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*The fashion industry in the European Union***

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# The fashion industry in the European Union

## Foreword

The publication of the two issues of the 2016 special edition of the journal *Papers di diritto europeo* (for issue No 2 click [here](#)) is envisaged among the scientific activities of the project «Univr Fashion Week», co-funded by the European Union as Jean Monnet Module 2015-2018 within the Erasmus+ Programme. More precisely, it follows the delivery of the Summer School on the fashion industry in the European Union, which was held at the Law Department of the University of Verona from 20 to 25 June 2016, and allows to further deepen the research on such topics, as well as to provide a wider dissemination of the project's results.

The issue is structured in two parts, «Lectures» and «Workshops». The first one in fact collects the articles drafted by the Teaching Staff members of the Summer School, while the second one is dedicated to the brief interventions of the professionals working in the fashion industry who were in charge of the workshops organised in addition to the teaching activities. Each paper analyses selected subject matters that formed part of the programme of the course with the aim of fostering the academic value of the project.



New developments of trade mark protection:  
the case of Louboutin's Red Sole mark

Diletta Danieli

*Abstract*

The paper aims at providing a framework of the new forms of trade mark protection (the so-called «non-traditional trade marks») by analysing the specific case of the famous red shoe sole used by the fashion designer Christian Louboutin, which has been recently registered as European Union trade mark. It focuses on its registration process, with particular regard to the initial refusal of the application and the oppositions that were filed. Then, a brief overview of the US trade mark protection of Louboutin's Red Sole and the case law related thereto is presented. Lastly, some considerations are drawn on the value of this case study for the development of trade mark legislation and its application.

# New developments of trade mark protection: the case of Louboutin's Red Sole mark

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Diletta Danieli\*

CONTENTS: 1. Introduction: non-traditional trade marks. – 2. The registration process of Louboutin's Red Sole as European Union trade mark (EUTM). – 3. A look to the US case law on Louboutin's Red Sole's trade mark. – 4. Concluding remarks.

## 1. Introduction: non-traditional trade marks.

The importance of trade marks resides in the connection they establish between a product and its manufacturer: when a consumer is selecting certain goods or services among a variety of possibilities, the trade mark plays a valuable role by enabling him to make a conscious choice on the basis of his previous experience, being it a positive or a negative one. Therefore, they not only provide for an effective means of communication between undertakings and consumers, but they mostly contribute to the creation of a competitive market based on the differentiation of products.

At the EU level trade marks registration has traditionally been granted to any signs that are «capable of being represented graphically» and are «capable of distinguishing the goods or services» of a company from those of others<sup>1</sup> (provided of course that they overcome any absolute or relative grounds of refusal). These requirements have been particularly suitable for the registration of signs such as words, designs, letters or numbers, which represent classical categories of marks.

Nowadays businesses need however to keep up with more sophisticated marketing and advertising strategies in order to convey promises of reliability and quality of their products. The range of signs and symbols that can serve as trade mark has been broadened accordingly, encompassing, among others, colours, sounds, scents, patterns, movements, three-dimensional shapes and positions. These non-traditional marks may raise some issues with regard to the mentioned requirements for

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<sup>1</sup> See Art. 4 of Council [Regulation \(EC\) No 207/2009](#) of 26 February 2009 on the European Union trade mark, *OJ L* 78 of 24 March 2009, p. 1 ff., as amended by [Regulation \(EU\) No 2015/2424](#) of the European Parliament and of the Council of 16 December 2015, *OJ L* 341 of 24 December 2015, p. 21 ff. (hereinafter also CTMR/EUTMR). Also the previous Council Regulation (EC) No 40/94 of 20 December 1993, *OJ L* 11 of 14 January 1994, p. 1 ff. (now repealed), provided for the same requirements. The EU legislation on trade marks also includes the [Directive 2008/95/EC](#) of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, *OJ L* 299 of 8 November 2008, p. 25 ff., which is going to be repealed with effect from 15 January 2019 by the [Directive \(EU\) 2015/2436](#) of the European Parliament and of the Council of 16 December 2015, *OJ L* 336 of 23 December 2015, p. 1 ff. (hereinafter also TMD).

registration, in particular they entail a wider interpretation of the term «sign», as well as the need to clarify the notions of «graphic representation» and «distinctive character»<sup>2</sup>. Indeed, they sometimes cannot be precisely identified for the purposes of registration, and their degree of recognition by the public may significantly vary among different categories of individuals<sup>3</sup>.

