

## WHO CERTIFIES THE CERTIFIERS?\*

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\* “Quis Certificabit Ipsos Certificatores?” With apologies to Juvenal. See D. Junii Juvenalis, *Satura VI, in Saturarum Libri V.* 325 (Mit Erklärenden Anmerkungen von Ludwig Friedlaender, Erster Band, Leipzig, Verlag von S. Hirzel, 1895). Juvenal asks, “Sed quis custodiet ipsos custodes?” (meaning “But who will guard the guards themselves?” or “But who watches the watchmen?” referring to the impossibility of enforcing moral behavior when the enforcers themselves are corruptible).

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## INTRODUCTION

Our consumption patterns must become more sustainable. The desire to preserve resources for future generations is not limited to modern environmentalists. It is exhorted in the Bible,<sup>1</sup> by great philosophers,<sup>2</sup> by our founding fathers,<sup>3</sup> and beyond. The seminal Brundlandt Report defines “sustainability” as “meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>4</sup> Defined in this manner, it is more than a yuppie luxury: it is the only path forward where future generations can thrive.<sup>5</sup>

In response to global changes, society is willing to move towards more sustainable consumption, and people are increasingly turning to ethical consumerism.<sup>6</sup> Consumers have indicated a willingness to pay a premium for goods and services that are less harmful to the environment, and the market is happy to oblige.<sup>7</sup> Despite its potential, consumer choice has no effect—or even a deleterious effect—if the goods chosen are not as environmentally friendly as claimed. Attaining sustainable consumption patterns is, in part, a consumer protection issue: when marketers mislead consumers on the environmentally friendly attributes of the goods they

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1. “The land is mine and you are but aliens and my tenants. Throughout the country that you hold as a possession, you must provide for the redemption of the land.” *Leviticus* 25: 23–24. “As for you, my flock . . . Is it not enough for you to feed on good pasture? Must you also trample the rest of your pasture with your feet? Is it not enough for you to drink clear water? Must you also muddy the rest with your feet?” *Ezekiel* 34: 17–18. There is also a devotional bible with a specific emphasis on environmentalism, highlighting environmental teachings with green text. *The Green Bible* I-15 (HarperCollins, 2011).

2. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 212–13 (Whitmore & Fenn 1821) (1690).

3. “For if he could, he might during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be reverse of our principle.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html> [<http://perma.cc/TL2F-BB6S>].

4. Our Common Future, Rep. of the World Comm’n on Env’t and Dev., U.N. A/RES/42/427, ch. 2. (1987).

5. For the purposes of this article, a rigorous definition is unnecessary. “Sustainability” and “sustainable” will be treated as a direction, not as a destination: no goods *are* sustainable, some are merely more sustainable than others. Hannah Judge Brown, *Sustainability a Journey, Not a Destination*, *THE GUARDIAN* (Sept. 29, 2009), available at <http://www.theguardian.com/sustainability/blog/sustainability-journey-destination> [<http://perma.cc/77WB-8FXF>].

6. Ming-Hui Huang & Richard T. Rust, *Sustainability and Consumption*, 39(1) *J. ACAD. MKTG. SCI.* 40, 44 (2011); Roger D. Wynne, *The Emperor’s New Eco-logos?: A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Programs*, 14 *VA. ENVTL. L.J.* 51, 53 (1994).

7. Elizabeth K. Coppolecchia, *The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertising?*, 64 *U. MIAMI L. REV.* 1353, 1356 (2010) (describing the rise of “green boomers”—environmentally conscious baby boomers—and the resultant pressures on businesses).

purchase, there is reduced incentive for truthful advertising and the consumers do not receive the benefit they intended to purchase. With the increased profitability of green goods there has been an increase in deceptive environmental marketing, dubbed “greenwashing.”<sup>8</sup> Though greenwashing pervades many trademarks, marketing tactics that falsely suggest a third party has certified the good are a potent problem.<sup>9</sup> When false environmental claims mislead consumers into buying greenwashed goods, the money does not go to the honest producers accurately advertising their products, and it allows the less scrupulous advertisers to abscond with the consumers’ money. In a market where informational imbalance is pervasive, especially where consumers are selecting products based on qualities not readily observable—such as environmental claims—there is incentive for marketers to overstate benefits.<sup>10</sup>

Trademark law is especially pertinent to environmental marketing because such marketing tactics often use trademarks to catch the green consumer’s attention.<sup>11</sup> Certification marks, a specific type of trademark, signal that the marked goods meet certain standards.<sup>12</sup> Certification marks can help consumers identify sustainable goods and help marketers attract more consumer attention towards goods that may be priced higher but are more sustainable. Certification marks play an important role in greening the market by aiding consumers in finding green goods. Consumers that purchase goods bearing certification marks are promoting more environmentally friendly goods, and the purchases can more strongly incentivize producers to certify their goods without rewarding fraudulent marketers. So long as the goods comply with the purported certification standards, this shifts the market towards more sustainable goods.

Stronger, clearer certification law will better ensure that consumers who choose environmentally friendly products are getting the benefits

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8. Greenwash (a portmanteau of “green” and “whitewash”) means “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service.” THE SINS OF GREENWASHING: HOME AND FAMILY EDITION, <http://sinsofgreenwashing.org> [<http://perma.cc/C8WT-M6BP>] (last visited Apr. 1, 2015).

9. *Infra* notes 106–108 (discussing the increase in false endorsements).

10. See Ariel Katz, *Beyond Search Costs: The Linguistic and Trust Functions of Trademarks*, 2010 BYU L. REV. 1555, 1561 (2010) (explaining that “[w]hen various attributes of goods that consumers care about are known to the sellers but cannot be observed or verified by consumers, sellers have an incentive to mischaracterize their goods as carrying such attributes”). This drives the “market for lemons” phenomenon where some sellers mischaracterize their goods, conditioning customers to assume the worst across all sellers, making it difficult for honest sellers to compete, forcing them to withdraw, thus creating a cycle that continues lowering average quality. *Id.* at 1061–62.

11. See Timothy C. Bradley, *Likelihood of Eco-Friendly Confusion: Greenwashing and the FTC “Green Guides”*, 4 LANDSLIDE 39, 39 (2011) (summarizing the rise of green trademarks in the late 2000s).

12. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 11 cmt. a (1995).

advertised and accurate information from the marks. Though certification law is laid out in the U.S. Code, it is not well-settled, and the statutory language is sparse. It has been “viewed as an inconsequential backwater of trademark law.”<sup>13</sup> Rather than treating it as the redheaded stepchild of trademarks, scholars should treat certification marks as an integral component of the law of unfair competition and should be better leveraged to protect consumers.<sup>14</sup> Complicating the issue, however, is the imprecision of the green lexicon: a “certification mark” is a term of art defined by United States federal statute,<sup>15</sup> but all too often the term is used in a general, non-term-of-art sense, often in conjunction with certification programs.<sup>16</sup> Although there is a wealth of literature on deceptive environmental marketing—much of it involving environmental certification programs—few authors address the statutory law governing certification marks.<sup>17</sup> Due to the growing popularity of certification marks and their potential to alter consumption and production patterns for the better, the laws governing certification marks must be clarified. A significant portion of environmental marketing uses certification as a tool for attracting more consumers; therefore laws governing environmental marketing are also necessarily an integral part of clarifying certification mark law.

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13. Margaret Chon, *Marks of Rectitude*, 77 *FORDHAM L. REV.* 2311, 2316 (2009).

14. *Id.* at 2317.

15. 15 U.S.C. § 1127 (2012).

16. Even professionals may confuse the term: a trademark attorney described a lawsuit against SC Johnson as a “case concern[ing] SC Johnson’s GREENLIST green seal (legally known as a ‘certification mark’).” Lara Pearson, *SC Johnson Greenlist Cases Settle—GREENLIST No Longer to be Used on WINDEX Products*, BRAND GEEK (July 12, 2011), <http://brandgeek.net/2011/07/12/sc-johnson-greenlist-cases-settle-greenlist-longer-windex-products> [<http://perma.cc/JS7U-UD26>]. SC Johnson, however, did not register any of its GREENLIST marks as certification marks. GREENLIST, Registration Nos. 3353719 (service mark), 3518048 (trademark), 3522370 (trademark), 3729963 (trademark), and 3951078 (trademark). That GREENLIST was not a certification mark was, in fact, a critical aspect of the lawsuit: “SC Johnson conveys to Plaintiff and other consumers that Windex has been subjected to a neutral, third party’s testing regime . . . [but] these representations by Defendant are false. . . . [T]he Greenlist ‘seal of approval’ is . . . *the work of Defendant SC Johnson itself*.” Complaint at ¶¶ 6–7, *Koh v. S.C. Johnson & Son, Inc.*, No. 09-cv-00927-HRL (N.D. Cal. Mar. 2, 2009) (emphasis in original) [hereinafter *Complaint*]. A more detailed explanation of trademarks and certifications marks is *infra* at Part I.A, I.B.

17. A search for scholarly literature containing the term “ecolabel” will turn up several thousand matches, but once “Lanham” (as shorthand for the Lanham Act, the federal trademark statute) is added to the search query, the results drop to less than 500. Using “Trademark Act” instead of “Lanham” generates less than ten results. *Compare Ecolabel Search Results*, GOOGLE SCHOLAR, <http://scholar.google.com/scholar?q=ecolabel> [<http://perma.cc/KE4E-BAS6>] (last visited Mar. 22, 2015) (showing 7,260 results), and *Ecolabel and Lanham Search Results*, GOOGLE SCHOLAR, <http://scholar.google.com/scholar?q=ecolabel+lanham> [<http://perma.cc/5JGH-JGLD>] (last visited Feb. 21, 2015) (showing 293 results), and *Ecolabel and “Trademark Act” Search Results*, GOOGLE SCHOLAR, <http://scholar.google.com/scholar?q=ecolabel+%22trademark%20act%22> [<http://perma.cc/P8U2-4S75>] (last visited Feb. 21, 2015) (showing 7 results).

