in this case that the limited market for the applicant’s dental hygiene instruments (the “very insular and discrete community of specialist[s]” to whom the products are sold) reduced the advertising expenditures necessary to support a finding of acquired distinctiveness. *Id.* at 1219.

96     *See In re Royal Appliance Mfg. Co.*, No. 74/156,648, 9 (T.T.A.B. Oct. 25, 1996) (unpublished decision).

97     *See Edward M. Weck, Inc. v. IM, Inc.*, 17 U.S.P.Q.2d (BNA) 1142, 1144 (T.T.A.B. 1990).

98     *Id.* at 1146.

99     *See In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125, 227 U.S.P.Q. (BNA) 417, 423 (Fed. Cir. 1985).

100 *Id.* at 1126, 227 U.S.P.Q. at 424.

101 *In re Denticator Int'l*, 38 U.S.P.Q.2d (BNA) 1218, 1219 (T.T.A.B. 1995) (unpublished decision).

102 *See In re Royal Appliance Mfg. Co.*, No. 74/156,648, 9 (T.T.A.B. Oct. 25, 1996) (unpublished decision). For example, one advertisement showed across the page from a picture of their vacuum cleaner “a red balloon with a red string hanging down and the following wording in large lettering: ‘What’s Bright Red, Feather-Light, And Comes With An Extra Long Cord? Guess Again.’” *Id.*

103 *Edward M. Weck*, 17 U.S.P.Q.2d at 1146.

104 *See Owens-Corning*, 774 F.2d at 1125, 227 U.S.P.Q. at 422-23.

105 *Qualitex Co. v. Jacobson Prods. Co.*, 21 U.S.P.Q.2d (BNA) 1457, 1458 (C.D. Cal. 1991), *rev'd* 514 U.S. 159, 34 U.S.P.Q.2d (BNA) 1161 (1995).

106 *Owens-Corning*, 774 F.2d at 1126, 227 U.S.P.Q. at 423.

107 *Id.* at 1126, 227 U.S.P.Q. at 423-424.

108 *See Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 159, 34 U.S.P.Q.2d (BNA) 1161, 1162 (1995).

109 *See, e.g., Brunswick Corp. v. British Seagull Ltd.*, 35 F.3d 1527, 1532, 32 U.S.P.Q.2d (BNA) 1120, 1123 (Fed. Cir. 1994).

110 *See Owens-Corning*, 774 F.2d at 1121, 227 U.S.P.Q. at 419-20.

111 *See, e.g., Mana Prods., Inc. v. Columbia Cosmetics Mfg., Inc.*, 65 F.3d 1063, 1071, 36 U.S.P.Q.2d (BNA) 1176, 1181 (2d Cir. 1995); *Fabrication Enters., Inc. v. Hygenic Corp.*, 64 F.3d 53, 58 n.3, 35 U.S.P.Q.2d (BNA) 1753, 1756 n.3 (2d Cir. 1995).

112 *See Owens-Corning*, 774 F.2d at 1124, 227 U.S.P.Q. at 421-22.

113 *Id.* at 1127, 227 U.S.P.Q. at 424.

114 *See id.* at 1124, 227 U.S.P.Q. at 421-22.