

## Who Owns the Color “Gold”? Fielding the Case of *Rawlings Sporting Goods Company vs. Wilson Sporting Goods Company*

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The legal issues addressed in this case are based upon a lawsuit filed in 2012 by Rawlings Sporting Goods Company against Wilson Sporting Goods Company. The lawsuit was initiated after Wilson provided a baseball glove with metallic gold-colored webbing and stitching to a Major League Baseball player who had won a 2011 Rawlings Gold Glove Award but was an endorser of Wilson rather than Rawlings. Although the case was eventually settled on confidential terms, the lawsuit provided a number of intriguing trademark law issues that are examined here. One of the key legal issues revolves around the concept of trade dress, and specifically the basis on which a single color can be deemed protectable as a trademark. After examining the legal history of various colors as trademarks, the authors then introduce the concepts of functionality and secondary meaning to provide a context in which readers can analyze the merits of Rawlings’ legal claim with respect to its “ownership” of the color gold within the baseball glove industry.

Judge Diamond sat in his office, a waft of warm spring “Opening Day” air blowing across his desk. He was eager to make his way across town to settle into his box seats for the start of a new baseball season. Before he could head out, however, he had to put the finishing touches on his legal decision involving a unique case the likes of which he had never ruled upon before. On the plaintiff’s side sat Rawlings Sporting Goods, a venerable St. Louis–based company that had specialized in baseball equipment for well over a century. The defendant in the lawsuit was Chicago-based Wilson Sporting Goods Company, one of Rawlings’ staunchest competitors in the market for baseball gloves purchased by players of all ages. Judge Diamond had sat for many hours hearing the legal arguments from both sides—much of it laced, to his enjoyment, with the vernacular of the game of baseball—and was confident that he was now ready to decide the pivotal question before him: Should he grant Rawlings exclusive trademark rights to the use of the color “gold”?

In 2007, the Rawlings Sporting Goods company celebrated, through a highly-coordinated public relations campaign, the 50th anniversary of its Gold Glove Award program. Around 1957, a Rawlings sales manager had observed that over half the

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players in professional baseball wore a Rawlings baseball glove. To capitalize on this, Rawlings decided to create an award to recognize defensive excellence. To create the original Gold Glove Award, Rawlings constructed a baseball glove made from gold tanned leather that was popular in the fashion footwear industry. Since its creation, Rawlings has distributed over 1,000 Gold Glove Award trophies, consisting of a gold-colored baseball glove attached to a solid base. In addition to naming its major league Gold Glove Award winner at all nine positions in both the American and National Leagues, Rawlings also recognizes fielding excellence at the minor league and collegiate levels. Over time, and through extensive marketing efforts, Rawlings’ award program—at least according to Rawlings’ arguments in court—has become synonymous with excellence in the field, and that because of this consumers perceive Rawlings gloves to be the best. In support of its program, Rawlings, in 1974, filed and received federal trademark registrations for the word marks “GOLD GLOVE” and “GOLD GLOVE AWARD,” and later, in 1996, for the word mark “RAWLINGS GOLD GLOVE AWARD.”

Early each season, the Major League players who win a Rawlings Gold Glove Award in the previous season are recognized in a pregame, on-field ceremony, and presented with the trophy. If they are under contract as a Rawlings’ glove endorser, they are also provided actual fielding gloves that include metallic-gold indicia on the glove itself. As Rawlings stated, “Players covet this functional glove as a mark of achievement that is visible to the thousands of fans viewing an MLB game play [sic] both at the stadium and as televised” (Rawlings Complaint, 2012).

Because the awards are decided by a confidential vote of major league players and coaches, it is not a requirement that the winners actually *use* Rawlings gloves in the field. Hence, over the years, Rawlings Gold Glove Award recipients have actually been under glove endorsement deals with companies ranging from Akadema to Zett, and all glove manufacturers in between. Although they receive the trophy itself, these players obviously are not provided a functional fielding glove with the metallic gold indicia that Rawlings endorsers receive.