This article defines and examines the general principles of trademark and certification mark law. From that foundation, this article delves into the messy lexicon surrounding environmental marketing. Next, Part II discusses traditional governmental mechanisms used to control against misleading environmental marketing in general and certification marks in particular. This article then identifies, in Part III, a public-private partnership utilizing voluntary certification programs as the most effective means of achieving change. Part IV examines the buildings sector as a concrete example of how such partnerships work. Finally, this article proposes several reforms to create or clarify existing legislation and regulations governing environmental marketing and certification marks, and to develop extra-governmental mechanisms that can best advance a public policy of sustainability.

## I. TRADEMARKS UNDER THE LANHAM ACT AND COMMON LAW

### A. Trademarks

The Lanham Act is the primary federal law governing trademarks.<sup>18</sup> A trademark can be any “word, name, symbol, or device, or any combination thereof” that is used in commerce to “identify and distinguish” the user’s goods or services from those of another.<sup>19</sup> The term “trademark” encompasses marks used on goods, or with services, to signal source, but “service mark” is a specialized name for the latter.<sup>20</sup> The Lanham Act is careful to maintain the difference in vocabulary by limiting its use of the word “trademark” to marks on goods and using “service mark” to describe marks for services.<sup>21</sup> Because the substantive trademark law governing trademarks and service marks are the same, “trademark” is often used to refer to both.<sup>22</sup>

Trademarks, and trademark law, protect both consumers and producers.<sup>23</sup> From the consumers’ end, trademarks identify the source of

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18. Trademark Act of 1946 (Lanham Act), 15 U.S.C. §§ 1051–1141n (2012).

19. *Id.* § 45.

20. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 (1995).

21. *Id.* cmt. f.

22. *Id.* This is analogous to “all squares are rectangles, but not all rectangles are squares.” Registrants often confuse trademarks and service marks. Adjudicators acknowledge the frequent confusion, largely choosing to treat the difference as clerical. The registration forms for both are identical. *Index of All TEAS Forms*, U.S. PAT. & TRADEMARK OFFICE, <http://www.uspto.gov/trademarks-application-process/filing-online/index-all-teas-forms> [<http://perma.cc/9PY3-RPGA>] (last visited Feb. 21, 2015).

23. 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:2 (4th ed. 2013).

the goods.<sup>24</sup> The consumers know that marked goods come from the same source and are of the same quality as other goods with the same mark,<sup>25</sup> and that the mark owner's reputation is behind those goods.<sup>26</sup> This "reduce[s] the buyer's cost of collecting information about products by narrowing the scope of information into brand segments rather than hav[ing] the buyer start anew with each single product."<sup>27</sup> On its own, a mark is largely without value: it is the underlying goodwill—the brand's reputation—associated with the mark that creates the value.<sup>28</sup> By "fix[ing] responsibility," "trademarks create an incentive [for mark owners] to keep up a good reputation."<sup>29</sup> For mark owners, trademark law provides them with power to protect that reputation.<sup>30</sup> Mark owners do not have to register with the U.S. Patent and Trademark Office ("USPTO") in order to receive protection against infringement: both state<sup>31</sup> and common<sup>32</sup> law may also govern trademarks. Should a registered mark be cancelled, it loses federal statutory protection but may retain common law protection.<sup>33</sup>

The Lanham Act prohibits anyone from using a trademark in commerce without consent of the mark owner.<sup>34</sup> Such use constitutes infringement, and a mark owner may bring a legal action against the infringer.<sup>35</sup> In exchange for legal protection for the mark, a mark owner has a duty to ensure the quality of the goods bearing the mark.<sup>36</sup> Part of the underlying premise for trademarks is that a marked good is only genuine when it is subject to the mark owner's regular quality control.<sup>37</sup> If a brand is known

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24. *Id.* § 2:4.

25. *Id.* § 3:10.

26. *Id.* § 2:4.

27. *Id.* § 2:5.

28. *Id.* § 2:15 (noting that a trademark "has no existence apart from the good will of the product or service it symbolizes[,] and that the two are "inseparable").

29. *Id.* § 2:4.

30. *Id.* § 2:14 (broadly discussing the property rights in a trademark, including using the Customs Service to prevent the import of infringing foreign goods).

31. *State Trademark Information Links*, U.S. PAT. & TRADEMARK OFFICE, <http://www.uspto.gov/trademarks-getting-started/process-overview/state-trademark-information-links> [<http://perma.cc/V5LC-YST7>] (last visited Mar. 21, 2015). The geographic extent of protection, however, is usually limited to the state.

32. 3 MCCARTHY, *supra* note 23, § 18:38.

33. *Id.* § 20:68 ("[C]ancellation of a registered mark only denies its owner the important procedural and substantive benefits that flow from registration" and even a plaintiff whose federal registration is cancelled may "prevail[] to either prove infringement or deny another a registration, relying on common-law trademark rights.") (citations omitted).

34. Lanham Act § 32(1) (protection for federally registered marks). Protection for unregistered, common law marks comes from § 43(a), which generally prohibits "[f]alse designations of origin, false descriptions, and dilution[.]"

35. 15 U.S.C. §§ 1114(1), 1125(a).

36. 3 MCCARTHY, *supra* note 23, § 18:48.

37. *Id.*

for low-cost, low-quality goods, that reputation alone is not a failure to control quality. The issue arises when a brand is known for high-quality goods, but the trademark is used on inferior goods. When the mark owner fails to control the licensing of the mark and allows “the licensee [to] place the mark on any quality or type of goods or services,” this failure amounts to “naked licensing.”<sup>38</sup> When the mark misrepresents the quality of the good by trading upon a consumer’s expectation of the normally-higher-quality good, it is “inherently deceptive”<sup>39</sup> and amounts to fraud.<sup>40</sup> Naked licensing may result in reduction in protection or outright cancellation of the mark because it has “los[t] its significance as a mark.”<sup>41</sup> “Abandonment” refers to non-use of a mark, but it has also been applied to any situation where the mark owner has lost property rights in the mark.<sup>42</sup> Naked licensing, therefore, is a form of trademark abandonment, but it does not result in the same absolute loss of rights that results if the mark owner ceased using—i.e., abandoned—the mark altogether.<sup>43</sup> An accusation of naked licensing is most often used as a shield by a party accused of infringement.<sup>44</sup> Rather than arguing that the accused action is not infringement, the defendant argues that the mark owner had licensed the mark without adequate quality control and therefore had given up rights to the mark.<sup>45</sup>

Trademark law also encompasses more than just trademarks, service marks, and certification marks. In addition to protecting mark owners against infringers and prohibiting mark owners from licensing marks in a fraudulent manner—e.g., naked licensing—the Lanham Act also provides for civil actions against false advertising. Section 43(a) prohibits “false or misleading” descriptions and representations in commerce, which encompasses common law trademarks and other forms of communication.<sup>46</sup> In spite of the broad language—“any person” who can show likely harm

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38. *Id.*

39. *Barcamerica Int’l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 598 (9th Cir. 2002) (quoting *Interstate Bancorp v. Stenquist*, 16 U.S.P.Q.2d 1704, 1706 (N.D. Cal. July 13, 1990) (emphasis omitted from quotation)).

40. 3 MCCARTHY, *supra* note 23, § 18:48 (citing *Societe Comptoir de L’Industrie Cotonniere Etablissements Boussac v. Alexander’s Dep’t Stores, Inc.*, 299 F.2d 33, 35 (2d Cir. 1962)).

41. 15 U.S.C. § 1064(3) (giving “abandon[ment]” as a ground for cancellation of a registration); 3 MCCARTHY, *supra* note 23, § 18:48.

42. 3 MCCARTHY, *supra* note 23, § 17:5.

43. RAYMOND T. NIMMER & JEFF C. DODD, *MODERN LICENSING LAW* § 9:42 (2014).

44. *Id.* § 9:42 n.4.

45. *Id.* § 9:42 nn.1, 10–11.

46. See Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1306–08 (2011) (summarizing the development of false advertising prohibitions in section 43).

can bring the action<sup>47</sup>—section 43(a) standing, in reality, has been narrower.<sup>48</sup> Since the USPTO is primarily a gatekeeper,<sup>49</sup> not tasked with policing trademark use once a mark is registered,<sup>50</sup> only competitors and consumers are likely plaintiffs. Until recently, several Circuits categorically prohibited indirect competitors from suing under the Lanham Act, but the Supreme Court ruling in *Lexmark v. Static Control* has tentatively extended standing to indirect competitors.<sup>51</sup> Despite this expansion of standing, consumer suits are unlikely for myriad reasons. First, most consumers cannot justify the expenses of pursuing litigation over a single instance of deception.<sup>52</sup> Second, class actions are possible but are likely to fail the “commonality” or “numerosity” prongs necessary for class certification.<sup>53</sup> The case-by-case nature of consumer deception usually means that individual issues predominate over common questions of law or fact,<sup>54</sup> rendering the class action inappropriate.<sup>55</sup> Potential class action plaintiffs may also have difficulty establishing that a sufficient number of consumers have suffered injury due to the misuse of a trademark.<sup>56</sup> However, courts have denied standing to consumers,<sup>57</sup> subordinating direct consumer protection to commercial competitive interests.<sup>58</sup>

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47. See generally Vincent N. Palladino, *Lanham Act “False Advertising” Claims: What Is a Plaintiff to Do?*, 101 TRADEMARK REP. 1601 (2011) (breaking down the types of misrepresentations that a plaintiff might assert).

