Doing the right thing? The dangers of environmental claims

With more companies highlighting "green" credentials when promoting their products, the authorities are clamping down on unqualified claims. For trademark counsel, the use of environmental claims should be closely monitored

By **Trevor Little**

While many contend that the US green movement began with the 1962 publication of Rachel Carson's *Silent Spring* and moved up a gear in the 1970s, others can trace the movement right back to mid-19th century intellectual thought. But whatever their origin, environmental concerns have long moved into the mainstream and companies are increasingly pitching goods and services at the socially concerned consumer, highlighting their green credentials and using ethical considerations as a tangible selling point. For brand owners, key questions centre on how influential such claims are and what specific liability arises when making environmental and ethical claims.

The business case for going green

For Joseph Norvell, founding partner of Norvell IP, there are three distinct benefits of boasting green credentials: "First, it is good business. While many factors go into consumer purchasing decisions, it is clear that there is a growing population that consider a company's green/sustainable credentials when making purchases. Second, it is important for employee recruitment and retention – people want to be proud of the company they work for. Third, institutionalising sustainable practices is in the best interests of everyone's future."

Taking the pragmatic approach that ethical and environmental activities can serve a commercial purpose, in addition to a philosophical one, the issue for brand owners is whether green claims allow consumers to distinguish between competing products and to choose those which most closely match their own concerns and beliefs.

The obvious answer is that they do, if you take as a measure the marked increase in the visibility of ethical and environmental marketing. While environmental issues have been in the public consciousness for decades now, Michael Tschupp, attorney at Espinosa Trueba PL and author of the Sustainable Marks blog (www.sustainablemarks.com), argues that the current enthusiasm for eco-friendly goods and services can be differentiated from earlier trends: "Previous upticks in green activity have always petered out. However, the last few years have brought a new green boom that appears to be here to stay. Several factors are contributing to this, including improvements in technology that have made green products more cost efficient and have allowed consumers to more quickly recover their investment in going green, increased government subsidisation and support of green innovation; increased awareness and concern about environmental issues; and increased awareness on the part of consumers of the power of their dollars to influence businesses to act responsibly. Of course, the process becomes self-catalysing at a certain point. As the demand for green products and services increases, economies of scale kick in, which reduces the cost of such goods and services – which in turn stimulates even more demand for them."

The knock-on effect of "greenwashing"

One activity which poses a risk both to companies that legitimately boast environmental credentials and to those amending their own advertising is that of "greenwashing".

Coined by environmentalist Jay Westerveld in an essay focusing on the hotel industry practice of placing signs in rooms to encourage the reuse of towels to help the environment, the term relates to the deceptive use of green marketing to promote a misleading perception that a company's products are environmentally friendly.

Whether deliberate or accidental, greenwashing is indisputably on the rise. Norvell provides an example: "Most companies have spent all of their efforts for so many years focusing on profits without giving any thought to the impact that their actions have on the environment. As a result, when, say, a chemical or plastic manufacturer implements a change in its processes to lessen the environmental impact, the natural inclination is to advertise the product as 'eco-friendly', 'environmentally friendly', 'green' or 'good for the planet'. The reality is that there are very few chemicals or plastics that are 'good for the planet'. Companies should be clear in their advertising that sustainable improvements are 'less harmful' than before and not mislead consumers into believing that the product as a whole benefits the environment. That is why a good advertising and marketing reviewing and claim substantiation programme is so important."

As well as potential liability for those organisations engaging in greenwashing, there may be a wider knock-on effect for all brand owners: the risk that consumers will come to distrust all environmental claims. Mennenga argues: "Environmental marketing, whether through the use of overt product claims or through imagery or colours that imply an environmental benefit, is indisputably becoming increasingly prevalent. Because these claims are often based on highly technical or scientific data, they can be very difficult for the average consumer to independently evaluate, so trust between consumers and advertisers is critical. When consumers are confronted with advertising that includes inflated or overstated benefits, this can contribute to a general sentiment that these claims cannot be trusted and even advertisers with a valuable message to convey can be viewed with scepticism."

The practice could thus devalue the very benefits that the "greenwashers" themselves are seeking to exploit. Tschupp notes: "Everyone stands to suffer from greenwashing, to the extent that it breeds cynicism and distrust about real green innovation."

Weighing the evidence

Yet is there any proof that consumers really are putting their money where their beliefs are and opting for green products when other, cheaper alternatives are available? The evidence is best described as contradictory.

