

CERTIFIED AND NON-CERTIFIED QUALITY MARKS ON FOOD INDUSTRY PRODUCTS

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INTRODUCTION:

Information about food product quality is available on food product packaging. The Trademark Act of 1946 (The Lanham Act), as amended, provides for the registration of trademarks and certification marks displayed on food products.² The Federal Food, Drug, and Cosmetic Act (FDCA) and the Nutrition Labeling and Education Act of 1990 (NLEA), which amended the FDCA, regulate nutrition information, nutrition levels, and health-related claims displayed on food products.³ These acts are only a few of the federal laws regulating information provided to consumers about food products. The consumer may consider food products marked with certification marks, trademarks, and nutrition content when making informed food choices.

CERTIFICATION MARKS:

Definition:

The Lanham Act provides for the registration of certification marks.⁴ A certification mark is any “word, name, symbol, or device, or any combination thereof,” used by a party or parties other than the owner of the mark.⁵ The certification mark certifies “regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics” of a non-owner’s goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.⁶ Certification marks inform purchasers that the goods or services marked with an authorized certification mark satisfy a set of certification requirements. Examples of certification marks, or applications for certification marks, in the food industry include:

- Certification mark, IDAHO, owned by the State of Idaho, certifies that goods so marked are grown in the state of Idaho.⁷

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² See 15 U.S.C. § 1501 et seq.

³ See 21 U.S.C. § 301 et seq.

⁴ See 15 U.S.C. § 1504.

⁵ 15 U.S.C. § 1127.

⁶ *Id.*

⁷ U.S. Trademark Registration No. 802418 (registered Jan. 18, 1966).



- Certification mark, , owned by the China Green Food Development Center, certifies that the goods provided are nutritious and contamination-free.⁸



- Certification mark, , owned by the Wisconsin Milk Marketing Board, Inc., certifies that the goods provided are natural dairy products having the State of Wisconsin as their geographical origin.⁹



- Certification mark, , owned by Karen Pendergrass, certifies that the goods provided conform with the paleo diet standards.¹⁰

Geographic Indicators:

The World Trade Organization's (WTO) 1995 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) establishes minimum levels of protection that each government offers to the intellectual property of other WTO members.¹¹ The TRIPS Agreement defines “Geographical indications” (“GIs”) as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographic origin.”¹² WTO members place great value in GIs. A GI associates a product with the reputation linked to its geographical origin. To that end, GIs may provide economic value to certified GI users based on tradition, culture and geography.¹³

As mentioned above, the Lanham Act provides for certification marks that certify region of origin. The application for a certification mark defines the region of origin that the mark certifies.¹⁴ Generally, an owner controlling a region-based certification mark is a governmental body or a body operating with governmental authorization. However, contrary to the “Geographical Indications” of European Countries, certification marks ownership is not limited to government organizations. Certification mark owners may include private trade organizations

⁸ U.S. Certification Mark Registration No. 3453928 (Registered June 24, 2008).

⁹ U.S. Certification Mark Registration No. 3754207 (Registered Mar. 2, 2010).

¹⁰ U.S. Certification Mark Application Serial No. 86931154 (filed Mar. 7 2016).

¹¹ *See* Overview: The TRIPS Agreement, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar. 21, 2016).

¹² Part II — Standards concerning the availability, scope and use of Intellectual Property Rights, https://www.wto.org/english/docs_e/legal_e/27-trips_04b_e.htm (last visited Mar. 21, 2016).

¹³ *Id.*

¹⁴ *See* 15 U.S.C. § 1504.

that guarantee that products originate from a specific geographic region. Examples of origin-based certification marks in the food industry include:

- Certification mark,  , owned by the Florida Department of Citrus, certifies that the goods bearing the mark consist of citrus fruit grown in the State of Florida, under specified standards, or are processed or manufactured wholly from such citrus fruit.¹⁵

- Certification mark,  , owned by the Consorzio Del Formaggio Parmigiano-Reggiano, certifies that the goods bearing the mark originate in the Parma-Reggio region of Italy, specifically the zone comprising the territory of the provinces of Parma, Reggio Emilia, Modena and Mantua on the right bank of the river Po and Bologna on the left bank of the river Reno.¹⁶

- Certification mark,  , owned by Pear Bureau Northwest Corporation, certifies that goods bearing the mark consist of pears grown in Oregon or Washington State.¹⁷

Role of Certification Mark Owners:

Owners of certification marks include “persons, and nations, States, municipalities, and the like, exercising legitimate control over the use of the marks sought to be registered, even though not possessing an industrial or commercial establishment...”¹⁸ The above-identified certification marks show owners, such as government agencies (Florida Department of Citrus) non-profit organizations (The Wisconsin Milk Marketing Board, a non-profit organization funded entirely by Wisconsin's dairy farm families), foreign organizations (the China Green Food Development Center), or individuals (Karen Pendergrass).