48. Tushnet, *supra* note 46, at 1375–76 (“[C]ourts have never given [section 43(a)] a literal reading. At first, courts simply excluded consumers from the class the law protected, allowing only competitors to sue.”) (citation omitted).

49. Sonia K. Katyal, *Trademark Intersectionality*, 57 UCLA L. REV. 1601, 1679, n.406 (2010).

50. 15 U.S.C. § 1064 (2012) (the cancellation procedures in Section 14 of the Lanham Act are limited to the FTC and “any person who believes that he is or will be damaged” by the mark).

51. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

52. 1 MCCARTHY, *supra* note 23, § 2:33.

53. Tawnya Wojciechowski, *Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 SW. U. L. REV. 213, 245–46 (1994) (discussing the status quo for consumer class actions and arguing for reform).

54. *Id.* at 246.

55. FED. R. CIV. P. 23(b)(3) (requiring that “questions of law or fact common to class members predominate over any questions affecting only individual members”).

56. Wojciechowski, *supra* note 53, at 246–47.

57. Tushnet, *supra* note 46, at 1374 (stating that courts generally dismiss cases of consumers seeking to sue under section 43(a)).

58. Wojciechowski, *supra* note 53, at 215–16 (denouncing court decisions that have read “any person” to mean “only business competitors”); see also 5 MCCARTHY, *supra* note 23, at § 27:39 (summarizing the various circuits’ treatment of section 43(a) standing).

### B. Certification Marks

In contrast to a regular trademark, “[a] certification mark is a special creature created for a purpose uniquely different from that of an ordinary service mark or trademark.”<sup>59</sup> Certification marks do not identify the source of goods but instead represent to a consumer that the goods meet certification standards chosen by the certification mark owner.<sup>60</sup> Serving as shorthand for an endorsement, certification marks do not convey detailed or technical information directly; consumers must trust the certifying parties.<sup>61</sup> A certification mark owner must file an additional description of the certification standards with the USPTO.<sup>62</sup> This requirement, however, is not rigorous, and the USPTO does not investigate the substance of the filed certification standards.<sup>63</sup>

Not only are certification marks subject to cancellation under any of the provisions that apply to trademarks,<sup>64</sup> there are four additional grounds for cancellation that apply only to certification marks.<sup>65</sup> Under section 14(5)(A) of the Lanham Act, if the certification mark owner “does not control, or is not able legitimately to exercise control over” the mark, this loss of control may be grounds for cancellation.<sup>66</sup> This is a codified prohibition against naked licensing.<sup>67</sup> Unlike the common law doctrine of naked licensing as applied to regular trademarks, however, the statute does not appear to allow for a partial reduction of protection. This potentially harsh result may arise from the perceived need to hold certification marks to a higher standard, since these marks affirmatively signify that the marked good meets the

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59. *In re Florida Citrus Comm'n*, 160 U.S.P.Q. (BNA) 495, 499 (T.T.A.B. 1968).

60. In addition to this type of certification mark, “geographic indicators” may certify that the marked goods are from a specific area. T.M.E.P. § 1306.02 (2007). Collective trademarks are marks that certify that members of a certain group performed the labor and are sometimes considered a type of certification mark. T.M.E.P. § 1306.9(a) (distinguishing between certification marks and collective marks). Although certification marks serve a different function, they are held to the same “standards generally applicable to trademarks and service marks . . . such as descriptiveness, disclaimers, and likelihood of confusion.” T.M.E.P. § 1306.06(a).

61. Chon, *supra* note 13, at 2318.

62. 37 C.F.R. § 2.45(b) (2011); T.M.E.P. § 1306.06(g)(ii); *see also* Terry E. Holtzman, *Tips from the Trademark Examining Operation*, 81 TRADEMARK REP. 180, 192 (1991) (summarizing what time during the process an applicant must submit the standards for certification when filing for a certification mark registration).

63. Chon, *supra* note 13, at 2335, 2337 (discussing the lack of oversight and accountability in the standard-filing process with the USPTO).

64. 15 U.S.C. § 1064 (“[A]ny person who believes that he is or will be damaged” by the prohibited actions may petition for cancellation of any federally registered trademark).

65. *Id.* § 1064(5).

66. *Midwest Plastic Fabricators, Inc. v. Underwriters Labs, Inc.*, 906 F.2d 1568, 1572 (Fed. Cir. 1990).

67. *See supra* Part I.A (discussing naked licensing as it affects trademarks in general).

certification criteria.<sup>68</sup> A certification mark owner must exercise sufficient control over the mark to prevent misleading the public.<sup>69</sup> The Trademark Trial and Appeal Board, as well as courts,<sup>70</sup> have emphasized the “affirmative obligation on the certification mark owner to monitor the activities of those who use the mark,” but there is no statutory definition of what “control” requires.<sup>71</sup> The “requirement cannot mean absolute control because it would be impracticable, if not impossible, to satisfy[;]” therefore the requisite amount of control must be determined on a case-by-case basis.<sup>72</sup> A challenger must “demonstrate by a preponderance of the evidence” that a certification mark owner has failed to exercise adequate or reasonable control over use of the mark in light of the “totality of the facts and circumstances.”<sup>73</sup> This is a heavy burden, and it appears that no cancellation has resulted from section 14(5)(A).

Section 14(5)(B) prohibits a mark owner from “engag[ing] in the production or marketing of any goods or services to which the certification mark is applied.”<sup>74</sup> Due to the need to maintain a high level of credibility, a mark owner may not use certification marks under the Lanham Act.<sup>75</sup> This reinforces the neutral, third party aspect of certification marks. In the same vein, a registrant cannot skirt the prohibition of section 14(5)(B) by registering a trademark and an identical—or nearly identical—certification mark.<sup>76</sup> If consumers cannot distinguish between the trademark’s source-identifying function and the certification mark’s certifying function, then the marks fail to perform the functions for which they are registered and may be cancelled. Differences that convey to consumers that the marks serve distinct functions—such as “wording denoting certification such as ‘Approved by’, ‘Tested by’, etc.”—may allow both registrations.<sup>77</sup> Section 14(5)(C) is a corollary to (B), barring use of the certification mark as a trademark or service mark by licensees. Such use does not directly fall under the prohibitions of subsection (B) since the certification mark owner is not the party engaged in misuse of the mark, but (B) and (C) together maintain a usage distinction between certification marks and other trademarks.

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68. Cf. Wojciechowski, *supra* note 53, at 223 (highlighting the importance of protecting the public’s faith by holding deceptive mark users accountable).

69. *Midwest Plastic*, 906 F.2d at 1572.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1572–73.

74. 15 U.S.C. § 1064(5)(B) (2012).

75. 15 U.S.C. § 1064(5).

76. *In re Monsanto Co.*, 201 U.S.P.Q. (BNA) 864, 867 (T.T.A.B. 1978).

77. *Id.* at 869.

Section 14(5)(D), like subsections (B) and (C), reinforces the neutral, third party aspect of certification marks: certification mark owners have no discretion as to who can use the mark, so long as the user meets the certification standards.<sup>78</sup> The compulsory nature of certification marks can be contrasted with regular trademarks, where the mark owner has total discretion to license the mark.<sup>79</sup> If a licensee of a certification mark meets the certification criteria but is denied use of the certification mark,<sup>80</sup> the legitimacy of the mark is compromised and the mark may be cancelled. Certification of “certain qualities or characteristics” of the goods, however, should not be confused with general guarantees of the “nature and quality” of the goods: a certification mark owner is responsible for the former whereas a trademark owner is responsible for the latter.<sup>81</sup>

In light of the different functions and uses of certification marks as compared to regular trademarks, the prohibitions of section 14(5) are sensible. Because the certification mark stands for third party verification of a good’s characteristics, consistent and non-discriminatory award of the mark is necessary. Less clear, however, are the ramifications if a certification mark owner permits use of the mark on goods that fail to meet the certification criteria. Although section 14(5)(D) prohibits denying a compliant good the use of a certification mark, nowhere in section 14 does the Lanham Act explicitly address the inverse scenario where a non-compliant good receives a certification mark. Such a scenario appears to fall under the prohibition on section 14(5)(A)—a failure to control the mark—if it falls under section 14. In naked licensing of a trademark, proving a sufficiently egregious loss of control is difficult.<sup>82</sup> Since a certification mark is a type of trademark, it is likely that a similarly high burden of proof would be required for a court to revoke rights to a certification mark.<sup>83</sup>

Another gray area of certification mark law is the legality of using a registered *trademark* as a certification mark.<sup>84</sup> Though deliberately using a

78. 15 U.S.C. § 1064(5)(D).

79. Holtzman, *supra* note 62, at 183.

80. 15 U.S.C. § 1064(5)(D).

81. T.M.E.P. § 1306.09(b); *but see supra* Part I.A, text accompanying notes 36–41 (discussing the duty of quality control).

82. 3 MCCARTHY, *supra* note 23, § 18:48 (courts requiring “a high degree of proof be made before . . . all rights in the mark are lost”).

83. Even so, a trademark licensing article notes that “[t]here are no reported cases of liability for failing to hold a licensee to the standards claimed.” Tsan Abrahamson, *Practice Pointers on Trademark Licensing*, 14 ALI-ABA ESTATE PLANNING COURSE MATERIALS J. 17, 18 (2008), available at [http://files.ali-aba.org/thumbs/datastorage/lacidoirep/forms/CMJ0810-\\_Abrahamson\\_thumb.pdf](http://files.ali-aba.org/thumbs/datastorage/lacidoirep/forms/CMJ0810-_Abrahamson_thumb.pdf) [<http://perma.cc/WX7A-KKZF>].

