

GREEN MARKS AND MISMATCHED MEANINGS

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MARY ZHAO*

Abstract: Demand for environmentally friendly products has skyrocketed in recent years in response to increased extreme weather events and former President Biden’s Executive Order 14008 calling for urgent climate action. Yet, consumers face a conundrum in their search for environmentally friendly products—consumers are not able to discern which of the many products with trademarks containing environmental terms such as “green” and “eco” are truly environmentally friendly. Indeed, consumers must rely on a company’s representations of its product’s environmental quality and are vulnerable to deception.

Section 2(a) of the Lanham Act aims to protect consumers from deception by barring the registration of deceptive trademarks. This Article shows that the way that Section 2(a) is currently applied, however, fails to capture trademarks that are deceptive as to a product’s environmental qualities. Under Section 2(a), a trademark is deceptive if a term in the trademark communicates to consumers that a product possesses a quality that the product does not in fact possess and the quality is material to consumers’ purchasing decisions. When applying Section 2(a), U.S. Patent and Trademark Office trademark examiners must first define the term at issue and then determine whether the term, as it is defined, accurately describes the product. The definition thus plays a crucial role, but no literature exists on how examiners define environmental terms, many of which are inherently ambiguous. This Article reveals that a mismatch exists between examiners’ definitions and consumers’ understanding of environmental terms. In other words, even if an applicant’s product satisfies an examiner’s definition for the term, the product may still fail to satisfy consumers’ expectations.

To effectively protect consumers from deceptive green trademarks, examiners must define environmental terms in a way that matches consumers’ understanding. This Article proposes increasing companies’ upstream disclosure of information to clarify their intended meaning for environmental terms so that the downstream interpretations of these terms by consumers and examiners can align with the

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intended meaning and, consequently, with each other. Specifically, this Article proposes that examiners require companies to provide a statement on their products disclosing the specific product qualities related to environmental protection that they intend for the environmental term to indicate. Examiners can then adopt this statement as the definition for the term. Additionally, this Article proposes extending the amount of time allowed for third parties to oppose the registration of a trademark on grounds of deceptiveness.

INTRODUCTION

With increased extreme weather events and former President Biden's Executive Order 14008 calling for urgent action across the country against climate change, the need for sustainable consumption is gaining significant public attention.¹ A conundrum that many members of the public face in their efforts to make sustainable lifestyle choices is how to know if a product is truly "green." After all, "green" is not something that consumers can taste, touch, or otherwise verify. But it is something that at least a portion of consumers are willing to pay for. Studies show that at least some consumers are willing to pay a premium for products that are environmentally friendly, or "green."² A 2010 survey involving nine thousand respondents from eight countries, including the United States, found that a third of the respondents were willing to pay a premium for environmentally friendly products.³ Indeed, if one were to stroll in the local supermarket on any given day, one would likely encounter a number of consumers browsing the myriad of "green" products on the store shelves.⁴

¹ Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) (revoked Jan. 20, 2025).

² See Clare D'Souza, Mehdi Taghian, Peter Lamb & Roman Peretiatko, *Green Decisions: Demographics and Consumer Understanding of Environmental Labels*, 31 INT'L J. CONSUMER STUD. 371, 375 (2007) (discussing a poll by the J. Walter Thompson advertising agency finding that 82% of respondents declared that "they would pay at least 5% more for a product that was environmentally friendly"); Michel Laroche, Jasmin Bergeron & Guido Barbaro-Forleo, *Targeting Consumers Who Are Willing to Pay More for Environmentally Friendly Products*, 18 J. CONSUMER MKTG. 503, 510–11 (2001) (finding that females who are married and have at least one child living at home to be likely to be willing to pay more for environmentally friendly products); Khan Md Raziuddin Taufique et al., *Synthesis of Constructs for Modeling Consumers' Understanding and Perception of Eco-Labels*, 6 SUSTAINABILITY 2176, 2178 (2014) (finding that consumers from Canada and England are willing to pay a higher price for eco-friendly products).

