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Single color trademarks in transitioning jurisdictions: An exportable EU–U.S. comparative framework applied to Georgia

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Abstract---In 2024 Georgia abolished the graphic-representation requirement for trademarks, rendering single-color (color-per-se) protection legally feasible and aligning the jurisdiction with a broader turn toward non-traditional marks. This article argues for a cautious, competition- and consumer-sensitive pathway to recognizing color marks, developed through a comparative EU–U.S. doctrinal analysis and an implementable evidentiary protocol. Substantively, it synthesizes standards on representation (advocating an “EU clarity + U.S. evidence” model: exact coded hue plus fixed locus/extent of use), acquired distinctiveness/secondary meaning (registration conditioned on nationally representative, color-only surveys with documented error bounds), and functionality (a robust screen combining utilitarian and a structured three-step aesthetic functionality test focused on psychological pull, socio-cultural salience, and non-reputation competitive advantage). The paper further proposes a two-tier consumer benchmark—average consumer at registration; informed consumer for scope and enforcement—to minimize spillover into adjacent hues and preserve essential competitive space. Addressing long-run risks of color depletion and constraints on creative freedom (notably in fashion), the article translates doctrine into concrete administrative guidance for Georgia—survey thresholds, municipal-level representativeness, precise identification, and tailored disclaimers—while offering an exportable framework for similarly transitioning jurisdictions.

Keywords---single color trademark; non-traditional trademarks; aesthetic functionality; acquired distinctiveness/secondary meaning; competition & consumer protection.

Introduction

In 2024, Georgia removed the graphical-representation requirement from its trademark law, making registration of single color (or *color per se*) legally feasible and aligning the system with the broader international turn toward non-traditional marks¹. That reform brings a familiar policy tension to the fore: how to recognize genuinely source-identifying color use without undermining competition, consumer welfare, or creative freedom. Color marks pose atypical risks—most notably the prospect of depletion in limited color spaces and the documented psychological and socio-cultural pull of color on purchasing decisions—so any protection must be carefully calibrated rather than assumed.

This article addresses that calibration problem through a comparative EU–U.S. doctrinal analysis coupled with an implementable evidentiary and procedural framework for Georgia. Doctrinally, we distill current law on representation, acquired distinctiveness/secondary meaning, and utilitarian and aesthetic functionality. Practically, we translate those doctrines into **(i)** identification standards that use recognized color systems and specify the manner of use, **(ii)** evidentiary thresholds capable of demonstrating that a *significant proportion* of relevant consumers attribute source to color alone, and **(iii)** competition-sensitive safeguards keyed to color’s non-reputation-based advantages.

The paper’s contributions are threefold. First, it proposes a nationally representative consumer-perception survey—adapting Teflon/Eveready instruments to color-only stimuli—as registration-stage evidence fit for administrative and judicial scrutiny. Second, it advances a two-tier consumer standard: the average consumer at the point of registration (to test whether color truly functions as a badge of origin in the marketplace at large) and the informed consumer in infringement/overlap analysis (to curb overbroad color monopolies and reduce spillover into adjacent hues). Third, it formulates a three-step aesthetic-functionality screen that asks whether the claimed color (1) exerts material psychological pull, (2) bears socio-cultural salience likely to boost product appeal, and (3) confers a competitive advantage independent of brand reputation; failure on any step counsels against registrability.

Although Georgia’s reform provides the immediate case study, the framework is designed for export to similarly situated jurisdictions that have relaxed representation rules but seek to preserve competitive and expressive spaces—especially in design-driven sectors such as fashion. The article proceeds as follows: Part I sets out feasibility and criteria for *color per se* protection across EU and U.S. law; Part II situates color rights within competition, consumer-protection, and creative-freedom principles (including color-depletion risks); and the last Part offers concrete recommendations for Georgian practice—survey design, territorial representativeness thresholds, identification precision, and functionality tests—aimed at implementing cautious, competition-sensitive recognition of color marks.

¹ Law of Georgia “On Amendments to the Law of Georgia “On Trademarks”. Document No. 4048-XIV06-X03 available at: <https://cutt.ly/6eMlrrp5> [accessed: 10 October 2025]

Methodologically, the study adopts a comparative doctrinal approach, synthesizing EU and U.S. case law and administrative practice, and operationalizes the analysis through a replicable evidence protocol—color-only stimuli, nationally representative sampling, and documented error bounds—alongside targeted industry illustrations.

I. Feasibility and Criteria for Protecting a Single Color as a Trademark

For Georgia—and for similarly situated jurisdictions where *color per se* protection is a relatively new phenomenon—it is essential to study leading practice and, drawing on the best insights, to formulate comprehensive guiding principles for protecting single colors as trademarks. In this regard, U.S. and European Union practice is especially instructive.

