

Properties of Green

On Color and its Rearticulation as a Corporate Asset

Abstract

How is something made into property for the first time? This paper examines the actors and processes that transformed color into an intangible asset through a case study of the 1995 U.S. Supreme Court case, *Qualitex v. Jacobson*, which explicitly granted corporations the right to trademark individual colors for the first time. Bearing in mind that courts had prohibited such trademarks for most of the century, it traces color's development trajectory as a *de facto* corporate possession and ultimately its institutionalization as property *de jure*. My findings suggest that the original acquisition of property is the outcome of a two-part process: the social construction of proper subjects as well as proper objects of property rights. In this case, that happened through the rearticulation of color as a salient object of property rights in a variety of legal texts and through the adjudication of the deserving subject of property rights to color based on quantitative metrics of creative labor. The paper concludes by addressing the broader socio-economic implications of conferring property rights on certain nodes of creative or imaginative labor—namely supply-side marketing work—and not on others—such as the “meaningful” work of consumer product qualification.

Keywords: color, trademarks, law, property rights, knowledge-based economy, valuation, culture

1. Introduction

How does something become property for the first time? This paper examines the actors and processes that transformed color into an intangible asset through a case study of the landmark 1995 U.S. Supreme Court case, *Qualitex Co. v. Jacobson Products Co.*, which explicitly granted corporations the right to trademark individual colors for the first time. Bearing in mind courts had prohibited these trademarks for most of the century, it traces color's development trajectory as a *de facto* corporate possession and ultimately its institutionalization as property *de jure*.

To show how color—a seemingly timeless and universal aspect of the real—came to be understood as a thing subject to private property rights, the paper outlines the justificatory principles and procedures that brought it under the control of an individual owner. I focus on two questions regarding the start of legitimate chains of transfer: 1) What institutional logics and acts morally justify the appropriation of previously unclaimed objects?; and 2) How are the legitimate subjects of property rights determined, and more specifically, what logics and processes guide the attribution of new properties to individuals and organizations?

To answer these, I first review the literature on “original acquisition,” addressing how scholars in political theory, sociology, and law have historically understood the means by which property is initially created and possessed. My analysis focuses on the two main justifications for the legitimate individualization of property rights that have been woven into the fabric of Anglo-American jurisprudence: the “first possession” rule and the doctrine of “just-deserts.” I show how both are grounded in the idea that certain kinds of labor processes create value, and it is this value that is conceived as morally deserving of the rewards of property rights.

Next, I discuss how the legal scaffolding for the idea that color could be corporate property in the form of a trademark developed over the course of the twentieth century. I then examine how actors in this legal dispute addressed the question of whether a particular green-gold could be attributed to the Qualitex Company, outlining the criteria used to connect individual properties to individual firms. My findings suggest that the original appropriation of property is the outcome of a two-part process: the social construction of proper subjects as well as proper objects of property rights. In *Qualitex*, that happened through the rearticulation of color as a salient object of property rights in a variety of legal texts and through the adjudication of the deserving subject of property rights to color based on quantitative metrics of creative labor.

The paper concludes by addressing the broader socio-economic implications of attributing property to certain nodes of creative or imaginative labor—namely supply-side marketing work—and not to others—such as the “meaningful” work of consumer product qualification. It draws attention to the complex intellectual work of legitimizing new forms of property and to the development of new instruments of attribution—documentation, registration, evaluation, and calculation—showing under what conditions it becomes possible for different authorities to make the possession of something for the first time not only lawful, but also appear just, and perhaps even natural.

2. Literature review: property and its provenance

How do previously unowned things come to be property? This question occupied political economists and classical sociological theorists for centuries. Contemporary economic sociologists, in contrast, have significantly less to say about the origins of ownership and its justificatory logics, something all the more puzzling in light of their renewed interest in morality. A crucial factor here is that creation of property has itself received less attention in this subfield than, say, the genesis of markets or firms.¹ Nevertheless, the work of defining and justifying property relations is an increasingly dynamic and valuable process in economic life, and thus, the “morality plays” as Fourcade (2013) might call them, that accompany the invention of new objects and processes of ownership present compelling case studies through which economic sociologists could revisit this classic question.

While sociological theorists have yet to fully explain how or why things come to be owned for the first time, their counterparts in law, politics, and economics have not managed much better. The puzzle that remains to be answered, as Rose (1985:73) puts it, is this: “one buys things from other owners, to be sure, but how did the other owners get those things? Any chain of ownership or title must have a first link. Someone had to do something to anchor that link. The law tells us what steps we must follow to obtain ownership of things, but we need a theory that tells us why these steps should do the job.” Epstein (1979, p. 1221) suggests the natural follow up question to this should be: “What principles decide which individuals have ownership rights ... over what things?” or put another way, how are “given bits of property are matched with given individuals?”

Investigations of “original acquisition,” therefore, must address at least to two sets of questions regarding the start of legitimate chains of transfer: 1) how are property rights to certain categories of objects morally justified? And equally, what institutional logics and acts legitimize the initial possession of specific objects?; and 2) what logics and processes guide the attribution of properties to individuals and organizations—or put another way, how do we determine the legitimate subjects of property rights?

Classical political economists had much to say about the origins of new objects of private property rights. Focusing on the privatization of possessions previously held in common, their research stressed how processes of communal dispossession are the Janus-face of private property creation. Engels (1972) traced the genesis of private ownership through kinship

relations, while Marx (1990) spoke of so-called “primitive” accumulation as a mythical construct, playing “in Political Economy about the same part as original sin in theology.” Both see their work as a rejoinder to Smith’s (1986) depiction of original accumulation as the natural outcome of voluntary acts, either a reward for industry or a penalty for sloth (Perelman, 2000). Critical analyses of propertization as commoditization can also be found in Polanyi’s (2001) work and more recently in Harvey’s (2007) concept of “accumulation by dispossession,” both of which emphasize the ongoing rather than historical quality of original accumulation.

While more agnostic about the institution, classical sociological theorists considered the power to exclude or constrain as a definitive feature of property relations. Weber (1978, p. 44) described it as a “closed relationship,” characterized by “monopolized advantages” that exclude all but the property owner. Tönnies (2001) likewise saw the rise of private property in modern society to reflect the development of individualization through social differentiation, in contrast to the commonly held possessions of traditional communities. Durkheim (2018) offers a similar portrait of property rights as the capacity to isolate or separate objects of ownership from other potential users within a society.

As for the second issue—how property rights get attributed to particular individuals and firms—legal scholars and political philosophers pick up where classical sociologists leave off. Two justifications for the legitimate individualization of property rights have been woven into the fabric of Anglo-American jurisprudence: the “first possession” rule and the doctrine of “just-deserts.”