An owner of a certification mark does not apply the mark to the owner’s goods or services.¹⁹ The owner of the certification mark exercises “legitimate control over the use [by others] of the certification mark in commerce.”²⁰ Yet, the owner may consider only the standards set for the mark in refusing to license a producer or distributor of a product in an associated market.²¹ The owner does not have discretion in applying the certification standards,

¹⁵ U.S. Certification Mark Registration No. 1200770 (registered July 6, 1982).

¹⁶ U.S. Certification Mark Registration No. 3467954 (registered July 15, 2008).

¹⁷ U.S. Certification Mark Registration No. 4715023 (registered Apr. 7, 2015).

¹⁸ 15 U.S.C. § 1504.

¹⁹ See 15 U.S.C. § 1127; 37 C.F.R. § 2.45(a); TMEP 1306.01(A).

²⁰ 37 C.F.R. § 2.45(a).

²¹ See *Idaho Potato Comm'n v. M&M Produce Farm & Sales*, 335 F.3d 130, 138 (2d. Cir. 2003) (holding that certification mark former-licensee is not contractually estopped from challenging the certification marks); see also

once established. In this respect, a certification mark “protects the market players from the influence of the certification mark owner...and aims to ensure the broadest competition, and therefore the best price and quality, within the market for certified products.”²²

Goods or services marked with a certification mark are assumed to meet a standard of quality provided by the certification, and controlled by the certification mark owner. In this respect, the certification mark functions to facilitate consumer expectations of a standardized product.²³

TRADEMARKS:

A mark on a food product may look like a certification mark, yet the mark is registered and functions as a trademark. A trademark is a word, name, phrase, symbol, or design that identifies and distinguishes one source of goods and services from another source of similar goods and services.²⁴ A trademark may promote a quality standard, such as WHOLESOME.



- Trademark, , identifies Cedarlane Natural Food, Inc. as a source of, for example, prepared, packaged and refrigerated or frozen entrees consisting primarily of meat, fish, poultry, and vegetables.²⁵

Alternatively, a trademark applicant may administer a comprehensive quality program, including privately regulating use of the trademark. The Whole Foods Market uses the below-identified trademark as part of its Responsibly Grown Program.²⁶



- Trademark, , identifies Whole Foods Market IP, L.P as a source of, for example, breakfast cereals; granola; fresh fruit, fresh vegetables, and fresh beans.²⁷

The suggested quality standard and the comprehensive quality program may logically suggest filing for a certification mark rather than a trademark. Yet, an applicant may choose to register a mark as a trademark, rather than as a certification mark, to maintain use of the mark on applicant’s goods and services.

15 U.S.C. §1064(5) (D) (A certification mark may be cancelled if 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.”).

²² *Id.* (citing 15 U.S.C. § 1064(5)).

²³ *Id.*

²⁴ *See* 15 U.S.C. § 1127.

²⁵ U.S. Trademark Registration No. 4494317 (registered Mar. 11, 2014).

²⁶ *See* Get to Know Responsibly Grown, <http://www.wholefoodsmarket.com/responsibly-grown> (last visited Mar. 21, 2016).

²⁷ U.S. Trademark Application Serial No. 86314981 (filed June 19, 2014).

Similarly, an applicant may choose to register a region or origin-based mark as a trademark, rather than as a certification mark, to maintain use of the mark on applicant's goods and services.

- Trademark, WISCONSIN HEALTHY GROWN, identifies the Wisconsin Potato & Vegetable Growers' Association Inc. as a source of fresh potatoes.²⁸

However, registration of a trademark may be refused if the mark "is primarily geographically descriptive of them."²⁹ In these cases, the USPTO may require disclaimer of the geographic aspect of the mark for registration.