The aim of this paper is thus to provide some insight into these new forms of trade mark protection through a case study based on a particular mark, namely Christian Louboutin's Red Sole that was granted trade mark registration both in the EU and in the US.

## 2. The registration process of Louboutin's Red Sole as European Union trade mark (EUTM).

On 29 January 2010 the French designer Christian Louboutin filed an application for the registration of the red sole as Community trade mark with regard to Class 25 goods – «Shoes (except orthopaedic footwear)», subsequently limited to «High-heeled shoes (except orthopaedic footwear)» – and whose description read as follows «[t]he trademark consists of the colour red (Pantone 18.1663TP) applied to the sole of a shoe as shown (the outline of the shoe is therefore not part of the trademark but serves to show the positioning of the trademark)»<sup>4</sup>.



Figure 1: graphic representation of Louboutin's red sole EUTM.  
Source: EUIPO website.

On 20 September 2010 the application was initially refused by the Office for Harmonisation in the Internal Market (OHIM) Examiner pursuant to Art. 7(1)(b) of CTMR, that is on the basis of the absence of any distinctive character. It is worth noting, preliminarily, that the Examiner qualified the

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<sup>2</sup> The state-of-the-art with regard to these aspects of trade mark registration practice finds its source in the European Union Intellectual Property Office (EUIPO)'s [Guidelines for examination of European Union trade marks, Part B – Examination, Section 4 – Absolute grounds of refusal](#) (amended version, entered into force on 23 March 2016).

<sup>3</sup> For further references on this issue see extensively S. SANDRI, S. RIZZO, *Non-Conventional Trade Marks and Community Law*, Leicester 2003, and more recently V.K. AHUJA, *Non-traditional trade marks: new dimension of trade marks law*, in *Eur. Intellectual Property Rev.*, 2010, pp. 575-581; M. DEVANEY, *The future of non-traditional trade marks in Europe*, in *Intellectual Property Magazine*, June 2011, pp. 32-33. For a US perspective cp. K.L. PORT, *On Nontraditional Trademarks*, in 38 *Northern Kentucky L. Rev.*, 2011, pp. 1-59.

<sup>4</sup> [Community trade mark application No 8 845 539](#). The applicant also claimed seniority from two national trade mark registrations, namely a 2007 UK registration and a 2009 Benelux registration. For a comprehensive framework of both national and international trade mark registration proceedings regarding Louboutin's Red Sole see C. GOMMERS, E. DE PAUW, *Red Sole Diaries: a tale on the enforcement of Louboutin's position mark*, in *J. of Intellectual Property L. & Practice*, 2016, pp. 258-269, at pp. 260-262.

sign as a *colour mark* as such and recalled the relevant case law of the European Court of Justice (ECJ)<sup>5</sup>. It was thus argued that the restriction of the availability of the colour red for a specific part of the shoe (the sole) would be contrary to the general interest of other producers. Moreover, consumers would not perceived said colour applied to a specific shape as a sign indicating the origin of the goods, but rather as a simple element of their finishing. For these reasons it did not possess inherent distinctive character. On the other hand, in relation to the acquisition of distinctive character through use under Art. 7(3) of CTMR, the Examiner held that the applicant did not produce sufficient documents to support this claim, so it was not possible to assess the scale and the presence of the trade mark in the EU footwear market.

The applicant lodged an appeal seeking the annulment of said decision, though he did not adduce the argument concerning the acquired distinctiveness through use. He claimed that the trade mark applied for does possess distinctive character by virtue of its significant departure from the practices and customs of the footwear sector, as well as its recognizability at first glimpse by the relevant public. The OHIM Board of Appeal correctly acknowledged that Louboutin did not seek registration of the colour red *per se*, as argued by the Examiner in the refusal decision, but rather of the specific colour red Pantone No 18.166TP applied to the sole of a high-heeled shoe. Said mark, thus qualified as *position mark*, is actually perceived as imaginative, surprising and unexpected and is easily remembered by consumers, as it was also demonstrated by the documentation provided by the applicant. Therefore, the Board reversed the Examiner's decision and ruled that the Red Sole mark is intrinsically distinctive within the meaning of Art. 7(1)(b) of CTMR<sup>6</sup>. The trade mark was consequently accepted for the purposes of publication.

