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Advertisers Beware: It's Not Easy Being 'Green' When Regulators Are Watching

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A store in San Francisco recently received a makeover: a new coat of ecru-colored paint, a large green-colored logo and the addition of the term GREEN to its previous store name. Granted, in San Francisco "green" may have another connotation (especially when the store is run by a suspiciously relaxed hippie), but in this case it is clear that this store has made a commitment to providing environment-friendly goods and services. Or has it really?

Within the last decade, there has been an ever-burgeoning increase in "greenwashing," an attempt by providers to present their goods and services as environment-friendly, eco-conscious or environmentally responsible. In an attempt to reach mindful and enlightened consumers, companies are finding ways to describe their products and services as good for the environment and the future, or at the very least, not as evil as all those other guys. Unfortunately, some of these claims really do not amount to much more than a superficial change in the color-scheme. What few seem to realize is that jumping on the "GREEN" band-wagon comes with responsibilities and commitments.

Unsubstantiated Greening Will Incite Action by the FTC

The Federal Trade Commission (FTC) is charged with protecting consumer interests and preventing unfair and deceptive business practices. As such, the FTC is the main watchdog against false advertising and has the authority to bring enforcement actions against those that make unsubstantiated and/or deceptive claims.

For example, in 2009 the FTC brought actions against four clothing and textile sellers that claimed their products were made of bamboo fiber using an environmentally friendly process that retained the natural antimicrobial properties of the bamboo plant. Several companies also claimed the products were biodegradable and would return to nature after a reasonably short time. In reality, the fabrics were made of rayon, a man-made fiber that is created by treating plant cellulose with harsh and toxic chemicals that release hazardous air pollutants. Thus far, three of the companies have agreed to settlements under which they are barred from making any of the above green claims, but which do allow the companies to describe

their products as “rayon made from bamboo” as long as this statement is true and could be substantiated. For a full report, see http://www.ftc.gov/opa/2009/08/bamboo.shtm.

The FTC has taken other actions against companies that have used the following claims and buzz words in their advertising: pesticide free, ecologically safe, ecologically safe aerosol spray, ozone safe, ozone friendly, degradable, safe for the environment, environmentally friendly, compostable, environmentally responsible, recyclable etc. A list of actions taken by the FTC can be found here: http://www.ftc.gov/bcp/conline/edcams/eande/index.html (click on “Environment” and then “Enforcement”).

At a minimum, the FTC requires that green marketing, like all other forms of marketing, be truthful, not misleading, and substantiated by competent and reliable scientific evidence so that consumers can make informed decisions about the products and services they buy. Beyond this, marketers can find guidance on specific green claims such as biodegradable, compostable, recyclable, recycled content, and ozone safe in the “Guide for the Use of Environmental Marketing Claims” (referred to simply as the Green Guides) issued by the FTC in 1992, revised in 1996 and 1998, and under current review. A copy of these guides can be found here: http://www.ftc.gov/bcp/grnrule/guides980427.htm.

In addition to barring unsubstantiated claims or slogans, the FTC Green Guides also bar the use of deceptively green brand names, which would mislead consumers and create a false impression regarding a quality or attribute of the goods or services.

State & Local Regulations

Green advertising and brand names are also regulated by state and local unfair competition law, which at minimum would prevent deceptive business practices and false advertising. In California, Section 17580 of the Business & Professional Code has the distinction of specifically regulating environmental advertising.

Per Section 17580, any person who represents in advertising or on the label or container that a good is either “not harmful” or “beneficial” to the environment through the use of terms such as environmental choice, ecologically friendly, or earth friendly etc. must have records that support the validity of those terms. These records shall include (in sum) the reasons why the person believes the representations to be true, any significant adverse environmental impacts, any measures taken to reduce the environmental impact, violations of federal, state or local law permits, and whether or not the good conforms with the FTC’s Guide for the Use of Environmental Marketing Claims for the use of the terms recycled, recyclable, biodegradable, photodegradable or ozone friendly. For the full text of this rule, see www.leginfo.ca.gov.

Protecting a Green Trademark

For those that have decided to use a “Green” brand name or slogan and have the substance to back it up, the next step is to protect it from third-party infringement or encroachment.

U.S. federal and state law provides trademark protection to any combination of words, letters, numbers or designs capable of distinguishing the source of certain goods or services from others. Though common law trademark rights are gained at the moment of first use in commerce, obtaining a federal trademark registration provides several key benefits unavailable under common law, such as nationwide protection.

The U.S. Patent and Trademark Office (USPTO) is responsible for examining federal trademark applications and issuing registrations. The USPTO's actions, however, are dictated by its dual mission to protect consumers from confusion and to foster fair competition amongst businesses. As such, the USPTO will not issue a registration for a mark that is confusingly similar to prior pending or registered trademarks, and it will prevent one trademark owner from claiming a monopoly over descriptive words that are essential to the relevant business.

With the advent of green advertising, this means that the USPTO will not allow one trademark owner to claim an exclusive monopoly over the term GREEN or any other eco-friendly term by itself. As such, to achieve registration, the eco-friendly term must be used in conjunction with other (non-descriptive) terms and/or with a distinctive design or logo to create a "composite" mark.

A review of the USPTO's online records revealed over 980 applications and registrations claiming the term GREEN for goods or services involving the environment, environmental or green. As demonstrated by this plethora of GREEN marks, it is simply not possible to claim rights to GREEN by itself or to prevent the encroachment of other marks simply because they share the term GREEN.