The “first possession” rule is a key mechanism for transferring open-access resources to private property (Epstein, 1979; Merrill, 2009). Despite its legal and cultural ubiquity, what counts as a sufficient level of control over a resource to qualify as first possession remains unclear. Merrill (2009) suggests that a necessary condition of “first possession” is a performative act—that in order to acquire something in this way, individuals must intentionally do something for which they are presumptively responsible. For Rose (1985), the justification is more specific, tied to the useful labor of speaking clearly and distinctly about one’s property claims. Here “acts of possession” become a “text,” which common law rewards with something akin to authorship rights (Rose, 1985, p. 73).

Next is the doctrine of “just-desert.” This is generally considered a cognate for Locke’s (1980: p. 19-20) labor theory of property, which holds, “Whatsoever then he removes out of the

state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.” Locke is a natural starting point for discussions of property as his writings have been a cornerstone of modern ownership rights (Wilf, 1999). Perhaps his most enduring and consequential claim is that the labor process creates value, and it is this value that deserves to be rewarded with property rights. This conclusion is predicated on the assumption that resources in the state of nature are essentially valueless, or as he puts it, “‘Tis labor, then, which puts the greatest part of value upon land, without which it would scarcely be worth anything ... Nature and the earth furnished only the most worthless materials, as in themselves” (Locke, 1980, p. 23). Applying labor to a thing in the “state of nature” thus creates almost its entire value, and it is through the rightful appropriation of this new value that ownership is legitimately established (Schlatter, 1951; Vaughn, 1978; Rose, 1985).

While the “labor-desert” theory purports to identify the conditions of legitimate appropriation, under closer scrutiny, it suggests as many questions as it answers. What kind or amount of labor qualifies one as deserving of credit and control, and what are the identity conditions of those who get included or excluded? As Nozick (1974) puts it:

If I own a can of tomato juice and spill it in the sea so that its molecules...mingle evenly throughout...do I thereby come to own the sea...? Perhaps the idea, instead, is that laboring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created...Ignore the fact that laboring on something may make it less valuable (spraying pink enamel paint on a piece of driftwood that you have found). Why should one’s entitlement extend to the whole object rather than just to the added value one’s labor has produced? (Pp. 174-175)

Economists point out other shortcomings in Locke’s argument with regard to the subjects of property rights. For Mazzucato (2018), Locke’s conception of individual entitlement as a product of work was based on a production system where individual labor was more important and easier to identify than it is today. Or as Simon (2000, p. 122) similarly concedes, “If we are generous with ourselves, I suppose that we might claim that we ‘earned’ as much as one-fifth of our income. The rest is the patrimony associated with being a member of an enormously productive social system, which has accumulated a vast store of physical capital, and an even larger store of intellectual capital-including knowledge, skills, and organizational know-how held by all of us.”

Both echo Durkheim's (2018, p. 122) doubts that anything is the singular production of an individual's labor: "We do not belong to ourselves entirely: we owe something of ourselves to others, to the various groups we form part of." Or as Veblen (1898, p. 353) puts it, the "natural-rights theory of property makes the creative effort of an isolated, self-sufficing individual the basis of the ownership," yet in doing so "overlooks the fact that there is no isolated, self-sufficing individual. All production is, in fact, a production in and with the help of the community."

Further complicating the mangle of property relations when it comes to the original acquisition is the shift from material to intangible assets (Coombe, 1998, 2007). On a definitional level, intellectual property (IP) refers to a bundle of rights over "mental creations"—including inventions, literary and artistic works, and symbols and names used in commerce. In functionalist accounts, IP rights are the "just-deserts" of imaginative thinking in its various forms (Biagioli, 1998; Beckerman-Rodau, 2011; Burke, 2012). Rose (2003, p. 94) suggests that the function of IP may in fact be "to turn *res communes*, things by their nature incapable of ownership, into *res nullius*, things not yet owned but capable of appropriation." If this is the case, the objects (and subjects) of IP offer an excellent opportunity to explore how new categories of things come to be owned. As yet, though, this remains a largely untapped resource in the economic sociology of property.

Scholars in a range of fields have also critiqued IP laws and norms. Claims that some things cannot or should not be the property of private individuals or organizations are common, particularly with regard to things that are abstract, virtual, or non-rival (Radin, 1996; Hettiger, 1989; Barlow, 1997; Lessig, 2001). Economists like Stiglitz (2008), and legal and media theorists like Benkler (2007) and Vaidhyathan (2003) question the efficiency, coherency, and fairness of IP relations. Jessop (2007) examines how "original acquisition" has extended to the commodification of knowledge, while Boyle (2008) suggests that we are in the midst of a second enclosure movement—"the enclosure of the intangible commons of the mind."

Regardless of these normative assessments, the contours of IP—its objects, subjects, and process changed noticeably over the course of the twentieth century. Scholars consider the unprecedented development of IP as one of the most important factors in the transformation of capitalist economies over the last thirty years (Dobbin, 2004; Coriat and Weinstein, 2011), while others note that the focus of IP rights has moved increasingly further upstream to include

research instruments and procedures (Rhoten and Powell, 2007; Mazzucato, 2018). There have also been changes to the subjects of IP. No longer centered on the individual, corporations have arguably become a main beneficiary of these rights (Coriat and Weinstein, 2011). The evolution of the rules governing the creation and assignment of patents, copyrights, and trademarks have evolved to provide more employer control over intellectual assets produced by contract workers who have been “employed to invent” (Merges, 1999; Fisk, 2003; Stone, 2006). The result has been that the value of IP to large corporations has increased enormously over the last century (Dobbin, 2004).

This expansionist tendency is especially pronounced with regard to trademarks (Port, 2010; Litman, 1999). Originally appearing as compulsory guild symbols in the early modern period, trademarks have transformed into commercial assets (Schechter, 1927; Wilf, 1999; Bentley and Sherman, 2001; Lury, 2008; Scott et al., 2008). Companies have successfully trademarked the decor of a restaurant, the unique registration process of a toy fair, and sweater patterns, not to mention an array of sounds, smells, and colors (Lemley, 1999). With the rise of anti-dilution statutes, trademarks are increasingly viewed as a creative enterprise in their own right, extending beyond the entitlement to exclude others from deceptively appropriating a mark (Dreyfuss, 1990; Coombe, 1991). The result is that these rights protections have come to resemble the moral right of attribution in civil copyright law—the right to protect and control the meaning embodied in a trademark from pernicious interpretations (Port, 2010).

3. Data and methods

This paper uses a single-case study design to examine the processes and actors involved in the reclassification of color as an intangible asset. This qualitative approach aims to generate theoretical statements grounded in rich descriptions of social relations as well as the technological, political, commercial, and legal infrastructures that scaffold the original acquisition of property.