Based on his stellar defensive play during the 2011 season, Cincinnati Reds second baseman Brady Willips won a Rawlings Gold Glove Award. At the time, Willips was a contracted endorser of Wilson gloves. Before the start of the 2012 season, Willips thought it would be cool to have a glove that featured a gold-colored webbing in recognition of his having won the award. After Wilson Sporting Goods granted his request, Willips took to social media, including Facebook and Twitter, to proudly display his new gloves with gold-webbing—a move which immediately caught the ire of Rawlings’ baseball staff . . . and its attorneys.

In July 2012, Rawlings sued Wilson, seeking a permanent injunction, attorneys’ fees, and damages based on Wilson’s alleged violation of the Lanham Act. In preparation for writing his decision, Judge Diamond again familiarized himself with the three potential causes of action under the Lanham Act. The first cause of action involves the infringement of officially registered trademarks. As he reviewed the statute, he recalled that Rawlings actually did have registration for a number of word marks associated with its Gold Glove Award program:

- (1) Any person who shall, without the consent of the registrant—
  - (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution,

or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

- (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive (15 U.S.C. 15§ 1114).

The second cause of action involved unfair competition, which applies to marks that are not officially registered:

(a) Civil action

- (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

- (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

- (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act (15 U.S.C. § 1125(a)).

The third cause of action involves trademark dilution which, although claimed by Rawlings, was not a claim that Judge Diamond expected to rule on due to his focus on the prior two claims:

c) Dilution by blurring; dilution by tarnishment

(1) Injunctive relief

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of

the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

Judge Diamond also knew that the resolution of this case rested on his understanding of the concept of trade dress, covered under the unfair competition section of the Lanham Act. A trademark is typically a brand name or logo, but can also consist of any device that serves to distinguish goods or services. Colors, sounds, scents, product packaging and even nonfunctional design features, are all potential marks (Chisum et al., 2011). One type of trademark capable of protection is “trade dress,” which refers to the distinctive features of a product’s packaging or the distinctive features of the produce configuration itself. Trade dress has been defined as “the total image of a product and may include features such as size, shape, color or color combinations, textures, graphics, or even particular sales techniques (*Two Pesos v. Taco Cabana*, 1992, p. 765). Typical examples of trade dress include the 3-chime melody used to promote NBC television, the distinctive curved shape of the Coca-Cola bottle, the square-ridged design of the Hershey’s candy bar, the color brown as used by the United Parcel Service (UPS), and the distinctive pink color of fiberglass insulation, among others. Like other types of trademarks, trade dress can receive legal protection only if it is capable of distinguishing, in the mind of the public, the goods or services of one entity from those of another.

Being a big baseball fan, Judge Diamond had enjoyed hearing the arguments presented by the attorneys for Rawlings and Wilson. In its argument that it “owned” the color gold, Rawlings’ attorney argued that Wilson had infringed its registered word marks, including RAWLINGS GOLD GLOVE AWARD. Wilson’s attorney argued that, although Rawlings admittedly had federally-registered trademark protection for word marks including “Gold Glove Award,” its *use* of the color gold on Willips’ glove webbing did not necessarily infringe Rawlings’ word marks. In supporting its Lanham Act trademark infringement under §1114, Rawlings argued that Wilson’s visual depiction of Rawlings’ registered word marks was likely to cause consumer confusion as to source of the goods or services. Rawlings relied upon federal court decisions to argue that its words marks (i.e., GOLD GLOVE AWARD) could be infringed by a pictorial depiction that would be confusingly similar to its marks. These decisions included *Mobil Oil Corp. v. Pegasus Petroleum Corp.* (1987), in which the word mark “PEGASUS PETROLUUM” was held to be confusingly similar to the plaintiff’s registration for a flying horse; and *Izod, Ltd. V. Zip Hosiery Co.* (1969), in which the pictorial representation of a tiger was found to be confusingly similar to the plaintiff’s “Tiger Head” word mark.

## 1. Trademark Protection of Colors

To further inform his opinion, Judge Diamond knew he had to understand the historical development and current state of the law regarding the protection of single colors as trademarks. His research unveiled the following.

