

It's Not Easy Being Green

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

September/October 2011 *Landslide* magazine, Volume 4 Number 1

A Publication of the ABA Section of Intellectual Property Law

By Jennifer M. Hetu and Anessa Owen Kramer

Jennifer M. Hetu is an associate at Honigman Miller Schwartz and Cohn LLP, in Detroit, Michigan. She specializes in trademark procurement, counseling, and enforcement. She can be reached at jhetu@honigman.com.

Anessa Owen Kramer is a partner at Honigman Miller Schwartz and Cohn LLP, in Detroit, Michigan. She specializes in trademark procurement, counseling, and enforcement. She can be reached at akramer@honigman.com.

Society as a whole is “greener” than ever, and this trend continues to spill over into the consumer marketplace. According to the 2010 Greenwashing Report published by the marketing firm TerraChoice, green product offerings grew by 79% between 2008 and 2009, and by 73% between 2009 and 2010.¹ Although the fact that consumers and companies are striving to become more environmentally friendly is certainly a positive trend, the “greening” of society and the marketplace has a negative consequence: greenwashing. Greenwashing is the practice of making misleading environmental claims about products in an effort to be perceived as “environmentally friendly.” Over 95% of “green” products commit one or more of the seven “Sins of Greenwashing”--or in other words, most “green” products are not truly as “green” as they claim to be.²

In 1992, the Federal Trade Commission (FTC) addressed the practice of greenwashing with the introduction of its “Guides for the Use of Environmental Marketing Claims,”³ commonly referred to as the “Green Guides.” However, the FTC Green Guides do not currently address the use of the terms “organic,” “natural,” and “sustainable,” nor do the proposed 2010 updates to the Green Guides. According to the FTC, the proposed Green Guides do not address use of these terms because the FTC either: (1) lacks a sufficient basis to provide meaningful guidance, or (2) wishes to avoid proposing guidance that duplicates rules or guidance of other agencies. (For example, organic claims relating to textiles and other products that are derived from agricultural products are currently governed by the U.S. Department of Agriculture’s National Organic Program.) Because the terms “organic,” “natural,” and “sustainable” are not addressed by the Green Guides, such terms are liberally used as part of a trademark, sometimes as a means of greenwashing.



Anessa Owen Kramer

USPTO’s Treatment of the Terms “Organic,” “Natural,” and “Sustainable” in Trademarks

It’s no secret or surprise that “green” trademark filings have become wildly popular at the United States Patent and Trademark Office (USPTO) within the past five years. In fact, by the end of the third quarter of 2011, the USPTO Trademark Electronic Search System (TESS) database contained over 2,000 pending applications and registrations



Jennifer M. Hetu

that contain the term “organic,” over 4,000 pending applications and registrations that contain the term “natural,” and over 500 pending applications and registrations that contain the term “sustainable.” In virtually all cases, the terms “organic,” “natural,” and “sustainable” are found by the USPTO to describe a feature or characteristic of the goods and/or services with which the trademark is used. Therefore, in a trademark application for a mark that contains one of these terms, the USPTO requires that the term be disclaimed or supported by a § 2(f) claim of acquired distinctiveness, or in the case of a mark that contains one of these terms in addition to other descriptive and/or generic matter, the application may only be eligible for registration on the Supplemental Register or registered under § 2(f).

However, given the evolution of the terms “organic,” “natural,” and “sustainable” and what they have come to mean and represent in certain fields and industries, the USPTO has begun to more specifically address the use of these terms within trademark applications and subject such terms to a higher standard of review, especially when the terms are used in connection with food products, cosmetics, cleaning preparations, and pharmaceuticals. The USPTO seeks to regulate certain marks containing these terms using § 2(a) of the Trademark Act, which addresses false and deceptive matter in trademark applications.

