

Environmental Marketing Claims: What to Know before Waving the "Green" Flag

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"Green" is in. The environment and its protection are among the important topics of the present day. It follows that environmental awareness plays an important role in an increasing number of buying decisions on the part of consumers for a variety of goods and services. As a result, providers of goods and services often want to use terms which convey "green," or environmentally friendly, aspects of their goods and services, whether they are marketing new products or services specifically developed to be environmentally friendly or are pointing out environmentally friendly aspects of pre-existing products or services. Before using environmental or "green" claims, including claims such as "biodegradable", "reusable," "eco-friendly," "recyclable," or even "environmentally friendly," there are a number of things to consider, including existing Federal Trade Commission ("FTC") guidelines which assist advertisers in avoiding unfair and deceptive trade practices and state laws relating to "green" claims.²

For those marketers who also want to create a brand around their "green" terms, there are emerging trends in the United States Patent and Trademark Office ("PTO"), as well as traditional concepts of trademark law, which also should be considered.

FTC Enforcement against False and Misleading Environmental Claims

The FTC has the power to bring enforcement actions against false or misleading marketing claims, including "green" claims, and advertisers should become familiar with guidelines relating to use of certain terms in advertising to avoid liability. Recently, the FTC charged three different U.S. companies with making deceptive and unsubstantiated claims that their products were "biodegradable." The alleged false claims were made with regard to disposable plates,³ moist wipes,⁴ and compressed dry towels,⁵ respectively.

Existing FTC public guidelines advise marketers that unqualified claims of "biodegradability" are acceptable only if they have scientific evidence that their product will decompose within a reasonably short time under customary methods of disposal. The FTC, in each of these recent actions, claimed that the products at issue are disposed in landfills, incinerators, or recycling facilities where it is impossible for such waste to biodegrade within a reasonably short time.

Two of the companies agreed to orders which bar them from making certain claims and which contain requirements regarding supportive evidence for environmental claims. The third company proceeded to administrative litigation.

These recent actions underscore the need for advertisers to vet all environmental marketing claims with regard to applicable laws and regulations before they are used publicly.

FTC "Green Guides"

In 1992, the FTC issued guidelines, commonly known as "Green Guides,"⁶ to help marketers avoid making environmental claims that are unfair and deceptive under Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair or deceptive practices. The Green Guides were updated in 1996 and 1998 and are currently again under review to insure that they address the proliferation of new "green" claims in the marketplace. The Green Guides themselves do not have the force of law but do provide general principles and specific guidance on the use of environmental claims in a manner which avoids liability under the FTC Act. The anticipated revised Green Guides are likely to provide greater guidance with regard to new "green" terms and the use of "green" terms in connection with new or developing technologies. However, even before the issuance of revised Green Guides, there are several steps advertisers can take to avoid making environmental claims which are false and misleading.

The current Green Guides apply to all forms of marketing materials for: (1) products, (2) product packaging, and (3) services, or components thereof, including labels, package inserts, promotional materials, symbols, brand names, and marketing, including claims made via email or the Internet. They relate to any claim whether made explicitly or implicitly. In evaluating environmental or "green" claims, the FTC considers advertising from the perspective of the consumer and how a consumer is likely to interpret such a claim, giving environmental claims the meaning consumers give them and not necessarily the technical or scientific definition of a term. The Green Guides contain many examples illustrating these principles with reference to different terms, products, services, and industries.

Substantiation

Anyone making a claim concerning the specific environmental attributes of a product, package, or service must, at the time the claim is made, have substantiation, or a reasonable basis for such a claim. Such substantiation comprises a competent and reliable

basis for such a claim which often is in the form of reliable, objective scientific evidence, such as tests, analyses, or other evidence conducted by experts in the relevant field.

General Green Guide Principles

Four guiding principles pervade the Green Guides and should be kept in mind when devising "green" claims. They are:

1. Any qualification or disclosure made in connection with environmental claims must be clear, prominent, and understandable and are evaluated with regard to the clarity of language used, absence of contrary claims, and proximity of the qualification or disclosure to the claim being qualified.
2. Environmental claims must make clear whether they relate to a product, packaging for a product, a service, or a component of a product, package, or service.
3. An environmental claim should not overstate a benefit or attribute. Even if a claim is technically true, it must not be presented in such a way as to overstate an environmental claim or attribute.
4. Comparative statements should be presented in a manner that makes clear the basis for the comparison so as to avoid consumer deception. The advertiser should be able to substantiate the comparison.

The Green Guides also provide guidance relating to specific types of claims, namely claims of general environmental benefit and claims of specific environmental benefit. Claims of environmental benefit must not deceptively misrepresent that a product, package, or service offers a general environmental benefit. General terms, such as "environmentally friendly," "essentially non-toxic," "earth smart," or "environmentally preferable," without a qualification which limits it to an attribute which can actually be substantiated, can be so broad as to be deceptive. As a general rule of thumb, broad environmental claims should be avoided or qualified to prevent deception.

