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COMMENTARY

ENVIRONMENTAL TRADEMARKS

By Jeffrey Belson

One result of the widespread awareness of our environmental predicament is the attempt to use consumer market-based means to reduce environmental harm. Companies are conscious of consumer demand for products that are designed, manufactured, usable, and disposable in accordance with environmentally sound principles. Environmental and social responsibility values have become part of the corporate culture, finding expression in the brand, the credentials of the products offered to the marketplace, and associated advertising. Indeed, a recent study indicates that companies that voluntarily adopted sustainability measures as early as two decades ago outperformed their counterparts over the long term, both in terms of stock market as well as accounting performance.¹

The trend toward inclusion of the environmental aspects of goods and services in advertising is accompanied by an increase in the number of applications for registration of trademarks that have environmental connotations. Such marks function psychologically as a cue, generating and reactivating consumer perceptions of the good or service and its claimed environmental attributes. These marks, which may be termed “environmental trademarks,” can be persuasive as well as symbolically informative because of their ability to resonate the environmental values of the brand with those of environmentally conscious consumers. This Commentary considers whether such marks merit special treatment.

A few examples taken at random from the large category of registered environmental marks are GOGREEN, registered by one firm for chemicals used in manufactured biodegradable plastic articles and by another firm for land vehicles propelled by human power, ICU ECO EYEWARE for eyeglasses and sunglasses advertised as eco-friendly, GREEN BRANCH for banking services, and ENVIROPAC LIGHTWEIGHT BOTTLES 50% LESS

PLASTIC, AND 100% RECYCLABLE PACKAGE. There are also multiple registrations for marks comprising THINK GREEN, notwithstanding a Trademark Trial and Appeal Board ("TTAB") determination in 1992 that registration of THINK GREEN and design for weatherstripping and paper products would be regarded "simply as a slogan of environmental awareness and/or ecological consciousness."

In recent years while registrations for environmental marks have been increasingly common, especially marks incorporating words such as ‘green’ and ‘eco,’ so have TTAB affirmances of Examiners’ refusals, sometimes because a disclaimer of one or more words in these marks is absent. GREEN CEMENT for environmentally friendly mineral-based cementitious materials, MF PLANTABLE PACKAGING for paper and cardboard materials infused with seeds (absent a disclaimer of PLANTABLE as well as PACKAGING), and ECO WICK for candles have been denied registration. On the other hand, the TTAB recently overturned the Examiner’s refusal of GREEN CONNECT for promoting consumer awareness and use of renewable energy sources. In light of these and many other citable examples, it is difficult to escape the conclusion that the outcome of an application for registration of an environmental mark historically has been quite unpredictable.

In the midst of uncertainty regarding the likely fortunes of a given application for an environmental mark, we can nevertheless discern a change in the examination process. This perhaps reflects misgivings whether the classical trademark examination approach best serves the public interest in reducing environmental degradation through what is commonly called “sustainable consumption.” Marks with environmental connotations seem to be treated, tacitly at least, as a special category of mark, a category in which the mark is at one and the same time a trademark or service mark and an environmental claim. Although there are no new written guidelines from the USPTO, practitioners have anecdotally noted a change in examination policy and have reported rejections in this vein on the Internet.

What does this mean? Environmental marks are synergistic with consumer demand for environmentally preferable products and help promote consumer interest in the environmental attributes of the good or service with which they are used. However, the environmental claim or claims that are made for the product are not necessarily apparent, and even when they are apparent they are not always trusted. In other words, environmental trade and service marks contribute to environmental improvement but must be recognized for their potential to deceive or mislead. It is this potential that is acted upon by examiners of “green” trademark applications in their
scrutiny of statements of environmental benefit in product descriptions.

