

Ecolabels: ownership, use, and the public interest

Jeffrey Belson*

Ecolabels are signs¹ used with goods or services. Their essential function is to indicate that the products with which they are used satisfy criteria for environmental preferability or reduced environmental harm. Ownership of ecolabels and control of their use may be vested in government or non-government bodies. Examples of government or official labels are the EU Eco-label ('EU Flower')² and the US Department of Commerce's 'Dolphin Safe' logo.³ Examples of non-government labels are the Forest Stewardship Council's 'tick-tree'⁴ and The Home Depot's 'Eco Options'.⁵

These examples illustrate how ecolabels are comprised of elements, such as logos, words, letters, or numerals. As with signs in general, an environmental logo often bears a natural relation to its meaning. Addition of other elements to the label can be a means of providing direct information about a particular product's environmental attributes, the identity of the label owner, standards adopted for evaluation, and so on.

One or more IP rights, notably trade mark rights and copyright, may attach to an ecolabel, affording protection against infringement under the relevant trade mark, copyright, anti-counterfeiting, and unfair competition laws. Manufacturers and vendors wishing to ecolabel products can either use their own 'private' label, or the label of another party under licence or similar authorization. Currently, there is a remarkable expansion in the use of both private and licensed ecolabels with products of many different types.

This article explores a set of interesting legal and commercial issues raised by ownership and voluntary⁶ use of ecolabels, set against the public interest. Topics that will be addressed are: legal definitions and typology; ownership and governance; IP; environmental claims; and potential influence on international trade. These topics tend to be controversial because they are bound up with perceptions of environmental protection and sustainability. Such perceptions are notoriously difficult to pin down, varying with national and

The author

- Dr Jeffrey Belson is Regulatory Manager at Hewlett-Packard Company, Indigo Digital Press Division.

This article

- This article explores a number of legal and commercial issues relating to ecolabels, which are signs used with products to indicate their environmental preferability.
- The contours of the ecolabel right are uncertain, due partly to an apparent duality in essential function where an ecolabel is also used as a trade mark.
- The remarkable growth in ownership and use of ecolabels is fuelling renewed debate about their status at law, impact on trade, and actual contribution to environmental protection.

regional economic, social and political conditions. The term 'sustainability' is used here in the sense adopted by the 1987 Brundtland Commission (formerly the World Commission on Environment and Development), namely ensuring that the needs of the present are met without compromising the ability of future generations to meet their own needs.⁷

While recognizing that ecolabelling helps promote environmentally conscious production and purchasing, the present article concludes that ecolabelling has yet to attain the level of public backing and trust necessary for it to become a major economic modality of environmental protection.

Background

Regulations, standards, official statements, and ecolabelling industry communications promote ecolabels

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1 The word *sign* as used in this article does not necessarily mean a sign as used in the context of EU trade mark law.

2 <http://ec.europa.eu/environment/ecolabel/>.

3 <http://en.wikipedia.org/wiki/File:Dolphin-safe-logo.jpg>.

4 See *Requirements for the use of FSC Trademarks, FSC Standard FSC-STD-50-001 (V1-1) EN* at <http://www.americangreen.net>.

5 <http://www6.homedepot.com/ecoptions/index.html?>.

6 In the present article, the term 'ecolabel' is intended to mean an ecolabel that is used voluntarily. Mandatory ecolabelling is outside the scope of this article.

7 <http://www.un-documents.net/ocf-02.htm#I>.

as an important contribution to environmental protection. Thus ecolabels are described as having ‘potential to reduce certain negative environmental impacts of products’,⁸ ‘promote products with characteristics contributing significantly to improvements in relation to key environmental aspects’,⁹ indicate ‘overall environmental preferability of a product’,¹⁰ ‘differentiate your product or service as environmentally sound’,¹¹ and provide ‘assurance that the products and services ... meet rigorous standards of environmental leadership’.¹² However, the political and social values standing behind ecolabelling schemes, their choice of assessment methods and the evaluation process, are seldom discussed publicly.

Public confidence in ecolabels is premised on their certification or validation of goods or services meeting environmental standards. The standards are designed to achieve reduced environmental harm, and may apply to some or all of the relevant metrics and stages in the life cycle of the product.¹³ Ecolabelling schemes differ in their perceptions of relevant metrics and the weight to be given to various stages in the product life cycle. Their analyses are founded on scientific principles but are coupled to notions of social accounting, which, at least impliedly, assess the social, environmental, and economic performance and impacts of a producer through its products. It is therefore important that the way environmental attributes are assessed for products in a given category be open to a stakeholder consultative process. This is normally the case, at least in government schemes and the leading non-governmental schemes.

Depending on the governance model for any particular label, the body responsible for controlling use of the label can draft, adopt, or implement the standards.¹⁴ The standards are normally referred to as *criteria* for award of the ecolabel. Frequently, the criteria are used to award points, and a minimum number of points must be scored before a product can be awarded the ecolabel. Some major international testing and certification companies with long histories

of product certification based on consensus standards are now extending their use of the term *standards* into ecolabel ownership and operation.