To map the convergences and divergences between the EU and U.S. legal frameworks on single-color registration, this section addresses two core questions: (1) What formal and substantive requirements must an applicant satisfy to register a color? and (2) On what grounds may protection for such a color be refused or later invalidated? Given the specificities of non-traditional marks, the analysis focuses on three issues in particular: representability, distinctiveness, and functionality.

1.1. Representability of a Single Color

Representability—how a sign is presented so that it is objectively perceptible—is foundational to both registration and enforcement of trademarks, including *color per se*. The European Union and the United States structure this requirement differently.

Under the Court of Justice’s case law², an applied-for sign must be presented to the registry in a manner that allows its subject matter to be determined clearly and precisely—“clear, precise, self-contained, easily accessible, intelligible, durable, and objective”—a standard often summarized as the “Sieckmann criteria.”³ Accordingly, EU registries require applicants for single-color marks to indicate the exact color code in a recognized color system^{4 5} and to specify the manner of use on the goods or their presentation (e.g., placement)⁶. In one case,⁷ protection for the color orange for plant seeds was refused on the formal ground that the application did not make clear whether protection was sought for the color of the seeds themselves or for the packaging.⁸

² Case C-273/00 Ralf Sieckmann v Deutsches Patent- und Markenamt [2002] ECR I-11737, ECLI:EU:C:2002:748. Available at: <https://cutt.ly/owlLRxyb> [accessed: 10 October 2025]

³ Ibid.

⁴ For example - CMYK, PANTONE, RGB or RAL systems. EUIPO, Guidelines for Examination (Trade Marks) — ‘Colour marks’, available at: <https://cutt.ly/kwG3DUnw> [accessed: 10 October 2025]

⁵ Case C-104/01 Libertel Groep BV v Benelux-Merkenbureau, ECLI:EU:C:2003:244. Available at: <https://cutt.ly/OeaoJvyj> [accessed: 10 October 2025]

⁶ Tove Øymo, Is the Future of Trade Marks Black and White? (King’s College London, 2021), 17.

⁷ KWS Saat AG v European Union Intellectual Property Office, Case C-447/02 P, ECLI:EU:C:2004:649 available at: <https://cutt.ly/beav5tX7> [accessed 10 October 2025]

⁸ Ibid.

Best EU practice is to pair a recognized code (e.g., Pantone/RAL/HEX/CMYK) with a concise verbal description that fixes where and to what extent the color appears (location, proportion, surface), and to avoid any variability that would leave the scope uncertain; this approach reflects the logic of *Libertel* for single colors.⁹ Examiners may also request mock-ups or standardized swatches to ensure the file record is stable over time, thereby safeguarding legal certainty for third parties.

By contrast, U.S. practice requires a drawing/specimen showing the color and identifying it by name¹⁰, but not a mandatory reference to a specific code. As a practical matter, U.S. registrations often cover broader ranges of hues, and even basic color names may be registered for particular goods (e.g., “blue” for medical equipment)¹¹. Moreover, because U.S. trademark rights are primarily use-based, registration is not a prerequisite to protection; it follows that more colors may function as trademarks in the marketplace than are formally registered.

Transitioning jurisdictions should adopt an “EU clarity + U.S. evidence” standard: specify the exact hue using a recognized code (Pantone/RAL/CMYK/HEX); fix the locus and extent of use (placement, proportion, surface); include a static swatch and, where useful, standardized mock-ups; exclude gradients, patterns, or combinations unless expressly claimed; add disclaimers for adjacent hues and for function-driven uses; and require re-filing or amendment if the claimed hue or mode of use shifts materially. Examiners should apply a short checklist—clarity, precision, durability, intelligibility—to the file record and reject applications that leave competitive space uncertain. These measures narrow scope *ex ante*, reduce enforcement noise *ex post*, and preserve legal certainty while keeping genuinely source-identifying color uses registrable.

1.2. Distinctiveness of a Single Color

The ability of a sign to identify the commercial source—rather than merely to decorate—is the core precondition for protection, and it is comparatively rare for a single color. Consumers typically experience color as part of packaging or product design, not as a badge of origin. Nevertheless, after intensive and consistent use in the marketplace, a product or its packaging may come to be recognized first and foremost by color; in such cases the color can acquire distinctiveness (secondary meaning), which is the principal basis for protecting a color as a trademark.¹²

For non-traditional marks—including single colors—the EU requires proof of acquired distinctiveness under the *Chiemsee*¹³ line of cases. In substance, the

⁹ Case C-104/01 *Libertel Groep BV v Benelux-Merkenbureau*, ECLI:EU:C:2003:244. Available at: <https://cutt.ly/OeaoJvyj> [accessed: 10 October 2025]

¹⁰ US Trademark Manual of Examining Procedure, Available at: <https://cutt.ly/seaPlylX> [accessed: 10 October 2025]

¹¹ Tove Øymo, *Is the Future of Trade Marks Black and White?* (King’s College London, 2021), 24.