Section 2(a) of the Trademark Act⁴ is an absolute bar to registration of deceptive matter on either the Principal Register or the Supplemental Register. Deceptive matter cannot be disclaimed, nor can a claim of acquired distinctiveness under § 2(f) overcome a refusal under § 2(a).⁵ A deceptive mark may be comprised of a single deceptive term; a composite mark that includes a deceptive term in addition to nondeceptive wording and/or design elements; a term or a portion thereof that alludes to a deceptive quality, characteristic, function, composition, or use; the phonetic equivalent of a deceptive term; or the foreign equivalent of any of the aforementioned marks.⁶ The elements of a § 2(a) deceptiveness refusal are as follows:

1. The term misdescribes the character, quality, function, composition, or use of the goods;
2. Prospective purchasers are likely to believe that the misdescription actually describes the goods; and
3. The misdescription is likely to affect a significant portion of the relevant consumer’s decision to purchase.⁷

The third element is what distinguishes § 2(a) deceptive matter from a deceptively misdescriptive mark under § 2(e)(1) of the Trademark Act. If the misdescription concerns a feature that would be relevant to the decision to purchase the goods or utilize the services, it is deceptively misdescriptive. However, if the misdescription is more than simply a relevant factor that may be considered in a purchasing decision, and instead materially affects the purchasing decision, the mark is considered to be deceptive under § 2(a). This is an important distinction, as a mark that has been refused registration as being deceptively misdescriptive under § 2(e)(1) may be registered under § 2(f) upon a showing of acquired distinctiveness or on the Supplemental Register, whereas a mark that has been refused as deceptive under § 2(a) may never be registered.

In order to determine whether a misdescription would materially affect a consumer’s decision to purchase, the following factors, although not considered a comprehensive list, are considered:

1. *Superior Quality*: Evidence that the goods or services that contain or feature the misdescriptive term are superior in quality to similar goods or services that do not.
2. *Enhanced Performance or Function*: Evidence that the goods possessing the characteristic or feature at issue are superior to those that do not.
3. *Difference in Price*: Evidence of a price difference between items that do possess the feature or characteristic described by the misdescriptive term and those that do not.

4. *Health Benefit*: Evidence that establishes a belief that the feature or characteristic provides a health benefit.

5. *Religious Practice or Social Policy*: Evidence that the religious practice or social policy has definable recognized criteria for compliance in order to support a finding of deceptiveness when the criteria are not adhered to by the applicant.⁸

Of the three terms “organic,” “natural,” and “sustainable,” the USPTO rather consistently and systematically considers the term “organic” deceptive when used in a misdescriptive manner. Therefore, for a wide variety of goods and services, the term cannot be included in a composite mark if the goods and/or services are not organic in nature. The term “natural” appears to be treated in a similar manner, and, at least as used in connection with food products, the USPTO’s treatment of the term “sustainable” mostly follows suit. Recently, in *Bayer Aktiengesellschaft v. Stamatios Mouratidis*,⁹ the Trademark Trial and Appeal Board (TTAB) sustained Bayer’s opposition of the mark ORGANIC ASPIRIN, finding the mark to be both deceptively misdescriptive and deceptive for dietary supplements. When considering the misdescriptive use of the term “ORGANIC,” the TTAB found that ORGANIC ASPIRIN conveyed the commercial impression that the applicant’s products were comprised in part or in whole of a natural aspirin product, and therefore consumers were likely to believe that the misdescription actually described the goods. Additionally, the court found that the mark ORGANIC ASPIRIN “is likely to affect the purchasing decision of consumers who want the benefits of aspirin from a natural source, as opposed to synthetic chemicals, without the problems that traditional aspirin may cause.”¹⁰ In contrast, the USPTO did not refuse registration of ORGANIC MOTORS for drive trains for vehicles,¹¹ presumably because “organic” has no significance with respect to motor vehicle parts.

It is not difficult to see why in the case of certain products the terms “organic,” “natural,” and “sustainable” are considered deceptive matter when used as part of certain trademarks. For example, it is very likely (and in the case of “organic” and “natural” a virtual certainty) that the USPTO can provide sufficient evidence that when any of these terms is used in a misdescriptive manner in connection with food products, it would materially affect the purchasing decision of a significant portion of relevant consumers. There is a clear demand for “green” products and services today.

An applicant can overcome a § 2(a) deceptiveness refusal if it amends its identification of goods or services to include the relevant term (e.g., in a trademark application for a mark that includes the term “organic,” specify that the application covers “organic coffee” rather than “coffee”).¹² There is no requirement that the USPTO substantiate the amount or percentage of the material or feature of the goods and/or services. If an applicant amends the identification to include the potentially deceptive term, the USPTO relies on the presumption that the goods contain a sufficient amount of the material to obviate deceptiveness. However, in terms of goods, the potentially deceptive term must apply to all of the goods in the identification. For example, a mark containing the term “organic” for a variety of food products must amend its identification of goods to specify that all of the food products covered by the application are organic--the mark cannot apply to both organic and nonorganic goods or it will be refused.