One example of such a company is UL Environment, a subsidiary of Underwriters Laboratories, an organization with a worldwide presence that recently acquired Terrachoice, the manager of Canada’s EcoLogo programme.¹⁵ Another example is Intertek, which offers validation of environmental claims under the Green Leaf label.¹⁶ *Standards* usage, unlike *criteria*, is in the lexicon of international trade law in this context, and is appropriate to enhanced alignment of the ecolabelling industry with the public interest in transparency and more robust legal underpinning. Thus, Annex 1 of the WTO Agreement on Technical Barriers to Trade defines a standard as:

A document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

An important formal basis for ecolabelling derives from the United Nations Conference on Environment and Development (‘UNCED’ or ‘the Earth Summit’), held in Rio de Janeiro in 1992. Conference Agenda 21, still widely regarded as the touchstone for sustainable consumption action plans, explicitly commends the use of ecolabels, as follows:

4.21. Governments, in cooperation with industry and other relevant groups, should encourage expansion of environmental labelling and other environmentally related product information programmes designed to assist consumers to make informed choices.¹⁷

Thus, in addition to promoting environmental standards, a primary purpose of ecolabelling is to inform consumers about the environmental attributes of products and their compatibility with environmental

8 Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000.

On a revised Community eco-label award scheme. Whereas clause (6).

9 Art 3 of Regulation (EC) No 1980/2000, see n 9, above.

10 ISO standard 14024.

11 ‘Green Certification and Ecolabeling’ US Small Business Administration, <http://www.sba.gov/content/green-certification-and-ecolabeling>.

12 Referring to Canada’s EcoLogo program, http://www.rona.unep.org/documents/scp/success_stories/Success4_Canada's_Eco-Labeling_Program-4June2010.pdf.

13 See n 12, above.

14 For an informative discussion of the principles of ecolabel governance, see M van Amstel-van Saane, P Driessen and P Glasbergen, ‘Eco-labeling

and Information Asymmetry: A Comparison of Five Eco-labels in the Netherlands’ (2008) 16 (3) *Journal of Cleaner Production* 253–400.

15 <http://www.ulenvironment.com/ulenvironment/eng/pages/>, Underwriters Laboratories, Inc. (UL) was founded in 1894 to provide testing services and ensure public safety.

16 <http://www.intertek.com/green/certification/>. The history of Intertek spans 124 years.

17 More than 170 governments participated in the Earth Summit. Proposals for action were issued as Agenda 21. See chapter 4 of UNCED Agenda 21, *Changing Consumption Patterns* at <http://www.un.org/esa/sustdev/documents/agenda21/english/Agenda21.pdf>.

protection goals. The tacit assumption is that consumers will act on information received and alter their purchasing habits to favour sustainable products.¹⁸

Definitions and typology

Ecolabelling is a relatively new means of voluntarily communicating environmental attributes of products to purchasers. Dating from the 1970s, it is not yet the subject of settled law. This may explain why internet searches yield no results for the phrase 'legal definition of an ecolabel', regardless of whether the spelling used is 'ecolabel', 'eco-label', or 'eco label'.¹⁹ The same is true for the term 'ecomark'. Replacement of 'legal' by 'statutory' does not change the result. This lack of a definition is in stark contrast to the number of results for 'legal definition of a trademark', ie more than 50,000 counting 'trade mark' and 'trade-mark' as variants of the spelling. However, with the increasing litigation concerning ecolabel schemes, principally in the USA, a judicial definition of ecolabel or ecomark can be expected eventually to emerge.

In the absence of a consensual legal definition of an ecolabel, this article adopts a heuristic definition. An ecolabel is *a voluntary sign, used on or with products, to represent that the product causes significantly reduced harm to the environment*. The label can be of the type awarded by a third party certifier,²⁰ or be a third-party-validated claim, or a producer's self-certification. This heuristic definition excludes labels that must be applied under regulatory requirements for lawful market access. Thus, for example, labels that must be affixed to indicate energy efficiency of an electrical or electronic product, or depicting forbidden modes of disposal (eg the crossed out wheeled bin symbol prescribed under the EU WEEE Directive)²¹ are not in the scope of this article.

While 'ecolabel' may not yet have a consensual legal definition, 'environmental certification' was recently defined in an FTC action as 'any certification that

expresses or implies that a product, package, service, practice or program is environmentally friendly, environmentally superior, preferable to other products, packages, services, practices, or programs; or expresses or implies other environmental attributes or benefits'.²² This definition clearly is intended to have wide reach, encompassing almost any representation that an offering is certified in respect of attributes that could be interpreted as environment related. Whether or not such a certification is reasonably inferred by a purchaser in a given instance is a core issue in current US ecolabel litigation, as will emerge later, in the discussion on environmental claims.

How does an ecolabel authority evaluate a candidate product for award of an ecolabel? Evaluation of the environmental impact of many categories of goods, processes, and services is based on the principles of Life Cycle Analysis, or 'LCA'. The LCA approach is a 'cradle-to-grave' science-based methodology that evaluates the resource consumption and environmental burdens associated with a product, process, or activity, and their impacts on the environment.²³ Widespread adoption of LCA in the private sector grew out of pioneering US and EU legislation that imposed environmental obligations on certain groups of public and private projects likely to have significant effects on the environment.^{24,25}

Depending upon the ecolabel type, all or only some of the stages of a product's life, such as raw material extraction, material transportation, manufacturing processes, and treatment as waste at end of life, may be taken into account in the LCA.²⁶ The International Standards Organisation (ISO) has developed methodology standards specifically governing labelling schemes that involve an LCA approach. These types are summarized as follows:

ISO Type I²⁷ assess multiple environmental impacts but do not constitute a full LCA. This is a pragmatic approach based on the realization that it not always practical to

18 See, generally, 'Exploring Sustainable Consumption', eds. MJ Cohen and J Murphy (Pergamon Oxford 2001). See also A K Pradeep, *The Buying Brain* (John Wiley & Sons, Inc. 2010) 174, 175.