³ Marie-Cécile Cervellon & Lindsey Carey, *Consumers' Perceptions of 'Green': Why and How Consumers Use Eco-Fashion and Green Beauty Products*, 2 CRITICAL STUD. FASHION & BEAUTY 117, 121–22 (2011).

⁴ See Agnieszka Bojanowska & Agnieszka Sulimierska, *Consumer Awareness of Biodegradability of Food Products Packaging*, 15 SUSTAINABILITY 1, 2–3 (2023) (discussing consumers' preference for packaging that is safe for the environment); Laroche et al., *supra* note 2, at 511 (finding that a strong motivation for respondents to pay more for environmentally friendly products was the thought of "how a ruined environment may negatively impact not only . . . their partner, but . . . their

Trademarks are a source of information that can help consumers find environmentally friendly products.⁵ For example, a consumer that is looking for environmentally friendly laundry detergent might see the INSOGREEN trademark⁶ on a pack of dissolvable laundry detergent sheets, shown below, and have the impression that the word GREEN in the trademark means that the laundry detergent sheets are environmentally friendly. The INSOGREEN trademark is an example of what this Article terms “green trademarks,” which are trademarks that communicate to consumers that a product possesses one or more qualities relating to environmental protection.



children’s future”); Neha Mehta et al., *Exploring Perceptions of Environmental Professionals, Plastic Processors, Students and Consumers of Bio-Based Plastics: Informing the Development of the Sector*, 26 SUSTAINABLE PROD. & CONSUMPTION 574, 575 (2021) (discussing consumers’ willingness to pay a premium for bio-based plastics); see also Cervellon & Carey, *supra* note 3, at 121–22 (discussing a global study conducted in 2019 showing that 7.6 million people are concerned about climate change).

⁵ See *infra* notes 19–20 (discussing the information transmission function of trademarks); Lucy Atkinson & Sonny Rosenthal, *Signaling the Green Sell: The Influence of Eco-Label Source, Argument Specificity, and Product Involvement on Consumer Trust*, 43 J. ADVERT. 33, 34 (2014) (explaining that in the presence of asymmetric information, such as information on the environmental impact of a product, consumers rely on cues or signals as a means of evaluating product quality); Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L. REV. 2311, 2316–17 (2009) (discussing the role of trademarks and certification marks in facilitating consumer protection and access to information about products’ sustainability standards); see also Jeremy N. Sheff, *Marks, Morals, and Markets*, 65 STAN. L. REV. 761, 765 (2013) (stating that the economic role of trademarks is to help consumers identify the unobservable features of the trademarked product).

⁶ U.S. Trademark Application Serial No. 97542670 (filed Aug. 10, 2022) (trademark application for the mark INSOGREEN in standard characters for use on “[l]aundry detergents; [l]aundry sheets impregnated with detergent”). The trademark was registered on February 27, 2024, without the U.S. Patent and Trademark Office trademark examiner raising any potential grounds for refusal.

But what exactly are the product qualities that the word GREEN indicates, and does the product in fact possess those qualities? The word GREEN as it is used on the laundry detergent sheets could indicate a number of different possible product qualities. For example, the word could indicate that the detergent sheets are free of artificial fragrances, are made with lower carbon emissions than other detergents, or are biodegradable. The consumer in our example might understand the word to mean that the detergent sheets are entirely chemical-free and decide to purchase the INSOGREEN detergent sheets based on this understanding of the word. His purchasing decision would be premised on the conditions that the word GREEN in the trademark means what he thinks it means and that the product in fact possesses the qualities indicated by the word GREEN as he understands the word—that the detergent sheets are in fact chemical-free.