The Qualitex case is worthy of this kind of in-depth analysis for two reasons. First, it is historically significant, having marked an important milestone in the expansion of IP rights to increasingly abstract elements of culture. This legal drama was arguably the most public and impassioned dispute over the private ownership of color to date. Second, as a lightning rod for larger issues around cultural appropriation, this case offers a unique setting through which to

analyze the social topography of propertization in action, and more specifically, the mechanisms that usher new forms of property into existence. Because color was not a naturalized object of property rights, substantial cognitive labor was directed toward legitimizing its reclassification as such. The long-running political, legal, and economic debates over color trademarks as a salient property category, therefore, generated a rich store of material for analysis.

The data collection strategy is archival research, incorporating both image- and text-based data, with the aim of providing a historical context for the varying processes of propertization and attribution. Much of the data came from the digital archives of the U.S. Supreme Court, the U.S. Patent and Trademark Office (PTO) and the National Archives. The court documents from *Qualitex v. Jacobson* include the district court findings; the decision from the Ninth Circuit Court of Appeals and the Supreme Court; the petition for a Writ of Certiorari; transcripts of Supreme Court oral arguments; briefs submitted by the petitioner and respondent; and amicus curie briefs.²

I also analyzed government documents pertaining to trademark law and regulations, including the U.S. Constitution; federal trademark statutes,³ the Trademark Review Commission Report and Recommendations to the U.S. Trademark Association President and Board of Directors; trademark registration applications; as well as the trademark rules of practices elaborated in a range of PTO publications.⁴ Finally, I analyzed advertisement copy for Qualitex press pads as well as newspapers articles to understand how color's transition to corporate property and its socio-economic implications were communicated to the broader public.⁵

As this legal dispute centered on the meaning of color, specifically the adjudication of who creates meaning as well as the processes through which meaning is created, the paper utilizes discourse analysis to develop a sociological theory of propertization as the outcome of two processes: the reorganization of subject positions as well as object relations. Since, as Mellinkoff (1963, p. i) aptly puts it, "the law is a profession of words," this analytical strategy is a fitting one because of its attenuation to the complexity of meaning as it arises in and between the production, distribution, and consumption of texts. I also draw on visual methods in my analysis. Color is a fascinating object of study precisely because its cognition does not neatly align with its textual representation and therefore demands to be analyzed in its various visual forms.

4. Trials of the color trademark

The facts presented in *Qualitex*, the landmark case that granted trademark rights to color, have largely been accepted without debate. The Qualitex Company manufactured and sold press pads for dry cleaners, laundries, and garment manufacturing businesses. Their “SUN GLOW®” press pad, introduced to the market in 1957, was distinguished by its distinctive “green-gold” fabric.

In 1989, a rival company, Jacobson Products, also a longtime and well-known presence in the commercial laundry and dry cleaning business, began selling their own brand of green-gold dry cleaning pads called, “MAGIC GLOW®.” In response to Jacobson’s introduction of green-gold pads to the market, Qualitex took a series of legal actions. First, they applied to register its green-gold trademark with the PTO, which was granted on February 5, 1991 as Registration No. 1,633,711 (see Figure 1).

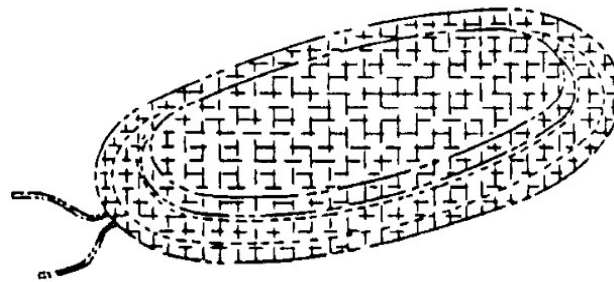


Figure 1. Image from Qualitex color trademark application, registration number 1633711, February 5, 1991. *Source:* United States Patent and Trademark Office, <http://tmsearch.uspto.gov/bin/gate.exe?f=doc&state=4806:ewpgjl.3.7>, Accessed on July 19, 2017

Qualitex then filed suit with the U.S. District Court for the Central District of California against Jacobson, alleging “trade dress” infringement in violation of the Lanham Act, the 1946 legislation that defined federal law regarding trademark rights. Lastly, Qualitex amended their suit to include an action for registered trademark infringement.

During the district court trial, Jacobson argued that the manufacture and sale of their products neither engaged in unfair competition nor infringed upon Qualitex’s trademark, most importantly because color was not eligible for trademark protection. Rejecting Jacobson’s interpretation of the statute and decades of legal precedent, the court found in favor of Qualitex, noting that the registered color trademark both identified and distinguished their press pad from others within the market. The court also awarded damages in the amount of \$8,208 to Qualitex

and enjoined Jacobson from “manufacturing, marketing or selling press pads made of any fabric using the same green-gold color or so close to said color that it cannot be easily distinguished from the Qualitex color by the casual user.”⁶

Jacobson appealed the ruling, and in 1994, the U.S. Court of Appeals for the Ninth Circuit reversed the lower court’s decision, citing decades of case law that disallowed the trademarking of color alone. This ruling also triggered the cancelation of Qualitex’s color trademark registration. Dissatisfied with the outcome of the appeal, Qualitex petitioned the U.S. Supreme Court to review the appellate court’s ruling.

The Court agreed to hear the case, acknowledging the problems posed by inconsistencies in the legal interpretation of trademark statutes. Federal appeals courts had been divided for some time over whether or not colors should be considered for protection (Landau, 1995). Then in 1985, the Court of Appeals for the Federal Circuit broke with the traditional common law rule and allowed the registration of a color *per se* as a trademark rather than in combination with a symbol or design (Baker, 1996). This led to a split in the circuit courts. The First, Third, Seventh, Ninth, and Eleventh Circuits upheld the rule that individual colors were not protectable, while the Federal and Eighth Circuits held the opposite view that nothing in the Lanham Act explicitly prevented color’s eligibility for trademark protection (Schechter, 1995). In 1995, the Supreme Court unanimously reversed the Ninth Circuit’s decision, finding in favor of Qualitex and declaring in its opinion that no rule prevented color from trademark protection.

While the record of this case is generally clear, the arguments for and against including color in the IP regime were distinctly more complicated. The specific question before the Court was whether “mere color” should be protected as a registered trademark under the Lanham Act. To appreciate how the Court ultimately determined color’s trademark eligibility, one must first understand the historical debates over the private appropriation of color. Three rationales address the problems posed by the ambiguity of “mere color” as a corporate asset and make the case for why it should not be institutionalized as property: the color depletion theory, the shade confusion theory, and the functionality doctrine.

A first problem the Court addressed was that of color depletion. Jacobson’s attorney, Laurence Strick argued that there are a limited number of suitable colors in any given market. Allowing individual colors to be trademarked would diminish that number to such a degree that it would unfairly advantage those able to secure color trademark rights early in the development

of a market. Adding further credibility to this complaint was the fact that Qualitex sought to protect hues other than green-gold. They requested and obtained an injunction not only against Jacobson's use of this color, but also for hues that could not be "easily distinguished from the Qualitex color by the casual user."⁷

The Court ultimately found this argument unpersuasive, noting that although colors may have previously been few in number, the contemporary marketplace provides such an array of pigments and dyes that it would be unlikely to deplete them in any given industry. It reasoned that companies in the business of producing press pads would not be at a competitive disadvantage if the green-gold color Qualitex applied to their pads was no longer available for industry-wide use.

