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I'm Dye-ing to Know

By [Brent Lorentz](#) on February 14th, 2012

For those of you who frequent DuetsBlog, you'll know that color trademarks are a common topic of discussion. Steve Baird posted an [excellent and thought provoking post](#) just recently discussing Louboutin's efforts to litigate the boundaries of its rights in the color red. It is generally accepted that color trademarks can receive protection upon obtaining "secondary meaning" (i.e. by obtaining a status where consumers have come to recognize the color as identifying goods or services from a specific source), but there are certain roadblocks to registration. The most common roadblock to trademark colors is the doctrine of "functionality." The [functionality doctrine](#) generally holds that if a feature gives a producer a competitive advantage which is not related entirely to its function as a brand identifier, then it cannot be trademarked.

Recently, I heard a news report on the radio about the purported adverse health impacts of food dyes and wondered whether this might eventually be an additional burden to trademark rights in colors. (Examples of the arguments against food dyes are [here](#), [here](#), and [here](#).) As you will note from the articles, this is certainly not a new debate. But this most recent report sparked my interest because it quoted a woman as saying (and I'm paraphrasing) that, "Food dyes should be banned because they create potential health risks with **absolutely no benefit**." I generally have a strong, visceral and negative reaction to unequivocal statements of absolutes, so I thought about it a little bit.

If food dyes actually had "absolutely no benefit," then they wouldn't exist and/or be used. They do have a benefit, albeit not health related, in product differentiation and branding. Think soft drinks, cereals, cough syrups, etc. Now I'm not personally going to opine on whether this particular benefit outweighs the potential health risks, but I am going to raise the question as to whether it would be appropriate for the United States Patent and Trademark Office to consider these potential risks in allowing or refusing trademark registration. The Lanham Act generally precludes the registration of offensive marks:



No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute...

There is, however, nothing in the statute that would expressly preclude registration of marks that pose potential adverse health consequences. My initial reaction is that the evaluation of adverse health impacts is territory that we would prefer the USPTO avoid, but I'm interested in what everyone else thinks. Do we want and can the USPTO make such determinations in allowing or refusing registration?