In terms of services, an applicant can amend the identification of services and add “featuring” or “including” to the potentially deceptive term. For example, a mark containing the term “organic” for restaurant services may amend its identification of services to “restaurants featuring organic cuisine” to overcome a deceptiveness refusal. As long as the identification indicates that at least some of the services are organic, the identification can also include nonorganic services.

Although the USPTO is taking steps to address use of the terms “organic,” “natural,” and “sustainable” in trademark applications in order to avoid consumer deception, which in turn helps to prevent greenwashing, these terms can still be used to greenwash, as the USPTO does not regulate the amount or percentage of the “organic,” “natural,” or “sustainable” matter in the goods.

The U.S. Department of Agriculture’s Regulation of “Organic”

As mentioned above, organic claims relating to textiles and other products that are derived from agricultural products and the use of the U.S. Department of Agriculture’s (USDA’s) organic seal are currently governed by the USDA’s National Organic Program (NOP). The FTC cites this as a reason why the use of the term “organic” is not addressed by the Green Guides. There are no similar labeling requirements or regulations provided by the USDA or other entity related to the terms “natural” and “sustainable.”

The labeling requirements of the NOP apply to raw, fresh products and processed products that contain organic agricultural ingredients. Agricultural products that are sold, labeled, or represented as organic must be produced and processed in accordance with NOP standards. The NOP's labeling requirements for agricultural products can be summarized as follows:

- Products labeled as “100 percent organic” must contain (excluding water and salt) only organically produced ingredients and processing aids. The USDA organic seal may appear on product packages and in advertisements.
- Products labeled as “organic” must consist of at least 95 percent organically produced ingredients (excluding water and salt). Any remaining product ingredients must consist of nonagricultural substances approved on the National List, including specific nonorganically produced agricultural products that are not commercially available in organic form. The USDA organic seal may appear on product packages and in advertisements.
- Processed products that contain at least 70 percent organic ingredients can use the phrase “made with organic ingredients” and list up to three of the organic ingredients or food groups on the principal display panel. The USDA organic seal cannot be used anywhere on the packaging.
- Processed products that contain less than 70 percent organic ingredients cannot use the term “organic” anywhere on the principal display panel, but may identify the specific ingredients that are organically produced in the ingredients statement on the information panel. The USDA organic seal cannot be used anywhere on the packaging.¹³

Because the USDA regulates the term “organic” as it applies to agricultural products through its NOP regulation, raw natural fibers, such as cotton, wool, flax, etc., are considered agricultural products and are therefore covered under the NOP crop/livestock production standards. Although NOP regulations do not include specific manufacturing or processing standards for textile products, any textile product produced in full compliance with the NOP regulations may be labeled as NOP certified organic and display the USDA organic seal. The NOP's labeling requirements for textiles can be summarized as follows:

- Textile products that are labeled as “organic” may: (1) use label claims that identify specific types of organic fibers, and (2) use statements identifying the percentage of organic fibers.
- Textile products that are labeled as “organic” must not: (1) use the USDA organic seal unless they are certified in accordance with the NOP regulations, (2) imply or lead the consumer to believe that the final product is certified under NOP regulations unless they are certified in accordance with NOP regulations, or (3) use a combination of both organic and nonorganic sources for a single fiber that is identified as “organic” in the final product.¹⁴

The Food and Drug Administration does not define or regulate the term “organic” as it applies to cosmetics, body care, or personal care products. However, such products can be certified and regulated as “organic” through the NOP if the product is made up of agricultural ingredients and meets the USDA's NOP standards for production, handling, labeling, and processing. These products are eligible for the same four organic labeling categories as all other agricultural products.¹⁵

The USDA organic labeling guidelines for agricultural products are a separate issue from the use of the term “organic” in a trademark application for the same products. An agricultural product may not meet the USDA requirements for use of the various organic marketing claims and the display of the USDA organic seal, but the product's manufacturer could obtain a trademark registration for a mark containing the term “organic” to be used in connection with the same products. The issues are related, however, because choosing a trademark with the term “organic” could subject a trademark owner to the USDA requirements, as that would be considered use of “organic” on a product.

Greenwashing Can Have a Harmful Effect on a Company's Reputation and Bottom Line

Despite the limitations discussed above, it is possible to use and/or register a trademark containing the term “organic,” “natural,” or “sustainable,” without having to specify just how organic, natural, or sustainable the product identified by the trademark really is. However, as discussed above, the terms cannot be deceptive for purposes of getting a trademark registration, and the use of “organic” must comply with USDA guidelines. In addition, it is not in a company's best interest to use misleading terminology, as it may be accused of engaging in the practice of greenwashing.