¹² Briana Reed, ‘Color Monopoly: How Trademarking Colors in the Fashion Industry and Beyond Expands the Lanham Act’s Purpose and Policy’ (2021) 15(3) *Liberty University Law Review*, 376.

¹³ Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Huber and Attenberger*, ECLI:EU:C:1999:230. Available at: <https://cutt.ly/EwGTy9GQ> [accessed: 10 October 2025]

question is whether a significant proportion of the relevant public¹⁴ perceives the color, by itself, as indicating the product's commercial origin. The "relevant public" is the circle of average consumers¹⁵ for the goods or services concerned—reasonably well-informed, observant, and circumspect¹⁶. Evidence must therefore demonstrate that color alone functions as a source identifier for that public.

A further EU requirement concerns territorial scope: acquired distinctiveness must be shown across the relevant territory (for a national mark, the member state; for an EU trademark, the Union) in those parts where the sign lacks inherent distinctiveness. Neither the case law nor the EUIPO Guidelines prescribe a fixed numerical threshold for the "significant proportion" standard¹⁷; instead, examiners and courts assess the totality of the evidence—surveys, sales and advertising data, market share, and the duration and intensity of use—bearing in mind that nationwide proof for a color claim is demanding and often costly¹⁸.

As in the EU, a single color is protectable in the U.S. only upon proof of acquired distinctiveness (secondary meaning). The inquiry is whether a substantial portion of relevant consumers identifies the product's commercial source from the color alone¹⁹. The evidentiary mix mirrors EU practice—consumer surveys, sales and advertising figures, length and exclusivity of use—though U.S. trademark rights are use-based and can, in principle, arise without registration.

The principal difference lies not in the legal test but in the definition of the consumer universe. EU decision-makers apply the average consumer benchmark (reasonably well-informed, observant, and circumspect). By contrast, U.S. courts define the relevant purchasers case-by-case—sometimes narrowing to more knowledgeable buyers in high-involvement markets²⁰. That flexibility can incentivize applicants to present unduly narrow survey universes; examiners and courts should therefore ensure that the universe reflects marketplace reality²¹. As to the "substantial/significant proportion" standard, neither system prescribes a fixed percentage; both assess the totality of the evidence and treat any numerical showings as context-dependent rather than as quotas²².

Register only where nationally representative evidence shows that color alone signals source to the average consumer, and the claim is strictly identified (recognized code + fixed mode of use) and backed by color-only surveys with documented error bounds. Where the record is weak—or the hue is commonplace, functional, or aesthetically value-laden—refuse or narrowly confine protection

¹⁴ Ibid, para 54.

¹⁵ Tove Øymo, *Is the Future of Trade Marks Black and White?* (King's College London, 2021), 22.

¹⁶ Case C-299/99 Koninklijke Philips Electronics NV v Remington Consumer Products Ltd, ECLI:EU:C:2002:377, para 63. Available at: <https://cutt.ly/9eaAjM4r> [accessed: 10 October 2025]

¹⁷ Joined Cases C-217/13 and C-218/13 Oberbank AG and Others v Deutscher Sparkassen- und Giroverband eV, ECLI:EU:C:2014:2012. Available at: <https://cutt.ly/YeaGBPzd> [accessed: 10 October 2025]

¹⁸ Irene Calboli and Jane C Ginsburg (eds), *The Cambridge Handbook of International and Comparative Trademark Law* (Cambridge University Press 2020), 220.

¹⁹ US Trademark Manual of Examining Procedure, Available at: <https://cutt.ly/seaPlyIX> [accessed: 10 October 2025]

²⁰ Tove Øymo, *Is the Future of Trade Marks Black and White?* (King's College London, 2021), 26.

²¹ Ibid, 26-27.

²² Ibid.

(adjacent-hue disclaimers; precise placement/proportion limits). For scope and enforcement, apply an informed-consumer lens and a competition-sensitive screen to prevent spillover and preserve need-to-use space.

1.3. Utilitarian and Aesthetic Functionality of a Single Color

Utilitarian functionality—where color performs a technical or performance role inherent to the goods—excludes protection as a trademark. This principle is firmly entrenched in both EU²³ and U.S.²⁴ law and case practice: color is not registrable where it confers or signals a technical function or performance advantage (for example, high-visibility colors for safety equipment²⁵, functional coding such as distinct colors for wiring or medical device components²⁶, or fruit-matching colors for fruit candies²⁷).

Aesthetic functionality covers situations in which consumers choose the product not because the color identifies a particular producer, but because the color or the coloration of the packaging is aesthetically attractive in its own right. In such scenarios, color operates as part of the product's design value rather than as a badge of origin.