In other words, when making a purchasing decision, a consumer needs to rely on the assumption that the word GREEN, *as he understands it*, communicates accurate information about the product's qualities and is not deceptive. To ensure that this assumption is true and to protect consumers from deception, I argue that trademark law, specifically Section 2(a) of the Lanham Act that aims to bar the registration of trademarks that are deceptive to consumers⁷, should use the consumer's understanding of an environmental term as the definition for the term when evaluating whether a trademark containing the term misdescribes the product and is thus deceptive. In cases where the term is inherently ambiguous and considerable variability exists in consumers' understanding of the term in connection with the product—as is the case with the term “green” when used on detergent sheets—the company should be required to provide a statement disclosing the precise product qualities related to environmental protection that the company intends the term to indicate. This statement should then be used as the definition for the term. This Article shows that the way that Section 2(a) of the Lanham Act is currently applied fails to protect consumers against deceptive green trademarks because U.S. Patent and Trademark Office (USPTO) trademark examining attorneys (examiners) define environmental terms in a way that is markedly different from consumers' understanding when evaluating a trademark for potential deceptiveness.

Protecting consumers from deceptive green trademarks is important because consumers are particularly vulnerable to being deceived by deceptive green trademarks. The ambiguity inherent in many environmental terms, such as the term GREEN as shown in the INSOGREEN example above, allows

⁷ 15 U.S.C. § 1052 (“No trademark . . . shall be refused registration . . . unless it . . . consists of or compromises immoral, deceptive, or scandalous matter . . .”).

companies to use these terms in their trademarks without disclosing a specific meaning while knowing that consumers would interpret these terms in a way that attributes positive qualities to a product that the product does not in fact possess.⁸ Consumers are not able to verify whether a product truly possesses those qualities because of an asymmetry in information about qualities that relate to a product's environmental impact.⁹ Consumers must rely on a company's representations about those qualities.¹⁰ For example, a consumer is not able to verify whether ropes in a hardware store with the trademark OCEAN KIND RECYCLED MARINE ROPES are in fact made with recycled material even after using the ropes.¹¹ Similarly, a consumer cannot determine

⁸ Clinton Amos, Anthony Allred & Lixuan Zhang, *Do Biodegradable Labels Lead to an Eco-safety Halo Effect?*, 40 J. CONSUMER POL'Y 279, 293 (2017) (discussing producers using the word "biodegradable" knowing that consumers would make unwarranted assumptions about the word's meaning); Cervellon & Carey, *supra* note 3, at 118 (discussing the lack of clarity in the meaning of green terminology); Louis A. Morris, Manoj Hastak & Michael B. Mazis, *Consumer Comprehension of Environmental Advertising and Labeling Claims*, 29 J. CONSUMER AFFS. 328, 329 (1995) (commenting that terms such as "eco-safe" are potentially misleading because their interpretation varies substantially depending on the context); Evangelia Sdrolia & Grigoris Zarotiadis, *A Comprehensive Review for Green Product Term: From Definition to Evaluation*, 33 J. ECON. SURVS. 150, 151 (2019) (stating that the absence of a universally accepted definition for "green" may lead producers to be biased in how they classify their products as such); *see also* Morris et al., *supra*, at 329 ("Because manufacturers are making these claims based upon differing standards, consumers may be uncertain about what these claims mean."); John Thøgersen, *Promoting "Green" Consumer Behavior with Eco-Labels* (commenting that consumers have trouble understanding the exact meaning of an environmental term and that this uncertainty in the meaning is often accompanied by mistrust), in *NEW TOOLS FOR ENVIRONMENTAL PROTECTION: EDUCATION, INFORMATION, AND VOLUNTARY MEASURES* 90–91 (Thomas Dietz & Paul C. Stern eds., 2002).

⁹ Atkinson & Rosenthal, *supra* note 5, at 34 (explaining that information asymmetry is an environment in which one side in the marketplace—consumers in this case—faces an information deficit compared to the other side and thus is at a disadvantage because it must assess the product based on incomplete or otherwise imperfect information); Carsten Herbes, Christoph Beuthner & Iris Ramme, *How Green Is Your Packaging—A Comparative International Study of Cues Consumers Use to Recognize Environmentally Friendly Packaging*, 44 INT'L J. CONSUMER STUD. 258, 260 (2020) (commenting on the credence nature of environmental attributes, "meaning [that] even after having purchased and used the product or packaging, consumers cannot determine whether it possesses the claimed pro-environmental or pro-social attributes").