19 One result was found for 'legal definition of ecolabel', but it does not appear to provide an explicit definition. See <http://www.texeastile.eu/greentools/philosophy-strategy-practice-eco-labelling-textiles-and-clothing-uctm-sofia>.

20 The US Federal Trade Commission's (FTC's) proposed changes to its Green Guides advise that marketers should disclose 'material connections to the certifier' and that '[b]ecause an unqualified certification/seal (one that does not state the basis for certification) likely conveys a general environmental benefit claim, marketers should use clear and prominent language limiting the claim to particular attribute(s) for which they have substantiation'.

21 Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE) as amended, Annex IV.

22 See Decision and Order in FTC case, Docket No C-4315, Definition 5, 23 February 2011, FTC File No 102 3064.

23 A Azapagic and R Clift, *Computers Chem. Engng*, Vol 19, Suppl., pp. 5229–34 (1995).

24 The US National Environmental Policy Act of 1969.

25 Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment 85/337/EEC. Annex 1 of the Directive sets forth the categories of project subject to an environmental impact assessment.

26 EPA Document EPA/600/R-06/060, *Life Cycle Assessment: Principles and Practice*, <http://www.epa.gov/NRMRL/lcaccess/pdfs/600r06060.pdf>.

27 ISO Standard 14024.

stipulate requirements regarding the environmental impact of a product at every stage of its life cycle. The focus is on stages at which the greatest environmental benefits are believed to be achievable. The intention is that only top performing products in a sector are awarded a Type I label. Examples include the EU Eco-label, Nordic Swan, and Blue Angel.²⁸

Type II²⁹ ecolabels may be based on reference to LCA only at the conceptual level. Claims are based on self-declarations by manufacturers or retailers, which may in some cases be validated by a third party authority. Typically, the label relates to a single attribute or set of attributes, such as biodegradability or compostability or ‘made from x% recycled material’.

Type III³⁰ is a third party ecolabel based on a full LCA.³¹ The LCA is used to develop a ‘neutral’ Environmental Product Declaration, which provides quantitative information about the criteria met by the product. Claims consist of quantified product information based on life cycle impacts and are subject to audit. Ecolabels that use the Type III approach are the EcoLeaf, developed by the Japan Environmental Management Association for Industry,³² and the German AUB-Zertifikat for building products³³

As indicated previously, LCA is a widely adopted paradigm for evaluating environmental performance; it aspires to a scientific, systematic, and multidisciplinary approach. However, LCA must be, and increasingly is, recognized as involving subjective choices and assumptions, which inevitably involve uncertainties. In addition, uncertainties are associated with the actual impact on the environment of particular physical and chemical phenomena associated with the manufacture of a product. A realistic appraisal of the limitations and inaccuracies of available data, and the simplifications necessary for tractable modelling of environmental impacts, leads to the conclusion that LCA is still in its formative stages.³⁴

Ownership and governance

What is meant by ownership of an ecolabel? Ownership implies a property right or rights. If there is property

in a thing then the owner can exclude others from certain activities impacting the thing, or permit others to engage in such activities, and in either case secure the assistance of the law in carrying out his decision.³⁵ In the present context, if an entity is empowered to grant or withhold, at its discretion, a licence to use a label, and enjoys the support of the law in implementing its decision, then the ecolabel can be said to constitute property. However, ecolabelling schemes have governance, management, and operations structures that are sometimes complicated, even arcane. While one can identify with relative ease the entity that *manages* the scheme, ie the person or entity that administers and operates the scheme on a day to day basis, the legal *owner* is not always readily apparent. A person unfamiliar with a particular scheme may not find it straightforward to identify the legal entity in which ownership is vested.

Where an ecolabel is a registered trade mark, it has the legal status of personal property.³⁶ Thus, the proprietor under the UK Trade Marks Act 1994, and similar trade mark statutes, has property rights and remedies provided by the Act.³⁷ In the case of a government-owned mark, a government department or agency can be the registrant and thus hold the right to grant or not grant a licence, or similar authorization, to use the mark. The government, or the relevant agency, is the owner.

An example of a government-owned ecolabel is the EU Eco-label (‘EU Flower’), which is managed in the UK by the Department for Environment, Food and Rural Affairs (DEFRA) with the assistance of UK Eco-label Delivery.³⁸ Another government-owned label is ENERGY STAR, for use on energy-efficient consumer products. ENERGY STAR originated in the USA as an Environmental Protection Agency (EPA) programme. The label is registered to EPA as a certification mark. The same label is also used in the European Union, Australia, Canada, Japan, and other countries, whose governments or their delegated agencies manage the licensing of the mark.

An additional example of government ownership is the Nordic Ecolabel (‘Nordic Swan’), which was established pursuant to a 1989 decision of the Nordic

28 European Commission, DG Environment, Study on different types of Environmental Labelling (ISO Type II and III Labels): *Proposal for an Environmental Labelling Strategy*, September 2000.

29 ISO standard 14021.

30 ISO standard 14025.

31 A methodology for full LCA is set forth in ISO standard 14040.

32 <http://www.jemai.or.jp/english/ecoleaf/outline.cfm>.

33 <http://bau-umwelt.de/hp1/Startseite.htm>.

34 See for example Lo and others, ‘Quantifying and Reducing Uncertainty in Life Cycle Assessment using the Bayesian Monte Carlo Method’ (2005) 340 *Science of the Total Environment* 23–33.