In September, GfK Roper Consulting's Green Gauge Global report found that the United States is one of the world's more environmentally cynical nations, with just 62% of the population believing that pollution is a serious issue. The results rank the United States 24th out of the 25 markets studied and reveal that approximately two-thirds of Americans perceive green products to be too costly, while one-third believe that they don't work as well as "regular" products. Similarly, an Ipos Reid study found that seven in 10 Americans feel that companies' green claims are just a marketing ploy.

However, Tschupp points to other evidence that would contradict these findings: "Businesses that are identified as environmentally responsible continue to stand out from their competitors and garner tremendous goodwill. In a recently published study of US consumers, 85% of respondents stated that they have a more positive image of a product or company that supports a cause that they consider important. This goodwill translates into increased sales – 41% of respondents stated that they had made a purchase in the past year due to a brand's affiliation with a social or environmental cause; 80% responded that, price and quality being equal, they would be likely to switch their buying from one brand to another based on such affiliation; and 19% would be willing to switch despite a higher price."

The reality may lie somewhere in the middle. In another study conducted by GfK Roper Consulting, 79% of consumers stated that a company's environmental record does in fact influence their buying decisions. Victor A Cardona, principal of Heslin Rothenberg Farley & Mesiti PC, observes: "From my own anecdotal experience, the truth is somewhere in between the two extremes, with consumers willing to pay a green premium when a green advantage is readily evident and believable, and the price premium is not too great. Otherwise, they see a green advantage as not worth the price or the claim as being untrustworthy."

In this respect, green credentials can be the tiebreaker that sways the buying decision, all other things being equal. Norvell agrees: "I do think consumers first look to make sure that the product meets their needs and expectations. If it meets their needs and expectations, then green and sustainable claims can make a product stand out from the competition."

Integrating green concerns

But if there is no demonstrable consumer demand, then what are the drivers for those organisations that do choose to flag up their environmental efforts?

For some organisations, the ethical dimension has formed part of their

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corporate identity from an early stage. A good example is Starbucks. Ben Packard, vice president global responsibility, previously told *WTR*: “The focus on people – extending not only to the people that work within the company, but down the supply chain to the coffee farmers – has been a strong part of our value system from the beginning.”

As such, the company realised early on that its founding philosophies needed a more prominent position in its branding. It started buying Fairtrade-certified coffee and even established its own standards in the CAFE (Coffee and Farmer Equity) programme – a set of environmental, social, economic and quality guidelines to ensure that its coffee farms are environmentally sustainable and that the coffee is traded ethically.

In other sectors, given that green credentials are not yet a consumer expectation, they can sometimes help a company to stand out. Cardona notes: “In certain industries, such as recycled paper, green practices have become standard and are expected, but other industries (eg, electric automobiles, residential combined heat and power systems) are just arriving at the party, so green innovations cause consumers to stand up and take notice.”

For those companies that have not integrated ethical and environmental concerns in this way, however, there are financial barriers to taking meaningful action. William Smith, founder and CEO of Ethical Brand (International), argues: “I’m not convinced that the commitments are substantially greater than 10 years ago. There is a sense of companies saying, ‘We need to do something, so let’s just do anything’, and a lot of it comes out the other end as parochial or unreflective of reality. There are lots of things that companies can do easily, like recycling. But that is the relatively low-lying fruit. The real issues are the systemic challenges in industries. For instance, in the electronics sector there are huge problems in the supply chain – the way that products are made, the way they are distributed. Then the lifecycle of the products themselves is causing huge environmental problems. And that is just one example. However, if one company decides, ‘We aren’t going to do business like this any more’, this becomes a real threat to its competitiveness. So you have to get an entire industry to change – and that isn’t easy at all. The only thing that will make industries move is the market: customers saying, ‘We won’t buy the products that are made this way any more’. That is when companies will have to do something.”



Badges of honour?

Meanwhile, in those industries where green credentials are already economically (as well as philosophically) beneficial, the challenge for brand owners is how to position these alongside their own trademarks and branding. As Tschupp suggests: “While a nebulous commitment to sustainable practices has become somewhat ubiquitous and therefore less impactful, businesses that are perceived as taking concrete, positive steps towards environmental responsibility still reap increased goodwill and sales. It is critical to be recognised as authentic.”