¹⁰ Atkinson & Rosenthal, *supra* note 5, at 34 ("Credibility is particularly salient in environmental product claims, which are viewed with suspicion by consumers."); Herbes et al., *supra* note 9, at 267 (2020) (stating that consumers are served poorly by misleading environmental claims); *see also* Michael Jay Polonsky et al., *Communicating Environmental Information: Are Marketing Claims on Packaging Misleading?*, 17 J. BUS. ETHICS 281, 281 (1998) ("It has been suggested that misleading environmental claims are one of the biggest environmental problems facing consumers and business.").

¹¹ *See* U.S. Trademark Application Serial No. 97457791 (filed June 14, 2022) (trademark application for the mark OCEAN KIND RECYCLED MARINE ROPES); Brenda J. Cude, *Consumer Perceptions of Environmental Marketing Claims: An Exploratory Study*, 17 J. CONSUMER STUD. & HOME ECON. 207, 208 (1993) (stating that consumers are vulnerable to deceptive claims of environmental benefits because they cannot verify the claims themselves).

whether a golf ball with the trademark BGB BIODEGRADABLE GOLF BALLS is truly biodegradable.¹²

Deceptive green trademarks not only adversely affect individual consumers, but they also have broad consequences for the market.¹³ The presence of a few deceptive trademarks can erode consumer confidence in all environmental information from producers because consumers do not have the ability to differentiate between truthful and false environmental information.¹⁴ As consumer trust erodes, producers of environmentally friendly products can no longer effectively differentiate their products from those of others based on environmental impact and will lose any competitive advantage that they had from being environmentally friendly. These producers would then have less incentive to invest in being environmentally friendly.¹⁵

Section 2(a) of the Lanham Act serves to protect consumers from deceptive trademarks by barring the registration of deceptive marks.¹⁶ To evaluate a mark for potential deceptiveness, trademark examiners at the USPTO apply a deceptive marks test that involves asking whether the mark contains a term that misdescribes the goods on which the mark is used.¹⁷ To

¹² See U.S. Trademark Application Serial No. 97671719 (filed Nov. 10, 2022) (trademark application for the mark BGB BIODEGRADABLE GOLF BALLS).

¹³ Atkinson & Rosenthal, *supra* note 5, at 34 (“Advertising works as a signal because it minimizes the cost of search and reduces consumer ignorance, but when the credibility of the signal is called into question, consumers are less likely to rely on it as an important informational cue.” (citation omitted)); Lise Magnier & Dominique Crié, *Communicating Packaging Eco-Friendliness: An Exploration of Consumers’ Perceptions of Eco-Designed Packaging*, 43 INT’L J. RETAIL & DISTRIBUTION MGMT. 350, 353 (2015) (“Studies also show that in order to be efficient, eco-friendly communications should be credible and therefore satisfy certain criteria.”); Thøgersen, *supra* note 8, at 90 (“A consumer only will use a label (as intended) in decision making if he or she trusts the message it conveys.”); Taufique et al., *supra* note 2, at 2185 (“Trust has been defined as the truster’s expectation that the trustee is willing to keep promises and fulfill obligations [It] is specifically considered to be valuable in analyzing situations where the truster is vulnerable.”).

¹⁴ Magnier & Crié, *supra* note 13, at 361 (“[T]he fact that environmental cues are . . . sometimes misleading can generate problems in terms of trust for consumers that don’t [have] the necessary expertise to judge if a packaging is ecological.”); Monick Cruz Nazareth, Mônica R.C. Marques, Lara Mesquita Pinheiro & Ítalo Braga Castro, *Key Issues for Bio-Based, Biodegradable and Compostable Plastics Governance*, 322 J. ENV’T MGMT., Nov. 2022, at 1, 2 (“[F]alse claims and/or improper certifications can lead to loss of consumers’ confidence in ecologically sound marketing initiatives.”).