Within the three-month period following the publication of Louboutin's trade mark application, three oppositions were received.

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<sup>5</sup> E.g. [Court of First Instance, 25 September 2002, case T-316/00, Viking-Umwelttechnik GmbH v Office for Harmonisation in the Internal Market \(trade marks and designs\) \(OHIM\)](#), EU:T:2002:225, para. 23: «colours or colour combinations *per se* are capable of constituting Community trade marks in so far as they are capable of distinguishing the goods or services of one undertaking from those of another»; [Court of Justice, 6 May 2003, case C-104/01, Libertel Groep BV v Benelux-Merkenbureau](#), EU:C:2003:244, para. 68-69: «a colour *per se*, not spatially delimited, may, in respect of certain goods and services, have a distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the Directive [89/104/EEC], provided that, *inter alia*, it may be represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable and objective. The latter condition cannot be satisfied merely by reproducing on paper the colour in question, but may be satisfied by designating that colour using an internationally recognised identification code. (...) [A] colour *per se* may be found to possess distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the Directive, provided that, as regards the perception of the relevant public, the mark is capable of identifying the product or service for which registration is sought as originating from a particular undertaking and distinguishing that product or service from those of other undertakings».

<sup>6</sup> OHIM Second Board of Appeal, decision of 16 June 2011, case R 2272/2010-2, *Red sole (figurative mark)*.



Two of them, which were based on non-registered trade marks in Germany for shoes, had been rejected as inadmissible given that both opponents failed to identify the earlier mark<sup>7</sup>.

The third opposition was brought by the German-based company Roland SE, claiming identity or similarity under Art. 8(1)(b) of CTMR with its earlier international trade mark designating the EU<sup>8</sup>. Said trade mark consists in a figurative sign composed of the word «my», written in standard typeface and placed in a blue square, and the word «SHOES», written with the same typeface and placed in a red rectangle.



Figure 2: graphic representation of Roland SE's (now myShoes) earlier international registered trade mark.  
Source: ROMARIN database.

With its decision of 21 June 2013<sup>9</sup>, the OHIM Opposition Division found only an irrelevant coincidence between the earlier mark and the contested sign, namely the mere inclusion of the colour red that is in any case of different nuances, and thus concluded that there was no likelihood of confusion in the case at hand. The opponent filed an appeal against the decision before the OHIM Board of Appeal. On the basis of the dominance of the colour red in its earlier mark, it argued that the conflicting signs were visually and conceptually similar, since the registration of the earlier mark did not specify any red nuance thus encompassing also the one Louboutin's application referred to, and both signs conveyed the concept of the same colour red. The appeal was however dismissed<sup>10</sup> as the signs did not share any relevant similarity. In fact, the colour red per se was not deemed as a concept expressed by the signs in question. More precisely, the red applied to the shoe sole served as an indication of origin of the product, whereas the red rectangle was a mere feature of the banner and had ornamental purpose. Neither were the signs aurally comparable, given that there was no clear determination of how the relevant public would communicate them orally. Nevertheless, the opponent Roland SE further challenged Louboutin's application before the General Court<sup>11</sup> and the Court of Justice<sup>12</sup>. In both instances the EU courts dismissed the action holding that no similarity between the signs in question could be established, thus confirming the opinion already given by the OHIM.

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<sup>7</sup> OHIM Opposition Division, decision of 13 February 2012, opposition No B 1 682 916, *GEB Schuh-Großeinkaufs-Bund GmbH & Co. Kommanditgesellschaft v Christian Louboutin*; decision of 13 February 2012, opposition No B 1 713 224, *Schubhaus Hcb. Zumorde GmbH & Co. KG v Christian Louboutin*.

<sup>8</sup> [International trade mark registration No 920 225 – my SHOES](#), registered on 1 March 2007. The colours claimed are red, white and blue and the Classes of goods and services are 18, 25 and 35.

<sup>9</sup> OHIM Opposition Division, decision of 21 June 2013, opposition No B 1 922 890, *Roland SE v Christian Louboutin*.

<sup>10</sup> OHIM First Board of Appeal, decision of 28 May 2014, case R 1591/2013-1, *Roland SE v Christian Louboutin*.

