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# PRESERVING COLOR WITH INTELLECTUAL PROPERTY LAW

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## ABSTRACT

“We live in a world of color”. Without colors, it is impossible to envision our lives. There are many colorful things, items, experiences, and decorations in the world, particularly in the realm of marketing and advertising, which includes trademarks and copyrights. The IPR Regime should be distinctive and be able to set the brand's goods and services apart from other goods and services, whether it is through the use of a single color or a variety of colors. However, discussions on whether a color can serve as a trade mark and be registered as such are now over. The majority of authorities, including the EU, assume that despite its uniqueness, abstract color can occasionally become an independently registered trade mark. When it comes to copyright of color it is a whole different regime. Copyright doesn't cover colors on their own. For instance, a painting's color scheme is protected by copyright, and the painting's author is the owner of that copyright. A work of art is a reflection of the artist's soul, into which the artist has poured the hues of his or her emotions and beliefs. “A painter should begin every canvas with a wash of black, for all things in nature are dark except where exposed by the light,” remarked the famous Italian artist Leonardo da Vinci. The need to safeguard the artist's vision when it converges on a canvas has led to the inclusion of intellectual property rights in the Indian legal system today with the development of new opportunities. In this Article, the author discusses the copyrightability and trademark of colors in immersive art along with why it is controversial while discussing various landmark cases.

**Keywords:** Color, Art, Copyright, Trade Mark, Intellectual Property Rights.

## Introduction

When I see red and yellow I think McDonald's. You may think Netflix when you see red and black. We refer to colors as Tiffany Blue, Cadbury Purple or Coca-Cola Red. "Studies have demonstrated that colors can have a strong influence on mind and association and are visually embedded in our brain so it creates a much greater recall value than taglines or brand names; therefore it makes sense that intellectual property protection and ownership of a color are complicated issues."<sup>1</sup> One must always be unique and different to be irreplaceable. A product's trade dress, which consists of color combinations, can only be protected if it is distinctive enough for customers to associate it with a particular brand. Today's brands must forge a type of philosophical connection with their consumers, which has sparked the development of unconventional trademarks that give businesses an advantage when the margins for profit and conversion are so thin.<sup>2</sup>

### Why is the Intellectual Property Protection of Color controversial?

This controversy is largely due to the fact that, while trade marking colors benefits advertisers that invest a lot of effort into marketing, especially corporate powerhouses, it might also convey the notion that businesses can claim ownership over something that is intangible or universal. All colors are tints and tones of previously discovered hues, proving that colors cannot actually be intellectually formed. Therefore, is it even necessary to provide them with protection?

#### 1. Copyrightability of Color

Copyright doesn't cover colors on their own. For instance, a painting's color scheme is protected by copyright, and the painting's author is the owner of that copyright. Can and does it limit another company or brand from using that color if a company, like Tiffany or Harrods, has used the same one to sell their brand for many years? Can another artist use yellow and pink in the same way as Rothko used them in *White Center*? If so, how can the piece be safeguarded

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<sup>1</sup> Gregory Ciotti's *Color Psychology: How Colors Influence the Mind* explores the role of colour in persuasion (2014) Information is accessible at <https://www.psychologytoday.com/us/blog/habits-not-hacks/201408/color-psychology-how-colors-influence-the-mind>. Visit [https://www.verywellmind.com/color-psychology-2795824#:text=These percent for more information](https://www.verywellmind.com/color-psychology-2795824#:text=These%20percent%20for%20more%20information). Warm colours elicit sentiments of grief, apathy, and other negative emotions, while cool colours inspire feelings of indifference and <https://neurofied.com/effects-of-color-on-behavior/>

<sup>2</sup> *Color Marks- A new Palette in the world of IPR*, PA Legal, 3 May 2022, <https://thepalaw.com/trademark/color-marks-a-new-palette-in-the-world-of-ipr/>

from plagiarism and infringement of it? If not, can we use an unlimited number of hues and shades, or will we eventually "run out" of colors to employ?