35 F Cohen, ‘Dialogue on Private Property’ (1954) IX (2) *Rutgers Law Review* 357 et seq.

36 UK Trade Marks Act 1994 (‘TMA 1994’), s 22.

37 TMA 1994, s 2.1.

38 A partnership between TUV NEL Ltd. and Oakdene Hollins. See <http://ecolabel.defra.gov.uk>.

Council of Ministers to introduce a voluntary ecolabelling scheme. An ecolabelling organization in each Nordic country manages the scheme for that country. Examples of privately owned ecolabels are Eco Options (Home Depot),³⁹ Green Leaf (Intertek),⁴⁰ and Green Tick (Green Tick Certification Ltd.), which is described by the company as 'the world's only government-approved, third party sustainability certification ecolabel that has the capability to certify any product from anywhere for supply to Wal-Mart'.⁴¹

Where an ecolabel scheme is operated as a Type I or Type III scheme, the producer uses the label under licence or equivalent form of authorization. A criteria document is prepared for each product group included in the scheme. The requirements imposed on the products are regulated in the documents and are based on environmentally relevant aspects of the life cycle of a product. In order to be authorized to use the label, the applicant must meet the requirements of the relevant criteria document.

The EU Eco-Label is a Type I official or government ecolabel, established by Regulation.⁴² Management of the scheme is overseen by the European Commission to ensure correct implementation, which includes transparency to facilitate access to, and participation in, the scheme by manufacturers and exporters of countries outside the Community. According to the official brochure, the scheme aims periodically to tighten criteria to keep pace with advances in technology.⁴³ The criteria are designed to assure 'comparatively modest impacts on air, water and soil quality; natural resource consumption; global warming; and bio-diversity. At the same time they contribute to waste reduction, energy savings, ozone layer protection, environmental safety and noise reduction'.⁴⁴

Responsibility for developing, publishing, and promoting the Eco-label criteria for product groups rests with the European Union Eco-labelling Board (EUEB), which is required to assure stakeholder participation in a Consultation Forum. The EUEB consists of the national Competent Bodies and the Consultation Forum, comprising stakeholders. Competent Bodies are designated by Member States and required to be independent and impartial organisations, responsible

for implementing the EU scheme at national level. The EUEB is at the centre of the EU Eco-label organization. Stakeholders can be members of the *ad hoc* working groups formed for revising criteria and are consulted by the Competent Bodies.⁴⁵

The Competent Bodies apparently carry a heavy burden in the EU Eco-label scheme, functioning as members of the EUEB, taking responsibility for drafting the Eco-label criteria, assessing applications and awarding the Eco-label to companies that apply. They are responsible for verification and compliance control functions in each Member State and their rules of procedure must ensure, at national level, the active involvement of all interested parties, to secure appropriate levels of participation and transparency.

Although the EU Eco-label scheme has been the subject of a great deal of planning, public investment, and initiative, the response of trade and industry to the label leaves quite a lot to be desired when the size of the internal market is considered—501 million people as of 1 January 2010. At the end of 2010, less than 1500 licences had been awarded, across 26 possible product categories (no licences had yet been awarded in four of the 26 product groups). Tourist Accommodation Services represented 37 per cent of the total number of licences, followed by Cleaning Products (13.5%), and Indoor and Outdoor Paints and Varnishes representing 8 per cent of licences.⁴⁶

Award policies

Ecolabelling award policies vary considerably. A scheme may provide for award of the label to all products in a category that meet a fixed standard, ie pass/fail system. In some cases, the award system is tiered. An example of a tiered ecolabel is CRADLE-TO-CRADLE.⁴⁷ This is a multi-attribute label that is described as assessing a product's safety to humans and the environment and design for future life cycles. There are four grades of product certification: Basic, Silver, Gold, and Platinum. In order to be certified at a certain level, a product must meet the minimum criteria for that level in five criteria categories: Material Health, Material

39 The label was launched in Home Depot's Canadian stores in 2007 and is used on thousands of products. <http://www.nytimes.com/2007/04/17/business/17depot.html>.

40 See n 12.

41 <http://www.greentick.com/Html/newsF.html>.

42 (EC) No 1980/2000.

43 <http://ec.europa.eu/environment/ecolabel/brochures/consumers/en/general.pdf>.

44 http://ec.europa.eu/environment/ecolabel/about_ecolabel/facts_and_figures_en.htm#distribution.

45 K Deschouwer and MT Jans, *Politics Beyond the State: Actors and Policies in Complex Institutional Settings* (Brussels University Press 2007) 188.

46 http://ec.europa.eu/environment/ecolabel/about_ecolabel/facts_and_figures_en.htm.

47 Certification mark Appln. USPTO Serial Number: 77329669.

Reutilization, Renewable Energy Use, Water Stewardship, and Social Responsibility.

Instead of adopting a tiered system, a scheme may have one grade, available to the best-performing products in a sector, based on a points system. Thus, in Europe, the EU Eco-label is intended to promote those products which accrue enough points in the impact assessment to evidence a high level of environmental performance. The regulation states that '[t]he Ecolabel criteria shall be based on the best products available on the Community market in terms of environmental performance throughout the life cycle. They shall correspond indicatively to the best 10–20% of the products'.⁴⁸

Ecolabelling's capacity to influence technology development through standard setting is apparent in the US ENERGY STAR programme, which is a joint Environmental Protection Agency and Department of Energy programme for energy-efficient products and practices. The programme states that '[g]enerally, a market share of ENERGY STAR qualified products in a particular category of 50 per cent or higher will prompt consideration for a specification revision. However, there are other factors that weigh into the decision, such as a change in the Federal minimum efficiency standards, technological changes with advances in energy efficiency which allow a revised ENERGY STAR specification to capture additional savings. . .'.⁴⁹