The Green Guides also provide specific guidance relating to the use of claims that a product, package, or service is: degradable/biodegradable/photodegradable, compostable, recyclable, contains recycled content, has been reduced or is lower in weight, volume, or toxicity, is refillable, ozone safe, or ozone friendly. It is likely that guidance on additional specific terms will be provided in the next iteration of the Green Guides.

The revised Green Guides are also likely to provide guidance on additional claims which have developed with the development of new or improved technologies. An indicator of the

issues the FTC is grappling with is a series of recent workshops it held in connection with its anticipated revisions which covered topics relating to:

- The marketing of carbon offsets, which fund projects designed to reduce greenhouse gas emissions in one place in order to counterbalance or "offset" such emissions elsewhere, and renewable energy certificates ("RECs"), which are created when renewable power generators that sell their electricity then sell the environmental attributes of their power separately through a certificate;
- Issues relating specifically to packaging claims including claims such as "compostable," and new packaging claims not yet addressed in the existing Green Guides; consumer perception of such claims, substantiation requirements specifically for "green" packaging claims, and consumer perception of third party certifications or "seals" relating to environmental attributes of packaging; and
- "Green" claims about textiles, building products, and buildings, substantiation of such claims, and third party certifications for "green" textiles, building products, and buildings.

Even before the issuance of new Green Guides, following the guiding principles already established will help advertisers making environmental claims reduce their exposure to liability for false and misleading claims. Advertisers should consider how their claims will be interpreted by consumers, they should be able to substantiate the claims they make, and should avoid general and overly broad claims, opting instead for specific claims relating to specific attributes of products, packaging, and services. Independent certification of environmental claims by third parties can also help to substantiate a claim. Finally, before making a specific claim already addressed by the existing Green Guides, advertisers should consult the specific guidelines and examples relating to such claims.

State Laws

Some states have implemented their own laws and regulations relating to environmental marketing. As the Green Guides do not have the force of law, they do not preempt relevant state statutes. Before any such claims are made, relevant state laws in the states where such products will be sold or services rendered should be carefully reviewed. For example, in California, which prohibits any explicit or implied environmental marketing claim which is "untruthful, deceptive or misleading," compliance with the Green Guides is a defense to liability.⁷

"Green" Trademarks and the U.S. Patent and Trademark Office

Advertisers seeking to register "green" trademarks in the United States Patent and Trademark Office ("PTO") face an entirely different set of hurdles than those imposed by federal or state laws relating to environmental claims. In contrast to state and federal agencies, the PTO is not charged with evaluating the substantiation or truthfulness of a "green" claim. The PTO evaluates trademark applications to determine whether a proposed mark is registrable under trademark law, applying fundamental considerations such as whether a proposed mark is fanciful, arbitrary, suggestive, descriptive, or generic, and whether it is confusingly similar to a registered mark.

Terms which are fanciful are invented terms, such as KODAK, which have no meaning at all until they are adopted and associated with a particular product. Arbitrary terms are existing terms which have no relation to the products or services on which they are used, such as APPLE for computers. Fanciful and arbitrary terms are considered to be the most protectable types of marks. Suggestive trademarks evoke characteristics of a product or service but do not describe them. An example of a suggestive term would be Q-TIPS for cotton tipped swabs. Descriptive terms describe a character or attribute of the product or service with which they are used and are not registrable unless the applicant can prove through evidence of advertising and public recognition that the mark functions primarily to indicate the applicant as the source of such goods or services. Where a descriptive term is incorporated into an otherwise registrable mark, the PTO will require a "disclaimer" of the term, such that the Applicant agrees that it does not claim, and will not seek to enforce, rights in that specific term except as it is used in the mark as a whole. At the other end of the spectrum are generic terms which are the common term for a product, service, or attribute of a product or service and can never function as a trademark, such as EAR PHONES for in ear headphones.

The PTO also does not afford registration to a mark which is confusingly similar to another registered mark and will conduct a search of its registration records in connection with all new applications to determine whether the applied for mark is confusingly similar to a mark in an existing registration or pending application.