<sup>11</sup> [General Court, 16 July 2015, case T-631/14, Roland SE v Office for Harmonisation in the Internal Market \(Trade Marks and Designs\) \(OHIM\)](#), EU:T:2015:521 (available only in French).

<sup>12</sup> [Court of Justice, order, 14 April 2016, case C-515/15 P, Roland SE v European Union Intellectual Property Office \(EUIPO\)](#), EU:C:2016:298 (available only in French).

After a lengthy process, the Red Sole position mark was finally registered and published as EUTM in the above-mentioned terms on 12 May 2016<sup>13</sup>.

### 3. A look to the US case law on Louboutin's Red Sole's trade mark.

In the US the Red Sole mark has been awarded trademark registration as a *colour mark* since 1 January 2008 for women's high fashion designer footwear (Class 25) on the basis of its acquired distinctiveness<sup>14</sup>. Its description now reads as follows: «[t]he mark consists of a red lacquered outsole on footwear that contrasts with the color of the adjoining (“upper”<sup>15</sup>) portion of the shoe. The dotted lines are not part of the mark but are intended only to show placement of the mark» (see Figure 1 above). The limitation to the use of contrasting red soles was actually the result of a dispute between Louboutin and Yves Saint Laurent (YSL), after which the previous description was narrowed pursuant to Section 37 of the Lanham Act<sup>16</sup>.

The action was brought in 2011 before the District Court for the Southern District of New York by Louboutin himself<sup>17</sup>, asserting claims for trademark infringements and counterfeiting against YSL. More precisely, the shoe designer claimed the use of the same or a confusingly similar shade of red on several models of footwear produced by YSL, whereas the defendant counterclaimed that the Red Sole mark should have been cancelled because it was not distinctive, but merely ornamental and functional. Louboutin also sought a preliminary injunction preventing YSL from marketing any shoes bearing red outsoles during the pendency of said action.

To resolve the case, the District Court called upon the Supreme Court's holding in the *Qualitex*<sup>18</sup> case, which established that single colours can meet the basic requirements for registration as trade marks under certain circumstances, namely if they acquire a «secondary meaning» that confers a distinctive character without serving any other significant function. However, in this case the Court applied said precedent in a quite peremptory manner, holding that single colours can never serve as trade mark in the fashion industry because they are «inherently functional». According to the Court's opinion, the aesthetic design of the product is itself the mark for which protection is sought, and thus it would produce a significant non-reputation-related disadvantage to other competitors in the given

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<sup>13</sup> For further examples of registered position marks in the EU, as well as a comment on the related case law, see N. NÁTHON, *Position marks in the European Union*, in 149 *Studia iuridica auctoritate Universitatis Pécs publicata*, 2011, pp. 157-175.

<sup>14</sup> [US Trademark Registration No 3361597](#). The application was filed on 27 March 2007 and the first use in commerce of the mark was claimed in the year 1992.

<sup>15</sup> More specifically, it is the visible portion of the shoe other than the outsole.

<sup>16</sup> Lanham (Trademark) Act, enacted on 5 July 1946 and codified as 15 U.S.C. § 1051 ff.

<sup>17</sup> *Louboutin S.A. v Yves Saint Laurent Am., Inc.*, 778 F.Supp.2d 445 (S.D.N.Y. 2011).

<sup>18</sup> [Qualitex Co. v Jacobson Product Co.](#), 514 U.S. 159 (1995).

market<sup>19</sup>. Therefore, doubting that Louboutin possessed a protectable mark, it denied his motion for a preliminary injunction on the basis of his unlikelihood of success on the merits of the case.

Louboutin then brought an interlocutory appeal against this order before the US Court of Appeals for the Second Circuit<sup>20</sup>. The appellate court adopted a two-stage approach, analysing first whether the Red Sole mark was eligible of trade mark protection, and second whether the alleged infringement by YSL was likely to cause consumer confusion.

With regard to the first question, it recalled that, while a single colour mark can almost never possess inherent distinctive character, the acquisition of a secondary meaning could nevertheless be demonstrated. Examining the evidence submitted by Louboutin, the Court of Appeals thus held that the Red Sole is a distinctive sign entitled to trade mark protection, but only to the extent where it is applied to a shoe with an «upper» of a contrasting colour. Consequently, it modified Louboutin's registered mark insofar as it was sought to be applied to any shoe bearing the same colour as its outsole. Having held that the Red Sole mark is valid and enforceable in the above-mentioned terms, the Court of Appeals therefore did not address the second issue on likelihood of confusion.