It is here that third-party certification comes into play. Issued by independent parties, certification marks can serve as an independent endorsement of environmental and ethical practices. One example is the Fairtrade mark, an independent consumer label which guarantees that a product has been certified against internationally agreed Fairtrade standards. To bear the Fairtrade

certification mark – itself a registered trademark – products (including ingredients and supply chain) must meet the Fairtrade product and generic trade standards. All licensed companies must also submit their packaging and promotional artwork to their licensing body for approval, in order to ensure that the Fairtrade mark is being used according to the organisation's guidelines.

To ensure the mark's integrity, Fairtrade has a system for reporting and investigating claims of misuse of its trademark, and brand owners need to ensure that they position marks correctly. Johnna Phillips, head of market development, Fairtrade Labelling Organisations International, explains:

USPTO and TTAB treatment of "green" trademarks

The US Patent and Trademark Office (USPTO) continues to receive numerous "green"-formative applications covering (hopefully) environmentally friendly goods or services. With few exceptions, recent applicants have faced disclaimer requirements from USPTO examining attorneys, as well as descriptiveness and genericness findings from the Trademark Trial and Appeal Board (TTAB). Armed with dictionary definitions and marketplace evidence, the USPTO considers "green" to be a merely descriptive or generic term.

USPTO examination of green marks

USPTO examining attorneys have become fairly consistent in requiring disclaimers for "green" marks. As an example, on 24th August 2010 the USPTO issued an office action requiring a 'green' disclaimer in the mark GREEN CELL, covering "mattress foundations; mattresses". The examiner stated that the "applicant must disclaim the descriptive wording "green" apart from the mark as shown because it merely describes the material aspect of the goods, namely, that they are made of environmentally friendly materials". In support, the examiner cited definitions appearing in the Merriam-Webster online dictionary, which define "green" as "tending to preserve environmental quality (as by being recyclable, biodegradable, or nonpolluting)…". The applicant subsequently accepted the disclaimer.

Similarly, the USPTO recently issued a green disclaimer requirement for the mark GREEN COATINGS COUNCIL and design, covering "architectural protective coatings". The examiner stated that "green" is a "desirable characteristic of coatings", again citing the Merriam-Webster online definition of "green". This applicant also accepted the disclaimer.

Some applicants have promptly acquiesced to disclaimers entered via examiner's amendment without issuance of a formal office action – for example, filed on 26th April 2010, the GREEN GIRL mark and design covering "educational services, namely, conducting conferences, seminars and workshops in the field of environmental and health education". In this instance, the disclaimer states that "no claim is made to the exclusive right to use 'green' apart from the mark as shown".

Other applicants have voluntarily submitted "green" disclaimers at the initial filing stage. For example, applicant GoGo Green LLC disclaimed exclusive rights in "green" in its application to register the mark and design GO GO GREEN, covering "management and business consulting services in the field of environmental sustainability; marketing consultation in the field of environmental sustainability". This application sailed through the examination phase and was published for opposition on 26th October 2010.

However, at least one recent application has passed through the USPTO without a descriptiveness refusal or disclaimer. RIDE BLUE GO GREEN was filed on 6th April 2010, covering "transportation services, namely, airport ground, charter, and door-to-door transportation services of passengers by motor vehicles, namely, vans and mini-buses". The application was published for opposition, without a "green" disclaimer, on 7th September 2010. Interestingly, an opposition is pending on likelihood of confusion and dilution grounds (TTAB Case No 91/196,488).

Green marks in the Trademark Trial and Appeal Board

After examination, applications for the USPTO's principal register face a second round of challenges prior to registration. Any entity that believes it would be damaged by the registration may file an opposition with the TTAB within 30 days of publication of the mark for opposition.

The TTAB issued several non-precedential "green" opinions through 2009 to 2010 in the context of *ex parte* appeals of USPTO examiners' refusals. Most recently, the TTAB affirmed an examiner's descriptiveness refusal of GREEN CEMENT, covering "non-metallic constructions materials", In *re Calera Corp* (USPTO Ser No 77/409,087 (TTAB 24th March 2010 (not precedential))). The TTAB noted that descriptiveness determinations are made not "in the abstract", but rather "in relation to the goods or services for which registration is sought". In affirming the refusal, it cited evidence relied upon by the examiner, including statements made by the applicant regarding prospective manufacturing processes for the goods (the application was filed on an intent-to-use basis), dictionary definitions, internet searches and third-party USPTO registrations showing "green" disclaimed.

Based on the evidence of record, the TTAB held that the term "green" indicates that a product is environmentally beneficial: "There simply can be no dispute today that the term green, ubiquitously used as an adjective with any good or service, will be perceived as an indicator that the good or service is environmentally friendly."