“Literary, dramatic, musical, and artistic original works are all protected by copyright, a type of intellectual property law.”<sup>3</sup> Although it may protect the manner in which these things are expressed, copyright does not protect facts, ideas, systems, or methods of operation.<sup>4</sup> The use of colors cannot be covered by copyright. For a work to be covered by copyright, it must exist in physical form. A color should not be copyrighted because it is not sufficiently distinctive to do so and because doing so would monopolize its usage and put limitations on other producers. However, if the work's creator used talent, judgment, and effort in creating it, an arrangement of colors might be granted such protection. The positioning and organization of particular colors in a given configuration, that is, their exact or almost exact placement and arrangement, is protected by copyright. Thus, copyrighting a color scheme would essentially be identical to copyrighting a completed work.<sup>5</sup> The positioning and organization of particular colors in a given configuration, that is, their exact or almost exact placement and arrangement, is protected by copyright<sup>6</sup>. Thus, copyrighting a colour scheme would essentially be identical to copyrighting a completed work.

Malevich's "The Black Square" is the ideal illustration of a painting that expresses itself solely via the use of one color (1915). If the painting was made more recently, it would be protected by copyright as an original work of art under the Copyright Act, but the one color would not be protected separately. In this scenario, the artist would probably only have "limited" copyright protection for the work.<sup>7</sup> Therefore, a straightforward duplicate of the identical work in a different color is a copying offence.<sup>8</sup> The color of the original copyrighted piece may be freely used by other artists, but not the pattern as such. In such circumstances, it is likely that there wouldn't be any infringement and that each artist would only be given limited protection with regard to the pieces they produce using a single hue. Due to an established scheme of certain colors and the artist's effort, it is possible that "broader" protection may be awarded to the artist for artwork that combines two or more colors. This would mean that later artists would

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<sup>3</sup> N M, Anjaneya & Aswath, Lalitha. *Understanding Copyright Laws: Infringement, Protection and Exceptions*. International Journal of Research in Library Science (2455-104X) 2016.

<sup>4</sup> *Id.*

<sup>5</sup> *Sarony v. Burrow-Giles Lithographic Company*, 111 U.S. (1884)

<sup>6</sup> *What Can Be Trademarked: Everything You Need to Know*, Upcounsel, 2018, <https://www.upcounsel.com/what-can-be-trademarked>

<sup>7</sup> 7 U.S.C. § 102

<sup>8</sup> Jeanne C. Fromer & Christopher Jon Sprigman, *Copyright Law: Cases and Materials* 10 (2d ed. 2020)

not be permitted to produce using that specific color scheme but might use those colors in a new arrangement without violating the copyright of the original artists.

The goal of copyright is to encourage beneficial arts and science while fostering innovative thinking.<sup>9</sup> If someone owned the copyright to a color, they would have exclusive control over it.<sup>10</sup> This would discourage artists from trying new things or exploring with color in their paintings. It may also be demonstrated by copyright law principles like the public domain and the sceneries a faire doctrine<sup>11</sup> why the concept of color was not specifically covered by copyright law. “These infamous concepts state that certain creative aspects are not covered by copyright protection because they either belong to the public or because their representation makes them necessary for a common context.”<sup>12</sup> It may be contended and inferred that colors are also creative aspects that allow for expression, and that if they were protected by copyright, the goal of the legislation would essentially become meaningless. Therefore, it makes more sense to copyright the entire piece rather than just one color.

## 2. Trademark of Color

“While colors are not usually protected under copyright law, colors may have a greater chance of doing so under trademark law since it is simpler to meet the standards and conditions of a color mark and the goals of trademark law.”<sup>13</sup> However, rather than artists trademarking a color based on their artwork, this usually works better with businesses and well-known marks. By securing the owner's exclusive rights to use the mark, trademark law prevents any illegal use of the mark that can mislead the general public. It tries to advertise products or services while also forbidding rivals from utilizing the mark and profiting from copying. Additionally, it aims to safeguard both the interests of market traders and consumers. The law definition of trademarks does not clearly cover colors, which have historically been prohibited from acquiring trademark protection. “However, the United States Supreme Court ruled in *Qualitex* in 1995 that a color can be registered as a trademark if proof is provided that it has become connected to a certain product and identified the manufacturer.”<sup>14</sup> The trademark holder must demonstrate that the color is unique and identifies the source of the items to which it is applied.

