

Growing your eco-brands in a changing climate

As more advertisers try to engage in green marketing, the challenge to stand out increases. For brands that truly boast green credentials, it is important to know how to position your marks and align these with a credible message

Consumer interest in products and services that benefit the environment – or at least harm it less than their counterparts – has spiked in recent years. As a result, the value of green branding has likewise increased. Entire businesses and product lines are built around green branding and mainstream brands have added green sub-branding to their advertising. However, in order to succeed, whether from a marketing viewpoint or from the perspective of legal protection, green branding must be properly developed and nurtured by the brand owner. The keys to a successful green branding strategy are differentiation and credibility.

Differentiation

US trademark law recognises and reflects the realities of the marketplace and consumer perception. Marks that are deemed to be generic as applied to the products on which they are used do not qualify for legal protection, because consumers do not view them as identifying sources. Marks, or portions of marks, that are deemed merely to describe the product, its features or its intended uses are not protectable unless they can make a showing of acquired distinctiveness – also known as secondary meaning – which refers to the sort of high degree of public recognition of the mark that would indicate that the public has seen past the mark's descriptiveness and has come to recognise those terms as identifying the mark owner as the source of the product. This must be established by a period of substantially exclusive use of the mark or through actual evidence of strong promotion and resulting recognition of the mark. Marks that merely suggest a property of the product or convey no information about the product at all are considered protectable from their inception, because they immediately differentiate themselves from others in the minds of consumers. However, these classifications of marks are not necessarily static; instead, they can change as the usage and understanding of terms evolve in the public sphere.

Similarly, if a consumer becomes accustomed to seeing the same brand elements emanate from different sources, the power of such

elements to differentiate a seller diminishes or disappears entirely. US trademark law reflects this with its concept of the 'crowded field', which states that marks are entitled to a narrower, weaker scope of protection to the extent that other similar marks or elements of marks are in use by competitors.

Eco-friendly brands are particularly susceptible to differentiation issues. One reason for this, perversely, results from the degree of success that the environmental movement has enjoyed in raising awareness of its message. The term 'green' first began to be used in relation to environmentally beneficial efforts in Europe in the 1970s, which saw the rise of national Green political parties that advocated sustainability initiatives. Businesses then also adopted the term and began to use it as part of their brands. At that point, 'green' suggested an environmental connotation, since plant life and undeveloped land tend to be green, but did not directly describe any eco-friendly products that were not literally green in colour. As a reflection of that, until recently it was not uncommon to see marks containing the word 'green' receive trademark registrations as inherently distinctive marks without proof of secondary meaning and without disclaiming rights in the term 'green'.

Then a shift occurred. The use of the term 'green' became so widespread among businesses and the general public that it began to be considered a direct adjective for environmentally beneficial products. US trademark examiners began to treat the term not as suggestive and inherently distinctive, but as merely descriptive. As a result, trademark applicants in the eco-friendly sector had to disclaim the term 'green' where it appeared in their marks or make a showing of secondary meaning.

This led to a series of non-precedential, but still persuasive and illustrative, decisions as to how the US Patent and Trademark Office will handle green marks. The Trademark Trial and Appeal Board has held the mark GREEN-KEY for environmentally friendly paper keycards to be generic, and the marks AllergyGreen for hypoallergenic bedding, GREEN CEMENT for an environmentally responsible cement and HYBRID GREEN UPS for an efficient power supply all to be merely descriptive and not registrable in the absence of secondary meaning. The reasoning of these opinions is not strictly limited to the word 'green', and could be extended to other common environmental buzzwords. 'Green' just happened to be the focus of those cases because it was the first and best-known environmental buzzword to make its way into the dictionary.

Other commonly used terms can expect the same fate; and even if they do not, their common use in the industry will weaken the marks thanks to the 'crowded field' doctrine. The marketplace is now filled with a large number of 'eco-', 'sustaina-', 'earth-' and 'enviro-' formative marks. In addition, graphic elements are not immune to the crowded field problem and similar imagery is often used in design marks for green products – most notably trees, leaves, recycling symbols and depictions of the Earth.

In this climate, green businesses would do well to move beyond well-worn buzzwords and designs. There is often great resistance to this because clients want to communicate their 'green' status as clearly as possible. However, if carefully nurtured, an 'outside-the-box' green mark will have greater impact with consumers and be entitled to stronger legal protection. The SEVENTH GENERATION® line of products is an example of a green-branding success story. The mark obliquely suggests an environmental message, but the message is not clear unless you are familiar with the brand or carefully read the product packaging, and common buzzwords are avoided. If you cannot avoid these buzzwords altogether, it is advisable to add distinctive elements to the buzzwords – and



perhaps a slogan – in order to ensure that consumers will be able to differentiate the mark, and that some registrable matter will remain should a trademark examiner require disclaimer of the buzzwords. Creativity should likewise be employed to come up with distinctive imagery that conveys a green message wherever possible. Brand creators should think beyond leaves and planets. Another alternative is to leave the green message out of the brand altogether and rely on product packaging and advertising to convey the environmental benefits of the product.

Credibility

The other major challenge faced by eco-brands is in establishing and maintaining credibility. Cynicism is still a significant obstacle to green businesses. Many consumers still view green-branded products as no better than their traditional counterparts, or only marginally better and not worth the extra expense. Most consumers do want to buy green and many are willing to pay a premium to do so, but they do not want to be taken in by frauds and are not sure whom to trust. High-profile examples of ‘greenwashing’ – false or misleading green advertising claims – lend credibility to consumers’ fears and make the job of green marketing more difficult. On the flipside, when credibility with the consumer is achieved, it is an asset of immense value to the brand owner.

The first step to establishing credibility is obvious: develop an excellent product or service with strong environmental benefits at the best price point you can. Then, grow awareness of the mark

through advertising that conveys strong messages and maintain that credibility by presenting your products without fabrication, exaggeration or concealment of any negative environmental impacts. Good resources for guidance of proper advertising – and examples of what to avoid – include TerraChoice’s “Sins of Greenwashing” report and the Federal Trade Commission’s Guides for the Use of Environmental Marketing Claims. It is important to avoid greenwashing not only because of its harm to your credibility, but also because of the potential exposure to government investigation and civil liability.

Also, consider the authorised use of third-party certification marks to burnish your green credibility. But remember that not all certifications are created equal. Anyone can establish their own certification mark, so make sure that you display only marks that have earned a reputation for rigorous standards. Avoid the temptation to affix logos to your own products that look like certifications, but in reality are simply your own marks, as this can also constitute greenwashing.

A properly differentiated green mark that earns an excellent reputation for credibility can take a lot of work and care to develop, but is certainly worth the effort. [WTR](#)

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