ENERGY STAR is a registered certification mark,⁵⁰ and therefore subject to anti-discriminatory safeguards under the US Trademarks Act 1946.⁵¹ A candidate product that meets the specification must not be refused certification. A certification mark is subject to cancellation, if, as expressed in section 14 of the Act, 'the registrant discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies'. The UK Intellectual Property Office takes the position that '[m]ost certification marks are available for use by any person whose goods or services demonstrate the relevant characteristic being certified . . . If, however, due to the nature of the goods/services being certified the mark is only available to certain types of person, for example only those with particular qualifications, then this should likewise be detailed'. [Emphasis in original].⁵²

Intellectual property rights

One or more IP rights, notably trade mark rights and copyright, may attach to a particular ecolabel, affording protection against infringement under the relevant trade mark, copyright, anti-counterfeiting, and unfair competition laws. In this section, the principal rights are outlined in the context of ecolabelling.

Ordinary trade marks

Since ecolabels have the essential function of communicating a product's environmental preferability, one might expect that many ecolabels that are also trade marks would be judged as either descriptive (possibly with acquired distinctiveness) or suggestive. As far as registration is concerned, for an ecolabel to qualify as a registrable trade mark, it must not be devoid of any distinctive character. The UK Trade Marks Act 1994, section 3 (1) (b) prohibits (*prima facie*) the registration of trade marks that are devoid of any distinctive character. Such marks do not distinguish between goods and services from one undertaking from those of other undertakings.⁵³ In the US registration system as well, a trade mark must be neither generic nor purely descriptive. Nevertheless, if a descriptive mark has won distinctiveness by acquiring a secondary meaning, or, in US practice, the mark is deemed suggestive, it is potentially registrable. Suggestive marks are eligible for protection even though they elicit positive associations for attributes of the product. There is a fine line separating descriptive from suggestive marks; the key test is whether the mark requires some measure of imagination to reach a conclusion about the nature of the product.⁵⁴ The explicit classification of a mark as suggestive is found in US practice but rarely elsewhere.

Trade marks having ecological connotations have become commonplace. In such marks, one or more of the sight, sound, or meaning of the mark conveys something ecological. They are frequently referred to as green trade marks. A weekly indication of the statistics of new applications and registrations of green marks is provided by Tschupp, in his *Weekly Round-Up of New Green Trademarks*. For example, in the week of 29 July 2011, Tschupp reported: 'green trademarks processed by the USPTO this week as follows: Green trade/

48 Regulation (EC) No 66/2010 of 25 November 2009 on the EU Ecolabel, Annex I, s 2.

49 http://www.energystar.gov/index.cfm?c=products.pr_how_earn.

50 USPTO Registration No 3569551 and No 3575484. For the law and practice of certification marks, generally see J Belson, *Certification Marks* (Sweet & Maxwell, London 2002).

51 15 USC 1064.

52 UK IPO, *Manual of Trade Marks Practice*, Ch 4, s 3.4.2.

53 However, a company name may be accepted for registration provided that it meets with the normal requirements of s 3 of the Act.

54 *Green Products Co. v Independence Corn By-Products Co.*, 992 F. Supp. 1070 (N.D. Iowa 1997), finding the name 'Green Products' requires at least some imagination to connect it with corn-cob by-products.

service marks published for opposition: 71; Green certification/collective marks published for opposition none this week; Green trade/service marks awarded registration: 57; Green certification/collective marks awarded registration: None this week.⁵⁵

The term green marks includes many marks containing the word GREEN. Such marks are appearing in US, UK, Australian,⁵⁶ and other Anglo-American trade mark applications and registrations in large numbers, triggering oppositions and stringent registry policies regarding their acceptance.⁵⁷ Given this very crowded trade mark space, it is difficult to see how green ordinary trade marks (as opposed to certification marks) can enjoy anything other than a narrow scope of protection.⁵⁸ In the USA, although there has yet to be a precedential opinion from the Trademark Trial and Appeal Board (TTAB), the Board's opinions on applications and oppositions to marks comprising GREEN show that such marks can now be difficult to protect. Marks comprising other 'eco-friendly' terms such as ECO and ENVIRO will probably suffer the same fate.

Where a sign is used simultaneously as an ecolabel and a trade mark, is there duality in essential function? The essential function of an ecolabel is to communicate preferable environmental qualities. However, basic trade mark theory requires the essential function of a trade mark to be designation of source. So how can one reconcile the essential function of an ecolabel with that of a trade mark? An answer may lie in the way the concept of *source* has evolved with changing patterns of commerce. In the first half of the twentieth century, third party use of trade marks increasingly became a feature of mainstream commerce. The trend culminated in judicial recognition of licensed use of a mark by a party other than the trade mark owner, provided the owner exercised some form of control over the goods sold under the trade mark. Wilkof recounts the evolution of the source perception beyond a strict designation of product origin to embrace a *consistent quality* perception as follows:

[This] development of variegated forms of use of the mark by a party other than the trade mark owner was coupled with a changing perception of the source function of a

trade mark. It increasingly came to be realized that the mark identified a product with a certain consistent quality. Under such a view, the identity of the owner of the mark became less important for the purchaser than the fact that the mark identified a product of a certain consistent quality and that the owner of the mark could be seen as standing behind this form of quality assurance.⁵⁹

and

This may be compared with the quality function of a certification mark. ...⁶⁰

Thus, by the middle of the twentieth century, the concept of source had changed. It mattered little whether the goods bearing the mark originated from the trade mark owner or from the licensee. What mattered was that the consumer was confident of consistent quality, secured through the proprietor's exercise of some form of control over the goods sold under the trade mark.