The protection of single colors (as opposed to color schemes that involve more than one color) using trademark law has had a long legal history. In fact, for over 100 years, courts have been asked to rule on the application of trademark law to single colors as source-identifiers (Scrimenti, 2012). The resulting precedent

has validated the use of trademark law to protect a single-color as a trademark, within certain legal parameters. In the first case to consider the issue, *Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.* (1906), the U.S. Supreme Court denied trademark protection for “a red . . . distinctively colored streak applied to or woven in a wire rope,” finding it to be too indefinite to be the subject of trademark registration (p. 170). Subsequent cases included *Campbell Soup v. Armour & Co.* (1949), in which the 3rd Circuit rejected Campbell Soup’s ability to trademark the colors red and white for its soup labels. The court voiced concern over Campbell Soup’s potential ability to monopolize the color “red in all its shades” if granted a trademark, resulting in insufficient color options for competitors to use (referred to as “color depletion theory”; p. 798). Trademark protection for single colors was off to a decidedly rocky start. Then, along came color pink.

In 1985, the Federal Circuit of Appeals in *In re Owens-Corning Fiberglas Corp.* held that a single color can be registered as a trademark. The case, involving Owen-Corning’s rights in the color pink for insulation, established the modern law of single-color trademarks. The appellate court held that Owen-Corning’s ability to trademark the color was not barred on the basis of functionality (discussed more fully below), finding no utilitarian purpose in selecting the color pink for insulation, and that it could be trademarked upon proof of secondary meaning as an indicator of source. In other words, when your average consumers see pink fiberglass insulation, they think first and foremost of one source, Owens-Corning. Furthermore, the court agreed that “even if the ‘pink’ color is considered to be ornamental, this does not prevent it from acting as a trademark,” creating precedent for future analogies involving other popular colors like the color gold (*Owens-Corning*, 1985, p 1122).

The cases decided after *Owens-Corning* established a split among the circuits, with regard to the ability to protect colors using trademark law (Scrimenti, 2012). A case in the 8th Circuit, considering protection of the color blue for splicing tape, were consistent with *Owens-Corning (Master Distributors, Inc. v. Pako Corp.*, 1993), while cases in the Seventh and Ninth Circuit rejected the idea of single colors as trademark (*NutraSweet Co. v. Stadt Corp.*, 1990, involving the color pastel blue for sugar substitute packets; *Qualitex Co. v. Jacobson Products Co., Inc.*, 1994, involving the color green-gold for dry-cleaning pads). This split was resolved by the U.S. Supreme Court in *Qualitex Co. v. Jacobson Products Co., Inc.* (1995) where the Court adopted the *Owens-Corning* position that single colors can serve as trademarks, holding that “it is the source-distinguishing ability of a mark—not its ontological status as color . . . —that permits it to serve these basic purposes.” (p. 164).

The next significant case, *Board of Supervisors for Louisiana State University Agricultural and Mechanical College v. Smack Apparel Co.* (2008), contributed to the developing body of case law by considering the ability of several universities to trademark their two-color combinations that have long been used as their school colors. The color schemes are widely used on officially licensed merchandise, including athletic merchandise, as well as have become a sort of “shorthand” way for alumni and fans to refer to the schools themselves, with, for instance, Louisiana State University (LSU) being known as “the Purple and Gold” (p. 477). On appeal, the court distinguished the fact that the colleges and universities were not claiming trademark infringement for every unauthorized use of their color scheme, just those where other identifying indicia of the university (e.g., logos, mascots,

or other verbiage associated with the university) was used (Grady, 2009; Grady & McKelvey, 2008). The court concluded it was proper to consider not only the colors used but also the entire context in which those colors and other indicia appeared on the merchandise, thus providing a more nuanced legal analysis of the use of color. Rejecting the aesthetic functionality doctrine all together, the appellate court ultimately found that the school's unregistered color schemes had acquired secondary meaning in the minds of consumers, stating that "the color schemes are immediately recognizable to those who are familiar with the University" (*Smack Apparel*, 2008, p. 472). At the time of the decision, Grady (2009) suggested that while *Smack Apparel* may help resolve unsettled legal theory, it was still unclear whether the decision established new precedent that expanded the scope of trademark protection of colors (p. 55). However, the most recent federal court decision involving color, *Christian Louboutin S.A. v. Yves Saint Laurent America Inc.* (2012), seems to have cleared up any lingering questions.