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<sup>9</sup> U.S. Const. art. 1, § 8, cl. 8.

<sup>10</sup> Moussawi, Yarah, *Does Copyright Protect or Hinder Innovation and Creativity in the Media and Cinematic Arts?* (Nov. 28, 2017) Available at: <https://medium.com/@YarahMoussawi/does-copyright-protect-or-hinder-innovation-and-creativity-in-the-media-and-cinematic-arts-c514d65b830f>

<sup>11</sup> Samuels, Edward, *The Public Domain in Copyright Law*, 41 *Journal of the Copyright Society* 137 (1993).

<sup>12</sup> Kurtz, Leslie, *Copyright: The Scenes a Faire Doctrine* 41 *Fla. L. Rev.* 79 (1989).

<sup>13</sup> *Qualitex Co. v. Jacobson Prods. Co.* 514 U.S. 159, 115 S. Ct. 1300 (1995)

<sup>14</sup> *Id.*

Before Qualitex, the Circuits disagreed on whether protection may be given based solely on color. The Supreme Court decisively ruled that “there is no rule categorically prohibiting the use of color alone,” resolving the argument.

Therefore, single colors and color combinations can be trademarked as a component of a product package or service if they meet the following requirements, just like any other trademark must:

- Even if the source of the items is unknown, the color mark must be able to identify it.
- The color mark cannot have a practical or useful purpose.<sup>15</sup>

Additionally, a color may only be trademarked in relation to a certain product or service if it has acquired "secondary meaning." The Court used the category of “descriptive marks” which are never naturally capable of establishing source, to compare color to.<sup>16</sup> There is a presumption that the term “or color” was chosen for these categories for reasons other than to indicate source. However, the Court acknowledged that color, like descriptive marks, might become a means of identifying, differentiating, and indicating the source of the commodity through “secondary meaning.”<sup>17</sup> The Federal Circuit recognized that color marks on product packaging might be fundamentally unique and may be eligible for trademark protection in a more recent decision, *In re Forney Industries*.<sup>18</sup> The controversy therein stemmed from Forney Industries' effort to register a mark that included a black banner at the top and an orange tint that faded towards yellow over time.

### **Color Marks in the Courts**

Brand owners are increasingly using non-traditional color markings to preserve the colors associated with their brands as they realize how much colors may boost brand identification. These trademarks are frequently regarded as having high value by the owners. Although there is little case law in this area, these cases imply that getting a legitimate color mark can be challenging.

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<sup>15</sup> *Id.*

<sup>16</sup> Bernet, Michael, *Can You Trademark a Color?*, IP Watchdog (Jul. 14, 2018), <https://www.ipwatchdog.com/2018/07/14/can-you-trademark-a-color/id=99237/>

<sup>17</sup> Starr, David, *Trademark Protection of Color Marks in the United States*, China IP Magazine (Jun. 2009) <http://www.chinaipmagazine.com/en/journal-show.asp?id=497>

<sup>18</sup> *In re Forney Industries, Inc.*, 955 F.3d 940 (Fed. Cir. 2020).

The striking ultramarine blue known as International Klein Blue was trademarked by painter Yves Klein. While it is less typical for an artist to do so, there are some trademarked colors that are held by artists and cannot be used legally without the artist's consent. The distinctive blue of jeweler company Tiffany & Co. is likewise protected as a registered trademark. More recently, in 2016, the artist Anish Kapoor bought the creative licence for "Vantablack,"<sup>19</sup> which has been called "the darkest man-made substance." Carbon nanotubes, which make up the material, reflect almost no light. However, Kapoor's Vantablack's exclusive licence turned out to be contentious, leading to a dispute with Stuart Semple, a British artist who then set out to free colors from private ownership. Semple wanted the product to spark a discussion about ownership, elitism, privilege, and accessibility to the arts.<sup>20</sup> Given the ongoing discussion on intellectual property ownership of color, even though this has not yet been resolved in a court of law since protection was granted, it does make for an interesting topic.