- Trademark, , identifies the Almond Board of California as a source of, for example, unprocessed and raw almonds. The term, "California Almonds," is disclaimed.³⁰

NUTRITION LABELS:

The Federal Food, Drug, and Cosmetic Act (FDCA) provides that the Food and Drug Administration (FDA) shall "protect the public health by ensuring that foods are safe, wholesome, sanitary, and properly labeled."³¹ The Nutrition Labeling and Education Act of 1990 (NLEA), which amended the FDCA, regulates nutrition information, nutrition levels, and health-related claims on food product labels.³² Health-related claims, characterize a relationship between a nutrient to a disease or a health-related condition, and nutrient levels, or nutrient content claims, characterize a level of a nutrient in the product.³³ Characterizations, such as "Diets low in saturated fat and cholesterol may reduce the risk of heart disease," "only 200 mg sodium," or "low fat," may be displayed on food products only pursuant to FDA regulatory guidelines for the characterized health-based relationship or nutrient level.³⁴

CASE STUDY: The Use of ORGANIC on Food Labels

Federal "Organic" Label:

The term "organic" refers to the way farmers grow, handle, and process agricultural products that "maintain or improve the natural resources of the operation, including soil and

²⁸ U.S. Trademark Registration No. 4648299 (registered Dec. 2, 2014).

²⁹ 15 U.S.C. § 1502.

³⁰ U.S. Trademark Registration No. 3723663 (registered Dec. 8, 2009).

³¹ 21 U.S.C. § 393(b)(2)(A).

³² 21 U.S.C. § 343 (q)-(r).

³³ 21 U.S.C. § 343 (r)(1).

³⁴ See 21 U.S.C. § 343 (r)(2)(A)(i).

water quality.”³⁵ Under the Federal Organic Foods Production Act of 1990 (OFPA), the United States Department of Agriculture (USDA) promulgates standards for consistent marketing of agricultural products as “organic.”³⁶ Specifically, the National Organic Program (NOP), created under OFPA, establishes an organic certification program for producers and handlers of organic agricultural products.³⁷ An organic certification allows food product producers and handlers to sell, label, and represent their food products as organic. A farm or business that grosses more than \$5,000 annually in organic sales must be certified. Farms and businesses that make less than \$5,000 annually in organic sales are “exempt,” and follow the NOP requirements with certain exceptions.

The regulatory scheme established under NOP provides for different levels of “organic” for raw or processed agricultural products³⁸.

- I. **100% Organic** - Single ingredient products, such as fruits, vegetables, eggs, or other single ingredient food, that are grown and processed with certified organic methods and processing; multi-ingredient food products made entirely with certified organic ingredients, methods, and processing.
- II. **Organic** – Multi-ingredient food products with at least 95% organically produced raw or processed ingredients.
- III. **Made with Organic {specified ingredients or food group(s)}** - Multi-ingredient food products containing a minimum of 70% organic ingredients.

The above-identified three-level regulatory scheme for labeling food products as “Organic” appears rather straightforward. However, it has been argued that “only exceptionally well-informed consumers can understand the difference between “made with organic,” “organic,” and “100% organic” products.”³⁹

The National Organic Standards Board (NOSB) interprets standards set by the NOP. For example, in April 2012, Medical Researcher, Dr. Joanne Tobacman, presented findings to the NOSB with respect to Carrageenan. Carrageenan is a food additive extracted from red seaweed, which may be used to improve the texture of, for instance, ice cream and soy milk. Dr. Tobacman presented data that suggests that Carrageenan, in certain amounts, may cause inflammation to the human body. Dr. Tobacman urged reconsideration of the use of Carrageenan in organic foods.⁴⁰

“Organic” Certification Marks:

USDA Organic Seal:

³⁵ 7 C.F.R. § 205.200.

³⁶ 7 U.S.C. §§ 6501 et seq.

³⁷ 7 U.S.C. § 6503.

³⁸ 7 C.F.R. § 205.301.

³⁹ *Harvey v. Veneman*, No. 02-216-P-H, 13 (D. Me. October 10, 2003)(holding the Secretary of Agriculture acted within express statutory authority to develop the “Made with organic...” label).

⁴⁰ *See Eminent Scientist Addresses Impact of Carrageenan in Food*, <http://www.cornucopia.org/2012/06/eminentscientist-addresses-impact-of-carrageenan-in-food> (last visited Mar. 21, 2016).

As discussed above, a certification mark provides standards for a market, and a certification mark owner establishes and enforces the standards. The owner does not participate in the market. Under NOP, the USDA sets standards for and regulates use of the term “organic”



on food products, including use of the USDA Organic seal. As a result, a food product consumer may rely on a consistent use of “organic” in the food product market.

