

Pseudo-Certification Marks¹

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July 24, 2019

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¹ This is a work in progress. Please do not circulate.

I. INTRODUCTION

The ecosystem of trademark law is composed of various different marks, such as individual trademarks, collective marks and certification marks. While all these marks function as marketplace signs, they are regulated differently to serve different purposes. There are some known, accepted, and even encouraged overlaps between different kinds of marks in this ecosystem. This paper, however, raises a previously undiscussed overlap, the use of what I term “pseudo-certification marks”. This is where a mark appears to be signalling a characteristic of a goods or service and functioning as a certification mark, but is in fact registered and protected as an individual trademark.²

The contribution of this paper is two-fold. First, I identify the practice I term ‘pseudo-certification marks,’ where marks are operating like certification marks but are registered, and thus regulated, as trademarks. This paper focuses on a specific category of pseudo-certification marks, namely those which are also marks of rectitude. Second, I explore the significance of this practice, especially in terms of what it may mean for how certification marks are used, regulated, and potentially reformed.

The occurrence of pseudo-certification marks occurs at the intersection of two growing trends: the expanding uses of trademarks and a rising consumer interest in corporate social responsibility.

First, the roles and recognized uses of trademarks are expanding.³ More than a mark that indicates source, or quality, today’s trademarks are dynamic marketplace signs. They have become an integral aspect of brands⁴ and play a critical role in the governance structure of certain businesses.⁵ They have merchandising value,⁶ are key to helping

² In this paper I will use “product” as a collective term to denote goods and/or services.

³ One notable instance of this is the line of case law stemming from the seminal case of *L’Oréal v. Bellure* in which the ECJ (at the time) recognized the numerous functions of trademarks, apart from the source indicating function: *L’Oréal v. Bellure*, Case C-487/07 [2009] ECR I-5185 (ECJ, First Chamber). See also: Barton Beebe, ‘Search and Persuasion in Trademark Law’ (2005) 103 Michigan Law Review 2020; Stacey L Dogan and Mark A Lemley, ‘Grounding Trademark Law through Trademark Use’ [2006] Iowa Law Review 1669.

⁴ Jessica Litman, ‘Breakfast with Batman: The Public Interest in the Advertising Age’ (1998) 108 Yale LJ 1717; Deven R Desai, ‘From Trademarks to Brands’ (2012) 64 Florida Law Review 981; Dev Gangjee, ‘Property in Brands: The Commodification of Conversation’ in Helena R Howe and Jonathan Griffiths (eds), *Concepts of property in intellectual property law* (Cambridge University Press 2013); Lionel Bently, Jennifer Davis and Jane C Ginsburg, *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge University Press 2008).

⁵ Celia Lury, ‘Trade Mark Style as a Way of Fixing Things’ in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Trade Marks and Brand: An Interdisciplinary Critique* (Cambridge University Press 2008); Margaret Chon, ‘Trademark Goodwill as a Public Good: Brands and Innovations in Corporate Social Responsibility’ (2017) 21 Lewis & Clark Law Review 277; Andrew Griffiths, ‘Brands, “Weightless” Firms and Global Value Chains: The Organisational Impact of Trade Mark Law.’ (2019) 39 Legal Studies 284; Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (Vintage Canada 2000).

⁶ Stacey L Dogan and Mark A Lemley, ‘The Merchandising Right: Fragile Theory or Fait Accompli?’ (2005) 54 Emory Law Journal 461.

consumers form brand communities and their identities,⁷ and are valuable assets in their own right.⁸

Second, consumers have become increasingly interested in democratizing their purchases and using their market behaviour to encourage socially responsible conduct. This requires, however, knowledge of how the companies they are considering purchasing from are behaving. No longer are consumers concerned with one aspect of corporate responsibility – their interests are wide ranging, and even contradictory.⁹

There is, accordingly, an increased consumer demand to be both aware of the supply chain and production standards of products they buy, as well as more information and “value identity” of the brands they are purchasing from.¹⁰ In response to this, brands themselves are becoming political and communicating their stated values.¹¹ Companies are responding to this growing consumer demand in various ways.

EVERLANE, for instance, is an American apparel company, who touts the slogan “Exceptional quality. Ethical factories. Radical transparency.”¹² This predominately online retailer has incorporated videos, photos, and infographics into their shopping platform to share with consumers a wide range of information such as the cost of the raw materials for individual items of clothes, as well as videos of their factories.¹³

Similarly, ABSOLUT’s campaign for its vodka-- ABSOLUT PLANET—is another example of how companies are responding to this trend. THE ABSOLUT PLANET campaign is a three-prong campaign, setting out ABSOLUT’s commitment to the environment (“the planet”),¹⁴ the LGBTQ community (“the people), and production of their vodka (“the product”).

⁷ Albert M Muniz and Thomas C O’Guinn, ‘Brand Community’ (2001) 27 *Journal of Consumer Research* 412.

⁸ Frank I Schechter, ‘The Rational Basis of Trademark Protection’ (1927) 40 *Harvard Law Review* 813.]

⁹ Fran Hawthorne, *Ethical Chic: The Inside Story of the Companies We Think We Love* (Beacon Press 2012).