84. An unregistered mark functioning entirely as a certification mark is simply a common law certification mark. *See infra* text accompanying notes 85–88.

trademark in a manner that misleads consumers into believing that a third party has certified the goods would be a violation of general consumer protection laws, it is unclear what happens if the mark owner treats the mark as a certification mark.<sup>85</sup> Assuming, however, the trademark owner complies with the fundamental requirements for certification marks, the Lanham Act is silent.<sup>86</sup> This would not qualify as naked licensing because the mark owner imposes enough control to ensure that marked goods meet certification standards. On a practical level, consumers would find it hard to distinguish between a trademark and a certification mark, so long as the mark indicates the standards determined by the mark owner. Therefore, principles of consumer protection would not impel cancellation of the trademark.

If, however, the trademark were used in a manner prohibited by section 14(5), what might be the grounds for cancellation? By its terms, section 14(5) applies to marks registered as certification marks only, but allowing a trademark used as a certification mark to skirt these prohibitions would violate the consumer protection principles undergirding trademark law.<sup>87</sup> A consumer has no reliable way of telling—short of looking it up in the USPTO trademark database—whether a mark is a trademark or a certification mark. A registrant that erroneously filed, and received, a trademark but conducts the licensing of the trademark according to certification mark requirements has created a *de facto* certification mark.<sup>88</sup> If a licensee benefits from the trademark-used-as-certification-mark, then principles of estoppel may apply as well.<sup>89</sup> There are, however, registrants who may knowingly and deliberately file for a trademark to skirt the restrictions of section 14(5).<sup>90</sup> Because the Lanham Act is silent on this

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85. See generally Complaint, *supra* note 16 (Koh v. SC Johnson & Son, a lawsuit over the use of a trademark by the mark owner in an allegedly misleading manner).

86. 15 U.S.C. § 1064(5). That is, the mark owner complies with the section 14(5) requirements to control the mark, abstain from “produc[ing] or market[ing] [] any goods or services to which the certification mark is applied,” forbid the use of the mark “for purposes other than to certify,” and certify “any person who maintains the standards or conditions which such mark certifies[.]” *Id.*

87. See *supra* Part I.A (discussing consumer expectations based on a mark owner’s reputation).

88. Such a use would fit the general definition of “*de facto*”: “[a]ctual; existing in fact; having effect even though not formally or legally recognized[.]” BLACK’S LAW DICTIONARY 506 (10th ed. 2009).

89. This would fit the general fact pattern underlying estoppel, which acts as “[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before[.]” *Id.* at 667.

90. See generally John M. Arnone, *Game (Not) Over: How a Mark Saved Video Games*, 19 J. CONTEMP. LEGAL ISSUES 247, 247–51 (2010) (describing the flood of low-quality video games in the early 1980s and Nintendo’s strategy to *selectively* endorse games so that consumers could reliably identify the quality of games).

issue, courts will likely look to general consumer protection laws to decide claims on a case-by-case basis.

Common law did not recognize certification marks before the Lanham Act.<sup>91</sup> Since its passage, however, common law certification marks can exist,<sup>92</sup> but unlike general trademarks, the law is far less settled<sup>93</sup> and continues to change. Though most cases recognizing common law certification marks focus on geographical indicators, the language used by the courts draws parallels between certification marks and trademarks without limiting common law protection to geographic certification marks only.<sup>94</sup> Out of several thousand registered certification marks, only a few are federally-owned.<sup>95</sup> Many well-known certification programs, such as the U.S. Department of Agriculture (“USDA”) Organics program, have no registered certification marks.<sup>96</sup> Other federal laws, however, back these marks.<sup>97</sup>

### C. *Interrelated and Conflated Terms*

Not all certification processes involve registered marks.<sup>98</sup> The legal terminology of trademark law becomes muddled in the marketplace, especially for environmental marketing. Certification programs are a

91. LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 17A:15 (4th ed. 2014) (declaring that certification marks were “not recognized under pre-Lanham Act common law”); *contra* Daphne Leeds, *Trademarks from the Government Viewpoint*, 44 CALIF. L. REV. 489, 492, 497–98 (1956) (noting that, although certification marks were “unregistrable” before the Lanham Act, “[b]usiness practices developed these types of marks . . . [and] the courts protected them”).

92. *Florida v. Real Juices, Inc.*, 330 F. Supp. 428, 430 (M.D. Fla. 1971); 3 MCCARTHY, *supra* note 23, § 19:3.

93. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 11 cmt. a (1995) (noting that certain aspects of the Lanham Act “have not been explicitly incorporated into the common law”).

94. *Real Juices*, 330 F. Supp. at 430 (finding no “substantive distinction between certification marks and trademarks which would render the case law pertaining to creation of common law trademarks inapplicable to certification marks” and holding “that rights in an unregistered certification mark can be acquired in the same manner as they can in trademarks”).

95. A Trademark Electronic Search System query for all live certification marks registered to federal entities returns 23 records. A similar search unrestricted to federal entities returns 4470 records. *Compare Trademark Electronic Search System (TESS)*, U.S. PAT. & TRADEMARK OFFICE, <http://tess2.uspto.gov> [<http://perma.cc/HD9W-6LFA>] (under “Select A Search Option”; click “Word and/or Design Mark Search (Free Form)”; search for “(certification)[TM] AND (live)[LD] AND (“united states” OR “u.s.” OR “us”) AND (“agency” OR “government” OR “federal”)[on]”) (last visited Mar. 21, 2015), *with id.* (search for “(certification)[TM] AND (live)[LD]”) (last visited Mar. 21, 2015).

96. *Id.* The TESS search for federally owned certification marks did not return any marks owned by the USDA, nor any marks regarding organic certification.

97. *See, e.g.*, 7 C.F.R. § 205.311 (2008) (providing for how the USDA Organic seal may be used).

98. Chon, *supra* note 13, at 2315.

popular way of encouraging sustainable consumption—and capitalizing on it. Often a certification program will have a distinctive symbol—i.e., a mark. In the ordinary sense of the words, these are “certification marks”: these marks represent the certification program. The phrase “certification marks” in an ordinary, not-a-term-of-art, sense encompasses more than the class of certification marks defined by the Lanham Act.<sup>99</sup> However, use of either type of mark is subject to consumer protection law.<sup>100</sup>

The dual purposes of trademark law—to protect consumers and to protect a mark owner’s rights—are largely premised upon anti-fraud and anti-deceit grounds.<sup>101</sup> Certification marks, as defined under the Lanham Act, convey to consumers that the goods meet an independent party’s standards.<sup>102</sup> This assurance operates as an indicator of approval.<sup>103</sup> This amplifies the consumer protection function of trademarks in the case of certification marks. In environmental marketing, ecolabels and eco-certification marks are important ways for marketers to convey that their goods are environmentally preferable.<sup>104</sup> Consumers choosing goods on the basis of such certification marks must be able to rely on the veracity of the labels to ensure that they are receiving the bargained-for benefit.

Due to the popularity of ecolabels,<sup>105</sup> there has been a corresponding rise in greenwashing, often divided into “seven sins” coined in widely-cited reports by TerraChoice.<sup>106</sup> Out of the sins of greenwashing, the sin of

99. Borrowing, again, the squares and rectangles analogy: All Lanham Act Certification Marks are certification marks in the ordinary sense, but not all certification marks in the ordinary sense are Lanham Act Certification Marks. *Supra* note 22.

100. See *infra* Part III (discussing the Federal Trade Commission’s role in regulating environmental marketing).

101. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. d. (1995).

102. 15 U.S.C. § 1127.

103. Chon, *supra* note 13, at 2315 (calling certification marks “proverbial stamp[s] of ethical approval”).

104. See, e.g., *Environmentally Preferable Product: Documenting Exceptional Performance*, SCS GLOBAL SERV., <http://www.scsglobalservices.com/environmentally-preferable-product> [<http://perma.cc/5CHJ-SF86>] (last visited Mar. 25, 2015) (giving reasons why consumers may seek environmentally preferable products and explaining how manufacturers can meet criteria for certification).

105. Jennifer M. Hetu & Anessa Owen Kramer, *It’s Not Easy Being Green: Use of the Terms “Organic,” “Sustainable,” and “Natural” in Trademarks and Advertising*, 4 LANDSLIDE 46, 47 (2011) (discussing the proliferation of green trademark filing with the USPTO, including “2,000 pending applications and registrations that contain the word ‘organic,’ over 4,000 . . . [for] ‘natural,’ and over 500 . . . [for] ‘sustainable’” in 2011).

106. TERRACHOICE INC., THE SINS OF GREENWASHING (2010), available at <http://sinsofgreenwashing.com/index35c6.pdf> [<http://perma.cc/6ASY-DAKB>]. It is important to note that TerraChoice is an environmental marketing firm, and that their reports are aimed at general consumers. The data supporting their analysis and conclusion are not available publicly. It is useful as a tool to teach consumers about greenwashing, but it is not an entirely neutral, third party source of detailed, technical information.

worshipping false labels<sup>107</sup>—falsely representing that a good has been endorsed by a third party—has risen dramatically in recent years, faster than any other sin.<sup>108</sup> This reflects the view by consumers who expect that independent third parties verify ecolabels,<sup>109</sup> but this may not always be the case. Depending on who is drafting the definitions, ecolabels may refer to any label that makes an environmental claim, including one that a company awards itself.<sup>110</sup> Consumers, however, take a dim view of self-certification. Rather than seek independent certification because it is too expensive, or because the goods to be certified would not meet standards, some marketers try to use self-awarded marks in a way that misleads consumers into believing a third party was involved.<sup>111</sup>

## II. THE PUBLIC PATH TO A CERTIFIABLY GREENER FUTURE

The issues surrounding greenwashing fall under the mandates of several federal agencies: the Environmental Protection Agency (“EPA”),<sup>112</sup> Federal Trade Commission (“FTC”),<sup>113</sup> USDA,<sup>114</sup> and Food and Drug Administration (“FDA”)<sup>115</sup> may all control various aspects of environmental marketing. The myriad overlapping mandates have resulted in a lack of oversight because neither of the most relevant agencies, the EPA and the FTC, claim full jurisdiction over environmental marketing. The EPA is primarily concerned with environmental protection, not environmental marketing—but regulating the former implicates the latter.<sup>116</sup>

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107. *Id.* at 10.

