The case of Fruity Pebbles: 'Stone-age' use does not guarantee trademark protection in colors

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A specific color or color combination can be the subject of common law trademark protection and/or federal registration with the U.S. Patent and Trademark Office ("USPTO") in certain circumstances, though it can be challenging to protect and register a color mark.

Some well-known examples of registered color marks include Tiffany robin's-egg blue and Christian Louboutin red when contrasting with other colors on shoes, and Mattel owns strong common law rights in Barbie pink. However, in other circumstances, color has been held to be unprotectable, such as General Mills' yellow for Cheerios packaging and Pepto Bismol's pink for stomach medication.

As an initial matter, a trademark is a word, phrase, symbol, design, or combination that identifies the source of certain goods or services. However, a color can never be an inherently distinctive and protectable mark. Instead, to obtain protection and/or registration, a trademark owner must show that the specific color has acquired distinctiveness for certain goods or services. This means that the mark must have acquired secondary meaning through consistent and substantially exclusive use over time, high profile usage, extensive advertising, and the like, with the result that the color has become a source identifier and consumers have come to associate it with the owner.

Notable is that even if a color has acquired distinctiveness, that color cannot be protectable or registrable as a mark if it is functional for the product or service to which it is connected.

A functional color mark is a color that either has a utilitarian or functional advantage (the USPTO's Trademark Manual of Examining Procedures provides that yellow or orange for safety signs is an example) or is more economical to manufacture or use, such that exclusive trademark rights would put others at a competitive disadvantage because they would be required to alter the manufacturing process (for example, in 1993, the Trademark Trial and Appeal Board ("TTAB") determined in *Kasco Corp. v. South Saw Services Inc.* that the color green used as a wrapper for saw blades is functional when that is one of six colors used to identify blade types).

While it is certainly possible for a trademark owner to support a claim that a color has acquired distinctiveness and that it is not functional, these showings can be an uphill battle. In the most recent failed attempt to demonstrate trademark distinctiveness, in early 2024, Post Foods, LLC ("Post Foods") was unable to secure a federal registration for the seven colors (the "Colors") of its popular Fruity Pebbles breakfast cereal.

The issues were how Post Foods' applied-for mark was defined (namely, the Colors alone or the Colors as applied to the entire surface of crisp rice cereal pieces), and whether Post Foods' applied-for mark had acquired distinctiveness for all breakfast cereals and therefore was protectable and registrable. The TTAB ultimately affirmed the USPTO's refusal to register the Colors alone as a trademark for "breakfast cereals" because Post Foods did not prove that the Colors had acquired distinctiveness in connection with all breakfast cereals.

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As to the first issue, the TTAB clarified that Post Foods' applied-for mark was only the Colors as applied to any breakfast cereal, without regard to the cereal's shape, rather than the Colors as applied to the entire surface of crisp rice cereal pieces, which Post Foods had argued.

The description of the mark in the USPTO application stated: "The mark consists of the colors of yellow, green, light blue, purple, orange, red and pink applied to the entire surface of crisp cereal pieces. The broken lines depicting the shape of the crisp cereal pieces indicate placement of the mark on the crisp cereal pieces and are not part of the mark."

Notably, this description did not reference "crisp rice cereal pieces." And based on this description, along with the submitted drawing of the mark that displayed crisp rice cereal pieces in dotted lines, as well as the description of the applied-for goods as "breakfast cereals," the TTAB determined that the configuration of the breakfast cereals was not claimed as part of the mark.

The TTAB then determined that the relevant evidence did not support Post Foods' claim that the Colors had acquired distinctiveness for all breakfast cereals. Specifically, Post Foods' evidence included longstanding use of the Colors on its Fruity Pebbles crisp rice cereals dating back to at least as early as 1973, extensive sales and advertising, media attention, and two consumer surveys.

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But the TTAB determined that this evidence focused on not just the Colors but also on the shape or configuration of Post Foods' crisp rice cereal pieces, even though the applied-for mark consisted of only the Colors for the broad description of "breakfast cereals." Indeed, the two consumer surveys measured the Colors as applied to only one type of cereal, namely, crisp rice cereal, rather than all breakfast cereals.

As such, the TTAB determined that Post Foods' evidence was insufficient to show that consumers associate the Colors with Post Foods for any and all breakfast cereals, regardless of shape. Notably, the TTAB made this decision even though "breakfast cereals" is an acceptable description in the USPTO's Trademark Identification Manual, based on the fact that the submitted evidence did not address the broader claim of all breakfast cereals.

Further, the Examining Attorney for the USPTO submitted evidence that consumers are accustomed to encountering multicolored breakfast cereals from different sources, so they do not exclusively associate all cereals with only one source (*i.e.*, Post Foods). For example, multiple third-party cereal manufacturers offer multicolored cereals, such as Cap'n Crunch's OOPS! All Berries cereal, Froot Loops cereal, and Trix Fruity Shapes cereal, to name a few.

Overall, in the case of Fruity Pebbles cereal, which Post Consumer Brands bestowed with the title of number one most popular Post cereal in 2022 and 2023, even longstanding use of the Colors for over 50 years was inadequate. The TTAB gave great weight to Post's broad identification of "breakfast cereals," which leaves open the question of whether narrowing the description, such as to "crisp rice breakfast cereals," could have impacted the analysis of acquired distinctiveness.

Trademark protection for and federal registration of a single color or multiple colors can be elusive and may require a significant evidentiary showing to prove acquired distinctiveness in connection with the products or services of interest (in addition to not being considered functional). Trademark owners should take care in describing their goods or services in their USPTO applications to register color (or any other type of) marks. It is also critical that the evidentiary support for acquired distinctiveness demonstrates use of the color for the specific applied-for goods or services.

The Fruity Pebbles case is a modern-day reminder that protecting color as a trademark is as complex as navigating the streets of Bedrock.

About the authors

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