### 1. Christian Louboutin case

It is challenging, yet color trade marking is a prevalent practice among corporations. The United States Court of Appeals for the Second Circuit acknowledged Christian Louboutin's use of red outsoles as a trademark in the Louboutin case, but only when the rest of the shoe was painted a different color. In its prior decision, the Federal District Court noted how well-known the Louboutin shoe had grown, noting that it was routinely seen on red carpets and fashion runways in Hollywood and was practically instantly recognized "to those in the know."<sup>21</sup> However, the court determined on appeal that the law prohibited "recognizing a trademark for the use of a single hue for fashion items." "In overturning that decision, the appellate court also stated that color can and does serve as a trademark in the fashion industry and that Christian Louboutin's renowned Red Sole trademark is valid, protectable, and enforceable."<sup>22</sup> This allowed Yves Saint Laurent to continue selling its monochromatic red shoes.

### 2. Cadbury case

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<sup>19</sup> See <https://www.thecollector.com/vantablack-anish-kapoor-stuart-semple-controversy/> and <https://www.theverge.com/2021/4/15/22386299/whitest-white-paint-anish-kapoor-vantablack>

<sup>20</sup> Kapoor got his hands on Semple's paint and posted an image of him flipping a pink-stained middle finger to Instagram with the caption "up yours" in retaliation. See more at <https://www.cnn.com/style/article/blackest-black-ink-culture-hustle/index.html>

<sup>21</sup> Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc., No. 11-3303 (2d Cir. 2013).

<sup>22</sup> Christina Guazzi and Lin Liu, European Union: *IP And Colours: Where Do We Stand And How Far Can We Go?*, Mondaq (2019), <https://www.mondaq.com/uk/trademark/796050/ip-and-colours-where-do-we-stand-and-how-far-can-we-go>

Cadbury eventually gave up its 1995 trademark registration for “Cadbury purple,” which was “applied to the whole visible surface or the main color applied to the complete visible surface of the packaging of the goods,” after a protracted legal struggle with Nestlé. Its striking purple color was undeniably unusual. The Court of Appeal, however, had earlier determined that the trade mark was inadmissible since the phrase “predominant color” was considered to cover an undetermined number of alternative signs. A further attempt in 2018 to distinguish a legitimate purple mark that was put to the “full visible surface” of the box failed.

One of the reasons the Courts are hesitant to uphold color mark registrations is a concern about policy to prevent handing businesses potential eternal monopolies over certain colors, particularly when a potential infringer finds it challenging to detect the exact shape of the mark. Nestlé viewed this as a danger to its bright purple Quality Street as well as an opportunity to compete with Cadbury after the latter opposed to Nestlé's registration of the Kit Kat bar's design as a trademark.

### 3. Red Bull case

Therefore, it could seem that using two or more colors rather than "monopolizing" one increases the likelihood of obtaining a genuine registration for a trade mark. An EU General Court ruling from late 2017 addressing the blue and silver used on Red Bull cans that were "applied in equal proportion and juxtaposed to each other" illustrates the difficulty in determining the exact arrangement of the colors.<sup>23</sup> It was found that the registration contained a number of unique combinations that would make it difficult for the customer to recognize and recall any one particular combination (a requirement for the colors to serve as a symbol indicating the origin of the items).

“Red Bull has now appealed to the CJEU, arguing that the decision of the General Court effectively limits color combination marks to figurative, position, or pattern marks in color, making the protection of color combination marks per se impossible in practice”.<sup>24</sup> However, marks for combinations of colors face particular difficulties. It is uncertain whether the CJEU will use this chance to address some of the ambiguities and set forth fair and impartial guidelines for color combination marks.