This was not to say that the number of colors available to marketers was ever determined. Between the amicus briefs, oral arguments, and the Court opinion, the range in estimates was really quite remarkable. Consider the following selection of figures from the court records:

- 1.) "In fact, as a result of modern developments in dye technology there are scores if not hundreds of distinct colors available for use."⁸
- 2.) "The Pantone system includes over 3000 commercially available process colors and over 7,200 commercially available metallic colors, and the Munsell Color System includes over 1,605 commercially available colors."⁹
- 3.) "[T]he human eye is physically capable of distinguishing thousands, if not millions, of colors."¹⁰
- 4.) "Under good lighting conditions the average person can distinguish among five million shades."¹¹
- 5.) "Experts estimate that the available number of color variations distinguishable by the human eye exceeds ten million."¹²
- 6.) "[T]here is virtually an unlimited number of hues between the primary colors on the color spectrum"¹³

The next problem was one of shade confusion. Two questions lay at the heart of this issue: 1) what degree of difference would be required between color trademarks to prevent consumer confusion?; and 2) would courts be able to deal with the complicated issue of color perception? Strick argued that as courts were not equipped to make fine-grain visual distinctions, allowing individual colors to be trademarked would create problems in future infringement

disputes. Take, for example, Jacobson's dry cleaning pads. If the shade had been a chartreuse rather than a gold-green, would that have proved sufficiently distinctive for trademark protection? This lack of clear standards when it came to identifying infringing color marks, he maintained, puts a heavy economic burden on new market entrants in terms of both research costs to determine available colors and potential liability for infringement that resulted from the difficulties associated with differentiating between colors trademarks through a review of the Principle Register.¹⁴

The Court also dismissed this line of reasoning. Colors, it determined, could provide as much distinctiveness as any other symbol serving as a mark, and be evaluated as a sign in much the same way. As Justice Breyer, writing for the Court, remarked, "if trademark law permits a descriptive word with secondary meaning to act as a mark, why would it not permit a color, under similar circumstances, to do the same?"¹⁵ Furthermore, he said, courts can and regularly do make decisions about whether words, symbols, sounds, devices, and colors are similar enough to cause confusion for the "reasonable consumer."¹⁶

The final problem was that of color's "functionality." Of the three areas of ambiguity in trademark law, the functionality doctrine was undoubtedly the most opaque. This was largely because it attempts to provide a means of adjudicating the complicated relationship between utility and aesthetics—or put another way, the longstanding metaphysical question of whether beauty is in fact useful. The term "functionality" in this context indicates the application of color to symbolize an essential characteristic or act as a useful feature of a product (McClure, 1996). Cases in which the courts denied trademark protection to color on functionality grounds include the color green for use on farm equipment ("because farmers liked their equipment to match"¹⁷); blue for use in ice-cream products ("to indicate cold"¹⁸); and the color black on outboard boat motors ("to make the engine appear smaller"¹⁹).

In the Court's eyes, the green-gold used by Qualitex served only to indicate the product's source. It therefore saw no competitive need for common access to green-gold in the press pad industry, maintaining that other colors were equally suitable. Accepting the facts established at trial, the Justices affirmed that Qualitex's green-gold press pad had developed "secondary meaning," concluding that this particular color has come to symbolize its source and nothing but its source.

5. Distinguishing marks

If the case for individual colors as property was so straightforward, why did it take almost a century for it to achieve this legal status? Corporate attempts to trademark color were hardly new. As early as 1906, courts rejected trademark protection for color alone,²⁰ with the Supreme Court declaring in 1920, “coloring matter ... free to all who make it.”²¹ For decades after, in cases involving well-known national brands like Klondike bars, Coca-Cola, Campbell Soup, Life Savers, Nutrasweet, and lesser known products such as match heads, grass seed, and anti-freeze, courts agreed that color could only be protected as a trademark when it was used as part of a pattern of other colors, words, or symbols and that no single color was distinctive enough to be granted trademark protection (Baker, 1996; McCarthy, 1996).

Perhaps then, as Slater (2014) suggest, it is not the ambiguity of things that requires explanation but rather their stabilization as just one thing or another. Thus, it might be better to ask: Considering “mere” color’s longstanding ambiguity as a legal object, how did it change from being free to all to a corporate asset? What were the precipitant factors leading up to its stabilization as property?

By the time *Qualitex* reached the Supreme Court, there had been significant developments to the body and interpretation of trademark law. The following section outlines how a variety of actors, either as a part of or inspired by the Chicago school’s economic analysis of law, or “law and economics” as it is often known today, worked to incorporate color into the property regime. I discuss how the emergent categories and vocabularies they elaborated in new legal theories, legislation, and judicial opinions stabilized the interpretation of both color and trademarks as particular kinds of economic artefacts. This in turn provided the very possibility for perceiving color as private property rather than as part of the public’s linguistic-symbolic heritage. As color’s historical exclusion from the property regime was largely due to its ontological ambiguity, these texts offered a powerful means of stabilizing it as an object of ownership, effectively allowing the law to see color differently.

Debates over trademark value can be traced back to the early part of the century. Historically, the value of trademarks had been notoriously difficult to articulate, but in 1927, legal theorist, Frank Schechter offered a new take on the problem in his groundbreaking article, “The Rational Basis of Trademark Law.” Anticipating many of the arguments that would become central to the economic analysis of law, the article rejected the orthodox definition of

trademarks as merely a means of identifying the source of a product (Schechter, 1927). Schechter instead argued that trademarks were an important way to generate consumer demand through product differentiation, reflecting a certain Keynesian outlook on the virtues of stimulating markets: “The value of the modern trademark lies in its selling power [...] this selling power depends for its psychological hold upon the public, not merely upon the merit of the goods upon which it is used, but equally upon its own uniqueness and singularity” (Schechter, 1927, p. 831; Wilf, 1999).

By the 1930s, though, legal realists like Felix Cohen (1935, p. 815) critiqued such economic justifications for their circular logic, contending that while they purport to base the legal protection of trademarks upon economic value, in actual fact, “the economic value of a sales device depends upon the extent to which it will be legally protected.” Others like Ralph Brown (1948) cautioned that overzealous trademark protections could distort consumer preference and create barriers to entry for competitors.

The Chicago school’s approach to the economic analysis of law suggested a way to escape from this trap. Articulating the rationale for trademark protection using economic models of property rights, these scholars claimed to have identified not only the value of trademarks, but also how to maximize it. This new narrative of value can be traced through the substantial body of work published in the three decades leading up to *Qualitex* (Coase, 1960; Stigler, 1961; Posner, 1973, 1979, 1984; Economides, 1988; Landes and Posner, 1987, 1988).