As with utilitarian functionality, both the EU²⁸ and the U.S.²⁹ recognize that aesthetic functionality can bar trademark protection for color. Where color primarily delivers aesthetic or design value, it aligns more closely with other intellectual-property regimes (e.g., design protection) or with general competition law, and trademark registration should not be used to monopolize that value.

The principal divergence, as reflected in case law, is one of calibration. U.S. doctrine frames aesthetic functionality around whether protection would grant a “significant non-reputation-related competitive advantage,” and over time courts have tended to narrow the doctrine³⁰. In practice, modern U.S. decisions focus on whether the color actually functions as a mark, while policing scope to avoid encroaching on competitively necessary hues³¹. EU practice accepts a similar competition-sensitive logic—particularly through the bar on shapes or “other characteristics” that confer substantial value—but a stable quantitative yardstick for the degree of competitive advantage has not yet crystallized³².

²³ Regulation (EU) 2017/1001 of 14 June 2017 on the EU trade mark [2017] OJ L154/1. Article 7(1)e,I,II. Available at: <https://cutt.ly/twI0Zjl6> [accessed: 10 October 2025]

²⁴ *Qualitex Co v Jacobson Products Co*, 514 US 159 (1995), para 165. Available at: <https://cutt.ly/PwILjxI3> [accessed: 10 October 2025]

²⁵ Jekaterina Kudrjavceva, *Issues Surrounding Registration of Colour Trade Marks* (RGSL Research Papers No 9, 2012), 40.

²⁶ *Ibid.*

²⁷ *McNeil Nutritionals, LLC v Heartland Sweeteners, LLC*, 511 F.3d 350 (3d Cir 2007). Available at: <https://cutt.ly/rwAOz76g> [accessed: 10 October 2025]

²⁸ Regulation (EU) 2017/1001 of 14 June 2017 on the EU trade mark [2017] OJ L154/1. Article 7(1)e,III. Available at: <https://cutt.ly/twI0Zjl6> [accessed: 10 October 2025]

²⁹ *Qualitex Co v Jacobson Products Co*, 514 US 159 (1995), para 165. Available at: <https://cutt.ly/PwILjxI3> [accessed: 10 October 2025]

³⁰ *Pagliero v Wallace China Co*, 198 F.2d 339 (9th Cir 1952) Available at: <https://cutt.ly/owSAaNQm> [accessed: 10 October 2025]

³¹ *Qualitex Co v Jacobson Products Co*, 514 US 159 (1995), para 163. Available at: <https://cutt.ly/PwILjxI3> [accessed: 10 October 2025]

³² Case C-237/19 *Gömböc Kutató, Fejlesztő és Kereskedelmi Kft. v SZTNH*, ECLI:EU:C:2020:296. Available at: <https://cutt.ly/CwGQKZnf> [accessed: 10 October 2025]

II. interrogates the relationship between exclusive rights in a single color and foundational legal principles.

Unlike other potentially registrable signs, a color exists independently of human creative activity³³. This ontological feature gives color a singular status among trade-mark signs and poses a threshold question: does reserving a single hue to one undertaking properly belong within intellectual-property law, or should any marketplace disputes about confusing similarity instead be resolved under the law of unfair competition?

A closely related concern is whether the very possibility of registering a single color as a trade mark is compatible with the principle that protects free and fair competition from unjustified restraints³⁴. Addressing this concern is essential because trade-mark law does not operate in isolation from competition law: its central policy rationale is to facilitate fair competition in open markets by reducing consumer search costs and curbing deception³⁵.

The analysis must likewise attend to the psychological and socio-cultural influence of color on consumers. To what extent does the color of a product or its packaging affect the purchasing decision? Would recognising a single color as a trade mark risk undermining the principles of free and fair competition and the protection of consumer rights? By foregrounding these questions, this part adds a novel dimension to the literature, integrating color psychology and consumer-protection considerations into the doctrinal assessment³⁶.

It is also necessary to frame color protection within the principle of freedom of creative expression³⁷, particularly in design-driven industries such as fashion. Could single-color registrations hinder the development of the sector and, more broadly, creative freedom?

In recent years, Georgia has undertaken legislative and institutional reforms aimed at strengthening these principles³⁸ and aligning national practice with contemporaneous EU instruments. Against this backdrop, it is crucial to ensure that the feasibility of registering a single color as a trade mark does not harm businesses, consumer interests, or creative freedom. To that end, this chapter identifies and evaluates the principal risks associated with the registration of single-color marks.

³³ Which cannot be said of color combinations, in which the arrangement is determined by human decision.

³⁴ Constitution of Georgia (1995), article 6. Also, Law of Georgia on Competition (2012) article 1.1.