108. *Id.* at 7, 16.

109. GLOBAL ECOLABELING NETWORK, INTRODUCTION TO ECOLABELING 2 (2004), available at [http://www.globalecolabelling.net/docs/documents/intro\\_to\\_ecolabelling.pdf](http://www.globalecolabelling.net/docs/documents/intro_to_ecolabelling.pdf) [<http://perma.cc/4L23-NUQC>].

110. *Id.* (comparing different definitions of “ecolabel” that differ on whether it must be issued by a third party).

111. TERRACHOICE INC., *supra* note 106, at 20. The TerraChoice researchers found the variety and ubiquity of clipart and stock art for “certified green” graphics to be “almost comical.”

112. The expert agency in all things environmental. *Our Mission and What We Do*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/aboutepa> [<http://perma.cc/6PEL-CNYL>] (last visited Mar. 25, 2015).

113. *About the FTC*, FED. TRADE COMM’N, <http://www.ftc.gov/about-ftc> [<http://perma.cc/S3NK-4GSD>] (last visited Mar. 25, 2015). The FTC is the primary consumer protection agency.

114. In charge of the National Organic Program, codified at 7 C.F.R. Pt. 205.

115. Protecting public health by supervising the safety of, *inter alia*, food and drugs. U.S. Food & Drug Agency, *FDA Fundamentals*, U.S. FOOD & DRUG AGENCY, <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm192695.htm> [<http://perma.cc/N9Z5-7DTM>] (last visited Apr. 1, 2015).

116. E. Howard Barnett, *Green with Envy: The FTC, the EPA, the States, and the Regulation of Environmental Marketing*, 1 ENVTL. L. 491, 500–03 (1995). Though Congress considered a bill to give the EPA authority to regulate against deceptive environmental claims, the bill did not pass. Kimberly C. Cavanagh, *It’s a Lorax Kind of Market! But Is It a Sneetches Kind of Solution?: A Critical*

The FTC, however, has been the primary agency in regulating environmental marketing through its mandate to protect consumers. Under the Federal Trade Commission Act, “unfair or deceptive acts or practices in or affecting commerce” are illegal, and the FTC has authority to prosecute such behavior.<sup>117</sup> The FTC focuses on the consumers’ perception of environmental claims, not on the environmental claims themselves.<sup>118</sup> In 2012, the FTC issued a newly revised set of Guides for the Use of Environmental Marketing Claims (“Green Guides” or “Guides”).<sup>119</sup> The Guides are the FTC’s interpretations of how section 5 of the FTC Act applies to environmental marketing claims, but they are not legally binding.<sup>120</sup>

The earlier Green Guides did not specifically address the use of certification, seals of approval, nor any other forms of endorsement.<sup>121</sup> In the 2012 iteration of the Green Guides, the FTC added section 260.6 to address certifications and seals of approval directly.<sup>122</sup> The language is general, comprising five short paragraphs and eight sample scenarios. Although section 260.6 forbids misrepresenting that a good has been subject to independent verification,<sup>123</sup> the Green Guides allow companies to use marks on their own goods if there is sufficient notice in the advertisement indicating that it is a self-certification.<sup>124</sup> As the EPA noted, and the FTC agreed, “the FTC is not in a position to specify the specific process for, or content of, programs that award seals and certifications’ and, thus, the Commission should review certifications on a case-by-case

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*Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. 133, 160–61 (1998).

117. 15 U.S.C. § 45 (2012).

118. See *infra* text accompanying notes 122–124 (discussing the jurisdictional issues between the FTC and the EPA); Deborah Majoras, Chairwoman, Fed. Trade Comm’n, Opening Remarks: Carbon Offsets Workshop 3, 6 (Jan. 8, 2008), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/opening-remarks/080108carbonow.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/opening-remarks/080108carbonow.pdf) [<http://perma.cc/4KX5-YW53>] (acknowledging the FTC’s lack of “authority [and] technical expertise” to set “environmentally preferable practices” or regulations, instead choosing focusing on “[the FTC’s] traditional consumer protection role”).

119. FED. TRADE COMM’N, THE GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 1, n. 1 (2012). The FTC released the Green Guides first in 1992, with revisions in 1996 and 1998. *Id.* at 1.

120. 16 C.F.R. § 260.1 (2012).

121. See FED. TRADE COMM’N, *supra* note 119, at 75 (acknowledging that the 1998 Guides did not address certifications, but that it came up in an example about claims of general environmental benefits).

122. 16 C.F.R. § 260.6. In addition to the Green Guides, certification marks are subject to the FTC’s Guides Concerning the Use of Endorsements and Testimonials in Advertising (“Endorsement Guides”). 16 C.F.R. pt. 255 (2009). Section 255.4, Endorsements by organizations, is the section most relevant to certification marks.

123. 16 C.F.R. § 260.6(a).

124. *Id.* § 160.6 example 1.

basis.”<sup>125</sup> Despite the FTC’s repeated reluctance to engage in more guidance or enforcement, many commenters on the FTC’s proposed rules pushed for requiring a higher level of substantiation for certifications and seals.<sup>126</sup>

Although the FTC has increased environmental advertising enforcement actions,<sup>127</sup> it is the only entity that can bring enforcement actions under the FTC Act;<sup>128</sup> therefore, most instances of deceptive environmental marketing go unscrutinized.<sup>129</sup> Given the proliferation of environmental marketing, the FTC’s policing on that front seems paltry: after two decades, the Green Guides are still not binding regulation and the handful of enforcement actions do not cover the full range of greenwashing. The FTC’s rather sluggish actions can be traced to agency expertise, or its absence: the FTC did not believe it had the power to create environmental policy nor the technical expertise to address complex environmental issues.<sup>130</sup> Recognizing its limited technical expertise, the FTC “actively consult[ed]” with specialist agencies, such as the EPA, to prevent duplicative or conflicting guidelines.<sup>131</sup> Despite consultation, the FTC’s Green Guides are largely devoid of the technical detail necessary to create useful guidelines. This continued lack of technical detail, even after two decades, highlights the need to bring in expert agencies. The EPA has been willing and able to promulgate at least more technically detailed guidelines, if not actual regulation.<sup>132</sup>

### III. GOVERNMENT AS MARKET PARTICIPANT AND INFLUENCER

American culture venerates private capitalism, and overarching national programs of the type found in many other countries would be unlikely here.<sup>133</sup> Monolithic government legislation and regulation are not viable.

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125. FED. TRADE COMM’N, *supra* note 119, at 97.

126. *Id.* at 95–96.

127. Press Release, Fed. Trade Comm’n, FTC Announces Actions Against Kmart, Tender and Dyna-E Alleging Deceptive ‘Biodegradable’ Claims (June 9, 2009), *available at* <http://www.ftc.gov/news-events/press-releases/2009/06/ftc-announces-actions-against-kmart-tender-dyna-e-alleging> [<http://perma.cc/P6Q2-DJQ4>].

128. 5 MCCARTHY, *supra* note 23, § 27:119.

129. *Id.*

130. Jamie A. Grodsky, *Certified Green: The Law and Future of Environmental Labeling*, 10 YALE J. ON REG. 147, 172–73 (1993).

131. 75 Fed. Reg. 63,552, 63,558–59 (proposed Oct. 15, 2010) (codified at 16 C.F.R. Pt. 260); Cavanagh, *supra* note 116, at 163.

132. Cavanagh, *supra* note 116, at 163.

133. *See generally* U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL LABELING ISSUES, POLICIES, AND PRACTICES WORLDWIDE (1998) (an EPA report comparing and contrasting the labeling programs of 18 foreign countries and several limited United States programs). Germany’s Blue Angel

Instead, fragmented government-run programs and private market solutions are the norm, if not *de rigueur*.<sup>134</sup> A voluntary certification program's potential to increase profits can be the carrot to governmental penalty's stick. Businesses usually balk at more regulation; therefore, a market incentive may be more palatable to businesses. On the other hand, consumers are often skeptical about the legitimacy of programs where the business interests of the stakeholders may conflict with consumer interests.<sup>135</sup> A fee-based, industry-managed program may set standards at a less stringent level to encourage a higher volume of certification, and in turn, a higher volume of certification fee income. Technology has made information dissemination easy and wide-reaching; consumer and environmental watchdog groups can increasingly alert consumers to misleading claims through electronic means.<sup>136</sup> Ultimately though, leaving consumer protection in the hands of private parties using little more than the threat of bad publicity is no substitute for legally enforceable standards.<sup>137</sup>

Without the guidance of labels or marks, the consumer must try to compare goods with minimal information.<sup>138</sup> The opposite extreme, however, is no better: information overload can paralyze consumers,

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program is a leading example, and one of the oldest. *The Blue Angel—Eco-Label with Brand Character*, BLAUER ENGEL, [http://www.moravia-europe.eu/files/files/file/522\\_EN\\_The%20Blue%20Angel%20%E2%80%93%20Eco-Label%20with%20Brand%20Character.pdf](http://www.moravia-europe.eu/files/files/file/522_EN_The%20Blue%20Angel%20%E2%80%93%20Eco-Label%20with%20Brand%20Character.pdf) [<http://perma.cc/U6UE-KJ9S>] (last visited Apr. 1, 2015). But there are other countries with labels run, in whole or in part, by the government as well. *National Eco-Labels—Worldwide*, BLAUER ENGEL, <http://www.blauer-engel.de/en/blue-angel/who-is-behind-it/global-ecolabelling-network> [<http://perma.cc/6F3Z-G4MA>] (last visited Apr. 1, 2015) (listing national environmental labels and the entities implementing and running the associated programs).