The TTAB also found GREEN-KEY (stylised) to be generic and unregistrable on the supplemental register for "paperboard keycards made of environmentally friendly materials". It held GREEN-KEY to be a compound word for genericness legal analysis purposes. Consequently, it could be deemed generic if it "would plainly have no different meaning from its constituent words, and dictionaries, or other evidentiary sources, establish the meaning of those words to be generic".

The TTAB ultimately held that the evidence of record, including dictionary definitions, third-party website excerpts and the applicant's own website describing the goods, "clearly establish that a 'green key' is an environmentally friendly keycard".

Although these *ex parte* decisions were not designated as precedential, they are illustrative of the USPTO's treatment of "green" trademarks. "Green"-formative marks, if deemed protectable, will likely be afforded a very narrow scope of protection in the USPTO.

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"When misuse is discovered, our legal team takes the appropriate steps to protect our trademark, as well as to protect the integrity of the system it represents. In our experience, most cases of misuse arise from misinformation, not a conscious decision to capitalise on the strength of the Fairtrade mark. For example, a company with a product pending certification may be a bit eager to communicate its commitment and use the mark on its website. Rather than alienating the company by taking legal action, we will work with it to bring it into alignment by referring it to our usage guidelines and assisting it with the application of those guidelines, if necessary. However, should we detect that our trademark has been used without permission or in a way that would damage the integrity of the mark, we act as needed to assert our rights under the appropriate national or international trademark laws."

Meanwhile, Ethical Brand is striving to take an alternative, more technological approach to certification. Smith explains: "We didn't want to go down the road that many other certification schemes had gone down, which is hands-on and costly. It involves a lot of people and time, so the barrier to entry for small businesses is huge. We let technology monitor the licensing and, to achieve this, you really need a tight definition of what being an ethical brand actually means. I was very uncomfortable with making that judgement as an individual – everyone has a different view of what is justifiable. That was our big challenge. And then, once a definition has been made, how do you monitor and validate that so you can say company A is ethical and company C isn't?"

The Ethical Brand scheme offers different grades of licensing and has strict guidelines on how its mark can be used. Smith is confident that, like Fairtrade, the organisation will be able to police its own mark. In this way, a degree of protection is offered to trademark owners that use the mark.

Such schemes play a vital role in endorsing, and sitting alongside, the house mark. However, a growing trend, which threatens to undermine legitimate certification schemes and could have a grave impact on consumer trust, is the use of trademarks with the "look and feel" of a certification mark. Tschupp observes: "Even with true certification marks, the degree of trust and respect placed in them by the public varies greatly, depending on the level of recognition that the certification has earned and its reputation for rigour and impartiality in applying its certification. Some businesses have developed a strategy of self-certifying by either creating their own self-awarded certification or simply adopting marks that look like certifications, but are not. This practice is not yet widespread, but its prevalence is increasing, and because it threatens to undermine consumer trust in legitimate certifications – and accordingly, the consumer's ability to use certifications to make informed choices – the practice is a real matter of concern."

Liability arising from green claims

For trademark owners in the United States trying to suggest environmental credentials,

Federal Trade Commission: revisions to the Green Guides

On 6th October 2010 the Federal Trade Commission (FTC) proposed new provisions for public comment, specifically addressing marketers' use of product certifications and seals of approval, and renewable energy, renewable materials and carbon offset claims.

The revised Green Guides state that companies should not make unqualified general environmental claims, such as labelling a product as "environmentally friendly" or "eco-friendly", because these are difficult, if not impossible, to substantiate. This differs from the current guidelines, which state that marketers can make unqualified claims if they can substantiate all express and implied claims.

A new section emphasises that certifications/seals are endorsements covered by the FTC's Endorsement Guides and provides new examples illustrating how those guides apply to environmental claims. The qualifications applied to certifications or seals should be clear, prominent and specific. When using an unqualified certification/seal, marketers must use clear and prominent language limiting the claim to particular attribute(s) for which they have substantiation.

Turning to degradable product claims, for solid waste products other than those destined for landfill, incineration or recycling, the proposal clarifies that the "reasonably short period of time" for complete decomposition is no more than one year after customary disposal.

Where it is claimed that a product is made with renewable materials, the new guide states that these claims should be qualified with specific information about the renewable material (eg, what it is, how it is sourced and why it is renewable). Additionally, companies should qualify renewable materials claims if the item is not made entirely from renewable materials (excluding minor, incidental components).