Under NOP, the USDA Organic seal may be used on labels and in labeling of raw or processed agricultural products, including ingredients, certified as “100% Organic” or “Organic.”⁴¹ That is, an Organic-certified farm or handling facility may sell, label, and represent their products as organic with the USDA Organic seal although use of the seal is voluntary. In contrast, food products certified pursuant to the Made with Organic {specified ingredients or food group(s)} standard, which do not meet the certification standards for “100% Organic” or “Organic” labeling, must not display the USDA Organic seal.⁴² For food products labeled as “Organic” or “Made with Organic {specified ingredients or food group(s)},” the label must identify each organic ingredient in the ingredient statement with the word “organic.”⁴³

Certifying Agent Mark:

OFPA defines “certifying agent” as a recognized official, person, or private entity “who is accredited by the Secretary as a certifying agent for the purpose of certifying a farm or handling operation as a certified organic farm or handling operation.”⁴⁴ A food product certified at any level of “organic” must identify a certifying agent.⁴⁵ A certifying agent may display a certifying mark on food products meeting any of the three standards discussed above although the USDA Organic seal may appear only on food products meeting the 100% Organic or Organic standards.

The certifying agent may “establish a seal, logo, or other identifying mark to be used by production and handling operations certified by the certifying agent to indicate affiliation with the certifying agent.”⁴⁶ The California Certified Organic Farmers (CCOF) is a certifying agent.



- Certification mark, , owned by California Certified Organic Farmers Inc., certifies that the goods were organically grown, processed and produced in accordance with the California Organic Food Act of 1978, amended in 1982, and

⁴¹ 7 C.F.R. § 205.301(a)-(b); 7 C.F.R. § 205.303.

⁴² 7 C.F.R. § 205.304(c).

⁴³ 7 C.F.R. § 205.303(b)(1) and § 205.304(b)(1).

⁴⁴ 7 U.S.C. § 6502

⁴⁵ 7 C.F.R. § 205.303(b)(2) and § 205.304(b)(2).

⁴⁶ 7 C.F.R. § 205.501(b).

that the grower, processor or producer practices a program of long-term ecological soil management and in the case of meat and poultry, practices a program of stress reduction and good nutrition to maximize animal health.⁴⁷

The certifying agent cannot require compliance with production or handling practices other than those under the USDA (or State regulations if more restrictive) as a condition of use of the certifying agent's mark.⁴⁸ However, under NOP, certifying agents may certify additional standards, but these cannot be referred to as organic standards and cannot be made a condition to receiving the USDA certification.⁴⁹ International Certification Services, Inc. is another certifying agent.



- Certification mark, , owned by International Certification Services, Inc., certifies that the goods and/or services provided have met or exceeded the requirements of the Farm Verified Organic program, granting the goods and/or services organic status.⁵⁰

The Farm Verified Organic standard meets all requirements for organic certification under NOP, as well as international organic standards set by the International Federation of Organic Agriculture Movements (IFOAM) and ISO 65 accreditation.⁵¹

“Organic” Trade Marks:

Trademarks do not reflect a certification scheme. Rather, trademarks identify a source of a food product. The USDA has a vested interest in trademark registrants' use of “organic” as brand names, such as in trademarks.⁵² The USDA published an instruction directed to certifying agents, yet indirectly addressing trademark applicants. In particular, the instruction makes the following points:

- NOP does not make determinations about the legality of trademarks containing the term, “organic”;
- company names containing the term “organic” may be displayed as the name of the manufacturer, packer, or distributor and listed on the information panel as required by FDA regulations; and
- OFPA prohibits labeling that falsely implies an agricultural product was produced or handled using organic methods in compliance with OFPA and its implementing regulations.⁵³

⁴⁷ U.S. Certification Mark Registration No. No. 3917765 (registered Feb. 8, 2011).

⁴⁸ 7 C.F.R. § 205.501(b).

⁴⁹ Harvey v. Veneman, No. 02-216-P-H, 37 (D. Me. Oct. 10, 2003).

⁵⁰ U.S. Certification Mark Registration No. No. 3731770 (registered Dec. 29, 2009).

⁵¹ Farm Verified Organic Standard, <http://www.ics-intl.com/farm-verified-organic.html> (last visited Mar. 21, 2016).