134. U.S. ENVTL. PROT. AGENCY, *supra* note 133, at 6–7.

135. *Id.* at 56–57; see Nick Feinstein, *Learning from Past Mistakes: Future Regulation to Prevent Greenwashing*, 40 B.C. ENVTL. AFF. L. REV. 220, 250 (2013) (discussing limitations of private sector attempts to prevent greenwashing). For an even more cynical view, see Donald A. Taylor, *Certification Marks—Success or Failure?*, 42 J. MKTG. 39, 46 (1958) (concluding that “it is apparent” the private sector has “little desire to aid the consumer directly” through the use of certification marks, and that most consumer benefits are “secondary and indirect”). It is likely, however, the cultural attitude has shifted—at least somewhat—since Taylor made his observations.

136. There is an app for that. Melissa Hinch-Ownby, *iPhone Apps to Help Navigate the World of Greenwashing*, 1-800-RECYCLING.COM (Apr. 6, 2010), <http://1800recycling.com/2010/04/iphone-apps-help-navigate-greenwashing> [<http://perma.cc/H3ZJ-RWKY>] (reviewing two iPhone applications that help consumers verify environmental claims and find environmentally responsible businesses).

137. Cf. Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 308 (2004) (showing that while social license drives some companies towards over-compliance, other companies comply with the bare minimum legal requirements regardless of public perception).

138. See generally *supra*, Part I.B, II (discussing the functions of trademarks and certification marks).

rendering the same results as an absence of information.<sup>139</sup> Registered certification marks help by ensuring that a third party has approved the good, but a certification mark needs a strong reputation to be effective, especially in a market where self-certification is allowed—with sufficient disclaimers—and marketers can use in-house ecolabels on goods. Although it is unlawful for a marketer to use a self-awarded mark in such a way that causes a reasonable consumer<sup>140</sup> to believe it is a third party endorsement, many trademarks skirt the line.<sup>141</sup>

The government is a natural choice for controlling against unscrupulous marketing, with regulation being one possible tool. Direct ownership and control of a certification mark is another way for government to use the commercial market to effect policy goals. The government can further impose green requirements on its own activities, and incentivize certain types of private development using credits or fee waivers.<sup>142</sup> Many local governments, in establishing green building codes, have adopted preexisting standards. Whether by mandate or convenience, government use of a certification mark can accelerate adoption of that mark in the market.<sup>143</sup>

There are downsides to a government-endorsed certification mark. While consumers will reasonably expect that private, third party certifications require a fee, they may not realize that fees may still be involved even when a certification program is government-regulated and run. The government is not immune to other pitfalls. Critics attack the bureaucratic nature of federal regulation of environmental marketing and the lack of inter-agency coordination—as illustrated by the FTC's Green Guides.<sup>144</sup> Political pressure and regulatory capture are also dangers that threaten federal intervention.<sup>145</sup> There are also long-term considerations when letting private programs fill in for federal standards. If the federal government establishes its own certification programs and standards years

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139. Wynne, *supra* note 6, at 111. The most common result, however, is neither of these extremes. Instead, consumers simply ignore information. *Id.*

140. 16 C.F.R. § 260.7(a).

141. Complaint, *supra* note 16.

142. Johnathan Furr, *Local Government Use of Green Building Rating Systems: Legal and Practical Considerations for Incentive Programs and Green Building Requirements*, in GREEN BUILDING AND SUSTAINABLE DEVELOPMENT: THE PRACTICAL LEGAL GUIDE 221, 221–23 (Johnathan E. Furr et al. eds., 2009).

143. See *infra* Part V.B (discussing the development and rise of LEED).

144. See *supra*, Part II (discussing the development of the FTC's anemic Green Guides).

145. Ann Jones & Nicola Landsell, *Environmental Labeling: Theory and Practice* 53 (Productivity Comm'n, Staff Working Paper, Dec. 2000), available at <http://ageconsearch.umn.edu/bitstream/125682/2/Jones.Pdf> [<http://perma.cc/6TKC-4W3D>] (summarizing why mandatory government programs may be unsuccessful).

later, it may threaten investment or proprietary interests of private programs established in the market.<sup>146</sup>

#### IV. THE BUILDING INDUSTRY: A CONCRETE EXAMPLE

The bulk of the scholarship on greenwashing targets business-to-consumer transactions,<sup>147</sup> but greenwashing is also common in business-to-business transactions.<sup>148</sup> Even sophisticated businesses are vulnerable to misrepresentations on environmental claims,<sup>149</sup> and governance solutions—including private, market-based ones—need to focus on the wider picture.<sup>150</sup> The buildings sector is one such market that involves many business-to-business transactions where environmental claims are common.<sup>151</sup> Because buildings have many characteristics not only unobservable but likely incomprehensible to the consumer—both business and individual—due to their technical nature, using certification programs allows developers to signal that a building has desirable environmental or sustainable qualities.<sup>152</sup>

Although the transportation sector is often at the forefront of energy consumption concerns, the residential and commercial buildings sectors, when combined, consume more energy<sup>153</sup> and release more greenhouse gases<sup>154</sup> than any other sector.<sup>155</sup> The United States is the second-largest

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146. Kyle W. Lathrop & Terence J. Centner, *Eco-Labeling and ISO 14000: An Analysis of US Regulatory Systems and Issues Concerning Adoption of Type II Standards*, 22(2) ENVTL. MGMT. 163, 170 (1998).

147. Eric L. Lane, *Greenwashing 2.0*, 38 COLUM. J. ENVTL. L. 279, 281 (2013).

148. See, e.g., Jorge L. Contreras & Charles R. MacManis, *Intellectual Property Landscape of Material Sustainability Standards*, 14 COLUM. SCI. & TECH. L. REV. 485, 489–91, 500–02 (2013) (discussing the use of ecolabels, trademarks, and certification marks in the construction business); see generally Lane, *supra* note 139, at 303–04 (the “2.0” in the title referring to the next big wave of greenwashing: transactions outside of the regular consumer market, such as business-to-business transactions).

149. Lane, *supra* note 139, at 303–04.

150. *Id.* at 281–82, 303–04 (discussing the disproportionate focus on the business-to-consumer paradigm of greenwashing and the need to pay attention to the rise of business-to-business greenwashing).

151. See Robyn L. Miller et al., *International Legalities of Sustainable Construction*, 8 NO. 1 J. AM. COLL. CONSTR. LAW. 3, Part III.A.2 (Feb. 2014) (summarizing litigation over misrepresentation in construction).

152. See, e.g., D.M. Phelps, *Certification Marks under the Lanham Act*, 13 J. MKTG. 498, 502 (1949) (observing that “[c]ertification is much more important to the consumer in relation to non-observable product characteristics”).

153. U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY REVIEW 2011, 3 (Sept. 27, 2012), available at <http://www.eia.gov/totalenergy/data/annual/pdf/aer.pdf> [<http://perma.cc/4CZP-XX8V>].

154. *National Greenhouse Gas Emissions Data*, U.S. ENVTL. PROT. AGENCY (Feb. 2015), <http://www.epa.gov/climatechange/ghgemissions/usinventoryreport.html> [<http://perma.cc/E7EX-FN2Q>].

consumer of energy in the world,<sup>156</sup> and the United States buildings sector alone consumed 7% of global energy in 2010.<sup>157</sup> Changes to how buildings are built and operated can have dramatic effects on a per-building basis, and with the size of the buildings sector, even small changes across the sector can have cumulatively large effects.<sup>158</sup>

The buildings sector can benefit from certification programs, and small changes on a widespread scale can have cumulatively significant impacts. Development without a deliberate focus on environmentalism or sustainability will “almost always result in a new building subscribing to some of the primary concepts of green building”<sup>159</sup> because the practical drive towards efficiency and economy naturally overlap a great deal with sustainability. As state and local-level building codes become greener, compliance often means building sustainably.<sup>160</sup>

Government involvement in encouraging or requiring green construction—at all levels of government—has significantly changed the market.<sup>161</sup> Though federal action has been largely limited to requirements imposed only on federal agencies, other levels of government are imposing similar requirements upon government-sponsored development and new private development.<sup>162</sup> Rather than drafting green building codes from scratch—which would require a hefty level of resources and expertise—many governments incorporate existing certification programs.<sup>163</sup>

Two of the most commonly used certification programs are Energy Star and Leadership in Energy and Environmental Design (“LEED”), which are also two of the most publically known certification programs. That level of recognition is likely due to government involvement and promotion using mechanisms unavailable to private parties, such as tax credits or mandates. As the largest consumer of energy in the United States,<sup>164</sup> changes to the

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155. U.S. DEP’T OF ENERGY, 2011 BUILDINGS ENERGY DATA BOOK Ch. 1 (Mar. 2012), available at <http://catalog.data.gov/dataset/buildings-energy-data-book-63a86> [<http://perma.cc/TL8V-LPPP>].

156. *Id.* China earned the dubious honor of being “first” in 2010.