The watershed article, “Trademark Law: An Economic Perspective,” by Landes and Posner (1987) was particularly influential. The authors characterized this as “an essay in positive rather than normative ‘law and economics,’” in which they used “economics to try to explain the structure of trademark law rather than to change that law” (Landes and Posner, 1987, p. 265). A particularly seductive aspect of this work was the claim that the public was a beneficiary rather than a casualty of the wealth generated by trademarks. They achieved this in part by determining which questions were worth asking and which could be ignored. Turning away from concerns over monopolization that historically animated trademark debates, their “economic” approach defined trademarks solely as tools for achieving marketplace efficiency. Rejecting “the power of brand advertising to bamboozle the public and thereby promote monopoly,” they concluded that consumers rely on trademarks as ‘informational devices and nothing more’” (Landes and Posner, 1987, p. 269).

How did they support the claim that trademarks produce value for the public rather than extract it? Trademarks, they argued, provide information to consumers in two ways: 1) they reduce search costs, allowing buyers to make rational purchasing decisions with speed and assurance; and 2) they encourage expenditures on quality (Landes and Posner, 1987). If goods were not marked, potential purchasers, unable to rely on brand names or distinctive packaging, would need a means of testing the products directly (Carter, 1990).

Economic justifications of trademark value, both elegantly simple and all encompassing, gained significant purchase in mid-century political and legal circles, ultimately informing a series of new bills aimed at modernizing trademark law. The first and perhaps the most consequential of these legislative actions was the adoption of the Lanham Act in 1946. Undoubtedly influenced by Schechter's work, the bill sought to facilitate commerce and protect consumers by "liberalizing" trademark common law (Port, 2010; Wilf, 1999). A key provision was the extension of trademark registration to a category of marks that had previously been excluded. Prior to 1946, registration was limited to "technical" trademarks that contained no descriptive content (Parness, 1993). Doing away with these "mere technical prohibitions,"²² the law extended registration to descriptive words in cases where they had acquired "secondary meaning."

Then in 1986 came a second major shift in the legal stabilization of color as property. The PTO began permitting the registration of individual colors as trademarks, allowing applicants to represent color in their registration forms using a black-and-white color lining system (see Figure 2).²³

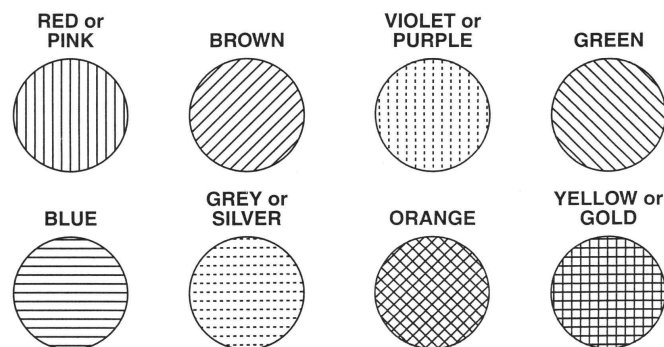


Figure 2. U.S. Patent and Trademark Office color lining system, pre-November 2, 2003. *Source:* United States Patent and Trademark Office, General Guidelines for Coding Design Marks, http://tess2.uspto.gov/tmdb/dscm/dsc_gl.htm#g15, Accessed on July 19, 2017.

This was followed shortly thereafter by the Trademark Law Revision Act (TLRA) of 1988. Here, Congress was said to have expanded the definition of a trademark by retaining the language of “symbol or device” from the Lanham Act, in an effort not to preclude the registration of colors, shapes, sounds, or configurations where they function as trademarks (Port, 2011).

This is not to say that everyone considered the legislative history of color trademarks to be straightforward. Legal scholars point to the Lanham Act’s long and convoluted legislative history, noting the numerous debates leading up to the adoption of the bill (McCarthy, 1996; Carter, 1990; Lunney, 1999). The Department of Justice opposed key provisions on the grounds that excluding certain words or visual images from commonly available language would limit competition and thereby promote monopoly (Lunney, 1999). In response, Congress played down the reach of the Lanham Act, arguing that it would do on a national level no more than the common law already did locally (Carter, 1990). Congress also agreed to rewrite the bill to include the limitation that a trademark must only consist of “any word, name, symbol or device,” specifically to exclude product packaging or features from the principal register and to relegate them exclusively to the supplemental register (Lunney, 1999). “Symbol” and “device” were terms of art that had been part of the traditional definition of a technical trademark—referring not to anything capable of carrying meaning, but to an emblem or artistic figure attached to a product (Lunney, 1999).

Yet, upon returning to *Qualitex*, we find that the Court opinion as well as the oral arguments and amicus brief submitted on behalf of the US government suggested the language of the Lanham Act and its 1988 revisions in particular “would seem to include color within the universe of things that can qualify as a trademark, as it describes that universe in the broadest of terms,” a position they based on a report by the Trademark Review Commission which accompanied the 1988 legislation (Port, 2011).²⁴

Jacobson’s attorney, Strick, countered that the Report begged rather than answered the question of color as a symbol or device, reminding the Court that the language of “symbol or device” from the 1946 Act had been *retained, not changed* (Baker, 1996; McCarthy, 1996; Port, 2010, 2011). “I don’t think—in any way in which you torture the language of the Lanham Act, mere colors used on these press pads, unconfined to a symbol or a design, cannot be designed as a symbol or a design. It is trade dress,” he opined in oral arguments.²⁵

In spite of these criticisms, the Court opinion made no mention of the contested definition of color in the Lanham Act or its 1998 revisions, relying on the same unchanged language of the law to support the new claim that color alone was an appropriate category for trademark protection.²⁶ Thus, the final way color was stabilized as an object of property rights was through the claim that it already was defined as such—in essence the justification that color trademarks were acceptable because they had already been accepted. These rhetorical gymnastics allowed the Court to invert past interpretations of the statute, which extended trademark rights only to those items elaborated in the Lanham Act, and instead grant virtually everything protection, barring a few exceptions.

While the definitional ambiguity of color as a symbol or devise was written out the *Qualitex* decision, the law and economics narrative of trademark value was unmistakably written in, particularly the theory that trademarks increase efficiency and the production of quality goods. For example, Justice Breyer, writing for the Court, reasoned:

In principle, trademark law...“reduce[s] the customer’s costs of shopping and making purchasing decisions” ... At the same time, 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 ... by capitalizing on a consumer’s inability quickly to evaluate the quality of an item offered for sale. See, e.g. ... Landes & Posner, *The Economics of Trademark Law*... See Landes & Posner, *Trademark Law: An Economic Perspective*.²⁷

By referencing Landes and Posner (1987) in its opinion, the Court effectively codified the economic interpretation of trademarks, offering what would ultimately prove to be powerful and enduring justification not only for why color could function as a trademark, but equally, why it should.