*Louboutin* (2012) involved claims of trademark infringement stemming from competitor Yves Saint Laurent America's (YSL) use of the color red on the outsoles of a monochromatic red ladies shoe. YSL counterclaimed arguing that the color red was functional and therefore could not be trademarked. While the district court acknowledged the fame of Louboutin's distinctive red outsoles on its line of shoes, which established secondary meaning, the district court ultimately challenged whether Louboutin should even be able to register the color red in the fashion industry. Applying the doctrine of aesthetic functionality, the district court proceeded to invalidate the Red Sole Mark registration, stating that color was used primarily "to advance expressive, ornamental and aesthetic purposes" and was therefore functional in the fashion industry. Widely-criticized by the trademark bar, the district court's over-reaching decision "seemingly turned the law of single color marks back 100 years" and "...not only denied protection of single-color marks to the entire broader fashion industry, but potentially to other industries" as well (Scrimenti, 2012, p. 2). Louboutin appealed.

The Second Circuit Court of Appeals found errors of law, determining that "to the extent the district court's decision denied protection to any single color trademark in the fashion industry, it was inconsistent with *Qualitex*" (p.1938) and concluded there was no per se rule barring color marks in the fashion industry. In conducting its own fact-specific analysis of the color red when used on the shoe's undersole/heel, the court found for Louboutin, ruling it had established distinctiveness of red sole shoes when used with a *contrasting* color for the upper part of the shoe. However, regarding the specific trademark alleged to have been infringed by YSL (a red heel sole with a red upper part of the shoe), the court denied Louboutin trademark protection in this specific instance and used its powers under the Lanham Act to modify the trademark registration to only cover shoes with a red sole and contrasting upper-shoe color (p. 1950). The court also ruled that the doctrine of aesthetic functionality is a valid defense in the Second Circuit in cases where protection of the mark significantly undermines competitors' ability to compete in the relevant market. The appellate court, however, did not see the need to analyze whether there was a likelihood of confusion or if the use of red soles was functional (p. 1950).

Most legal experts consider the appellate decision in *Louboutin* to be the "right" decision which "restored equilibrium to the law of protection of single color marks" (Scrimenti, 2012, p. 3). Moreover, "[w]hile not treating the fashion

industry as deserving of unique treatment, the court recognized the importance of a factual analysis of the evidence of secondary meaning of the specific mark at issue and considerations of competitive necessity in any specific industry” (Scrimenti, 2012, p. 3). However, post *Louboutin*, even assuming proof of secondary meaning, can single colors now be protected as trade dress in all industries?

## 2. The Parameters of Functionality and Secondary Meaning

Judge Diamond knew that, if he were to rule against Rawlings on its trademark infringement claim under §1114 of the Lanham Act, he’d then have to decide on Rawlings’ unfair competition claim in violation of §1125. To prevail on this claim, Rawlings knew it would first have to demonstrate that it held a valid trademark interest in the color “gold.” During the legal proceedings, Rawlings’ attorney argued that Wilson’s “use of colorable imitations of the Gold Glove Marks is likely to cause confusion, or to cause mistake, or to deceive purchasers and potential purchasers and members of the public as to the affiliation, connection or association between [Wilson] and its products on the one hand, and between Rawlings, the Gold Glove Award and Rawlings products on the other hand, as to the origin, sponsorship, authorization or approval of [Wilson’s] goods by Rawlings” (Rawlings Complaint, pp. 7–8). Wilson’s attorney countered by arguing that Rawlings was not entitled to trade dress protection for the color gold, but furthermore even assuming, for the sake of argument that Rawlings was granted trade dress protection, no consumers would be confused or misled as to the association between Rawlings and Wilson.

Before he could tackle these conflicting arguments, Judge Diamond had to first consider a threshold question: Should Rawlings even be able to “own” the color gold with respect to the sport of baseball? He knew that resolving this complicated question involves a two-step inquiry involving the concepts of functionality and secondary meaning. First, as a threshold matter, Judge Diamond needed to determine whether the specific color for which Rawlings was seeking trademark protection is “functional” within the specific context in which it is being used. If so, the trade dress cannot be registered or protected as a trademark. “Generally speaking, a color is functional if competitors have a legitimate need to use the color and allowing one party to register the color as a trademark for a particular product/service would impair the ability of others to compete effectively” (Handelman, 2013).

