

HONIGMAN

It's Not Easy Being Green:

Use of “ORGANIC,” “SUSTAINABLE,” and
“NATURAL” in Trademarks and Advertising

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FTC Green Guides

- FTC Green Guides do not address use of the terms “ORGANIC,” “NATURAL,” or “SUSTAINABLE”
- *Why?*
 - The FTC lacks sufficient basis to provide meaningful guidance regarding these terms
 - FTC wishes to avoid proposing guidance that duplicates rules or guidance of other agencies
- As a result, the terms “ORGANIC,” “SUSTAINABLE,” and “NATURAL” are often used as part of a trademark as a means of Greenwashing

Green Trademarks and the USPTO

- By the end of the Q3 2011:
 - 2,000+ pending applications and registrations contain the term “ORGANIC”
 - 4,000+ contain the term “NATURAL”
 - 500+ contain the term “SUSTAINABLE”
- Section 2(e) Review: In almost all cases, the terms have been held to be “descriptive” and must be disclaimed or supported by a Section 2(f) claim of acquired distinctiveness

Section 2(e) Descriptive/Deceptively Misdescriptive VS. **Section 2(a) Deceptive**

- USPTO regulates marks featuring these terms using §2(a) of the Trademark Act
 - 15 U.S.C. §1052: *No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it*
 - (a) *Consists of or comprises immoral, **deceptive**, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or a geographical indication, which when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after one year after the date on which the WTO Agreement (as defined in section 2(9) of the Uruguay Round Agreements Act) enters into force with respect to the United States.*

- Section 2(a) applies to both the Principal Register *and* the Supplemental Register

Section 2(a)

Section 2(a) Scrutiny

No registration if:

1. The term misdescribes the character, quality, function, composition or use of the goods;
2. Prospective purchasers are likely to believe the misdescription actually describes the goods; and
3. **The misdescription is likely to affect a significant portion of the relevant consumers' decision to purchase.*
 - *This element distinguishes §2(a) deceptive matter from §2(e)(1) deceptively misdescriptive matter*

- How does the USPTO determine whether a misdescription would materially affect a consumer's decision to purchase?
 - *Superior Quality*
 - *Enhanced Performance*
 - *Difference in Price*
 - *Health Benefit*
 - *Religious Practice or Social Policy*

Specific “ORGANIC” Examples

COMPARE:

- *Bayer Aktiengesellschaft v. Stamatios Mouratidis:* TTAB sustained opposition of the mark **ORGANIC ASPIRIN**, finding the mark to be both deceptively misdescriptive and deceptive for dietary supplements
- App. Serial No. 77/419,086: The mark **ORGANIC MOTORS** was not refused on deceptiveness grounds (or deceptively misdescriptive grounds) for drive trains for motor vehicles

General Rules of Thumb

- Food products: “NATURAL,” “ORGANIC,” and possibly “SUSTAINABLE” are almost always likely to be found deceptive absent substantiation
- Refusal unlikely where the terms have no connection with the product

General Rules of Thumb

- What if your goods really are “organic” or “natural”?
 - Amend the description of goods or services to say so, e.g., *Jams and jellies made with organic fruit, NOT jams and jellies*
- What if only some of the goods in the identification are “organic” or “natural”?
 - If only the jams are organic and not the jellies, the refusal will be maintained
- BUT: the USPTO does not evaluate the amount or percentage of organic/natural/sustainable matter

General Rules of Thumb

- Deceptiveness in Enforcement:
 - Trademark applications or registrations can be challenged by third-parties for deceptive claims
- Even if you convince the USPTO of non-deceptiveness, your “green” trademark could leave this an attractive area for challenge by a third-party

U.S. Department of Agriculture's Regulation of the term "ORGANIC"

- "Organic" is not addressed by the FTC Green Guides because it is governed by the USDA's National Organic Program (NOP)
- NOP applies to raw, fresh or processed products that contain agricultural ingredients

Summary of NOP requirements

- “100% Organic”: Must contain (excluding water and salt) only organically produced ingredients and processing aids
- Manufacturer may use the USDA Organic Seal:



Summary of NOP requirements

- “Organic”: Must consist of at least 95% organically produced ingredients, excluding water and salt
 - Any remaining product ingredients must consist of nonagricultural substances approved on the National List (e.g., things that are not commercially available in organic form)
- Manufacturer may use the USDA Organic Seal:



Summary of NOP requirements

- “Made with Organic Ingredients”: Must contain at least 70% organic ingredients and list up to 3 of those on the principal display panel
- Less than 70% organic: No use of term “organic” on principal display panel, but can identify specific organic ingredients
- USDA Organic Seal may not be used



Summary of NOP requirements

- Textiles: May use label claims that identify specific types of organic fibers and use statements identifying percentages
 - Cannot use seal unless certified in accordance with NOP regulations
- Cosmetics: No regulation unless made up of agricultural ingredients

Intersection between USPTO and USDA

- It is possible to meet USPTO requirements to avoid deceptiveness of “Organic,” but fail to meet USDA standards

Greenwashing: Bad Marketing Strategy

- Consumer studies have shown that consumers are turned off by companies who make unsubstantiated “green” claims
- Consider the public interest considerations before counseling clients to “Go Green” on product labeling

Questions?

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