157. *Id.*

158. U.S. ENVTL. PROT. AGENCY, PROTECTING THE ENVIRONMENT—TOGETHER: ENERGY STAR AND OTHER VOLUNTARY PROGRAMS 2–3 (2003).

159. Brandon Robinson & James Smith, *Overview of Green Building and Associated Legal Issues*, 26 NAT. RESOURCES & ENV’T 1, 1 (2012).

160. Miller et al., *supra* note 151, at Part III.A.1.

161. Michael T. Durham, *Counsel’s Role in Sustainable Solutions: Pay Now or Pay Later*, 31 STRATEGIC PLAN. ENERGY & ENV’T 19, 31 (2012).

162. Furr, *supra* note 142, at 221–22.

163. *Id.*

164. Press Release, Office of the Press Sec’y, President Obama Sets Greenhouse Gas Emissions Reduction Target for Federal Operations (Jan. 29, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-sets-greenhouse-gas-emissions-reduction-target-federal-operations> [<http://perma.cc/WG6J-5AU3>]. (“As the single largest energy consumer in the

federal government's operations can greatly reduce energy and resource consumption on a global scale. Self-imposed requirements allow governments to set a good example for both public and private future projects,<sup>165</sup> but their effects can extend into the private sector as well.<sup>166</sup>

Legally mandated use of private certification programs raises some constitutional concerns, however, when applied to private parties. Municipalities have successfully encouraged private certification programs in a voluntary manner (e.g., through tax incentives),<sup>167</sup> and the federal government has required that its own buildings meet LEED standards.<sup>168</sup> But when private buildings must meet standards set by a non-governmental organization, there may be due process issues as private processes are pressed into public service.<sup>169</sup>

#### A. Energy Star

In order to carry out its mandate for reducing air pollution,<sup>170</sup> EPA began the Energy Star program in 1992 as a “voluntary, public–private partnership designed to reduce energy use, greenhouse gas emissions, and related air pollution.”<sup>171</sup> The success of the Energy Star program—and brand—grew from the cooperation between the federal agencies, market players, and other policy makers.<sup>172</sup> The EPA has worked with regional groups carrying out state-level energy market restructuring and improvements. Together they have promoted energy efficiency—and the

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U.S. economy, the Federal Government spent more than \$24.5 billion on electricity and fuel in 2008 alone.”).

165. See, e.g., Johnathan Furr, *History and Status of Sustainable Development*, in GREEN BUILDING AND SUSTAINABLE DEVELOPMENT: THE PRACTICAL LEGAL GUIDE 3, 5–6 (Johnathan E. Furr et al. eds., 2009) (providing an overview of successes in greening federal facilities).

166. Timothy Simcoe & Michael W. Toffel, *Government Green Procurement Spillovers: Evidence from Municipal Building Policies in California*, HARVARD BUS. SCHOOL 1, 1–3 (2013), available at [http://www.hbs.edu/faculty/Publication%20Files/13-030\\_a79ab7b7-ad5e-4b80-9e9a-f700baaa9e68.pdf](http://www.hbs.edu/faculty/Publication%20Files/13-030_a79ab7b7-ad5e-4b80-9e9a-f700baaa9e68.pdf) [<http://perma.cc/VNB6-NFKQ>].

167. Lawrence L. Ostema, *Climate Change Considerations for Land Use and Real Estate Development*, in GREEN BUILDING AND SUSTAINABLE DEVELOPMENT: THE PRACTICAL LEGAL GUIDE 11, 12 (Johnathan E. Furr et al. eds., 2009).

168. *Infra* Part IV.B.

169. See Durham, *supra* note 161, at 34 (raising due process concerns when municipalities mandate private development standards where the final determination as to whether a development meets the required standard is determined by “a non-governmental actor, without the right of appeal through a court or administrative judge”); see also *infra* Part V.B (discussing some governmental sustainability requirements imposed on private development).

170. 42 U.S.C. § 7403(g); U.S. ENVTL. PROT. AGENCY, MAINTAINING THE VALUE OF ENERGY STAR 6 (2007) (summarizing the history of the Energy Star program).

171. U.S. ENVTL. PROT. AGENCY, *supra* note 170.

172. Rich Brown et al., *Status and Future Directions of the Energy Star Program* 5 (2000), available at <http://escholarship.org/uc/item/7b9216hn> [<http://perma.cc/F2C4-XQK8>].

Energy Star program itself—to transform those markets.<sup>173</sup> Unlike most government marks, the Energy Star certification mark is registered with the USPTO.<sup>174</sup> Because the mark is used on goods frequently imported, EPA must work with the United States Customs Service to check for infringing goods at the border.<sup>175</sup> With a federal registration for the Energy Star mark, the EPA can have the Customs Service enforce protections granted by trademark law.<sup>176</sup>

A large majority of United States consumers know of the Energy Star label and make purchases based upon the label.<sup>177</sup> The program began as a way to promote energy-efficient computers, but has since expanded to include many types of household appliances, electronics, and even the buildings sector.<sup>178</sup> In 2010, the United States Government Accountability Office investigated the Energy Star program's verification process. Some of the highlights—or lowlights—include the certification of a gas-powered alarm clock and partnership status for several bogus companies.<sup>179</sup> In response, the EPA and DOE implemented third party verification processes.<sup>180</sup>

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173. *Id.* at 6.

174. ENERGY STAR, Registration Nos. 3569551, 3575484.

175. U.S. ENVTL. PROT. AGENCY, *supra* note 170, at 7.

176. 19 U.S.C. § 1526 (2012). *See also* CUSTOMS & BORDER PROT., CUSTOMS DIRECTIVE NO. 2310-008A, TRADEMARK AND TRADENAME PROTECTION (Apr. 7, 2000), *available at* <http://www.cbp.gov/sites/default/files/documents/2310-008a.pdf> [<http://perma.cc/WG2L-7ZGR>] (detailing agency statutory and regulatory authority for enforcing trademark law); CUSTOMS & BORDER PROT., CUSTOMS DIRECTIVE NO. 2310-010A, DETENTION AND SEIZURE AUTHORITY FOR COPYRIGHT AND TRADEMARK VIOLATIONS (Dec. 11, 2000), *available at* <http://www.cbp.gov/sites/default/files/documents/2310-010a.pdf> [<http://perma.cc/69HY-32UK>] (a table of various types of violation and the agency's corresponding regulatory and statutory authority to act).

177. U.S. ENVTL. PROT. AGENCY, NATIONAL AWARENESS OF ENERGY STAR FOR 2012 ES-1-ES-3 (2013), *available at* <http://www.energystar.gov/ia/partners/publications/pubdocs/National%20Awareness%20of%20ENERGY%20STAR%202012%20508%20compliant.pdf> [<http://perma.cc/8WYH-VAKS>] (summarizing the 2012 survey, finding 87% of households recognized the label, with 70% having a “high understanding” of what it stands for, and 73% of households that recognized the label made at least one purchase where the label influenced their decision).

178. *About Energy Star*, U.S. ENVTL. PROT. AGENCY, <http://www.energystar.gov/about> [<http://perma.cc/JGE3-V7T6>] (last visited Mar. 25, 2015).

179. U.S. GOV'T ACCOUNTABILITY OFFICE, ENERGY STAR PROGRAM: COVERT TESTING SHOWS THE ENERGY STAR PROGRAM CERTIFICATION PROCESS IS VULNERABLE TO FRAUD AND ABUSE, Highlights (Mar. 2010), *available at* <http://gao.gov/new.items/d10470.pdf> [<http://perma.cc/V44W-P44C>].

180. Press Release, Env'tl. Prot. Agency, U.S. EPA, DOE Announce Changes to Bolster Energy Star Program (Apr. 14, 2010), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/f0d7b5b28db5b04985257359003f533b/a1681df7e5a27357852577050058fd62!OpenDocument> [<http://perma.cc/CL7L-MA5A>] (summarizing the new verification processes and safeguards).

### B. Leadership in Energy and Environmental Design

LEED is a prominent example of public–private use of a certification program. It is a privately-run certification system developed by the United States Green Building Council (“USGBC”), a non-profit organization composed of a broad selection of stakeholders, including the construction industry, environmental groups, and lawmakers.<sup>181</sup> Unlike Energy Star’s focus on energy efficiency, LEED focuses on several categories for certification, including sustainability, water efficiency, and indoor environmental quality.<sup>182</sup> Its prominence can be partially attributed to its widespread use by governments.<sup>183</sup>

In 2007, Boston, Massachusetts, was the first major city to require private development to be LEED-certified.<sup>184</sup> Several other cities have followed suit, with Washington, D.C.’s Green Building Act being recognized as one of the most comprehensive<sup>185</sup> and demanding<sup>186</sup> green building codes to date. As governments impose more green building requirements and as green building projects become more common, disputes over such projects, dubbed “LEEDigation,” are expected to rise.<sup>187</sup> LEEDigation may, but does not have to, center on LEED certification: the

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181. *About USGBC*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/about> [<http://perma.cc/TH5H-DL2B>] (last visited Mar. 22, 2015).

182. *LEED Rating Systems*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/leed#rating> [<http://perma.cc/BT92-WXC5>] (last visited Mar. 22, 2015).

183. Andy Medici, *New Law Bars LEED Energy Certifications for DoD Building Projects*, FED. TIMES (Jan. 3, 2012), <http://www.federaltimes.com/article/20120103/FACILITIES02/201030302> [<http://perma.cc/2N73-D8N8>] (noting that “[g]overnment buildings make up 27 percent of all LEED projects”). From 2003 to 2013, the minimum requirements were pegged to LEED certifications, but in late 2013, the federal government now allows Green Globe certification as an alternative to LEED. Press Release, U.S. Gen. Serv. Admins., *GSA Recommends LEED and Green Globes for Federal Buildings* (Oct. 31, 2013), available at <http://news.agc.org/2013/10/31/gsa-recommends-leed-and-green-globes-for-federal-buildings> [<http://perma.cc/6TMF-XFC4>]. It is interesting to note that the Green Globes marks are only registered as service marks, not certification marks.