⁵² USDA, NOP 4012 USE OF BRAND OR COMPANY NAMES CONTAINING THE WORD “ORGANIC” (August 14, 2014).

⁵³ *Id.*

Applicants are not prohibited from registering trademarks with the term “Organic.” Most likely, the USPTO will require applicants to disclaim the term. However, registrants should consider the USDA instructions discussed above, as well as NOP exemptions and labeling standards, when applying a trademark with an “Organic” term to food products. Examples of Organic trademarks include:



- Trademark,  , identifies Gelson's Markets as a source of organic foods, for example, meat, cheese, and olive oil. The term, ORGANIC, is disclaimed.⁵⁴



- Trademark,  , identifies Rainier Fruit Company as a source of organic fresh fruits, and organic unprocessed apples, pears, cherries and blueberries. The term, ORGANIC is disclaimed.⁵⁵

CASE STUDY: The Use of NATURAL on Food Labels

Federal “Natural” Label

The FDA responds to changes in food term interpretation. For instance, FDA policy currently interprets the use of the term, “natural,” on a human food label to mean that for a food normally provided without the addition of anything artificial or synthetic, nothing artificial or synthetic has been added.⁵⁶ The FDA understands that term interpretations change, and provides for comments on term interpretation. With this in mind, and at the time of this writing, the FDA has extended the comment period for the use of “Natural” on food labeling. The comment period will end on May 10, 2016.⁵⁷

“Natural” Certification Marks:

As mentioned above, no federal law regulates the use of the term “Natural” on food products. However, organizations may establish Natural certification marks. For example, small organic farmers may experience a heavy resource burden when seeking organic certification under NOP. The small organic farmers started an alternate Certified Naturally Grown grassroots movement.⁵⁸

⁵⁴ U.S. Trademark Registration No. No. 3368061 (registered Jan. 15, 2008).

⁵⁵ U.S. Trademark Registration No. No. 4385172 (registered Aug. 13, 2013).

⁵⁶ “Natural” on Food Labeling,

<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm445609.htm> (last visited Mar. 21, 2016).

⁵⁷ *Id.*

⁵⁸ Certified Naturally Grown, <http://www.cngfarming.org> (last visited Mar. 21, 2016).



- Certification mark, , owned by Certified Naturally Grown, certifies that the goods have been grown, raised, produced, or sold in accordance with the Certified Naturally Grown standards established by the owner of the mark.⁵⁹

Also, the Glycemic Research Institute established a Natural certification mark.



- Certification mark, , owned by the Glycemic Research Institute, certifies that the goods provided do not contain high fructose corn syrup, chemical or synthetic sweeteners, sugar alcohols, or toxic glycosides.⁶⁰

“Natural” Trade Marks:

As mentioned above, a mark on a food product may look like a certification mark, implying a quality standard, yet the mark is registered and functions as a trademark. Applicants may register Natural or Naturally marks, but will most likely have to disclaim the term, Natural. Examples of Natural trademarks include:



- Trademark, , identifies Naturally Organic, LLC as a source of Organic processed fruit. The term, NATURALLY ORGANIC, is disclaimed.⁶¹



- Trademark, , identifies National Beef Packing Company, LLC as a source of pork that is minimally processed and contains no artificial ingredients. The terms, NATURAL PORK and MINIMALLY PROCESSED AND CONTAINS NO ARTIFICIAL INGREDIENTS, are disclaimed.⁶²

CONCLUSION:

⁵⁹ U.S. Certification Mark Registration No. No. 4834448 (registered Oct. 20, 2015).

⁶⁰ U.S. Certification Mark Registration No. No. 3690168 (registered Sept. 29, 2009).

⁶¹ U.S. Trademark Registration No. No. 4793730 (registered Aug. 18, 2015).

⁶² U.S. Trademark Registration No. No. 4407666 (registered Sept. 24, 2013).

Certification marks, trademarks, and federally regulated food labels and claims function to offer consumers different food product quality information. The certification marks tell a consumer that the food product satisfies a quality standard. The trademark identifies the source of the food product. The food labels and claims provide the consumer with numeric data and quality relative to other products. Consumers familiar with FDA and USDA regulated food labels, claims, and marks may navigate comfortably through the information provided by food-based certification marks and trademarks. However, without such familiarity in at least the federally regulated food labels, claims, and marks, consumers may fall short of making informed decisions about food purchases.