Human Factors In Intellectual Property Law Disputes

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A Tale Of Cars & Cat Food
Using The Human Factors Expert
Marc Green, ph. D.

Cases & Issues

Visual Confusion

Name Confusion

Sources of Dispute

- Confusion;
- Acquired Meaning;
- Distinctiveness;
- Dilution; and
- Tarnishment.
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**Color Is In The Head**

**Why Confusion?**

- Memory is worse than you know;
- Attention is limited (*focal v. automatic*);
- Context is (almost) everything.
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**Color Confusion Numbers**

- 1,000,000 colors;
- 7,200 color names;
- 150 distinct hues;
- 17 hues in memory; and
- 11 color categories.

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<thead>
<tr>
<th>Hue</th>
<th>Brightness</th>
<th>Saturation</th>
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<td>Achromatic</td>
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**Color Memory Stinks**
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One Slide Psychology Course

Information Processing Model

Protecting Color Space

Shade Confusion
Color Depletion
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**Color v. Shape**
- **Round**
- **Square**
- **Green**
- **Blue**

**Visual Confusion**
- RaceTrac
- Fastrac
Functionality Definitions

Definitions of Functionality:

**Traditional**: “if it is essential to the use or purpose of the article or if it affects the cost or quality of the article”

**Utilitarian**: “the exclusive use of which would put competitors at a significant non-reputation-related disadvantage.”

(Traffic Devices, Inc. v. Marketing Displays, Inc)

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Color Functionality

- **Visibility**
- **Conspicuity**
- **Meaningfulness** (Amrit v. Kraft)
- **Space/Size** (Brunswick Corp v. British Seagull)
Visual Confusion

Hershey Candy Co. V. EFFEM

Psychology Experiment

- In Context;
- Doesn’t direct attention;
- Direct measure of likely damages; and
- Real confusion, not possible confusion;
Name Confusion

**Terra Boots**  V.  **Nike Terra**

Word Context

“Could you get my check, I left it at the bank?”

“Could you get my rod, I left it at the bank?”
People Contextualize Meaning

“...under the uncontrolled conditions we loosely call ‘everyday life,’ multiplicity of meaning abounds...We navigate daily through a sea of potential ambiguities, resolving them so easily that we seldom even notice that they are there. We resolve the potential ambiguities by taking into account the contexts in which they occur.”

-George Miller

Retail Contexts
**Name Confusion**

**Stongard**  
**Scotchgard**

**BIGRAM Similarity (DICE)**

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Shared Bigrams = 10  
Total Bigrams = 20  
Bigram Score = 50%
Further Reading

- [www.visualexpert.com](http://www.visualexpert.com)


Take Home Message

1. “When you believe in things that you don’t understand, then you suffer.” - L. Steven Wonder

2. Surveys are not very good.