184. Durham, *supra* note 161, at 32.

185. *Id.*

186. Danielle Rodabaugh, *What Can We Learn from D.C.’s Green Building Law?*, DCJ GREEN BUILDING BLOG (Feb. 4, 2013), <http://www.djc.com/blogs/BuildingGreen/?p=2868> [<http://perma.cc/FTQ9-W46M>]; Durham, *supra* note 161, at 32–33, (noting potential issues with the D.C. Green Building Act); see generally *id.* at 34–37 (reviewing the legality of green building codes in general).

187. Durham, *supra* note 161, at 63–66, 80 n.99 (crediting Chris Cheatham with coining the term, but also noting that “performance slippage” is the professional term for a failure to meet contracted-for requirements, a common ground for LEEDigation). It appears that “LEEDigation” is not limited to LEED projects, and applies more generally to all green building-related litigation. A good pun is hard to pass up. Chris Cheatham, *LEEDigation*, GREEN BLDG. LAW UPDATE (Apr. 15, 2009), <http://www.greenbuildinglawupdate.com/2009/04/articles/legal-developments/leedigation> [<http://perma.cc/Q6ZE-CZ88>] (defining “LEEDigation” as simply “green building litigation”).

development of a building involves so many components that there are many other opportunities for green litigation.<sup>188</sup>

## V. PROPOSED REFORMS AND ACTIONS

### A. *National Uniformity*

Consumers and producers have been calling for uniform federal regulations to bring certainty to environmental marketing.<sup>189</sup> The USPTO administers trademarks, but the FTC is primarily responsible for consumer protection, and the nebulous field of ecolabels further implicates the EPA, USDA, and FDA. Though tasked with leading the regulatory effort, the FTC is woefully limited in technical expertise regarding environmental issues, and consultation with the EPA has proven insufficient to overcome this weakness when crafting regulations on environmental marketing.<sup>190</sup> A higher level of inter-agency cooperation is necessary to carry out these consumer protection duties.

A separate but related goal would be for the federal government to create a nationwide labeling standard.<sup>191</sup> Even a narrowly focused environmental labeling program, however, has its difficulties: there are no obvious criteria to include on an environmental label, nor are there well-established quantitative measures for many of the potential criteria.<sup>192</sup> The same technical hurdles that have stymied efforts to create uniform standards will likely stymie a uniform regulatory program.<sup>193</sup>

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188. See generally Miller et al., *supra* note 151, at Part III.A (sub-headings under Risks Inherent in Green Construction/Litigation include: Standard of care; Materials/warranty/negligent misrepresentation litigation; Sales representation litigation/"Greenwashing"; Failure to obtain LEED certification/challenges to certification; Compliance with Laws; Insurance Considerations; and Energy Savings/Project Costs) (original capitalization preserved).

189. *Supra* Part II.

190. Lauren C. Avallone, *Green Marketing: The Urgent Need for Federal Regulation*, 14 PENN ST. ENVTL. L. REV. 685, 699 (2006) (discussing why the EPA should take over from the FTC in regulating environmental marketing claims).

191. *Supra* note 133.

192. *Supra* Part II, text accompanying notes 130–32.

193. See Lathrop & Centner, *supra* note 146, at 164 (noting that the "difficulties in applying the research and science of environmental management to label information" has delayed agency action).

## B. Trademark Law

### 1. Greater Scrutiny of Standards During Registration

Despite its consumer protection underpinnings, trademark law is ill-suited to defeat fraudsters. Trademark law developed to prevent use of trademarks in an inappropriate manner, not to provide causes of action to misled consumers or indirect competitors in unfair competition claims. The USPTO acts as a gatekeeper of sorts, barring confusingly similar or misleading marks, but is not responsible for policing how registered trademarks are used. Instead, the FTC is the agency tasked with actively seeking consumer protection. One reform option that can better protect consumers from misleading certification marks while retaining the USPTO's duties as gatekeeper is raising the requirements for registering certification marks. By raising the bar, the USPTO's gatekeeping function can better filter out some of the obviously deficient programs. Such a change, however, would make it harder to register for a certification mark, increasing the likelihood of people bypassing the process. Applicants may seek to deliberately register marks as ordinary trademarks and then use them as certification marks. This practice results in an unfair advantage for those who improperly file under less stringent criteria.

### 2. Creation of a Federally-Protected Certification Symbol

The laws need to better distinguish between certification marks and non-certification marks, and the benefits for registering a certification mark should be increased to better match the burdens. As the Lanham Act stands today, registrants seeking certification marks not only have to go through more registration requirements, but registered certification marks are also subject to cancellation on all grounds applicable to regular trademarks, plus more.<sup>194</sup> So while there is no obvious benefit to registering for a certification mark, there are clear benefits to registering for a trademark. Carefully tailored licensing agreements allow mark owners to use trademarks in a manner largely indistinguishable—to a consumer—from certification marks, while preserving (1) the right to apply the mark to one's own goods, and (2) the broad discretion to reject licensing the mark on otherwise qualifying goods.<sup>195</sup> While such a scheme could be administered

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194. See *supra* text accompanying notes 60–65.

195. See Arnone, *supra* note 90, at 252 (explaining how Nintendo's choice to register its seal of quality as a trademark allowed it to "maintain[] the advantages of control—the option to choose whom to license and not to license to use the mark.") (citation omitted).

impartially, the broad discretion given to a trademark owner<sup>196</sup> lends itself to less-than-impartial administration. Closing that loophole is an important step.

With a lopsided array of trade-offs for registering trademarks versus certification marks, and the absence of any discernible difference to consumers, it is unsurprising that some trademarks are used as certification marks.<sup>197</sup> The neutral third party aspect of certification marks is the major distinguishing factor, and emphasizing that can better offset the more demanding requirements of registering and maintaining a certification mark. Just as the ® symbol is reserved for federally registered trademarks,<sup>198</sup> a certification mark-specific equivalent could prove useful. By creating a certification mark for certification marks, the USPTO and registrants can signal to consumers that the mark is truly from a third party. By distinguishing certification marks in this manner, consumers can better trust that certified goods have been verified by a neutral, third party. Such a symbol has no power if consumers are not aware of what it symbolizes. Given that the public is not well-acquainted with the nuances between the ® symbol and using <sup>TM</sup>, it would be reasonable to expect that educating the public would be necessary before a <sup>CERT</sup> symbol would have much meaning to consumers. If the certification mark registration screening process could be reformed to include greater scrutiny of the applicant's certifying legitimacy, then the USPTO's certified certification mark would further demonstrate reliability to consumers.

### 3. Broader Standing for Citizens' and Competitors' Suits

The FTC is tasked with consumer protection. It is statutorily authorized to seek cancellation of improperly used certification marks, but its handling of greenwashing has been limited. Even after an increase in enforcement actions, the FTC continues to handle complaints on a case-by-case basis. Rather than give more work to an already-overburdened agency, the market can police itself if competitors and consumers have mechanisms through which to hold marketers accountable. The statutory language under section 43(a) of the Lanham Act is broad enough to encompass

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196. Holtzman, *supra* note 62, at 183.

197. *About Green Globes*, GREEN GLOBES (Mar. 25, 2015), <http://www.greenglobes.com/about.asp> [<http://perma.cc/C898-79H5>]; *Labels & Claims*, SUSTAINABLE FORESTRY INITIATIVE (Mar. 25, 2015), <http://www.sfiprogram.org/sfi-standard/labels-claims> [<http://perma.cc/X858-6FJ4>]. Green Globes (a leading competitor to LEED) and the Sustainable Forestry Initiative (a competitor to the Forest Stewardship Council) do not have any certification marks registered with the USPTO, but both offer certification services.

198. 15 U.S.C. § 1111.

citizen/consumer suits and indirect competitor suits.<sup>199</sup> Extending standing to allow citizen-suits would give consumer watchdog organizations and other groups a way to act upon consumer concerns. Allowing an array of plaintiffs would also better reflect the nature of information channels in the digital age. Misrepresentations affect direct competitors, indirect competitors, and even non-competitors.<sup>200</sup> The more parties that can keep an eye on each other to prevent fraudulent claims, the less the government expends to regulate these practices directly, and the less the public suffers from fraud. These changes can benefit more than just the green-minded segment of the market.

#### CONCLUSION

Voluntary certification marks and programs in the private market can change consumption patterns for the better. Even the use of privately-run certification programs can effect large-scale change through partnerships with local, state, and federal governments. A large-scale patron can extend the reach of a program nationwide and provide a strong boost to legitimacy. The informational accuracy, however, needs to be more robust: mischaracterization of the environmental benefits of a marketed product undermines the proper functioning of the market and can harm both consumers and honest competitors. Unfortunately, the current laws and legal mechanisms are especially inadequate to police the increasing use of certification and endorsement claims in environmental marketing. Although federal agencies are attempting to resolve these issues, their efforts have been insufficient. The legal nuances of certification marks are less developed than in regular trademark law, but as the market for green goods continues to grow, consumer reliance on certification marks is likely to continue. Certification mark law must be brought into sharper legal focus, and loopholes that encourage registration of trademarks over certification marks must be closed. Besides closing the loopholes, a federally-backed certification symbol can better accentuate the strength a certification mark has over a regular trademark: neutrality.

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199. *Id.* § 1125(a); *see supra* notes 46–58 and accompanying text (outlining the disparity between the broad language of section 43(a) and court-imposed standing).

200. Palladino, *supra* note 47, at 1642.