6. Creative accounting

Having addressed how color as an object of property rights was stabilized through the introduction of new institutional logics, I would like to consider how the individuation of property relations—attributing specific properties to specific parties—took place in this case. Particularly if the creation of meaning is, as Scarry (1985) suggests, a kind of interior imaginative work, how was this process externalized so as to become visible to the judges?

To determine if a mark is worthy of protection in trademark litigation, judges examine

whether consumers perceive the mark to be a designation of source (Beebe, 2005). Because the Patent and Trademark Office considers color a descriptive mark, Qualitex needed to show that the green-gold of its press-pads had taken on a secondary meaning. As mentioned previously, descriptive marks have been eligible for registration since 1946, with the extra requirement of “secondary meaning.” While not defined by a statute, secondary meaning is generally considered to be achieved when a mark becomes distinctive enough that the public associates it with a single source rather than any feature of the product (Beebe, 2005; Morris, 2011).

So how did judges determine the meaning of green-gold in *Qualitex*? And furthermore, what did they consider to be evidence of who constructed this secondary meaning and thus deserved credit for their creation?

The findings of fact from the district court trial offer some answers. They note that Qualitex invested substantial time and effort making the color “brass # 6587” into its symbol. The length of time they exclusively used the color in commerce, the amount time they investing in procuring it as a trademark, the length of time the trademark was used, as well as the length of time and frequency that the image of the product featured in advertisements were all listed as evidence of secondary meaning.²⁸ Moreover, the court noted that the company prepared bulletins, sent out flyers, draped its booths in green-gold at trade shows, and distributed various brochures and mailers in English and Korean. Monetary expenditures and profits were also considered evidence of successful attribution, specifically the amount of sales revenue generated and money spent on advertising. The court noted that Qualitex sold more than 1,000,000 green-gold press pads and expended approximately \$1,621,000 for advertising this product, with nearly all of the marketing material highlighting the green-gold color.²⁹

So what initial conclusions can be drawn about the process by which color as property was attributed to Qualitex? First, it is clear that despite its cultural ubiquity, the attribution of property to a person or in this case, a corporation, is an expensive and labor-intensive undertaking. This is in large part because the boundary between who is and is not a creator requires work to stabilize. Qualitex worked to gain legitimacy as both the source and owner of its color through a series of inscriptions of nodes of credit, investing significant resources and utilizing a range of tactics in remaking green-gold into a symbol of their company. Their efforts also vary in degrees of formality—ranging from in-person product promotions to formal trademark application filings with and approved by the Patent and Trademark Office.

Second, the task of individuating color as property involved a number of parties in addition to Qualitex. Thus far, we can see that it involved Congress, the Justice department, the Patent and Trademark Office, multiple members of the judiciary, lawyers, magazine publishers, and a variety of other commercial firms and trade organizations as amici.

And third, even a cursory overview of the legislative history, scholarly interventions, and judicial deliberation in this case show that the process of moral judgment which awards property as the just deserts of labor are in fact political, contested, and ongoing. The work of attributing property to a source is the work of drawing and redrawing the boundaries between who qualifies as the legitimate creator of meaning and who does not, with the aim of securing and potentially enlarging material and symbolic recourses. Property, thus, is not simply the outcome of first possession but the just-deserts of re-iterating a subject's property claim, not to mention the willingness to fight others to protect that claim.

7. Logics of exclusion

Considering the many actors and processes involved in making green-gold into a symbol of Qualitex, it would be easy to overlook the public's role in this drama. Yet, to understand the conceptual link between labor and ownership, it is crucial to address their role in constituting trademark meaning in this case, and more specifically, the contribution they made to the construction of green-gold as a symbol.

Behind this question is the longstanding academic debate over who creates meaning—producers or consumer. A substantial body of scholarship addresses how the consuming public construct meaning around the goods and services they purchase (Veblen, 1899; Douglas and Isherwood, 1979; Bourdieu, 1993; Baudrillard, 1998; Coombe, 1998; Wilf, 1999; Callon et al., 2002; Lury, 2004, 2008; Scott et. al., 2008; Slater, 2011; Bentley and Sherman, 2014). While some consider advertising to have the power to mold consumers taste, often to their detriment (Brown, 1935; Galbraith, 1958; Marcuse, 1964), others contend that the meaning consumers attribute to products are based on diverse logics of calculation, many of which are rational (Stigler and Becker, 1977; Miller, 1997). Callon et al. (2002) exemplify this position, arguing that consumers participate in the process of qualifying products. As it is the public's ability to judge and evaluate that is mobilized to establish and classify relevant differences, there is no reason, they add, to believe that agents on the supply side are capable of imposing on consumers

either their perception of qualities or the way they should grade those qualities (Callon et al., 2002).

Trademark doctrine likewise locates the value of a mark not in any particular aspect of its design but in the public's association of it with a product. Returning to an earlier point, proving secondary meaning requires trademark registrants show that in the minds of the public, the mark identifies the source of the product rather than a feature of the product itself.³⁰ The public's interpretive role in trademark law becomes even more apparent when we acknowledge their capacity to "unmake" marks. Referred to as "genericide," trademark owners can lose property rights when their mark becomes the generic name for a thing itself (Gaines, 1991; Coombe, 1998; Lury, 2004). Examples of formerly trademarked words that became victim of their own associational success include aspirin, cellophane, dry ice, escalator, heroin, tabloid, and trampoline.

The role of public cognition in trademark disputes often appears in reference to "goodwill." In *Qualitex*, the district court determined that Jacobson used the green-gold color at issue to trade on the "goodwill" that Qualitex had developed.³¹ But what kind of thing is goodwill? To whom does it belong and how does it come to be owned? In a legal context, goodwill is generally described as an association made by the public about a product, specifically the willingness of a customer to continue doing business after the first transaction (Carter, 1990; Sherman and Power, 1994; Morris, 2011). Wilf (1999) describes it as the outcome of a two-step process: first, a producer affixes a symbol to a product; and second, that association is recognized and invested with meaning by the public as an interpretive community. Thus, scholars argue, goodwill is as much the product of consumer consciousness as producers marketing efforts (Coombe, 1998; Wilf, 1999;)

In light of this, what can be said about the public's meaning-making role in this case? Included in the findings of fact are statements such as—"readers [of trade publications] associate the color with Qualitex," and "some purchasers of press pads have come to identify and order Qualitex press pads over the telephone by merely describing its color."³² There is also survey evidence cited in support of the claim of consumer confusion.³³ Respondents were shown a Jacobson press pad and asked: "What company or companies do you think makes this press pad?" Thirty-nine percent answered Qualitex, while no one named Jacobson. When asked, "What is it that makes you think [Qualitex] makes this press pad?" numerous respondents stated

the “color.” Finally, the findings noted that many of Qualitex’s customers are Korean and do not speak or read English well.³⁴ From this, the court did not determine that these customers had a high degree of knowledge about the product, but rather that these customers were unlikely to exercise a sufficiently high degree of care in the purchase of their ironing board covers, concluding that the law “protects not only the intelligent, the experienced, and the astute. It safeguards from deception also the ignorant, the inexperienced, and the gullible.”³⁵