¹⁰ Margaret Chon, ‘Marks of Rectitude’ (2009) 77 *Fordham Law Review* 101; Hawthorne (n 9); Margaret Chon, ‘Slow Logo: Brand Citizenship in Global Value Networks’ (2013) 47 *University of California Davis Law Review* 935.

¹¹ ‘Grab Your Wallet: When Brands Go Political’, *Under the Influence* (24 August 2017).

¹² <https://www.everlane.com/about>

¹³ See for instance: <https://www.everlane.com/products/womens-luxe-cotton-jumpsuit-black>.

This webpage, which features a woman’s jumpsuit, informs consumers about a variety of information about the product. In addition to the standard fit and garment care instructions, the factory it was made in (Nobland Vietnam Co., Ltd in Ho Chi Minh City, Vietnam) linking consumers to a webpage outlining details about the factory as well as photos (<https://www.everlane.com/factories/vietnam-knits>), as well as the cost of materials (\$16.11), hardware (\$0.91), labor costs (\$7.85), duties (\$2.74), and transport costs (\$0.41). Other suggestions to incorporate such information have been raised in the literature. See, for example: Margaret Chon, ‘Tracermarks: A Proposed Information Intervention’ (2015) 53 *Houston Law Review* 101.

¹⁴ This aspect of the campaign announces that ABSOLUT is “on a mission to expand how the world thinks about its people, our product, and the planet.” To this end, one aspect of this campaign is their website where ABSOLUT explains that “taking care of our home is the ABSOLUT priority” and sets out the ways

In a similar vein, another part of their campaign has a corresponding web page publicizing that “we only celebrate when everyone is invited” and that “ABSOLUT believes in a more open and inclusive world.” ABSOLUT aligns itself with the LGBTQ community by partnering with the non-profit organization GLAAD,¹⁵ and creating billboards that celebrate inclusivity and honouring LGBTQ activists. With all of its discussion of community outreach, initiatives and partners one might fairly think ABSOLUT is a human rights foundation, not a brand of vodka.

ABSOLUT’s campaign is emblematic of what consumers are beginning to expect of brands.¹⁶ ABSOLUT is not only declaring its *support* of certain social justice issues; it is stating its *beliefs* about issues and positioning itself as an actor driving change. ABSOLUT is championing movements, inviting consumers to join them. This campaign makes it easy to list the values that ABSOLUT stands for and holds. In fact, there is no ambiguity about it. ABSOLUT’s branding and advertising makes its values explicit – it declares its values and beliefs.

Thus, it is no surprise these two trends, brands embodying a set of values and the expansion of trademarks, have come to a head. Trademarks themselves begun to be used to communicate their political and social values, as Margaret Chon aptly describes in her paper, “Marks of Rectitude.” Trademarks, indeed, are now being used as marks of rectitude.

This paper focuses on marks that communicate a broad spectrum of information related to corporate social responsibility to consumers while appearing to be certification marks. The term corporate social responsibility in and of itself includes a wide range of concepts and understandings, including environmental impact, treatment of workers, accessibility of products to various market segments, inclusive advertising practices, and affiliation with other corporations, industries or governments.¹⁷

This paper proceeds as follows. In part 2, borrowing the term from the work of Margaret Chon, I explain what marks of rectitude are, and what they do. Next, in Part 3, I set out

in which ABSOLUT is striving to make as little impact as possible. Their website contains videos, facts and figures and even an option to join the ABSOLUT movement to make a positive impact. Consumers are invited to join their newsletter and receive information about, among other things, how to support ABSOLUT’s charitable partners, sustainability initiatives in one’s community, and even ABSOLUT recipes for *sustainable* cocktails! Having checked the cocktail recipes, it is difficult to discern what makes them different from any other cocktail. It appears the only thing that makes these cocktails *sustainable* is the use of ABSOLUT vodka and not some other spirit.

¹⁵ <https://www.glaad.org/about>

¹⁶ (n 11).

¹⁷ Hawthorne (n 9).

For instance, the Geneva-based International Organization for Standardization provides guidance on social responsibility, which they take to mean “acting in an ethical and transparent way that contributes to the health and welfare of society”¹⁷. The European Union Commission for Internal Market, Industry, Entrepreneurship and SMEs has defined corporate social responsibility as “the responsibility of enterprises for their impact on society.” See: <https://www.iso.org/iso-26000-social-responsibility.html> and <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681>

what certifications mark are to demonstrate how they are the natural fit to protect marks of rectitude as intellectual property under the current ecosystem of trademark law. In Part 4, I provide some examples of pseudo-certification marks with an eye to illustrating how these marks are acting within the purview of certification marks but are registered as trademarks. Last, in part 5 I focus on potential tensions that may arise as a result of this practice and highlight questions that merit deeper exploration that are raised by acknowledging the practice of pseudo-certification marks. Specifically, this paper highlights questions of how our intellectual property systems regulate marks of rectitude.

II. MARKS OF RECTITUDE

Marks of rectitude are consumer-oriented marks that signal a standard or characteristic of a product which relates to, broadly speaking, virtues. That is, marks which signal a standard, quality or other characteristic that is moral, environmental, or political in nature. The range of these types of marks of rectitude vary, both in the types of products they are associated with as well as the nature of the values and characteristics they are indicating.

