

# The Washington Post

## There's no accounting for (or trademarking of) taste

By [David Post](#)

November 4, 2014

In the 1995 case of *Qualitex v. Jacobson* (514 US 159) the Supreme Court upheld Qualitex' trademark in the distinctive green-gold color of its dry-cleaning pads,

Both the language of the [federal trademark] Act and the basic underlying principles of trademark law would seem to include color within the universe of things that can qualify as a trademark. The language of the Lanham Act describes that universe in the broadest of terms. It says that trademarks “include any word, name, symbol, or device, or any combination thereof.” § 1127. Since human beings might use as a “symbol” or “device” *almost anything at all that is capable of carrying meaning*, this language, read literally, is not restrictive. The courts and the Patent and Trademark Office have authorized for use as a mark a particular shape (of a Coca-Cola bottle), a particular sound (of NBC's three chimes), and even a particular scent (of plumeria blossoms on sewing thread). If a shape, a sound, and a fragrance can act as symbols why, one might ask, can a color not do the same?

Although color does not ordinarily serve as a “source-identifier” for consumers, signalling (the way that a distinctive name or logo does) that a product comes from a particular manufacturer/distributor (which would qualify it for trademark protection), in the right circumstances it can do so. And if a shape, a sound, a fragrance, and a color can act as a trademark, why not a product's distinctive taste?

Russo's [New York Pizzeria](#) (interestingly enough, a pizza chain based in Texas – perhaps New York City itself might have a trademark infringement claim against the chain for misleading consumers about the “source” of the pizza?) made that very claim in a suit against rival pizza-maker Gina's Italian Kitchen – that by replicating the distinctive taste of its pizza, Gina's infringed NYP's trademark.

Fortunately, the district court in SD Texas dismissed the claim (describing it, using an inevitable double entendre, as “half-baked”). *New York Pizzeria, Inc. v. Syal*, 3:13-CV-335 (S.D. Tex. Oct. 20, 2014). Taste, the court held, is usually a “functional” feature of restaurant food – that is, it “affects the cost or quality” of the product being sold – and functional product features are not protectable as trademarks. Trademark law allows firms to protect their reputations (and to use marks to obtain reputation-related advantages in the marketplace); it's not designed to regulate

competition among products with respect to other features that are not reputation-signalling. Like the taste — even if that taste is “distinctive” — of pizza.

It’s a silly little case – though as [Eric Goldman nicely put it](#), “In my world, ridiculous intellectual property overclaims aren’t very funny,” because they occasionally lead to ridiculous law. But at least the court got it right; a world in which food distributors could start suing rivals for infringing their distinctive flavors would be a horrorshow indeed. Note that the ruling doesn’t go so far as to say that flavor can never be trademarkable – one can at least imagine products whose taste actually is not a functional feature of the product — distinctively-flavored coatings on pencils (for those who like to chew on them), or distinctively-flavored stamp or envelope glue – that could, I suppose, still qualify as trademarks (the way that the color of Qualitex’ press pads did). But at least we are spared the more absurd results that would have followed from a ruling that the taste of a product that is distributed as food can be the basis for an infringement claim.

*David Post taught intellectual property and Internet law at Georgetown Law Center and Temple University Law School until his recent retirement. He is the author of "In Search of Jeffersons Moose: Notes on the State of Cyberspace" (Oxford, 2009), a Fellow at the Center for Democracy and Technology, and an Adjunct Scholar at the Cato Institute.*