We find in these descriptions of the public a certain dissonance between what is described as the source of a trademark’s meaning and how judges and government agencies such as the PTO test for the creation of meaning in practice. The imprecision in the descriptions of consumer inputs to meaning-making put into sharp relief the specific figures used to calculate Qualitex’s agency in shaping the meaning of color. Consumer data was used primarily to support claims of confusion rather than cognition. Of course, there is a certain irony that the courts and regulators considered themselves better able to make fine grain distinctions about color than the consuming public, when, for example, the PTO itself lack the basic infrastructure necessary to represent color trademark applications *in color* (see Figure 2).

In any case, the facts suggest three conclusions about the legal attribution of meaning of color to a corporation. First, judges construct the meaning-making process in trademark procurement as the result of work done by corporations rather than customers. As Coombe (1998) puts it, the judicial recognition of secondary meaning relies on evidence of attempts by the producer to build consumer association and the consumer to passively accept it. Even considering the survey evidence, the fact that 39% of the customers interviewed stated that the pad was a Qualitex product may show a certain level of brand recognition, but neither tests nor answers the question of whether they would have purchased a Jacobson pad in an actual commercial setting, mistakenly or otherwise, particularly as the packaging for the Qualitex and Jacobson products were of differing colors and their respective names clearly printed on their pads.

Second, the work of attribution is the work of reduction, or better yet, disarticulation. To be articulated as property, an object must first be disarticulated from the broader world around it, what Strathern (1996) refers to as “cutting the network.” The ambiguities of color as corporate property were resolved by subtracting the presence of other creative sources from the narrative of production. Attribution in this case certainly required the work of judges, regulators, and

legislators who offered the categorical stabilization for color as property. Here again this case echoes Strathern's (1996) findings that while the social networks of creativity are long, intellectual property truncates them, giving creativity a social boundary by disarticulating one's own property from "the great commons of unowned things" (Rose 1985, p. 84).

And third, the attribution process requires the suturing or rearticulation of meaning. In this case, it happened at the point of exchange. In effect, the sale creates a certain kind of subjectivity as well as structuring object relations. The trademark application, the advertising copy, the legal statute, the work of the dye manufacturers who made brass #6587, the work of the fabric finisher who constructed the cover, and perhaps even the natural world all combine to constitute the hybrid object of color as a symbol. Harry Campagna, the owner of Qualitex, recalls seeing this color one day as he sat on a beach watching the setting sun filter through the leaves (Podmolik, 1995). He went home and changed the color of his pads to this shade of green-gold, renaming them "Sun Glow" (Podmolik, 1995). The "unifying moment" for this "network of disparate elements summated in [the] artifact" of color is the point of sale, which freezes it under the banner of its marketer, Qualitex as the property subject of property rights (Strathern, 1996, p. 522).

8. Conclusion: articulations and disarticulations

I want to conclude the paper by reflecting on the broader socio-economic implications of how "things not recognized as property" enter "the universe of owned objects" (Merrill, 2009). The significance of this stems from the fact that the original appropriation of property is no relic of the past, or as Vossen (2009: p.357) puts it, "Unowned things are appropriated all of the time. Moreover, there may (will) even arise entirely new questions of original appropriation, perhaps in Antarctica, on the moon, or on Mars, and perhaps in the form of new kinds of property. So we had better be prepared." With this in mind, I offer an outline of three overlapping features of contemporary "making and taking" this case illuminates, which I believe could benefit from future research and theorization.

8.1 Property creates texts, but texts also create property

First, the work of creativity is made visible to the law through the production of texts. We can also understand this to mean that the creation and individuation of new property are narrative

processes, fundamentally mediated by texts even when their objects are not. Perhaps this is, as Scarry suggests (1987), because the human imagination only become visible through the material residue it leaves behind. For sounds, we have musical notation; for smells, a chemical formula. Intangibles like brand names and goodwill, are made visible through a complex nexus of abstract valuation models; marketing studies of consumer psychology; regulatory definitions of assets; legal and accounting rules for the treatment of goodwill arising from consolidation; and balance sheet categories and classifications (Sherman and Power, 1994). And in this particular case, there is the PTO lining guide used to signify color on trademark applications. Taken together, this also suggests that those aspects of the world yet to be “documented” may lack legibility within the property regime, a point to which I will return to shortly.

8.2 Incorporating creativity

Second, there are significant socio-economic implications of shifting the work of attribution from consumers to corporations such as we find in this case. When it comes to trademarks, producers have proven willing to assume the search costs of consumers through massive investments in marketing, for, as it turns out, in assuming such costs, producers also garner the means of persuasion (Beebe, 2005). Thus, the morality play that is trademark doctrine is one in which producers have been rewarded for bringing ever more information to the marketplace, while consumers have been allowed to bring ever less (Beebe, 2005). Certainly, there is an argument that this has freed consumers from the immense cognitive labor of qualifying goods in a world teeming with commodities. Yet, this freedom from work no doubt come at a price.

Recalling an earlier point, the Lanham Act and its amendments were described as “liberalizing” trademark law. The evocation of the language of economic liberalism here might give us pause to think more broadly about who or what is made free through the expansion of trademark rights and at what price this freedom is achieved. In fact, trademarks are quite literally restrictions on speech—instruments for excluding other parties from using certain signs and symbols as they please. With the introduction of anti-dilution statutes, this dynamic has been amplified. In such cases, the stronger or more famous the mark, the greater legal protection it is afforded against unauthorized use—i.e. the more power it has to be immunized against oppositional, ironic, or mocking cultural strategies that seek to “recode” it (Coombe, 1991). This

suggests a certain Orwellian corollary that some marks are in fact more equal than others.

8.3 *Mind over matter*

My final point concerns the entanglements of labor, ownership, and subjectivity. In *Qualitex*, the court articulates the conferral of trademark rights to color as the just-deserts of creative labor rather than simply the spoils of first-possession. Jacobson, alternately, was penalized for—to borrow the words of Justice Louis Brandeis—“endeavoring to reap where it has not sown.”³⁶ One consequence of this logic is that it also precludes the public from reaping the rewards of the intellectual property regime. While this group may have the power to destroy trademarks, it seems to lack a means of signify its contribution to creating them—trademark and patent applications as well as most copyright attribution norms are based largely on the archetype of the individual (or the corporation as the legal fiction of the individual) author/inventor. Returning to an earlier point, if new property is created through the production of texts, it seems likely that the consuming public will remain outside the intellectual property rights regime until it has a means by which to represent its collective creative labor.