If a consumer is interested in a characteristic or standard of rectitude, this is an attribute of a product a consumer is unlikely be able to discern simply by using the product or interacting with the product. That is, the information a consumer desires is either prohibitively expensive to obtain (because it may involve flying to factories and following products through their distribution chain) or impossible to discern. These types of attributes are what economists refer to as *credence attributes*.¹⁸

Some types of information about a product are easier to acquire than others. Economists refer to the different qualities of a product that can be determined at various points in the market chain as *search*, *experience*, and *credence* attributes. Search attributes are readily apparent and can be known before purchase (eg, the product's appearance). Experience attributes can only be determined after purchase by engaging with the product (eg, the product's flavour). Credence attributes cannot be evaluated in normal use, and assessing a credence attribute, if possible, requires additional costly information (eg, nutritional content or the labour conditions under which the product has been produced). By purchasing and using a product, a consumer will learn some of its attributes (either before or after purchase), but some attributes may remain obscured.

The ethical dimensions of a product are credence attributes. One cannot taste the difference between a chocolate produced under fair working conditions or not, and nor is their hair shinier and thicker if washed with a shampoo that doesn't pollute the environment.¹⁹ Because so much of the information consumers are increasingly interested in are related to corporate social responsibility, and thus are credence attributes, this information needs to be shared. It can't be discovered.

¹⁸ Phillip Nelson, 'Information and Consumer Behavior' (1970) 78 *Journal of Political Economics* 311.

¹⁹ Much to, the likely, chagrin of the Rainforest Alliance. On February 3, 2016 on their Twitter account, @RnfrstAll_UK, they asked followers to re-tweet if they agreed that "sustainably grown #pineapples tast3 the sweetest!" on February 3, 2016 twitter account.

This is where marks of rectitude become a potential critical tool in reducing marketplace asymmetry. A mark of rectitude can transform a credence attribute, such as whether the employees making the product are paid a living wage,²⁰ or whether the company is in favour of a political social movement, into a search attribute. A search attribute is something that is readily apparent and can be known before purchase (eg, the product's appearance).²¹ This is preferable as a search attribute is something that can be observed and known by consumers before the time of purchase. This allows for informed and empowered consumer behaviour.

For instance, a soap sold by DR. BRONNER'S, a B Certified Corporation, is expressing their values of corporate socially responsible conduct by verifying their brand (the source of the product) meets a certain standard.²² Similarly, SUSTAIN NATURAL, a company which sells feminine hygiene products, boasts their products meet various certifications. Despite their relatively modest product line, their website reads, "We're over certified." And lists eight certifications their products are certified by including: Certified Vegan, Fair Rubber, and Forest Stewardship Council certified, implicitly expressing environmentally minded values.²³ By making use of a certification, a brand can signal that it or its product possesses a certain characteristic. The corollary of this is that it signals that the brand "believes" in certain values and accord with a given consumer demographic.

A mark of rectitude, as being used in this paper, is a descriptive term, meant to indicate a mark which signals to a consumer a standard, quality or other characteristic that is moral, environmental, or political in nature. The term, as I am using it, has no prescriptive qualities as to *how* a mark of rectitude must indicate this content (such as through association, a partially descriptive sign, etc). This term is also agnostic to the legal status of such a mark.

In order for a mark of rectitude to receive legal protection and be protected as a form of intellectual property, the mark must fall into a given category of marks within the scope of trademark law. This could include, trademarks, collective marks, certification marks or Geographical Indications.²⁴ The next section will explore why certification marks are a natural fit for marks of rectitude because they are designed to communicate a characteristic of a product divorced from any source indicating function.

²⁰ <https://www.livingwagennetwork.org/get-certified>

²¹ Nelson (n 18); Michael R Darby and Edi Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 Journal of Law and Economics 67.

²² <https://www.drbronner.com/about/our-customers/product-certifications/>

²³ <https://www.sustainnatural.com/>

²⁴ Although in the EU, GI's are a sui generis form of IP. In several other jurisdictions GIs are regulated as a part of trademark law.

III. CERTIFICATION MARKS

The term “marks of rectitude” is agnostic to the legal nature of the mark in question.²⁵ The legal nature of marks of rectitude is, however, of interest here. This section considers the suitability of certification marks for marks of rectitude and argues that given the nature of what certification marks communicate, as well as their ownership and use structures, make them uniquely well suited to act as marks of rectitude.

Certification marks are a natural fit for marks of rectitude for the following three reasons. First, certification marks are designed to convey a product is certified as having a given characteristic. This communicates the nature of the product, not the source of a product. This makes certification marks particularly well-suited to convey the kind of credence attributes that are often the subject of marks of rectitude. Second, certification marks are generally not allowed to be used by their owners. The mark’s independence from its owner is intended to create the kind of objective arm’s length relationship. This is thought to increase the credibility of a mark signaling a credence attribute, as the owner’s own business interests cannot be directly implicated by the use of the mark, or the standards for the characteristic being signaled. Third, by allowing a certification mark to be used across brands, they are inherently “un-branded” or “multi-branded.” This is similar to the type of information marks of rectitude may intend to communicate, which is applicable to various different sources and producers.