Application of Wilkof's exposition to the perceived duality of essential function between ecolabel and trade mark dispels the perception. A common essential function, a quality-based function, can be ascribed to both ecolabel and trade mark. From the consumer's perspective, like a trade mark, an ecolabel identifies quality, albeit ecological quality, established through conformity to certain ecological criteria.

Certification marks

In jurisdictions that statutorily provide for and register them, certification marks are well adapted to function as ecolabels. These marks are principally indications of conformity of goods or services to particular standards stipulated by the proprietor of the mark. The certified characteristic can be geographical origin, material, mode of manufacture of goods or performance of services, quality, or accuracy, but is not limited to such characteristics.⁶¹ Such marks are for the use of multiple sources.⁶²

A principal fundamental to the concept of a certification mark in most, but not all, Anglo-American

55 <http://sustainablemarks.com/category/trademarks/>.

56 'The growth of 'green brands', Natasha Williams and Mike Lloyd, 14 October 2010, at <http://www.brr.com.au/event/69672/chris-sgourakis-and-john-lee-at-griffith-hack> (7 May 2011).

57 As an example of a UK inter partes case see re. Application No 2444239 to register Clean&Green for Cleaning products and Opposition No 95964 by the owner of Community Trade Mark 'Clean Green' for similar goods.

58 *In re Cerveo* (2009) (affirming refusal of GREEN-KEY and Design), *In re Bargoese Home Textiles, Inc.* (2009) (ALLERGYGREEN), and *In re Calera Corp* (2010) (GREEN CEMENT). A recent example of an *inter partes* proceeding is *United Parcel Service of America, Inc. (UPS) v Powertech*

Industrial Co. Ltd., Opposition No 91184197 (TTAB 2011) (HYBRID GREEN deemed descriptive).

59 NJ Wilkof, 'Third Party Use of Trade Marks' Ch 7, p 114 in *Trade Mark Use* eds. J Phillips and I Simon (OUP, Oxford 2005).

60 *ibid*, n 8.

61 TMA 1994, s 50.

62 Such marks may not necessarily be individual sources. For an example of a case involving use of a certification mark by a syndicate of associations see, *Re Union Nationale Inter-Syndicates des Marques Collectives* Application [1922] 39 RPC 97.

jurisdictions, and others as well, is that the owner of the certification mark is precluded from using the mark for the certified goods, or services where covered, upon penalty of revocation ('cancellation' under US trade mark practice⁶³). The owner's function is not to use but to *control* use of the mark by those it authorizes, thereby ensuring that their products meet its required standards. This principle derives from the notion that it would not be in the public interest for a non-independent person, which is a person carrying on a trade in the goods or services certified, to act as certifier. Furthermore, a certification mark may not be refused to anybody who complies with the required standards. Non-compliance is cause for cancellation of the mark.

Collective marks

A collective mark is used to indicate that goods and services are those of a member of an association which is the proprietor of the mark. Protection of collective marks is expressly provided for under the Paris Convention.⁶⁴ The Trade Mark Act 1994 does not make registration of a collective mark contingent upon the goods' or services' conformity to standards.⁶⁵ However, the proprietor association is required to file with the registrar regulations governing use of the mark, specify the persons authorized to use the mark, the conditions of membership of the association, and any conditions for use of the mark and sanctions against misuse.⁶⁶ Other jurisdictions as well, including the USA, require an applicant to file regulations governing use of the mark.

Collective marks are also used to certify, particularly in countries that do not provide for registration of certification marks. The World Intellectual Property Organization's *Intellectual Property Handbook: Policy, Law, and Use*, explains a collective mark as follows: '[T]he members [of the association] may use the collective mark if they comply with the requirements fixed in the regulations concerning the use of the collective mark. ...'⁶⁷ and '[T]he main difference between collective marks and certification marks is that the former may be used only by particular enterprises, for example, members of the association which owns the collective mark, while the latter may be used by

anybody who complies with the defined standards'.⁶⁸ This language implies that a collective mark can serve a certification function in relation to the products of the members of the proprietor association, where the association chooses to set standards which its members must meet when using the mark. But, unlike a certification mark, the proprietor does not *have* to set any such standards as a condition of registration.

Copyright

Ecolabels can in principle be accorded copyright protection. However, to be capable of copyright protection, the label must be sufficiently ornate or artistic to constitute a creative work. Nothing in the law appears to render the two rights mutually exclusive.⁶⁹

Ecolabels as environmental claims

An ecolabel is a statement or sign that refers to or creates the general impression that it reflects the environmental aspects of a product or service. It is therefore subject to regulation as an environmental claim. The general impression conveyed by an environmental claim, as well as its literal meaning, normally can be expected to be taken into account when determining whether such a claim is false or misleading.

What forms can an environmental claim take? According to the UK Department for Environment Food and Rural Affairs (DEFRA) Green Claims Guidance, claims can come in a variety of forms, for example: statements about environmental sustainability, corporate marketing campaigns and declarations about recyclability, energy and water efficiency, or labels on products. A claim may also include imagery such as landscapes and wildlife, or specially developed symbols, pictures, or labels.⁷⁰

The Guidance is aimed particularly at those making self-declared claims in environmental statements, graphics, or imagery (ie made without independent third-party certification), but also provides good practice for any type of claim, including third party certification and labels.