Similarly, where it is claimed that a product has been made using renewable energy, under the new proposals the source of renewable energy should be identified and the claim further qualified if less than all, or virtually all, of the significant manufacturing processes involved in making the product/package was powered with renewable energy or conventional energy offset by renewable energy certificates.

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there is a fine line to be negotiated – whether a company belongs to a certification scheme or uses green claims as part of its marketing campaign (or looks to challenge a misleading mark), liability for making false claims can arise through a number of channels. Similarly, companies wishing to challenge potentially misleading advertisements and marks have several available options.

As well as action from advertising bodies, companies making false claims could find themselves facing a civil suit for false advertising under the Lanham Act or action under state unfair competition laws. Tschupp explains: “In the United States, a false or misleading statement can lead to civil liability under federal, state or local laws. Action can be brought by competitors, individual consumers, as a class action, and by government consumer protection agencies or attorneys general acting either on a consumer complaint or upon their own initiative. In extremely egregious cases of fraud, criminal prosecution might be possible.”

Like any product feature, environmental claims can be the subject of a false advertising or unfair competition claim if they are suspected of being false or are not backed up by proper evidence, with jurisdiction rooted in various state and federal statutes.

However, relying on science is not necessarily enough – the claims also must not be misleading, regardless of the scientific weight behind them. As Tschupp elaborates: “It is important to provide more than just literal truth. Claims should not be so vague as to be effectively meaningless, conceal negative impacts of the product or service or highlight features that sound ‘green’, but are irrelevant as a practical matter.”

One body that has become more active in policing green claims is the Federal Trade Commission (FTC). Chairman Jon Leibowitz has noted: “In recent years businesses have increasingly used ‘green’ marketing to capture consumers’ attention and move Americans towards a more environmentally friendly future. But what companies think green claims mean and what consumers really understand are sometimes two different things.”

The FTC therefore states: “Any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”

The FTC can bring an action based on its own independent review of false claims and its Green Guides offer marketers and in-house counsel advice on the specific evidence that is persuasive in determining whether an eco-friendly claim can stand (see box above).

Finally, when it comes to claims in advertising, regulatory groups such as the National Advertising Division (NAD) of the Better Business Bureau and the National Advertising Review Board (NARB) can also be involved. Norvell, who describes himself as a “fan” of the former, explains: “The NAD

is a self-regulatory body for advertising of the Council of Better Business Bureau. The NAD provides quick and cost-efficient resolution of advertising disputes — it is much less time consuming and cheaper than US litigation. Although the NAD's decisions are non-binding, it has a high compliance rate and failure to comply with an NAD recommendation could result in further investigation by the FTC."

Finally, Norvell pinpoints a liability that no company would wish to suffer — the loss of customers: "A potential liability is the court of public opinion. Once a company has been identified as making false claims, its reputation with the consuming public can be deeply tarnished."

The role of the trademark counsel

For trademark counsel, this is important to consider, as marks can themselves be challenged if they use terms such as "green" or "eco" in a way that is descriptive or generic of the products or services in question.

In addition, there is a need to engage with the marketing department so that there is a coordinated approach to environmental suggestions and claims. Catherine Mennenga, counsel for advertising and brand management at General Electric, says: "Advertising claims can 'lurk' within trademarks or product packaging, particularly in the environmental arena, where certain words, such as 'green' or 'sustainable', can be viewed as claims of broad environmental benefit.

Legal counsel should be sensitive to potential false advertising issues when reviewing these materials, as well as in more traditional advertising formats. A regular review process with the marketing team should be established and, as always, education and training can be an enormous help.

Norvell agrees: "Companies of all sizes should have in place an advertising and review programme that ensures that all advertising and marking materials are reviewed for claim substantiation prior to public release. This can be done either in-house or by outside counsel. The key is to set up a programme that works with the advertising and marketing staff, as opposed to against them."

As well as ensuring that claims are advertised in the correct way, the key is to ask whether all dimensions of the claim can be backed up. "For example, if your company advertises a product as biodegradable, not only must the product/packaging completely break down and return to nature within a reasonably short period of time", says Norvell, "but it must be clear to consumers whether the biodegradable claim applies to the product, its packaging or both".

For trademark counsel, issues surrounding environmental and ethical claims go beyond the claims marks themselves and into the realm of marketing and advertising, where the house mark sits alongside other elements that give rise to potential liability. At a time when the notion of environmentally friendly goods and services is increasingly gaining currency, trademark monitoring must take into account the wider, greener picture. *iam*