¹⁵ Polonsky et al., *supra* note 10, at 290.

¹⁶ 15 U.S.C. § 1052(a). See generally Meaghan Annett, Note, *When Trademark Law Met Constitutional Law: How a Commercial Speech Theory Can Save the Lanham Act*, 61 B.C. L. REV. 253 (2020).

¹⁷ U.S. PAT. & TRADEMARK OFF., TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1203.02(b) (Nov. 2023) (“The Court of Appeals for the Federal Circuit has articulated the following test for whether a mark consists of or comprises deceptive matter: (1) Is the term misdescriptive of the character, quality, function, composition or use of the goods? (2) If so, are prospective purchasers likely to believe that the misdescription actually describes the goods? (3) If so, is the misdescription likely to affect a significant portion of the relevant consumers’ decision to purchase?”).

determine whether an environmental term misdescribes the goods, an examiner must first define the environmental term that is used in the mark and then determine whether the term, as it is defined, misdescribes the goods. The definition that examiners apply to the term thus plays a crucial role in the outcome of the test. No literature exists, however, on how examiners define environmental terms, many of which are inherently ambiguous, despite the emerging body of literature shedding light on the role of trademarks in mitigating climate change.¹⁸

This Article fills this gap and reveals that a mismatch exists between examiners' definitions of the environmental terms studied in this Article and consumers' understanding of the terms. In other words, even if an applicant's product satisfies an examiner's definition for the term, the product may still fail to satisfy consumers' expectations for the product. This is problematic because Section 2(a) aims to bar the registration of marks that are deceptive *to consumers*. To effectively protect consumers from deceptive green trademarks, examiners must define environmental terms in a way that closely mirrors consumers' understanding. Consumers need to be able to rely on the information that they receive from trademarks to identify and purchase products with the environmental qualities that they prefer.¹⁹ Protecting

¹⁸ David E. Adelman & Graeme W. Austin, *Trademarks and Private Environmental Governance*, 93 NOTRE DAME L. REV. 709, 752–54 (2017) (proposing reforms to trademark law to address consumer information overload from eco-labels); Margaret Chon, *Trademark Goodwill as a Public Good: Brands and Innovations in Corporate Social Responsibility*, 21 LEWIS & CLARK L. REV. 277, 315–16 (2017) (discussing the role of brand value in conveying information about social responsibility); Chon, *supra* note 5, at 2312, 2316–17 (discussing the role of trademarks and certification marks in facilitating consumer protection and access to information about products' sustainability standards); Michael A. Gollin, *Using Intellectual Property to Improve Environmental Protection*, 4 HARV. J.L. & TECH. 193, 212–13 (1991) (discussing the role of intellectual property law, including trademark law, in promoting the innovation and commercialization of beneficial environmental technology); Maureen Beacom Gorman, *What Does It Mean to Be Green: A Short Analysis of Emerging IP Issues in "Green" Marketing*, 9 J. MARSHALL REV. INTELL. PROP. L. 774, 775–76 (2010) (analyzing different government agencies' interpretations of "green" products); Eric L. Lane, *Consumer Protection in the Eco-Mark Era: Preliminary Survey and Assessment of Anti-Greenwashing Activity and Eco-Mark Enforcement*, 9 J. MARSHALL REV. INTELL. PROP. L. 742, 743 (2010) (comparing different enforcement actions for deceptive green trademarks and certification marks); Jeffrey Belson, Commentary, *Environmental Trademarks*, 104 TRADEMARK REP. 822, 824–25 (2014) (arguing that environmental trademarks should be a separate category of trademarks for prosecution and protection purposes); see also Hajin Kim, Essay, *Eco-Labels and Competition: Eco-Certification Effects on the Market for Environmental Quality Provision*, 22 N.Y.U. ENV'T L.J. 181, 183 (2015) (considering the effects of eco-label certification on competition in environmental quality); Hajin Kim, Note, *An Argument for WTO Oversight of Ecolabels*, 33 STAN. ENV'T L.J. 421, 454–55 (2014).