The US Federal Trade Commission's Green Guide's statement of the possible forms of an environmental claim includes [claims] in

63 Lanham Trademarks Act 1946, s 14, §15 USC 1064.

64 Paris Convention for the Protection of Industrial Property, 20 March 1883, as revised, Art 7bis.

65 TMA 1994, s 49.

66 TMA 1994, Sched 1, para 5.

67 WIPO Publication No 489, Ch 2, para 2.327.

68 WIPO Publication No 489, Ch 2, para 2.330.

69 In German law as well, it is generally acknowledged that copyright and trade mark rights may overlap. See 'Areas of Overlap between Trade Mark Rights, Copyright and Design Rights in German Law', Report of the German Association for the Protection of Intellectual Property (GRUR) to WIPO Director General, 27 April 2007.

70 <http://archive.defra.gov.uk/environment/economy/documents/green-claims-guidance.PDF>.

labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail.⁷¹

Among other things, the FTC places a high priority on preventing deceptive or unfair health and safety claims, and environmental marketing claims. Enforcement is through administrative proceedings and through legal action in a federal court. Proposed changes to the FTC Green Guides include advice that third party certification does not eliminate a marketer's obligation to have substantiation for all conveyed claims.

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Alleged false certification features as a central issue in ecolabel litigation. One example of enforcement involving allegedly fraudulent third-party certification is the FTC action against *Nonprofit Management LLC* and Jeremy Ryan Claeys. The case resulted in a settlement to put an end to what FTC described in its annual report as 'their hollow environmental certifications'.⁷² The FTC alleged that the respondents issued 'Tested Green' certifications to any company that paid a fee, but never actually tested those companies' products or services. The FTC also alleged that they deceived consumers by touting endorsements from the National Green Business Association and the National Association of Government Contractors—implying that these were independent organizations when in fact they were operated by Claeys.

In addition to FTC enforcement actions, a number of private actions or putative class actions have been filed in recent years. In *Koh v S.C. Johnson, Inc.*,⁷³ the plaintiff sued for violations of California's statutory unfair competition laws, common-law fraud, and unjust enrichment, alleging that the company had 'greenwashed' its products and that the GREENLIST label used with prod-

ucts was deceptively designed to look like a third party seal of approval, and falsely represented to consumers that the products are environmentally friendly, in violation of the FTC Green Guides.

In *Hill v Roll International*,⁷⁴ another California case, Hill alleged that she bought Fiji water relying on representations that the product was 'environmentally friendly and superior'. She paid a price about 15 per cent higher than other bottled water and would not have bought Fiji water had she known the truth that the Green Drop on the bottles was the creation of the defendants, not a neutral party or environmental group, and that Fiji bottled water was not environmentally friendly or superior to similar bottled water available at cheaper prices. The appellate court affirmed the trial court's holding of Hill's failure to show a cause of action and dismissal of the case. Distinguishing this case over *Koh*, the court held that, unlike GREENLIST, which was a name not immediately apt to be associated with the product or its manufacturers and suggested third party rating by an independent source, the image of a green drop on bottles of Fiji water confirmed to a reasonable consumer that the symbol was associated with Fiji water, not an independent third party organization. In the appellate court's opinion, Hill's beliefs did not satisfy the reasonable consumer standard, as expressed in the FTC guides⁷⁵ (material implied claims conveyed 'to reasonable consumers') and as used in California's consumer laws.

The case of *Biodegradable Products Institute v Le* illustrates further the interplay that occurs between environmental claims and certification. Biodegradable Products Institute (BPI) operated a labelling programme to certify plastic products that safely and completely biodegrade and compost in accordance with the organization's standards. Companies whose products meet BPI's standards can apply to BPI to have their products reviewed for use of the federally registered COMPOSTABLE certification mark.⁷⁶

BPI filed suit against the operators of a California company, EcoVision Alternatives, alleging that EcoVision infringed BPI's certification mark by selling products bearing the COMPOSTABLE mark and by stating on its website that its products were BPI certified when EcoVision never applied to BPI's labelling program and

71 <http://ftc.gov/bcp/grnrule/guides980427.htm> and <http://www.ftc.gov/bcp/edu/microsites/energy/documents/Green-Guides-Summary-of-Proposal.pdf>.

72 In the Matter of Nonprofit Management LLC, a limited liability corporation, also doing business as Tested Green, and Jeremy Ryan Claeys, also doing business as Tested Green, individually and as an officer and member of Nonprofit Management LLC, FTC File No 102 3064.

73 *Koh v S.C. Johnson & Son, Inc.*, No C-09-00927 RMW (N.D. Cal.).

74 *Ayana Hill v Roll International Corporation et al.* Court of Appeal for the State of California, First Appellate District Two, First Division, opinion filed 25 May 2011. <http://www.courtinfo.ca.gov/opinions/documents/A128698.PDF>.

75 (16 CFR § 260.7(a) (2011))

76 US Trademark No 2,783,960 (filed 19 September 2002).

the products were not certified. The court permanently enjoined EcoVision from using BPI's COMPOSTABLE mark or any similar design, placing BPI's name or any similar name on any goods, or suggesting any affiliation with or sponsorship by BPI. This case illustrates the important role that registered certification marks can play in protecting the reputations of certifiers and producers of environmentally preferable products, and vindicating consumer trust in products certified to particular standards.