Certification marks are signs which communicate that the product which bears the mark is certified by the mark’s owner to meet a given standard regarding a specific characteristic, such as quality, material, mode of production, origin. The core function of a certification mark is to express the nature of a product by indicating a given characteristic—they do not communicate the source of the product in the classical trademark sense.²⁶

Certification marks, in conveying a characteristic of a property, such as the quality, mode of production, material, etc. communicate the *what* or *how* of a product. That is, a certification mark can tell a consumer *what* a product is, such as kosher or halal-certified, or *how* the product was produced, such as by organic farming or free trade production.²⁷

²⁵ “This essay considers afresh the potential for instruments such as trademarks and certification marks to facilitate consume protection and access to quality market information in light of these new regulatory trends. Marks of rectitude should represent accurately the standards purported to be embodied within the products (and services) being purchased by consumers in this disaggregated global marketplace.” Chon, ‘Marks of Rectitude’ (n 10) 102.

²⁶ In classic trademark doctrine, ‘source’ refers to a mark’s ability to indicate that a product bearing registered mark has been placed on the market with the authority of the proprietor: C-102/77 *Hoffman-La Roche v Centrafarm* [1978] ECR I-1139, para 7; C-661/11 *Martin y Paz Diffusion SA v David Depuyat and Fabriek van Marquinerie Gauqui NV* EC:C:2013:252, 24 March 2012, Opinion of AG Cruz Villalón, para 75. There are different types of ‘sources’ implicated by products that carry certification marks.

²⁷ Consumer marketing research has found that consumers consider certification marks to be credible sources of information regarding a product, for example: Thomas L Parkinson, ‘The Role of Seals and Certifications of Approval in Consumer Decision-Making’ (1975) 9 *Journal of Consumer Affairs* 1; Francisco J Montoro Rios and others, ‘Improving Attitudes Toward Brands with Environmental Associations: An Experimental Approach’ (2006) 23(1) *Journal of Consumer Marketing* 26.

Trademarks, in contrast, express the *who* of a product—the trader with whom the product is associated.

Certification marks are, thus, a way to minimize market information asymmetry with respect to credence attributes.²⁸ Certification marks are market signs that indicate the quality, nature or attribute of a good or service, such as materials, mode of manufacture, or specified standards of quality. Certification marks can convey to a consumer, at a glance, information about a product that would otherwise be indeterminable, before or after purchase. Essentially, certification marks can transform a credence attribute into a search attribute.²⁹ By signaling a credence attribute in the market, a consumer can search the market for a product that has their desired characteristic or quality.

The result is that while trademarks help a consumer identify between different producers on a market, certification marks identify products that are certified as having a given characteristic from those that are not. The European Union Certification Mark, for instance, is defined as:

“[A] mark capable of distinguishing goods or services which are certified by the proprietor of the mark in respect of material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics, with the exception of geographical origin, from goods and services which are not so certified.”³⁰

Similarly, the United Kingdom’s Trade Mark Act 1994 defines certification marks as:

s. 50 (1) A certification mark is a mark which is described as such when the mark is applied for and indicates that the goods or services in connection with which it is used are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics.

There is such limited case law treating certification marks that it is difficult to look to judicial articulations of principle. Similarly, there is limited academic scholarship on certification marks, although the small body of work that exists describes these marks aptly. As put by Belson:

²⁸ Geographical indications are another method of addressing information asymmetry, as discussed in Chapters 7 and 8, see: European Union Intellectual Property Office, ‘Infringement of Protected Geographical Indications for Wine, Spirits, Agricultural Products and Foodstuffs in the European Union’ (European Union Intellectual Property Office 2016) 13 <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Geographical_indications_report/geographical_indications_report_en.pdf>.

²⁹ Dev Gangjee, ‘Proving Provenance? Geographical Indications Certification and Its Ambiguities’ [2015] World Development; Gabriele Jahn, Matthias Schramm and Achim Spiller, ‘The Reliability of Certification: Quality Labels as a Consumer Policy Tool’ (2005) 28 Journal of Consumer Policy 53.

³⁰ <https://euipo.europa.eu/ohimportal/en/certification-marks>

“Whereas ordinary trademarks serve to distinguish the goods or services of one individual source from another, certification marks have a different significance. Certification marks are principally indicia of conformity of goods or services to particular standards, stipulated by the proprietor of the mark. Such marks are for the use of multiple sources, which may not necessarily be individual sources, provided that their goods or services meet the proprietor’s required standard.”³¹

Certification marks are treated by law as a special form of trademark.³² That is, they are defined in relation to trademarks, and are regulated by trademark legislation. As such, “The processes of examination, registration, and provisions for redress when infringed, are all integrated into the trademark statutes of the world.”³³ The critical feature that make certification marks unique from an ordinary trademark, the difference in what they signal, result in a few differences in how certification marks are regulated. Of particular interest here, is the differences in regulation between certification marks and trademarks with respect to ownership and use.