³⁵ Tove Øymo, *Is the Future of Trade Marks Black and White?* (King's College London, 2021), 13.

³⁶ Constitution of Georgia (1995), article 26.4.

³⁷ Constitution of Georgia (1995), article 20.

³⁸ Nanuka Gabelaia, *Analysis of Anti-Competitive Practices by State Authorities in Georgia* (Tbilisi Open University, 2019) 11.

Tamar Lakerbaia, *The Legislative Foundations of Consumer Rights Protection in Georgia* (2021) Georgian-German Journal of Comparative Law 5/12, Institute of State and Law Publishing, 12.

2.1. Interface with the Principle of Free and Fair Competition: The Color-Depletion (Scarcity) Thesis

The trademark-depletion thesis posits that the steady registration of signs progressively reduces the pool of competitively viable signs available to future market entrants³⁹. Empirical work on word marks suggests that, within certain Nice classes⁴⁰, the stock of attractive, unclaimed verbal signs is already thin, placing new entrants at a relative disadvantage unless they accept weaker signs or purchase existing ones⁴¹—conditions that in turn can fuel “trademark-trolling” dynamics⁴². By analogy, single-color marks raise a structurally similar concern.

Although, in theory, the human visual system can discriminate a vast number of hues⁴³, the set of colors that can realistically function as protectable trade marks within a given product class is far smaller. The reason is legal and economic: a registration in one hue necessarily casts a penumbra over adjacent shades in the same or similar classes, as the likelihood-of-confusion analysis must account for consumer fallibility regarding close tonal neighbors⁴⁴. In practical terms, standardized color systems used in commerce list only a few thousand swatches⁴⁵, which illustrates the finite nature of the palette available for mass-market use. Scarcity, therefore, is not merely perceptual but also legal and competitive in its effects.

Color-depletion arguments appeared early in U.S. case law. In the well-known Campbell Soup (3d Cir 1949) litigation⁴⁶ over red-and-white labels, the court declined to condemn the defendant’s use on the ground that granting the claimant an exclusive right in the color scheme would invite others to monopolize colors in packaging until the usable spectrum “ran out.”⁴⁷ For decades, this competition-oriented skepticism shaped lower-court outcomes.

The Supreme Court in *Qualitex* (1995)⁴⁸ rejected an absolute bar on color marks but did not dismiss depletion concerns outright. Rather, the Court treated the risk as contingent and product-specific: where color actually functions as an

³⁹ Barton Beebe and Jeanne C Fromer, ‘Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion’ (2018) 131(4) *Harvard Law Review*, 950.

⁴⁰ World Intellectual Property Organization, ‘Nice Classification—Class Headings (NCL 11-2022)’ (in force 1 January 2022) Available at: <https://cutt.ly/Zea1VGGF> [accessed: 10 October 2025]

⁴¹ Barton Beebe and Jeanne C Fromer, ‘Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion’ (2018) 131(4) *Harvard Law Review*, 950.

⁴² Such actors are commonly described as “trademark trolls,” engaging in trademark warehousing—registering commercially attractive marks not for bona fide use in production, but for subsequent sale or leverage of the mark itself.

Source: Anna B. Folgers, ‘The Seventh Circuit’s Approach to Deterring the Trademark Troll: Say Goodbye to Your Registration and Pay the Costs of Litigation’ (2007) 2(2) *Seventh Circuit Review* 39.

⁴³ Reena Mukamal, ‘How Humans See in Color’ (*American Academy of Ophthalmology*, 2017). Available at: <https://cutt.ly/6eaudM3Z> [accessed: 10 October 2025]

⁴⁴ Lionel Bentley, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property Law* (5th edn, Oxford University Press 2018), 960.

⁴⁵ The New 2023 Pantone Formula Guide Includes 224 Just Released PMS Colors, Available at: <https://cutt.ly/YeaM2ceJ> [accessed: 10 October 2025]

⁴⁶ *Cambell Soup Co v Armour & Co* The Federal court of appeal U.S.P.Q 430 175 F. 2d 795 (3d. Cir 1949) available at: <https://cutt.ly/Nr28IXLi> [accessed: 10 October 2025]

⁴⁷ *Ibid*, para 798.

⁴⁸ *Qualitex Co v Jacobson Products Co*, 514 US 159 (1995), para 163. Available at: <https://cutt.ly/PwILjxl3> [accessed: 10 October 2025]

indicator of source, alternative colors will “usually” remain available for competitors⁴⁹. That reasoning is thought-provoking. The full force of depletion is unlikely to be observable at the inception of registration programmes. It accumulates over time, driven by two structural features: potentially perpetual protection for valid marks and a finite, commercially standardized color space. It is also rational to expect that applicants will target first those hues that carry strong cultural or marketing appeal in particular classes. In short, the risk is prospective and systemic, which counsels a preventative stance.