As some commentators pointed out<sup>21</sup>, the outcome of the appeal was welcomed as a victorious decision for both parties, but also for the fashion industry itself, since it ruled out the per se ban to single colour trade marks applied to fashion items as argued by the District Court, which appeared too restrictive<sup>22</sup>.

#### 4. Concluding remarks.

After having presented an overview on the registration processes and the case law regarding Louboutin's Red Sole trade mark in both the EU and the US, it is now worth trying to draw some conclusions on the significance of this case study for the development of trade mark protection.

First of all, the (at least partially) different qualification that said trade mark was given in the two legal systems must be borne in mind. On the one hand, in the EU it was interpreted as a position mark, which consisted in a specific shade of red applied to a certain part of a high-heeled shoe, on the other

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<sup>19</sup> For a thorough analysis of the protection of colour trade marks in the fashion industry, see, among others, S. SREEPADA, *The New Black: Trademark Protection for Color Marks in the Fashion Industry*, in 19 *Fordham Intellectual Property, Media & Entertainment L. J.*, 2009, pp. 1131-1168.

<sup>20</sup> *Christian Louboutin S.A. v Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2nd Cir. 2012).

<sup>21</sup> D.E. GORMAN, *Revisiting single color trademarks in fashion after Louboutin*, in 31 *Cardozo Arts and Entertainment L. J.*, 2012, pp. 209-214. For an extensive comment on this issues, taking into account also the District Court's decision examined above, see, by the same Author, *Protecting single color trademarks in fashion after Louboutin*, 31 *Cardozo Arts and Entertainment L. J.*, 2012, pp. 369-402.

<sup>22</sup> It is worth mentioning that Tiffany & Co., the world-renowned jewelry manufacture that holds one of the most famous single colour trade mark («Tiffany blue»), filed an *amicus curiae* brief in the second instance proceedings in support of Louboutin, criticising the District Court's opinion as a «sweeping and unprecedented per se rule» (brief for Tiffany LLC and Tiffany & Co. as Amici Curiae supporting Appellants at 3-4, *Louboutin S.A. v Yves Saint Laurent Am., Inc.*, No. 11-cv-3303 (2nd Circ. Oct. 24, 2011), ECF. No. 63, at p. 3).

hand, in the US it was registered as a colour mark as such, albeit subsequently limited to a particular use. This appears to be relevant in relation to the requirement for registration based on the distinctiveness of the product. In fact, according to the established case law in both the EU and the US<sup>23</sup>, colour marks per se can be granted trade mark registration if the applicant demonstrates that the sign has acquired a secondary meaning, and such evaluation was precisely carried out by the Second Circuit of the Court of Appeals when assessing the issue of eligibility of protection of the Red Sole mark. On the contrary, the OHIM Board of Appeal qualified the trade mark applied for as a position mark and overruled the refusal decision of the Examiner on this precise ground. Therefore, it could affirm the inherent distinctive character of the Red Sole pursuant to Art. 7(1)(b) of CTMR on the basis of its significant departure from the customs of the footwear sector.

Moreover, another aspect worth noting regards the different registration strategy pursued by Louboutin in the two legal systems that were examined. While in the US the trade mark registration was obtained without any specification of the shade of red claimed, the recent EUTM was granted for a certain Pantone number (18.1663TP) that identifies a precise shade of red. Such choice, besides resulting in an increase of chances for a successful application, also appears to be grounded on the relevant ECJ case law. The requirement of the graphic representation has in fact been interpreted as enabling the sign to be represented visually and in a way that is «clear, precise, self-contained, easily accessible, intelligible, durable and objective»<sup>24</sup>. This latter condition, with particular regard to colour marks, is further satisfied by «designating [the] colour using an internationally recognised identification code»<sup>25</sup>. In the near future, however, the graphic representation should not be regarded as problematic for non-traditional trade marks in general. Indeed, the new EUTM legislative package (entered into force on 23 March 2016) has substantially amended Art. 4 of EUTMR that provides for the signs of which a EUTM may consist. More precisely, not only does the new formulation expressly encompass colours and sounds within the list of such signs, but more importantly the requirement of graphic representation has been deleted in order to allow for more flexibility in the registration process<sup>26</sup>. This significant amendment is however not yet applicable, but shall be from 1 October 2017.