Unlike trademarks, the owner of a certification mark cannot use their mark. That is, the certification mark owner cannot engage in the business of the kind related to the goods or services being certified.³⁴ That is, there must be an arm’s length relationship between the owner of the certification mark and those that carry on a business relating to the certified goods or services.

“A principle fundamental to the concept of a certification mark in most but not all Anglo-American jurisdictions, and other as well, is that the owner of the certification mark is precluded from using the mark for the certified goods or services where covered. This principle derives from the notion that it would not be in the public interest for a non-independent person, that is a person carrying on a trade in the goods or services certified, to act as a certifier.”³⁵

The type of prohibition on the ownership of certification marks by some, and limitation in how the mark owner can use their certification mark by others, is intended to create a certain level of objectivity in the mark and thus add credibility to what the mark signals. This stands in stark contrast to trademarks, which are intended to have their owner engaged in the corresponding practice and can largely be freely licensed by their owner.

The second notable difference, and corollary of the first, corresponds to who *can* make use of a certification mark. While a certification mark owner cannot use their mark, other businesses that have products that meet the required standard ought to be able to use the

³¹ Jeffrey Belson, *Certification and Collective Marks: Law and Practice* (2nd edn, Edward Elgar Publishing Limited 2017) para 3.05.

³² *ibid* 1.03.

³³ *ibid*.

³⁴ This is true in the United Kingdom, European Union, Canada and the United States. Australia being a notable exception to this.

³⁵ Belson (n 31) para 3.81.

mark. Thus, a certification mark is intended to be used by a variety of brands and producers. Indeed, the ability of various producers to use a certification mark if appropriate is key to ensuring certification marks don't impeded competition.³⁶ As explained by Belson:

“The [certification] mark *ab initio* is for the use of other, multiple, sources subject to the proprietor's authorization. Indeed he is obligated not to deny authorization for any source to use the mark on products that meet his stipulated standards.”³⁷

Thus, certification marks are intended to appear on various sources, alongside source indicating signs, to convey a given characteristic.

IV. PSEUDO-CERTIFICATION MARKS

Marks of rectitude can take different forms; a mark of rectitude need not be a certification mark. Nevertheless, there does exist a class of marks of rectitude which *appear* to be a certification mark, as they perform a certifying function, but are in fact trademarks, and thus registered and regulated as a trademark. It is this class of marks of rectitude, which I call pseudo-certification marks, which are the subject of this section.

While there are several cases of this practice, below I set out three examples of pseudo-certification marks. This practice is not unique to these marks, rather they are illustrative of this practice – where registered trademarks are behaving like certification marks in that they are performing a certification mark like signalling function in the market.³⁸

My focus on each mark is two-fold.³⁹ I both discuss the forward-facing aspect of the mark, demonstrating how the mark also appears to be a certifying mark. To this end, for each mark I set out why I am considering it a mark of rectitude, what the mark is like, where it is used and how it presents to consumers, why it appears to be a certification mark. I then turn to the “behind the scenes” aspect of each mark. This includes who owns the mark, how the mark is actually used, and what characteristic or standard the mark purports to signify.

³⁶ Jeanne C Fromer, ‘The Unregulated Certification Mark(Et)’ (2017) 69 Stanford Law Review 121.

³⁷ Belson (n 31) para 1.03.

³⁸ Other marks, for example, include: THE RAINFOREST ALLIANCE <https://www.rainforest-alliance.org/>, ECOCERT <https://www.ecocertcanada.com/>, FORESTRY STEWARSHIP COUNCIL <https://ca.fsc.org/en-ca>, and GOODWEAVE (<https://goodweave.org/about/>).

While these types of certification marks have generally been used on food stuff products, their uses have expanded, and are now also found on cosmetics and personal care items. See: ‘Proliferation of Ethical Labels in Cosmetics Industry’ (*Ecovia*, 11 September 2015) <<https://www.ecoviain.com/r1109/>> accessed 8 April 2019.

³⁹ As this paper focuses on how this type of information is communicated to consumers within a trademark law context, it is outside the scope to evaluate the standards and certification practices associated with these marks.

a. COCOA LIFE

The COCOA LIFE mark is the mark of rectitude for the Cocoa Life global cocoa sustainability program launched in 2012.⁴⁰ This program takes a “holistic approach” to cocoa sustainability. As Cocoa Life’s website explains, “We focus our efforts on the three areas where we can make the most difference: cocoa farming as a prosperous business; empowered and inclusive cocoa communities; conserving and restoring forests.”⁴¹ By signifying cocoa production that is done with the goal of having positive and responsible social and environmental effects, COCOA LIFE is a mark of rectitude.

COCOA LIFE is a combination word and design mark. It is composed of two concentric circles, where the outer circle is a solid green colour and has the words “COCOA LIFE” written in it. In the inner circle is the outline of a flower, that is composed of various different colours. From the words on the mark, and the use of a flower, one could assume this mark indicates something regarding the quality of cocoa and nature. The word life could mean various different ideas – the life cycle of cocoa creation, the commitment of cocoa for life, the health of cocoa plants. There is nothing about the mark itself which communicates a discrete or standard. The mark itself can be found on various cocoa products, namely chocolate bars, that come from a range of sources, such as CADBURY, FREIA, CÔTE D’OR and MILKA. The mark itself has no noticeable brand affiliation.