Even so, Qualitex did not usher in a laissez-faire regime. The Court relied on functionality doctrine—utilitarian and aesthetic—as the principal safeguard to police overreach⁵⁰. When strictly applied, functionality should filter out colors whose exclusive appropriation would materially hinder competition.

EU case law has likewise expressed caution. The Court of Justice has underscored both the finite nature of the color spectrum and the average consumer’s limited capacity to perceive fine differences between close shades⁵¹. Libertel (C-104/01) emphasized clarity and precision in identifying the claimed hue⁵², and EUIPO practice reflects an awareness that expansive claims can unduly restrict competitors’ access to needed colors. Administrative decisions (e.g., refusals concerning “light green” for chewing-gum packaging) illustrate the concern that broad, ill-defined claims may impede market entry⁵³.

Contemporary EU and U.S. law permit registration of single colors, reflecting a broader international trend. Yet the underlying scarcity logic has not disappeared. It is plausible that, as portfolios of color marks expand across classes and jurisdictions, depletion effects will crystallize more visibly, with implications for free and fair competition at scale. Accordingly, systems should calibrate registrability and scope *ex ante* (through precise identification and robust proof of acquired distinctiveness to the average consumer) and police overreach *ex post* (through a competition-sensitive application of functionality and carefully tailored disclaimers for adjacent hues).

2.2. Interface with the Principles of Free and Fair Competition and Consumer Protection — The Influence of Color on Consumers

A long-standing body of psychological research recognises that color can exert substantial influence on human affect, cognition, and choice⁵⁴. The point is sufficiently established in the discipline to have inspired various applied instruments—for example, the so-called “Lüscher test,”⁵⁵ which posits that the mere order of a person’s color preferences can reveal a range of personality

⁴⁹ Ibid, para 168.

⁵⁰ Qualitex Co v Jacobson Products Co, 514 US 159 (1995), para 169. Available at: <https://cutt.ly/PwILjxI3> [accessed: 10 October 2025]

⁵¹ WM. Wrigley Jr. Company, Light Green, Case R 122/1998-3, EUIPO, Decision of the Third Board of Appeal (1999) available at: <https://cutt.ly/xealEgvd> [accessed 10 October 2025]

⁵² Case C-104/01 Libertel Groep BV v Benelux-Merkenbureau, ECLI:EU:C:2003:244. Available at: <https://cutt.ly/0eaoJvyj> [accessed: 10 October 2025]

⁵³ Ibid, para 168.

⁵⁴ Kendra Cherry, ‘Color Psychology: Does It Affect How You Feel?’ (Verywell Mind, 2024) available at: <https://cutt.ly/Vea0w9Xz> [accessed: 10 October 2025]

⁵⁵ See: <https://cutt.ly/Fea16dQk> [accessed: 10 October 2025]

attributes. Unsurprisingly, firms do not seek to protect color merely so that consumers may identify the commercial origin of goods; they also wish to appropriate a powerful psychological lever that may shape purchasing decisions.

Beyond any innate or biological effects, colors acquire socio-cultural meanings through prolonged co-existence within particular communities. In this respect, it is pertinent to ask whether Georgian cultural consciousness displays distinctive features in its perception of color. Although nationwide studies remain limited, individual works indicate that the Georgian language employs color-based metaphors to express emotion more frequently than some other languages⁵⁶, while the symbolic meanings of colors in Georgian society broadly mirror those prevalent across European cultures⁵⁷.

When deployed appropriately, the psychological and socio-cultural pull of color generates concrete, quantifiable benefits for undertakings. Various studies report that effective color-based marketing can increase product sales by roughly 50–85 percent⁵⁸, while brand recognition can rise to as much as 80 percent⁵⁹. Moreover, approximately 52 percent of consumers consider the color of product packaging to be an indicator of quality⁶⁰.

Taken together, these observations substantially support the view that, if registration of colors as trademarks were made too easy and public policy too permissive, there would be a meaningful risk of entrenching competitive inequality in favour of certain firms. At the same time, consumer interests in making informed decisions could be jeopardised: marketing that strategically appeals to product color—especially where competitors are restricted from employing similar hues—may act upon consumers’ subconscious processes and foster unwarranted expectations about the product’s characteristics.

2.3. Interface with the Principle of Creative Freedom: Color in the Fashion Industry

The possibility of protecting a color as a trademark raises a natural question: will such protection unduly restrict the creative freedom of those for whom color is an essential element of practice? Within this context, the fashion industry warrants the most careful consideration.