Thus, there now appears to be alignment between claim truth requirements under Federal Trade Commission policy regarding environmental claims in advertising and USPTO policy in the examination of environmental trademarks. There are, of course, precedents for other agencies to have coexisting requirements that allow them to take action with respect to a mark contrary to an allowance by USPTO of that mark, where the public interest is at stake. Well-known examples are the FDA’s mandate to review and approve drug brand names to prevent purchaser and medical profession confusion caused by similar names for different drugs, and the EPA’s approval of a pesticide name, brand or trademark through registration or supplemental registration.

Consider FTC policy, where environmental claims are concerned, as set forth in the FTC Green Guides. The Guides apply to labeling, advertising, promotional materials, and all other forms of marketing in any medium, whether asserted directly or by implication, through words, symbols, logos, depictions, product brand names, or any other means [emphasis added]. Now the USPTO is reported to require statements of environmental friendliness to accompany the description of goods or services of “green marks.” The upshot is an emerging sense that the USPTO, like the FTC, is acting to prevent so-called “greenwashing” via trademarks that deceptively convey environmentally friendly attributes. At first sight, this may appear odd to the brand owner, if not, the practitioner. However, assimilation of an environmental mark to a claim is consistent with well-established judicial recognition of both the advertising function of a trademark and the consumer’s expectation of a consistent level of quality. In the present context, the term “quality” includes environmental quality secured through the proprietor’s exercise of some form of control over the goods sold under the mark.

There are several reasons why environmental trademarks ought to be cast into a separate genus of trademark for prosecution and protection purposes. Firstly, these marks and the products with which they are used mirror the growing importance of consumer market economics in the war against environmental degradation. They are especially important trademarks from a social welfare perspective and it is defensible policy to require applicants for such marks to declare and affirm the environmental benefits attaching to the products with which the mark is to be used. However, any requirement that makes self-certification of the environmental quality of the product a prerequisite of trademark registration causes such marks to morph into a sort of self-certification mark.
The owner of an ordinary trademark is not subject to sanctions or loss of rights in the mark if the product manufacturing process, materials, recycled content, biodegradability, recyclability and the like are changed. In contrast, where quality-related attributes are concerned, certification marks attest to attainment of a particular and absolute level of quality, and therefore come closer than ordinary trademarks to providing a meaning of quality that is consistent with the contractual notion of quality.

Against this backdrop of differing perceptions of product quality, the environmental trademark is neither an ordinary trademark nor a conventional certification mark. If environmental trademarks are to be subject to truthfulness scrutiny in registration and protection proceedings, then it is time to go the whole hog and explicitly treat them as a special category of mark, namely an “environmental self-certification trademark.”

Yet another reason for treating environmental marks separately is their relative descriptiveness. Almost by definition, the distinctiveness of environmental marks frequently is located in the lower range of the continuum extending from genericness to inherent distinctiveness as established by the court in *Abercrombie & Fitch Co. v. Hunting World*,2 There are both advantages and disadvantages of descriptive environmental marks. The benefit to purchasers lies in the mark’s ability to convey essential descriptive information about its claim. This could be justification for a lower standard of distinctiveness for registration. Government attaches great importance to the quality of consumer product information, therefore adoption of a lower distinctiveness standard for environmental marks would help attain the twin goals of consumer protection through better provision of information and environmental protection through sustainable purchasing. However, to the extent that we ease the standard for descriptiveness, we leave open the possibility of allegations that the mark is misleading or deceptive from the administrative law point of view. The extent of this potential paradox remains uncertain.

Consumers who wish to purchase products that are environmentally preferable need information to make choices. The environmental trademark is a basic communicator of environmental information about a product. Therefore, the makers of policies that shape trademark registration and protection ought to consider explicit establishment of a new type of mark, the environmental trademark, which is a brand name yet able to directly inform choice through a degree of descriptiveness. In this regard, the presence of fewer arbitrary or fanciful marks and more descriptive marks on the register would be a small price to pay for

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2. 537 F.2d 4 (2d Cir. 1976)
supporting environmentally and socially conscious purchasing habits.