The COCOA LIFE mark operates under its own banner. The COCOA LIFE mark corresponds to the Cocoa Life program. That being said, Cocoa is controlled and owned and by Mondelez International. It is also, not entirely surprising, used for the purposes of their products.

Mondelez International is a large multi-national snack producing corporation – in their words, their “**purpose** is to empower people to snack right. We will lead the future of snacking around the world by offering the right snack, for the right moment, made the right way.”⁴² To this end, they have a large range of beverages, biscuits, chocolates, gum and candy in their portfolio. This includes an impressive array of powerful brands such as CADBURY, MILKA, TOBLERONE, TRIDENT, RITZ and OREO, to name a few.

The COCOA LIFE mark, thus, only appears on some Mondelez International products, such as CADBURY, FREIA, CÔTE D’OR and MILKA. As the COCOA LIFE mark is used on a variety of brands, which a consumer may not know are all owned by Mondelez International. Thus, based only on marketplace experience, a consumer would likely see the COCOA LIFE mark on a variety of chocolate products and assume it is some sort of third-party mark as it has no explicit affiliation with the chocolate brand.

The characteristic behind the COCOA LIFE mark appears to be some vague notion of cocoa sustainability. While Cocoa Life’s website outlines the five principles they are

⁴⁰ See, for example, the Canadian trademark registry no: TMA957998.

⁴¹ <https://www.cocoalife.org/>

⁴² <https://www.mondelezinternational.com/about-us> (emphasis in the original)

guided by, these principles are both developed by themselves and do not correspond to a specific standard or characteristic.

Despite being a program operated by Mondelēz International, their website seeks to legitimize them and centre their program in a network of independent organizations by listing their partners, initiatives they are members of, and external advisors. For instance, Cocoa Life works with various partners, such as Save the Children, FAIRTRADE International, World Vision, and is a member of the International Cocoa Initiative and the World Cocoa Foundation.⁴³ Several of these organizations are well-known and have reputations for being reputable advocacy and non-profit organizations. While Cocoa Life is not at arm's length from a brand, through its numerous partners, memberships, and external advisors, it appears to be trying to garner the goodwill a third-party could give it, while still operating entirely in line with Mondelēz International's interests.

b. FAIRTRADE

The FAIRTRADE mark is one of the most well-known marks of rectitude, indicating that a product that bears it has been made in accordance with certain standards of fair-trade practices.

The best-known FAIRTRADE mark is a design one, depicting an abstracted figure holding an arm above their head, in a similar shape as a Yin Yang symbol.⁴⁴ To the left part of the figure the symbol is green, and to the right it's blue, with a black figure in the middle. It is often accompanied by the word mark "FAIRTRADE" underneath it. Thus, from looking at the mark alone, a consumer would likely know or infer (from previously interacting with the combination word and figurative mark) that a product bearing this mark has in some aspect of its production met a fair-trade production standard. The FAIRTRADE mark can be found on a variety of products and brands, thus appearing to have no brand affiliation. It does not communicate the source of a product.

The FAIRTRADE mark is owned by FAIRTRADE INTERNATIONAL is a global organization, with national entities, that seeks to create an "alternative approach to conventional trade and is based on a partnership between producers and consumers."⁴⁵ The FAIRTRADE mark, therefore, is a third-party owned mark, created and maintained by a standard setting organization and used by a wide range of producers in association with numerous, even competing, brands. For instance, the Fairtrade directory identifies currently 81 cocoa traders in North America who are certified. Similarly, the UK branch of Fairtrade International, the FAIRTRADE FOUNDATION (which makes use of the same mark), has an article on their blog "15 FAIRTRADE Chocolate Choices You Can Find on the High Street" which names several well-known and competing brands of chocolate as those which carry fairtrade chocolate and can be identified by "look[ing] for

⁴³ <https://www.cocoalife.org/the-program/partners>

⁴⁴ See, for example, the Canadian trademark registry no: TMA872494 and TMA761679.

⁴⁵ <https://www.fairtrade.net/about-fairtrade/what-is-fairtrade.html>

the Fairtrade Mark” such as MALTESERS, GREEN & BLACKS, WAITROSE chocolate, ASADA brand chocolate, and ALDI’S MOSER ROTH chocolate bars.⁴⁶

Fairtrade sets the standards that are required for their mark to be used. The characteristic of fair-trade production being certified corresponds to a specific standard. Fairtrade’s website explains that when a product bears the FAIRTRADE mark, the producers and traders of the product have met the Fairtrade Standards.⁴⁷ The FAIRTRADE marks are owned and licensed by Fairtrade International to products that meet the requisite standards.⁴⁸ Fairtrade International has a range of standards, such as for hired labour, small-scale producers, contract production, climate and textile.⁴⁹ These standards are made by the Fairtrade International Standards Committee in accordance with the ISEAL Code of Good Practice on Standard Setting, which includes a consultation practice.⁵⁰ The Fairtrade website has an extensive list of documents available outlining the process by which standards are created and reviewed, the standards themselves, and even minutes of their Standards Committee’ meetings.⁵¹

c. B CORP CERTIFIED

The B CORP CERTIFIED mark is a mark that indicates a company has become a Certified B Corporation.⁵² This is a mark which indicates a certain level of corporate social responsibility on the part of the company bearing this mark.