In fashion, the flagship example of color protection is the “Louboutin red sole” on women’s high-heeled shoes and the cascade of litigation surrounding it⁶¹. In

⁵⁶ Salome Tsikhiseli, *A Comparative Study of English, Chinese, and Georgian Idiomatic Expressions (from the Perspective of Culture, Color, and Translation)* (Ivane Javakhishvili Tbilisi State University, Tbilisi 2020), 111.

⁵⁷ Gaiane Manasian, ‘A Creative Approach to the Nomination of Colors and the Semantic Boundaries of Color-Descriptive Words’ (2011) *Spekali*, Tbilisi, available at: <https://cutt.ly/Cea2eFqB> [accessed 10 October 2025].

⁵⁸ Bayston R., 6 Colors That Are Proven to Boost Sales, *The Daily Egg*, 2020. Available at: <https://cutt.ly/VeaiY8RU> [accessed 10 October 2025].

⁵⁹ Zachary Crockett, ‘Can a Corporation “Own” a Color?’ (*The Hustle*, 2024) available at: <https://cutt.ly/lea1grzl> [accessed 10 October 2025].

⁶⁰ *Ibid.*

⁶¹ Briana Reed, ‘Color Monopoly: How Trademarking Colors in the Fashion Industry and Beyond Expands the Lanham Act’s Purpose and Policy’ (2021) 15(3) *Liberty University Law Review*, 371.

2008, Christian Louboutin registered in the United States the use of a red color applied to the outsole⁶²; in 2011, Yves Saint Laurent (YSL) introduced an all-red high-heeled shoe⁶³. Louboutin sued, seeking the removal of all red-soled shoes from the market⁶⁴, while YSL counterclaimed to cancel Louboutin's registration⁶⁵. The courts were thus presented with a foundational question: can a single color be protected as a trademark in the fashion industry?

At first instance, the district court, reading *Qualitex*, reasoned that a color should be protected as a mark only when it functions as a source identifier and does not simultaneously carry other significant value⁶⁶. Relying on the functionality doctrines, the court rejected Louboutin's claim, stating that, in fashion, color is a basic and fundamental ingredient⁶⁷ and that its role is to convey the product's aesthetic appearance⁶⁸. On this basis, the court concluded that allowing one company to register a single color in fashion would contravene the principles of free and fair competition and of creative freedom⁶⁹.

The court of appeals declined to adopt the district court's approach⁷⁰. It framed aesthetic functionality as limited to cases in which protection would "significantly undermine competitors' ability to compete" in the relevant market⁷¹. In the appellate court's view, YSL and other fashion houses would not be placed in such a position by protecting Louboutin's mark, as numerous creative alternatives remained available to them⁷².

The appellate decision is not entirely convincing in that its reasoning does not foreground trademark law's paramount aim—protecting consumers from deception. The goods here were high-value products whose purchasers possess high buying power; empirical studies support the practical inference that the more a consumer pays for a product, the more carefully she chooses it, which in turn reduces the likelihood of confusing one brand's goods for another's⁷³. In this case, the plaintiff did not introduce evidence of likely confusion.

At the same time, the district court's position on color's essential aesthetic function in fashion is intuitive and readily understandable: color is among fashion's principal design elements. By casting aesthetic functionality primarily as a mere anti-monopoly device, the appellate court leaves out of account that, in the fashion industry, allowing color registration can place other houses in a

⁶² *Christian Louboutin S.A. v. Yves Saint Laurent Am. Inc.* United States District Court, S.D. New York. No. 11 Civ. 2381(VM), 2011, para 448. Available at: <https://cutt.ly/lea33Fox> [accessed: 10 October 2025]

⁶³ *Ibid.*, para 449.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, para 450.

⁶⁷ *Ibid.*, para 452.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, para 453.

⁷⁰ *Christian Louboutin SA v Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2d Cir 2012), para 448. Available at <https://cutt.ly/iesiVqou> [accessed: 10 October 2025]

⁷¹ *Ibid.*, para 222.

⁷² *Ibid.*, para 223, 224.

⁷³ *How Affluent Shoppers Buy Luxury Goods: A Global View*, available at <https://cutt.ly/qesoxla0> [accessed: 10 October 2025]

structurally unequal position and can encourage a race to “appropriate” colors through aggressive marketing. In practice, brands have little choice: if they do not act, another company may seek to secure a given color.

The foregoing case set the tone for U.S. practice. However, as noted elsewhere in this paper, the European Union has not yet settled upon a single, unequivocal approach to the width of the aesthetic-functionality bar when single colors are claimed, which leaves room for EU bodies to account more fully for color’s unique nature and properties.

Conclusion and Recommendations

Overall, single-color trademark protection entails significant long-term risks to market competition, consumer welfare, and creative freedom and uncertain public benefits. In principle, isolated cases of color confusion could have been addressed under unfair-competition rules rather than by creating exclusive rights. Since any reversal now depends on broad international consensus, the pragmatic course is to focus on aligning national norms and institutional practice with the existing international framework.