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<sup>23</sup> Rozemarijn Ietswaart, *Red Bull loses case but still crosses finish line*, European Patent and Trademark Attorneys (2019), <https://www.nlo.eu/en/news/red-bull-loses-case-still-crosses-finish-line>

<sup>24</sup> Agnieszka Sztoldman, *No monopoly on blue and silver for Red Bull*, Kluwer Trademark Blog, (2019), <http://trademarkblog.kluweriplaw.com/2019/08/13/no-monopoly-on-blue-and-silver-for-red-bull/>

#### 4. Mars UK

Mars UK's use of the purple logo on its Whiskas cat food and kitten milk is another effective example. According to the OHIM Board of Appeal, the color mark has grown distinctive enough to qualify as a trade mark.<sup>25</sup> Therefore, it appears that establishing a color mark is attainable when the sign's form is distinct, the colors are precisely defined using a recognized identification system, and the sign's spatial delimitation is sufficiently accurate.

Other colors that are frequently employed by painters could be referred to as “signature colors,” since they are identified with a particular artist because they were utilized so frequently in their works.<sup>26</sup> Typically, it is difficult to register a color as a trademark. This is as a result of the idea of public interest connected to intellectual property. A monopolization of the available colors would result from more trademarks or copyrights being issued for colors. Though there may be a variety of shades or hues, there are only really a finite number of colors.<sup>27</sup> There may not be any colors left for businesses to employ if all colors were granted trademarks and copyrights. Therefore, it is in the interest of the general public to prevent monopolization in order to ensure that artists and businesses can access colors. If the owner can show that the color's long-standing and broad use on its products and services has altered consumers' perceptions of the hue, it would be possible to trademark the shade.<sup>28</sup> It would be much more challenging for an artist to gather evidence of a relationship between their work and a viewer's impression.

#### Conclusion

Even though it is evident that the law anticipates that color marks, including combination color marks, are capable of registration, the question of how an applicant can accurately describe the application of the color and/or the combination of several colors in order to obtain a legitimate trade mark remains.<sup>29</sup> Each artist has a copyright over their own work and that exists at the time of creation. A creative and artistic project that calls for selection, compilation, and

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<sup>25</sup> *Id.* at 22

<sup>26</sup> Glynn S. Lunney Jr, *Trademark Monopolies*, 48 Emory L. J. 367 (1999)  
<https://scholarship.law.tamu.edu/facscholar/476>

<sup>27</sup> *Id.*

<sup>28</sup> Mar, Anita, *Can you trademark a color alone?*, Trade Mark Angel (Jun. 6, 2019). Available at:  
<https://trademarkangel.com/trademark-color-alone/#:~:text=Colors%20by%20themselves%20aren't,be%20protected%20as%20a%20trademark.>

<sup>29</sup> Brady, Maureen, *Property and Projection*, 133 Harv. L. Rev. 1143 (2020) Available at  
<https://harvardlawreview.org/2020/02/property-and-projection/>. Also see, Architectural Light Graffiti: Image Projection Bombing, Urbanist. Available at <https://weburbanist.com/2007/09/07/architectural-light-graffiti-projection-bombing-images-on-urban-surfaces/> and <https://www.cnn.com/videos/politics/2017/05/16/trump-hotel-projection-jnd-orig-vstop.cnn>



organization is an exhibition of various installations that deal with color. The notion of using colors for the display would not be protected, even if it is likely that the art is copyrighted and copying of the work would be illegal. Although every installation in immersive modern art is protected by the copyright as a work of art, neither the copyright nor the trademark laws are likely to apply to the colors themselves. Similar to how light projection onto a building cannot be declared graffiti but may still be deemed light pollution, the usage of different lights and colors in immersive projects cannot be monopolized.<sup>30</sup> This does not imply that there is no intellectual property protection for the artwork or the display. However, the way in which the colors are employed to express one varies. The goal of intellectual property and copyright legislation is to safeguard expression while allowing others to build on preexisting works and develop new ones. Even though it is likely that there will be some limited copyright protection, it is likely that both these exhibitions and the art installations they comprise will be one-of-a-kind, allowing other designers to express color through comparable contemporary exhibits. However, given the nature of the protected work, it would frequently be impractical to register a trademark for any of the installations.

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<sup>30</sup> Jeanne C. Fromer & Christopher Jon Sprigman, *Copyright Law: Cases and Materials* 10 (2d ed. 2020).