International trade

The status of voluntary ecolabelling under World Trade Organization (WTO) law is uncertain. Historically, the prevailing view among commentators has been that where an ecolabel is not a prerequisite for admission of imports into a jurisdiction, it does not constitute a direct technical barrier to trade (although it may have the potential to function as a type of non-tariff barrier).⁷⁷ In this connection, Mexico's long-standing complaint⁷⁸ in the WTO against the US government's voluntary 'Dolphin-Safe' tuna labelling provisions is of particular interest.⁷⁹ In its report of 15 September 2011, the WTO dispute resolution panel found that the US measures required for award of the voluntary 'Dolphin-Safe' label establish *de jure* mandatory labelling requirements. Furthermore, the panel ruled that the US measures were more trade-restrictive than necessary to fulfill their legitimate objectives, in violation of Article 2.2 of the Agreement on Technical Barriers to Trade. Nevertheless, the WTO ruled that the Dolphin-Safe label, awarded for the protection of the lives of the dolphins with which the tuna to be harvested associate, had not been denied to Mexican tuna products in a discriminatory manner.

While there is no prohibition *per se* on imports of Mexican-processed tuna into the USA, according to the www.mexico.vg website, major US retailers do not sell product lacking a Dolphin-Safe label and the largest US tuna processors do not buy Mexican tuna.⁸⁰

Heightened public awareness of environmental problems in one country easily morphs into support for measures such as import restrictions, designed to

compel trading partners to remedy perceived domestic shortcomings in ecological practices. These measures are often viewed by developing economies as damaging to their own development and impeding their longer term progress towards a better environment. Whether environmental degradation increases monotonically, decreases monotonically, or first increases and then declines along a country's development path is crucial to regulatory policy.⁸¹

Developing countries often take exception to Life Cycle Analysis ecolabels. They may be unable or less likely to qualify for a voluntary LCA-based ecolabel that focuses on developed world environmental issues and values. One key United Nations Environmental Programme report, issued in 2005, addresses the problem of the impact of life cycle approaches on developing countries. The report states, among other things:

With regard to life cycle approaches in general, some additional and very serious criticism is expressed by stakeholders in developing countries. The scope of many approaches is said to be one sided: tools only focus on environmental issues that are of concern in the industrial world, and criteria underlying labels are not always relevant in developing countries. It has also been argued that life cycle approaches are barriers to trade for developing countries.⁸²

Concern continues to be voiced by developing countries that their access to world markets is impeded by the developed world's ecolabels.

Concluding remarks

Ecolabelling has developed into a veritable industry, comprising government and non-government sectors. Government-owned ecolabelling schemes typically are the subject of special regulations detailing the structure and governance of the scheme, and the criteria for awarding the ecolabel. The regulations implicitly or explicitly include measures and procedures to assure a degree of transparency. The label normally takes the form of an official mark, certification mark, or trade mark. In the non-government sector, ecolabels range from self-certified generic claim statements and logos

77 V Vitalis, Round Table on Sustainable Development, 'Private Voluntary Eco-labels: Trade Distorting, Discriminatory and Environmentally Disappointing', 2002, OECD.

78 WTO Dispute DS381 United States of America—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complainant: Mexico). WTO panel report WT/DS381/R [http://www.worldtradelaw.net/reports/wtopanelsfull/us-tunamexico\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/us-tunamexico(panel)(full).pdf) 15 September 2011. For a summary of the panel's findings see http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm

79 Federal Register Vol 65, No 104, 30 May 2000. 50 CFR Part 216 Dolphin-Safe Tuna Labeling; Official Mark.

80 <http://www.mexico.vg/mexicos-economy/mexico-tuna/4675>.

81 See T Panayotu, Economic Growth and the Environment, Ch 2.

82 UNEP, 'Life Cycle Approaches: The Road from Analysis to Practice', A UNEP/ SETAC Life Cycle Initiative Report, 2005, p 19.

commonly regarded as public domain,⁸³ to a variety of IP forms, including certification, collective and ordinary trade marks, or service marks. The dramatic growth in applications and registrations of 'green' or 'ecological' trade marks will probably result in only limited protection of such marks. Furthermore, they will be vulnerable increasingly to opposition, cancellation, and other adversarial proceedings.

Emergence of the ecolabelling industry has increased focus on ecolabel schemes' transparency, fairness, and impact on developing economies. In addition, the true measure of their contribution to environmental protection remains elusive. All of these factors bear heavily on the public interest, given the magnitude of the social, economic, and political responsibilities assumed by an ecolabelling authority. Each authority is ultimately accountable for the mapping of its own conceptualization of the environment into the ecological impacts of particular goods or services, and even particular

technologies. The considerable complexities involved in scoring a product in terms of weighted life cycle impacts must be acknowledged more readily by the ecolabel authorities, coupled with a willingness to embed the best available calculus of uncertainties in the life cycle assessment process.⁸⁴

If society as a whole is to subscribe to ubiquitous ecolabelling in support of the quest for development coupled with reduced environmental harm, then improved public understanding of what an ecolabel signifies is essential. Trust in the ecolabel's message is a fundamental requirement for success of the system. With the wealth of options open to purchasers in today's marketplace, both with regard to products and the ecolabels used with them, trust is *per force* legalized trust. Therefore, the success of ecolabelling will depend on future administrative and judicial interpretations of the full range of relevant laws, only some of which have been considered in the present review.

83 One example being the universal recycling symbol, see International Organization for Standardization: 'Background information on Recycling Symbols', Working Group Document ISO/IEC JTC1/SC2/WG2 N2342, 2001-04-02.

84 J Lemons (ed), 'Scientific Uncertainty and Environmental Problem Solving' (Blackwell Science 1995), Ch 10, LW Canter, *Scientific Uncertainty and the Environmental Impact Assessment Process in the United States*.