The U.S. Supreme Court, in a series of cases, has set forth the standards for determining if a product feature, such as color, is functional. Even if a product feature such as color has obtained secondary meaning, the functionality doctrine will preclude protection if “its use as a mark would permit one competitor (or a group) to interfere with legitimate (nontrademark-related) competition through [its] actual or potential exclusive use” (*Qualitex.*, 1995, p. 170). The overarching purpose of the functionality doctrine, as repeatedly enunciated by the U.S. Supreme Court, is to serve as a guardian of marketplace competition. If the feature is “essential to the use or purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage,” (*Qualitex*, p. 165), trademark protection will be denied.

One of the earliest U.S. Supreme Court cases involved an unfair competition claim arising from the fraudulent activities of pharmacists who were attempting to pass off the defendant’s cheaper medication for the plaintiff’s more expensive medication because the capsules were identical in color (*Inwood Laboratories*, 1982). The Court, in siding with the defendant, held that the color of the capsules served a utilitarian function for several reasons: 1) patients associated the color with the type of medication, 2) some patients commingled their pills; 3) color helped identify drugs in emergencies, and 4) uniform colors for brand name and generic versions of a drug helped to prevent errors by pharmacists (p. 850 n. 10).

Beyond the concept of utilitarian functionality has evolved the somewhat controversial concept of “aesthetic functionality” (Chisum et al., 2011). The Restatement (Third) of Unfair Competition recognizes aesthetic functionality, noting that “a design is functional because of its aesthetic value only if it confers a significant benefit that cannot practically be duplicated by the use of alternative designs” (Restatement, 1993). In 1995, the Supreme Court addressed this concept in the *Qualitex* case. Although recognizing that “sometimes color plays an important role in making a product more desirable,” the Court found that color played no such role (*Qualitex*, p. 165). In other words, does Rawlings’ use of gold serve some function other than just “looking nice” and being ornamental?

Various courts have grappled with the issue of color and functionality, with some taking more of a utilitarian-test approach and others adopting more of an aesthetics-test approach. For instance, the 8th Circuit denied trademark protection for a particular shade of green used on John Deere tractors and other farm equipment, in spite of strong evidence that its green color had acquired secondary meaning, because the court found that farmers preferred to buy their equipment in matching colors (*Deere & Co. v. Farmhand, Inc.*, 1982). Hence, providing John Deere with trademark protection for its green-colored farm equipment would have had obvious and detrimental implications on the competitive marketplace. A slightly different test was adopted in *Brunswick Corp. v. British Seagull* (1994), in which the court treated an aesthetic element as functional if its presence was deemed to be a “competitive necessity.” In *Brunswick*, the Federal Circuit upheld the Patent and Trademark Office’s refusal to register the color black for outboard boat motors on the grounds that black was more desirable than other colors because it made the motor appear smaller and was compatible with a wider variety of boat colors.

There continues to be legal debate over the concept of aesthetic functionality (Chisum et al., 2011). Some argue that purely ornamental features of trade dress (including products that feature the color gold) should receive trademark protection when they acquire secondary meaning. For instance, the concept that combinations of college sports team colors were aesthetically functional was rejected by the Fifth Circuit in *Board of Supervisors for Louisiana State Univ. v. Smack Apparel Co.* (2008).

In cases where courts have expressly recognized aesthetic functionality, post *Qualitex* decisions have “revealed some confusion over how to apply the competitive necessity test to aesthetic features” (Chisum et al., 2011, p. 492). The color gold was specifically at issue in a 7th Circuit in which the court held that the use of gold-colored gilding on the edges of cookbook pages was aesthetically functional because “[g]old connotes opulence” and is a color commonly used both in food



decoration and bookbinding (*Publications Int'l., Ltd.*, 1998, p. 342). As the court further reasoned: “[I]f consumers derive a value from the fact that a product looks a certain way that is distinct from the value of knowing at a glance who made it, then it is a non-appropriable feature of the product” (p. 339).