Eco Pulse, the annual survey conducted by green advertising firm Shelton Group, has shown that greenwashing is not a good long-term strategy for companies to engage in. In the 2009 Eco Pulse survey, 40% of the population claimed that if they found out that a product that had been advertising itself as green turned out not to be, they would stop buying the product. Further, 36% said that they would not only stop buying the product, but they would also tell their friends and family to stop buying it.¹⁶

Consumers are now making note of greenwashers and posting information about these companies online. The Greenwashing Index^{®17} allows users to post, view, and rate ads about “green” products. This website has one particularly damaging category that greenwashers can be voted into and subsequently labeled as--the “worst offenders.”

Lastly, depending on the industry, it is possible that a third party may question or challenge the use of a mark by another party that includes the term “organic,” “natural,” or “sustainable” where the product is not actually organic, natural, or sustainable as defined by the particular industry, or is only marginally so.

Conclusion

Attorneys who advise clients on the use of “green” terms as trademarks, on packaging, or in advertising should understand the implications of such use for their clients. It is important to note that although the terms “organic,” “natural,” and “sustainable” are not addressed by the FTC’s Green Guides, other entities seek to regulate the use of these terms as trademarks and in other forms of advertising. The USPTO will refuse registration of a mark that contains the term “organic,” “natural,” or “sustainable” as being deceptive under § 2(a) if the term misdescribes a characteristic of the goods and the misdescription is likely to materially affect a consumer’s purchasing decision.

Further, organic labeling and marketing claims that are related to textiles and/or other products that are derived from agricultural products are governed by the USDA’s NOP. In order to label or market such goods as “100 percent organic,” “organic,” or “made with organic ingredients,” the goods must meet certain requirements as determined by the USDA.

Lastly, it is important for companies to avoid using the terms to greenwash consumers, as it can ultimately have an adverse effect on the sale of its products and the company itself.

Endnotes

1. TERRACHOICE GRP. INC., THE SINS OF GREENWASHING: HOME AND FAMILY EDITION 2010, 6, 11, available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2010/> (follow “Greenwashing Report 2010” hyperlink).
2. *Id.* at 6, 16.
3. 16 C.F.R. pt. 260 (2010).
4. 15 U.S.C. § 1052(a) (2006).
5. *See* Am. Speech-Language-Hearing Ass’n v. Nat’l Hearing Aid Soc’y, 224 U.S.P.Q. 798, 808 (T.T.A.B. 1984); *In re* Charles S. Loeb Pipes, Inc., 190 U.S.P.Q. 238, 241 (T.T.A.B. 1975).
6. U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1203.02(a) (7th ed. 2010) [hereinafter TMEP].
7. *In re* Spirits Int’l, N.V., 563 F.3d 1347 (Fed. Cir. 2009); *In re* Budge Mfg. Co., 857 F.2d 773, 775 (Fed. Cir. 1988), *aff’g* 8 U.S.P.Q.2d 1790 (T.T.A.B. 1987).
8. TMEP § 1203.02(d)(i).
9. Opposition No. 91185473, 2010 WL 2191893 (T.T.A.B. May 21, 2010) (not precedential).
10. *Id.* at *6.

11. See U.S. Trademark Application Serial No. 77,419,086 (filed Mar. 11, 2008).
12. TMEP § 1203.02(f)(i).
13. *Organic Labeling and Marketing Information*, U.S. DEPARTMENT OF AGRIC., AGRIC. MARKETING SERVICE, <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELDEV3004446> (last updated Apr. 2008).
14. *Labeling of Textiles That Contain Organic Ingredients*, U.S. DEPARTMENT OF AGRIC., AGRIC. MARKETING SERVICE (May 20, 2011), <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5090967>.
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16. Suzanne Shelton, *The Pitfalls and Opportunities of Eco Labeling*, GREENBIZ.COM (July 16, 2009), <http://www.greenbiz.com/blog/2009/07/16/pitfalls-and-opportunities-eco-labeling>.
17. GREENWASHING INDEX, www.greenwashingindex.com. The Greenwashing Index is promoted by EnviroMedia Social Marketing in partnership with the University of Oregon School of Journalism and Communication. See the sidebar on page 49 for a description of how this website defines “greenwashing.”