With appropriate legislative and administrative choices, Georgia—and similarly situated jurisdictions—can design an internal regulatory framework that, on the one hand, remains consistent with international standards and, on the other, reduces the risks identified in this paper’s analysis. The following recommendations are offered with that dual objective in view.

A. Registration Standard for Acquired Distinctiveness (Secondary Meaning)

Key question: Under what conditions should the Georgian registry and courts recognize that a single color has acquired distinctiveness for particular goods? Chiemsee’s “significant proportion of the relevant public”⁷⁴ remains the governing benchmark. However, two elements—(i) who counts as the “relevant public” and (ii) what qualifies as a “significant proportion”—require national calibration through soft-law guidelines and, in time, case law.

1) Two-Tier Consumer Standard

- At the registration stage, the relevant public should be the average consumer (reasonably well-informed, observant, and circumspect). This choice ensures that only colors that truly function as source identifiers across broad consumer segments are admitted to the register.
- In infringement/overlap analysis, courts and examiners should apply an informed-consumer lens. This approach better captures how knowledgeable purchasers assess proximate hues and reduces the risk that protection for one registered tone will unfairly spill over into adjacent shades.

2) Evidence Protocol and Thresholds

- Mandatory quantitative survey evidence. Applicants should submit valid, reliable, and transparently reported quantitative surveys demonstrating that color alone functions as a badge of origin. The surveys should employ color-only stimuli, nationally representative sampling, and documented error bounds.

⁷⁴ Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Huber and Attenberger*, ECLI:EU:C:1999:230. Para 54. Available at: <https://cutt.ly/EwGTY9GQ> [accessed: 10 October 2025]

- Numerical threshold. As a strict evidentiary standard suited to Georgia's market, the share of respondents identifying the color with a single commercial source should exceed 50 percent, and the decision should be anchored in the lower bound of the confidence interval.
- Territorial representativeness. Beyond the national aggregate, representativeness should be demonstrated across Georgia's municipalities. In other words, the survey should show that a significant proportion of consumers in each municipality—not merely in the aggregate—associates the color with a single source.

To give real effect to the “average consumer” standard—crucial where color perception is inherently subjective—registrability should rest on rigorous, quantitative color-only surveys rather than hypothetical assessments⁷⁵. Because Georgia is unitary, protection cannot hinge on pockets of recognition; it requires nationally representative, municipality-level evidence that the color functions as a source identifier throughout the country. Only applicants meeting this threshold should obtain single-color registration.

B. Identification and Scope at Filing

To safeguard legal certainty and competitive space, color claims should reflect an “EU clarity + U.S. evidence” approach: an exact hue specified in a recognized color system (e.g., Pantone/RAL/CMYK/HEX), a concise verbal description fixing locus and extent of use (placement, proportion, surface), static swatches and, where appropriate, standardized mock-ups, and disclaimers for adjacent hues and function-linked uses. Material shifts in the claimed hue or the mode of use should trigger re-filing or amendment.

C. Functionality—Statutory Wording and Aesthetic-Functionality Screen

Georgia's revised trademark statute retains the utilitarian-functionality bar and adds aesthetic functionality. To clarify purpose and align with comparative practice, the aesthetic-functionality clause should state that protection is refused where the claimed color “confers substantial value on the goods by granting aesthetic appeal.” Because color exerts psychological and socio-cultural influence on consumers, aesthetic functionality should be understood broadly for single-color claims. Administratively, the applicant should be required to demonstrate that none of the following conditions obtains:

- Material psychological pull: the color does not exert a material psychological effect likely to increase the product's appeal.
- Socio-cultural salience: the color does not carry socio-cultural meaning that is likely to increase the product's appeal.
- Non-reputation-related competitive advantage: exclusive use of the color would not grant the applicant a significant competitive advantage independent of brand reputation.

If any one of these conditions is present, the color should be deemed aesthetically functional and refused as an absolute ground.

D. Implementation and Institutional Practice

⁷⁵ See: Nicole A. Fider and Natalia L. Komarova, ‘Differences in Color Categorization Manifested by Males and Females: A Quantitative World Color Survey Study’ (2019) 5(1) Palgrave Communications, 5. available at: <https://cutt.ly/Sea3AYxx> [accessed: 10 October 2025]

Codifying these rules in secondary legislation (examination guidelines) and embedding them in agency and judicial practice would materially improve the balance between business incentives and consumer protection. The result would be a cautious, competition-sensitive pathway for recognizing single-color marks while preserving expressive and creative space—particularly in design-driven sectors such as fashion.

These recommendations are formulated for Georgia but are readily exportable to other jurisdictions that have relaxed representation requirements and now face the same calibration problem.

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