Assuming Judge Diamond determined that the color gold, as being used by Rawlings as trade dress, were found to be nonfunctional, his final step in his analysis was to determine whether the color at issue has acquired sufficient “secondary meaning” to justify trademark protection (Handelman, 2013). Secondary meaning occurs when an otherwise descriptive mark (while not inherently distinctive) acquires distinctiveness through use, and as a result the public comes to recognize the mark as an indication of source. As Rawlings’ attorney had argued: “The GOLD GLOVE MARKS and the goodwill of the business associated with them in the United States are of great value to Rawlings, are highly distinctive, and have become universally associated in the public mind with products and services of the very highest quality and reputation, with Rawlings as their source” (Rawlings Amended Complaint, p. 11). For a mark to have acquired secondary meaning within the 8th Circuit, within Judge Diamond’s jurisdiction, the user of the mark must show that due to long and exclusive use in the sale of the goods or services, the mark has become so associated in the public’s mind with such goods or services that the mark serves to identify the source of the goods and to distinguish them from those of others (*B&B Hardware, Inc. v. Hargis Indus., Inc.*, 2009). In determining whether there is secondary meaning in the 8th Circuit, “the chief inquiry is whether in the consumer’s mind the mark has become associated with a particular source” (*Heartland Bank v. Heartland Home Fin., Inc.* 2003).

### 3. Now Stepping Into the Batter’s Box . . .

Although the 7th Circuit recently held that the color gold had aesthetic functionality in the context of cookbooks, and was thus not protectable as a trademark in that jurisdiction, it now weighs on Judge Diamond’s mind whether a similar analogy holds true for the use of gold in the context of sport industry . . . and, furthermore, should he be considering the sport industry as a whole, or the baseball glove industry in particular? As Judge Diamond mulls over his legal dilemma, he keeps coming back to the notion that, within the sports industry, the word “gold” often carries significant weight as a sign of achievement and accomplishment in the world of athletics. With the top Olympic athletes winning gold medals, certainly the connection between gold and excellence, particularly in the sporting realm, helps explain why Rawlings may have created its “Gold Glove Awards” program to recognize excellence in fielding in the first place. Rawlings’ creation of the Gold Glove Award program may even help explain *why* the color gold is so prominent within the baseball glove industry.

As Judge Diamond weighs the past judicial decisions, many questions roll around in his mind as he attempts to resolve this issue. Has Wilson infringed on Rawlings’ federally-registered word marks? Is the color “gold,” in a legal sense, functional or nonfunctional? Is there something about the color gold, he ponders, whereby it should be available to all baseball glove manufacturers? And to what extent would granting Rawlings “ownership” of the color gold potentially harm

the competitive marketplace for baseball gloves? Furthermore, has Rawlings’ Gold Glove Award program acquired secondary meaning in the eyes of the public? Even if he decides to grant Rawlings trade dress protection for the color gold, has Wilson’s production of its gold-webbed glove amounted to unfair competition? Judge Diamond mulled all these issues over in his mind as his imagination briefly drifted to start of the upcoming baseball season—the sound of the National Anthem, the smell of the crackerjacks, the crack of the bat, and the umpire’s call of “PLAY BALL!”

## Case Study Questions

1. After reviewing the significant cases discussed in the case study, do you think that the color “gold” as used by Rawlings is functional or nonfunctional? How does the 7th Circuit’s decision in *Publications Int’l., Ltd. v. Landoll, Inc.* inform your thinking?
2. Carefully read and consider the *Mobil v. Pegasus* and *Izod, Ltd. V. Zip Hosiery Co.* cases. Build a legal argument that these cases support Rawlings’ argument with regard to its Lanham Act §1114 cause of action.
3. Assume that the court finds that Rawlings’ use of gold in its Gold Glove Awards is not functional. Applying the requirement as stated by the 8th Circuit, as well as your own Internet research, decide whether the Rawlings’ Gold Glove Award has acquired secondary meaning. What types of questions would you ask in a consumer survey to try to determine if the Rawlings Gold Glove Awards had established secondary meaning?
4. If this case was heard in the 8th Circuit, based on that Circuit’s past decision on functionality, how do you think the court would rule?
5. Based on your knowledge of the facts in this case, how would you access the consumer confusion issue? Would you, as a consumer, be confused or misled by Wilson’s use of its gold-colored webbing on its baseball gloves? Research and provide examples of similar potential trademark confusion within the sport industry.
6. Who do you think will prevail in this case, and why?

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