The second issue with making work the justificatory principle of original acquisition is that it lends itself to taking as much as making certain kinds of materiality. As Coombe (1998) remarks, it is those who collect, classify, inscribe, enclose, codify, sequence, and cultivate objects that are granted ownership rights. Though I suspect few judges would say so outright, the legal framework of intellectual property treats much of the “raw” matter of nature as valueless today as Locke described it centuries ago. As Strathern (1996) points out, it is the addition of intellectual labor to nature that is perceived to change the character of the entity, thereby creating its value. “Bare life” as Agamben (1998:9) might call it—“the simple fact of living common to all living beings”—provides the very conditions of value creation within the current IP regimes.

We can see this logic at work in the now infamous controversy over of the original appropriation of the HeLa cell line—cancerous cells taken from the body of Henrietta Lacks without her consent or knowledge by medical researchers at Johns Hopkins University, which were ultimately cultivated and distributed to laboratories around the world; and in *Moore v. Regents of the University of California*, the landmark decision that ruled a person has no legally protected rights or ownership interest in tissue removed from their body. In both cases, the bodies from which the original tissue derived lacked an idiom through which to articulate their

property rights, at least in part because there is no clear act of productive labor to justify such a claim. Attribution, in these cases, is far more than an analytical issue; it is a form of boundary work that offers considerable material opportunities, advantages, and rewards to those regarded as “creators” and “owners” over bodies as scientific objects (Gieryn, 1983). As Ron Lacks, Henrietta’s grandson lamented in a recent interview, “My family has had no control of the family story, no control of Henrietta’s body, no control of Henrietta’s cells, which are still living and will make some more tomorrow” (Brown, 2018).

As Bourdieu (1993) once observed, the field of cultural production is beset by concerns over who has the power to impose the dominant definition of the creator. Fundamentally at stake in this case is the struggle for a monopoly over creative legitimacy—“the power to say with authority who are authorized to call themselves creators; or, to put it another way, it is the monopoly of the power to consecrate producers and products” (Bourdieu, 1993). To end, I turn to Elaine Scarry’s (1996) meditation on the making and unmaking of the world, in which she offers a directive for future research:

Achieving an understanding of political justice may require that we first arrive at an understanding of making and unmaking... Knowledge about the character of creating and created objects is at present in a state of conceptual infancy. Its illumination will require a richness of work far beyond the frame of any single study: like the activity of “making,” the activity of “understanding making” will be a collective rather than a solitary labor. (P. 280).

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Endnotes

¹ See Swedberg, 2003, 2006; Carruthers and Ariovich, 2004; Davis, 2004; Beckert, 2007; Berman, 2008; Ford, 2010 for recent work by economic sociologists on property.

² Amicus briefs were submitted by the American Bar Association, the U.S. Government, Dr. Pepper/7Up Corporation, Owens-Corning Fiberglas Corporation, the Hand Tools Institute, Lackenbach Siegel, B.F. Goodrich Company, Private Label Manufacturers Association, and the Intellectual Property Owners membership association.

³ I focus on the Trademark Act of 1946 (the Lanham Act) and the Trademark Revision Act of 1988 in particular.

⁴ These include the online Trademark Register, the Trademark Manual of Examining Procedures, Patent and Trademark Office Facts Sheets, the Trademark Trial Appeal Board Manual of Procedure, and the Acceptable Identification of Goods and Services Manual.

⁵ These articles came from the Chicago Tribune, Chicago Sun Tribune, the New York Times, and the Washington Post.

⁶ *Qualitex Co. v. Jacobson Products Co.*, 21 U.S.P.Q.2d 1457, 1 (C.D. Cal. 1991).

⁷ Brief for Respondent, p. 31, *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

⁸ Brief of Owens-Corning Fiberglas Corporation as Amicus Curiae, p. 24, *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

⁹ Brief for the Hand Tools Institute as Amicus Curiae, p. 26, *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

¹⁰ *Ibid.* at 33.

¹¹ Brief for the B.F. Goodrich Company as Amicus Curiae, p. 17, *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

¹² Brief for the Hand Tools Institute as Amicus Curiae, p. 25, *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

¹³ Brief for Owens-Corning Fiberglas Corporation as Amicus Curiae, p. 25, *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

¹⁴ Transcript of Oral Argument at 50, *Qualitex Co. v. Jacobson Product Co., Inc.*, 514 U.S. 159 (1995) (No. 93-1577).

¹⁵ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 163 (1995).

¹⁶ *Ibid.*

¹⁷ See *Deere & Co. v. Farmhand, Inc.*, 560 F. Supp. 85, 98 (SD Iowa 1982), *aff'd*, 721 F. 2d 253 (CA8 1983).

¹⁸ *AmBrit, Inc. v. Kraft Inc.*, 812 F.2d 1531, 1548 (11th Cir. 1986).

¹⁹ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 165 (1995).

²⁰ *Diamond Match Co. v. Saginaw Match Co.*, 142 F. 727 (6th Cir.), *cert. denied*, 203 U.S. 589 (1906) at 729-30.

²¹ *Coca-Cola Co. vs. Koke Co.*, 254 U.S. 143, 147, 41 S.Ct. 113, 114, 65 L.Ed. 189 (1920).

²² S. Rep. No. 1333, 79th Cong., 2^d Sess., 3 (1946)

²³ This remained the PTO's protocol for publishing color trademark registrations until November 2nd, 2003.

²⁴ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 173 (1995).

²⁵ Transcript of Oral Argument at 31, *Qualitex Co. v. Jacobson Product Co., Inc.*, 514 U.S. 159 (1995) (No. 93-1577).

²⁶ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 173 (1995).

- ²⁷ Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 173 (1995).
- ²⁸ Qualitex Co. v. Jacobson Products Co., 21 U.S.P.Q.2d 1457, 1 (C.D. Cal. 1991) at 2.
- ²⁹ Qualitex Co. v. Jacobson Products Co., 21 U.S.P.Q.2d 1457, 1 (C.D. Cal. 1991) at 2.
- ³⁰ Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851 n.11 (1982).
- ³¹ Qualitex Co. v. Jacobson Products Co., 21 U.S.P.Q.2d 1457 (C.D. Cal. 1991).
- ³² 21 U.S.P.Q.2d 1457 at 1.
- ³³ Qualitex Co. v. Jacobson Products Co., 21 U.S.P.Q.2d 1457 (C.D. Cal. 1991) at 4.
- ³⁴ Qualitex Co. v. Jacobson Products Co., 21 U.S.P.Q.2d 1457 (C.D. Cal. 1991) at 5.
- ³⁵ Qualitex Co. v. Jacobson Products Co., 21 U.S.P.Q.2d 1457 (C.D. Cal. 1991).
- ³⁶ International News Service v. Associated Press, 248 U.S. 215 (1928).