The mark is a black and white word mark. The standard appears to be that the company which carries the B CORP CERTIFIED mark is certified as a certain type of corporation. This mark appears on a wide range of products and affiliated with a wide-range of brands. Given that the mark is somewhat descriptive, it appears to be speaking to a characteristic of the company selling the product rather than anything relating to a product itself. It does not indicate the source of a product but by describing the nature of the company that produces the product it communicates, indirectly, a characteristic of the production of the product bearing the mark.

This mark is owned by B Lab, a nonprofit organization the administers the B Corp certification program. Once certified, a company becomes a “Certified B Corporation,” or “B Corps” for short, and may make use of the B CORP brand and affiliated mark.

⁴⁶ <http://www.fairtrade.org.uk/Media-Centre/Blog/2019/February/15-Fairtrade-Chocolate-Choices-You-Can-Find-on-the-High-Street>

⁴⁷ <https://www.fairtrade.net/about-fairtrade/the-fairtrade-marks.html>

⁴⁸ <https://www.fairtrade.net/about-fairtrade/the-fairtrade-marks.html>

⁴⁹ <https://www.fairtrade.net/standards/our-standards.html>

⁵⁰ <https://www.fairtrade.net/standards/setting-the-standards.html>

⁵¹ https://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/minutes/2019-03-20-SC-Minutes-Meeting83.pdf

⁵² See, for example, the Canadian trademark registry no: TMA906232.

What is unique about B CORP CERTIFICATION, and in some ways distinguishes it from several other third-party marks of rectitude, is that it does not certify or identify a goods or service that has a specific quality:

“Certifying as a B Corporation goes beyond product- or service-level certification. B Corp Certification is the only certification that measures a company’s entire social and environmental performance.”⁵³

As their website explains, B CORP CERTIFIED is evaluating the company that stands behind a product or service, “And increasingly that’s what people care most about.”⁵⁴ Thus, like FAIRTRADE, not only is B CORP CERTIFIED a third-party certification that is used by multiple brands, such as BEN AND JERRY’S, DR. BRONNER’S, and PATAGONIA, it is a third-party mark which speaks to the company or brand, rather than a specific product.

Certified B Corporations “are for-profit companies that use the power of business to build a more inclusive and sustainable economy. They meet the highest verified standards of social and environmental performance, transparency, and accountability.”⁵⁵ The *Certified B Corporation Brand Communication and Identity Guidelines* state that as of 2018 there were over 2,500 B Corps in 130 industries and 60 countries worldwide.⁵⁶

None of the above marks are functioning as trademarks. None of them serve the purpose of identifying the source of the product or brand responsible for producing the product. All of these marks appear on products alongside actual trademarks that *are* performing a source identifying function. What all these marks do signal, however, a “how” or “what” of the product – that they have been produced in a certain way, by a certain type of entity, or with a certain kind of material. Furthermore, the nature of these marks is that the who or what of the product is relating to a characteristic of rectitude.

Thus, none of the above marks are occupying what is traditionally considered the role of a certification mark. Yet, these marks are registered trademarks. It is insufficient, however, to merely suggest the registration of these marks be amended. This practice is indicative of a greater shift in our trademark law ecosystem that merits further exploration.

⁵³ <https://bcorporation.net/certification>

⁵⁴ <https://bcorporation.net/about-b-corps>

⁵⁵ B Labs, ‘Certified B Corporation Brand Communication and Identity Guidelines’ (2018) Branding Guidelines version 2.4 9.

⁵⁶ *ibid.*

IV. ANALYSIS

The core issue with pseudo-certification marks is that while they appear to be functioning as certification marks (one type of marketplace sign with its own rules and regulations that influence consumer behaviour), they are in fact a trademark (a wholly different type of marketplace sign). This incongruity between how the mark appears to consumers, and how the mark is registered and use, gives rise to certain tensions. Where certification marks are regulated differently than trademarks, a pseudo-certification mark side-steps potentially vital regulatory safeguard. For this reason, this practice merits closer examination. In this section I explore potential tensions that may arise as a result of this practice and highlight questions that merit deeper exploration that are raised by acknowledging the practice of pseudo-certification marks and how they operate as marks of rectitude.

This mis-alignment between the forward-facing function and back end requirements may have various consequences. For one, these marks may not be communicating as clear or objective a characteristic as one would expect behind such marks. For COCOA LIFE in particular, it is unclear what is required for their products to have meet the standard required to bear this mark. What are the indicia of sustainability? This lack of clarity is likely related to the lack of independence between the owners of COCOA LIFE and the products that bear the mark. When other market actors have to be able to apply to make use of your certification mark, the standard they must meet has to be articulated with sufficiently clarity. The failure to do this may be anti-competitive. A corollary of this is the consumers, who rely on the mark, can assume that even if they are not aware of it, a clear standard for the mark exists. Yet, when a pseudo-certification mark is created, regulated, and used by the owner of the mark, the requirements of a clear standard required by trademark legislation no longer applies. The information the mark is communicating can become much murkier and vague. This is the kind of scenario trademark legislation regulating certification marks attempts to avoid by requiring an arm length's relationship between the owner and users of certification marks.