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<sup>23</sup> See Court of Justice, 6 May 2003, *Libertel*, cited above, para. 67 and US Supreme Court, *Qualitex*, 514 U.S. 159 (1995), cited above, at 163-164.

<sup>24</sup> [Court of Justice, 12 December 2002, case C-273/00, Ralf Sieckmann](#), EU:C:2002:748, para. 55.

<sup>25</sup> Court of Justice, 6 May 2003, *Libertel*, cited above, para. 68. Said requirement, as interpreted by the case law, is also provided for in the Guidelines for examination of European Union trade marks, Part B – Examination, Section 4 – Absolute grounds of refusal, cited above, para. 2.1.1, lett. b) and 2.1.2.5. The possibility to introduce a similar requirement in the US trade mark legislation as well is favoured by M.E. ROTH, *Something Old, Something New, Something Borrowed, Something Blue: A New Tradition in Nontraditional Trademark Registration*, in 27 *Cardozo L. Rev.*, 2005, pp. 457-495, at p. 480.

<sup>26</sup> See also Recital 9 of Regulation (EU) No 2015/2424, cited above, which explains the amendment as follows: «[a] sign should be permitted to be represented in any appropriate form using generally available

A further issue emerging from this case study remains still open. In particular, during the EU registration process of the Red Sole mark, the applicability of the absolute ground of refusal for shapes that confer a substantial value to the goods (as was provided in Art. 7(1)(e)(iii) CTMR, applicable *ratione temporis*, and Art. 3(1)(e)(iii) TMD) has not been called into question. Nevertheless, this aspect has been addressed in an infringement proceeding pending in the Netherlands between Louboutin and the Dutch shoe manufacturer Van Haren, which sells high-heeled shoes with a red sole in that country as well as online. In its judgment of 1 April 2014 the District Court of the Hague agreed with Van Haren's argument that Louboutin's Red Sole does give substantial value to the shoe itself, and thus reasoned on the relevance of the mentioned exclusion ground in the case at hand. The Court, however, doubted whether the notion of «shape» within the meaning of Art. 3(1)(e)(iii) TMD could also cover other characteristics of the product, such as colour, and therefore referred the case to the ECJ for a preliminary ruling, which is still pending<sup>27</sup>. The answer to the question seems in any case already resolved by the new formulation of the mentioned provision of the TMD, as reformed by the EU trade mark legislative package. In fact, the exclusion ground has been extended in order to include, besides the shape, «any other characteristic» that gives substantial value to the goods. Should this absolute ground of refusal ultimately be deemed applicable to the Red Sole trade mark, it would imply that it could not be overcome by resorting to the acquired distinctiveness of the mark<sup>28</sup>. However, as it was already pointed out, the Red Sole was rather argued to be inherently distinctive for the purposes of the EU registration process and therefore such finding could be maintained in the Dutch case as well.

This issue appears to be comparable, at least to some extent, to the questions that were left unanswered after the decision of the Second Circuit of the Court of Appeals in the *Louboutin v YSL* case, namely the correct interpretation of the functionality defense in relation to single colour marks in the fashion industry. Indeed, the doctrine of aesthetic functionality, according to which a product feature is ineligible for trade mark protection where its aesthetic design is itself the mark applied for, presents some similarities with the above-mentioned exclusion ground based on the substantial value given by the shape (and now, after the legislative reform, by any other characteristic) of the product. For the time being, absent a clear guidance by either EU or US courts, it seems however safer to support a narrower interpretation of these arguments, taking into account the sector-specific market structure of the fashion industry. In other words, borrowing the Second Circuit's reasoning, «courts

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technology, and thus not necessarily by graphic means, as long as the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective».

<sup>27</sup> [Case C-163/16, \*Christian Louboutin, Christian Louboutin SAS v Van Haren Schoenen BV\*](#), OJ C 211 of 13 June 2016, p. 30 f.

<sup>28</sup> On this issue see also C. GOMMERS, E. DE PAUW, 'Red Sole Diaries', cited above, pp. 267-269.

must avoid jumping to the conclusion that an aesthetic feature is functional merely because it denotes the product's desirable source»<sup>29</sup>.

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<sup>29</sup> *Christian Louboutin S.A. v Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206 (2nd Cir. 2012), cited above, at 222.