To protect consumers, the USPTO will refuse registration of trademarks that contain "green" terms but do not indicate the environmental quality in the claimed goods or services. For example, in a recent office action the Examining Attorney refused registration of a mark containing the term "GREEN" as misdescriptive because the claimed services made no mention of how the services produced a reduced environmental impact. In short, the Examiner argued that the term "green" is commonly used to denote goods or services designed to produce reduced environmental impact and that in fact there is a "green" type of the claimed services, which is currently offered and viewed as desirable. As such, consumers are likely to believe that the services offered by the applicant are "green" and their purchasing decision will be influenced by that understanding. Registration was ultimately allowed only when the trademark applicant agreed to amend the description of services to specifically state that it had a "reduced environmental impact."

Green Here Does Not Mean Green There

Many companies have commerce that crosses both sides of the pond. As such, it is important to note that U.S. laws and guidelines regarding "green" advertising are not applicable to foreign jurisdictions and that the regulatory system may be more or less complicated/restrictive depending on the jurisdiction.

In the United Kingdom for example, advertising relies primarily on self-regulation, with the principal self-regulation body being the Advertising Standards Authority (ASA). Several government agencies can also act to regulate environmental claims, namely: the Trading Standards Office (TSO), the Office of Fair Trading (OFT), the Office of Communications (Ofcom), the Department of Business, Innovation and Skills (BIS), and the Department for Environment, Food and Rural Affairs (DEFRA). With this many hands in the pot, advertisers are cautioned to pay close attention to the available rules and guidelines.

In the UK, Advertising Codes, administered by the ASA, are drafted by two industry Committees: the Committee of Advertising Practice (CAP), which is responsible for non-broadcast advertising, and the Broadcast Committee of Advertising Practice (BCAP), which is responsible for radio and television advertising. CAP and BCAP recently published new UK Advertising Codes that will go into effect September 1, 2010 (see http://bcap.org.uk/The-Codes.aspx).

Among the various requirements, some of the more interesting provisions found in the current non-broadcasting code (British Code of Advertising, Sales Promotion and Direct Marketing, or "CAP Code"), in relation to "green claims" are:

- Marketers must base environmental claims on the full life cycle of the advertised product, unless the marketing communication states otherwise, and must make clear the limits of the life cycle. If a general claim cannot be justified, a more limited claim about specific aspects of a product might be justifiable. Marketers must ensure claims that are based on only part of the advertised product's life cycle do not mislead consumers about the product's total environmental impact (clause 11.4, CAP Code).

- Marketers must not suggest that their claims are universally accepted if a significant division of informed or scientific opinion exists (clause 11.5, CAP Code).

- If a product has never had a demonstrably adverse effect on the environment, marketing communications must not imply that the formulation has been changed to improve the product in the way claimed. Marketers may, however, claim that a product has always been designed in a way that omits an ingredient or process known to harm the environment (clause 11.6, CAP Code).

- Marketing communications must not mislead consumers about the environmental benefit that a product offers; for example, by highlighting the absence of an environmentally damaging ingredient if that ingredient is not usually found in competing products or by highlighting an environmental benefit that results from a legal obligation if competing products are subject to that legal obligation (clause 11.7, CAP Code).

These rules of course work to ensure that advertisers claim only truthful and relevant environmental benefits. For example, there is no sense in advertising that a product is BPA free if this is not a chemical usually found in that type of product.

The ASA will also take into account the guidance in the International Organization for Standardization's ISO 14021 on environmental labeling and the UK Government's "Green Claims Code" when making its adjudications. ISO 14021, in particular, sets out the terminology, symbols, testing and verification methodologies that should be used for the self-declaration of environmental claims, provides detailed definitions for several widely used environmental claims as well as advice on how to use such claims in practice.

The Green Claims Code, available on the DEFRA website (www.defra.gov.uk) is similar to the Green Guide issued by the FTC in the U.S. in that it offers guidance on how to ensure environmental claims are accurate, truthful, relevant, unambiguous, and presented clearly. The Green Claims Code also gives general advice regarding environmental labeling such as the European Union Ecolabel, a symbol established by the European Commission to identify top performing products in the marketplace in terms of overall environmental performance. (Specific advice regarding how to apply for the Ecolabel can be found here: http://ec.europa.eu/environment/ecolabel/)

The ASA can invoke various sanctions against non-broadcast advertisers. For example, it can request a company to change or withdraw an advertisement, disqualify a company from media awards, issue ad alerts, or require pre-vetting before publication. The ASA can also report non-broadcast advertisers, in serious cases, to the Office of Fair Trading, which can use its statutory powers to seek an injunction through the courts to prevent similar claims being made in future advertisements and can issue fines. Meanwhile, broadcasters are obliged to follow ASA rulings or risk being referred to Ofcom, which can impose fines or even withdraw broadcast licenses.

Conclusion

A change of paint, a new store sign and the addition of GREEN can go a long way towards tapping into a profitable market of eco-conscious consumers, especially in sensitive markets such as San Francisco. The use of such “green” branding in the U.S., however, is highly regulated by federal and state law. To avoid violations that can lead to costly lawsuits or re-branding, it is important to be aware of the FTC Green Guides, state and local unfair competition law and federal trademark law. Likewise, when expanding commerce outside of the U.S., it is important to do your homework on how green advertising is regulated and enforced within the foreign jurisdiction.

If you have any questions regarding the content of this white paper, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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