Therefore, pseudo-certification marks may receive a market benefit without satisfying regulatory standards otherwise required to receive that benefit. Because certification marks are regulated distinctly from trademarks, with an eye to the public interest good they perform, registering a certification mark is more onerous than an ordinary trademark. These heightened requirements correspond to the public good that certification marks are meant to protect. The idea is that certification marks then provide consumers a credible way to discern if a product has a characteristic, they are interested in. Thus, the use of pseudo-certification marks gains the benefits of a certification marks while sidestepping the corresponding regulatory oversight that is intended to ensure the regime has integrity. This is a problem for both the consumers who seek to rely on these marks, and the legitimacy of the certification mark institution as a whole.⁵⁷

⁵⁷ Jessica Lai, “‘Rainbow Tick’ Is Not a Certification Mark’ *Newsroom* (New Zealand, 4 June 2019).

Given the potential for tensions to arise when pseudo-certification marks are used, we ought to consider whether there is something about the way certification marks are regulated that makes them either undesirable or unsuitable to the needs of marks of rectitude owners. This requires closer examination. Although there is limited scholarship on why owners may opt for the use of a pseudo-certification mark for their marks of rectitude, we may consider a few possible reasons. Exploring the reasons why this practice may be happening, will allow us to understand why this incongruity is occurring and the significance of it on the greater regulation of certification marks and trademarks in our intellectual property regimes.

The owner of the mark may have opted to use a pseudo-certification mark instead of an actual certification mark because they wanted the market advantage of setting the standards for their products while receiving any market benefit of appearing to support the values associated with their marks – in these cases the values associated with sustainable farming and production.⁵⁸ COCOA LIFE is an example of this, as discussed above.

Another, related, reason why owners may use pseudo-certification marks is control. A trademark owner can exert more control over their mark than a certification mark owner can. Certification mark owners are required to authorise the use of the mark to anyone who meets the associated standards. In contrast, trademark owners have discretion over how, and to whom to license their mark, and can refuse to license their mark to a trader who may otherwise meet the requisite standards. Moreover, unlike a trademark owner, a certification mark owner cannot assign or transmit a registered certification mark without the consent of the registrar.⁵⁹ Even where a pseudo-certification mark owner does not intend to use their mark on their own products, they may enjoy the increased control and benefits trademark registration provides.

Another possible reason for this practice is pragmatic. While the practice of using trademarks as certification marks is not permitted in most jurisdictions, this was not always the case in the EU. There was a time before the creation of the EU certification mark that the European Union Intellectual Property Office (OHIM at the time) was suggesting to mark owners to register their certification marks as Community trademarks. While this practice was not officially endorsed by OHIM, their former guidelines state:

Certification marks in the sense that one individual entity unilaterally sets standards with which the goods shall comply if they may carry the mark cannot be Community Collective Marks but must be filed as Community individual marks.⁶⁰

⁵⁸ Samanth Subramanian, 'Is Fair Trade Finished?' *The Guardian* (23 July 2019) <<https://www.theguardian.com/business/2019/jul/23/fairtrade-ethical-certification-supermarkets-sainsburys>> accessed 23 July 2019.

⁵⁹ TMA 1994, sch 2, para 12.

⁶⁰ Office for Harmonization in the Internal Market (OHIM), 'Guidelines Concerning Proceedings Before the Office for Harmonization in the Internal Market (Trade Marks and Designs) Part B, Examination' (2008) Guidelines 58.

Thus, it is possible not every registration of a pseudo-certification mark is an intentional exploitation of the system. That being said, other jurisdictions have long had certification mark registration available, and mark owners have still opted to register their marks of rectitude as trademarks.

Yet, there is not necessarily anything inherently wrong with the use of pseudo-certification marks. More work is needed to consider if this is a practice that should be discouraged, tolerated, or embraced. If the latter, the acquiescence or support of an increasingly expanded role for trademarks ought to be more closely considered.

Considering the reasons behind the use of pseudo-certification marks helps to identify potential tensions that exist in our trademark law ecosystem. More work ought to be done to consider the potential overlaps between certification marks and trademarks when it comes to protecting marks of rectitude, and consider why owners are opting for one mark over the other. Exploring this practice more deeply will help us further elucidate the relationship between trademarks and certification marks, the role we want each of these marks to play in our markets, and how marks of rectitude ought to be protected.

V. CONCLUSION

The practice of pseudo-certification marks has previously been undiscussed by the trademark law literature. The use of marks of rectitude, as pseudo-certification marks, however, is not without the potential for various tensions – both in law and in the market.

Considering this practice, and relatedly, the potential challenges and issues that can arise, is vital to deepening our understanding the role that both certification marks and trademarks are playing in our markets, and ought to play as consumers continue to look for, and make purchasing decisions, on the basis of marks of rectitude.