As these traditional trademark principles are applied to terms which incorporate "green" claims, certain trends are emerging. The PTO has taken the position that GREEN and similar terms are descriptive as applied to various goods and services. For example, in connection with an application to register GREEN LABEL ORGANIC SUSTAINABLE THREADS for clothing, the PTO took the position that the terms GREEN and SUSTAINABLE mean "environmentally friendly" and went on to state that as these terms described characteristics of Applicant's goods, a disclaimer of the terms was required before the mark could issue. Descriptive

terms, which describe an attribute or characteristic of a product or service, are not separately registrable and must be disclaimed, although application of such principles sometimes varies as between applications. Thus, the mark GREEN EFFICIENT SMART was registrable for boats, ships, and vessels where "green" and "efficient" were disclaimed. ECOSAFE is registered in the United States for tires. GREEN GLOBE ENVIRONMENTALLY FRIENDLY RECYCLED TIRE RUBBER was registered by the PTO for floor mats. Uses of the terms "environmentally friendly" and "recycled" are specifically addressed in the current Green Guides and are associated with specific parameters. However, within the analysis conducted by the PTO, these advertising considerations are not relevant. What is relevant is whether your mark will be considered registrable under U.S. trademark law.

There are certain steps that can be taken to increase the likelihood that your "green" mark will be registered:

- Consider using it with other terms, such as fanciful, arbitrary, or suggestive ones, which will be registrable, or with a distinctive design or logo;
- Obtain a trademark search and opinion to determine whether there are other uses of the term or terms you seek to adopt for your goods or services, whether those terms have been disclaimed by other applicants and registrants, and whether your proposed mark is likely to be confused with other marks; and
- Consider claiming the goods or services in a manner which does not include environmental terms or claims. The PTO does not require that such claims be included in a description of goods and services and its determination regarding whether a mark is descriptive focuses on the manner in which the goods or services are described in the application for registration. For example, ECO-SHINE for environmentally safe furniture oil could instead be described as "furniture polish" if such a description is accurate.

The PTO also refuses registration to marks which it deems confusingly similar to other registered marks, applying a traditional likelihood of confusion analysis which includes an analysis of the appearance, sound, and meaning of the marks at issue. The marks are compared for similarities in sound, appearance, meaning, or connotation.⁸ Similarity in any one of these elements may be sufficient to find a likelihood of confusion.⁹

These concepts were applied where registration was refused for ENVIRO PENCIL for "writing implements, namely, pencils made of recycled material" not because the mark was descriptive of the goods, and obviously not on any ground relating to the truth of any

environmental claim inferred by the mark the applicant sought to register, but on the ground that the mark was confusingly similar to ENVIRO STIK for "pencils" which had been previously registered. The examiner noted that the dominant portion of each mark was ENVIRO, which the examiner considered to be arbitrary as applied to the goods of the respective parties.

Certification Marks

An entity which evaluates the products or services of others, including from the standpoint of environmental attributes, can apply to register a special form of trademark with the PTO, namely a certification mark. A certification mark is any word, name, symbol, device, or combination, used in commerce with the owner's permission, typically by some form of license, by someone other than the owner of the mark, to certify an attribute of the product or service, such as geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of someone's goods or services. Of course, the reputation and value of a certification mark is related to the reputation of the owner of the mark, the reliability of its requirements, and enforcement of the use of its mark. Third party businesses which evaluate the environmental claims of others or the environmental attributes of the products or services of others should consider applying to register a certification mark which can be used by their clients who meet certain certification requirements.

Of course, where advertisers do succeed in registering their "green" marks, they still should be aware that their marks are subject to federal laws including those pertaining to deceptive advertising, as well as state laws. Registration by the PTO does not mean the mark complies with applicable federal and state laws and regulations.

For example, a class action lawsuit was filed against the owner of a registered mark which contained the term "green." The mark was registered by the PTO without any required disclaimers. The lawsuit claims that use of the "green" mark violates certain state laws prohibiting unlawful business practices, fraud, and unjust enrichment. The registrant was successful in registering its mark in the PTO. However, it now must defend the use of that mark and the implications of it.

While the use of "green" words, symbols, claims, and terms can be very useful in promoting goods and services, consideration must be given to a variety of federal and state laws, rules, and regulations before they are used to promote goods and services. When an advertiser wishes to create a brand around such advertising, consideration also must be given to the relevant requirements of the trademark law.

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² 16 C.F.R. Part 260.

³ *In the Matter of Kmart Corp.*, FTC File No. 082 3186.

⁴ *In the Matter of Tender Corp.*, FTC File No. 082 3188.

⁵ *In the Matter of Dyna-E Int'l, Inc. and George Wheeler, individually and as an officer of Dyna-E Int'l, Inc.*, FTC File No. 082 3187.

⁶ 16 C.F.R. Part 260.

⁷ Cal. Bus. & Prof. Code §§ 17580 and 17580.5.

⁸ *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973).

⁹ *In re White Swan Ltd.*, 8 U.S.P.Q.2d 1534, 1536 (T.T.A.B. 1988); *In re Lamson Oil Co.*, 6 U.S.P.Q.2d 1041, 1043 (T.T.A.B. 1987).