¹⁹ See Atkinson & Rosenthal, *supra* note 5, at 34 ("Advertising works as a signal because it minimizes the cost of search and reduces consumer ignorance, but when the credibility of the signal is called into question, consumers are less likely to rely on it as an important informational cue." (citation omitted)); Thøgersen, *supra* note 8, at 90 ("A consumer only will use a label (as intended) in

consumers from being misled by deceptive green trademarks furthers trademark law's aim of decreasing consumer search costs and, in turn, facilitates a competitive market for quality products.²⁰

To be clear, a number of other areas of the law also play an important role in addressing deceptive environmental claims and false advertising more generally, for example Section 5 of the Federal Trade Commission (FTC) Act and Section 43(a) of the Lanham Act.²¹ I set aside these areas of the law for the purposes of this Article because they likely entail a different set of challenges and tradeoffs that merit their own detailed analysis. For the purposes of the present discussion, however, I note that Section 2(a) of the Lanham Act differs from these other areas of law in that it is systematically applied to *all* trademark filings with the aim of proactively identifying deceptive marks before they are registered or have had widespread use in the market. By contrast, both Section 5 of the FTC Act and Section 43(a) of the Lanham Act are applied retroactively to a limited number of marks, ones that have been challenged by a competitor or have been investigated by the FTC.

I also note here that this Article focuses on trademarks rather than certification marks, which can also communicate information about a product's environmental qualities.²² Examples of certification marks include the Environmental Protection Agency (EPA) Energy Star certification and the United States Department of Agriculture (USDA) Organic certification. Certification marks are also governed by trademark law, including Section 2(a) of the Lanham Act. However, they differ from trademarks in that they have a clear definition, in the form of certification requirements, that sets forth the

decision making if he or she trusts the message it conveys.”); *see also* Sheff, *supra* note 5, at 765 (stating that the economic role of trademarks is to help consumers identify the unobservable features of the trademarked product).

²⁰ *See* Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547, 555 (2006) (stating that the major focus of trademark law is to protect the source identification and information transmission function of trademarks, which reduces consumer search costs); Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 782 (2004) (noting that the normative goal of trademark law is “producing better-informed consumers”); William McGeveran & Mark P. McKenna, *Confusion Isn't Everything*, 89 NOTRE DAME L. REV. 253, 272–73 (2013) (stating that trademark law allows consumers to “rely on trademarks as shorthands for information about the source and quality of . . . products”); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 97 TRADEMARK REP. 1126, 1126 (2007) (arguing that trademark law traditionally, like other forms of unfair competition law, intended to protect producers from illegitimate diversions of trade by competitors); *see also* Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223, 1223–24 (2007) (noting that the “search costs theory of trademark law has attracted a substantial following among both commentators and courts”).

²¹ 15 U.S.C. §§ 45, 1125.

²² *Certification Mark Applications*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trade-marks/apply/certification-mark-applications> [<https://perma.cc/JH3Z-4KHX>] (Jan. 18, 2025).

exact product qualities that a certification mark indicates. Thus, they do not have the same issue of ambiguity that many green trademarks have. Further, a company can only use a certification mark on its products if a third-party certifier has certified that the products meet the certification requirements. For example, USDA accredited third-party certifying agents only issue organic certifications to companies that meet the USDA Organic certification requirements. Green trademarks, on the other hand, are created and used by companies themselves, without any disclosure of the precise meaning of the environmental terms contained in the trademarks or of whether the products in fact possess the qualities indicated by the environmental terms.

This Article offers two main contributions. *First*, the Article shows that a mismatch exists between how consumers understand the environmental terms studied in this Article and how examiners define the same terms when evaluating the deceptiveness issue under Section 2(a). Even if an applicant's goods satisfy an examiner's definition for an environmental term, the goods may still fail to possess the qualities that consumers expect the goods to possess based on their understanding of the term.

Second, the Article proposes solutions to fix this mismatch and, relatedly, to strengthen the ability of third parties to prevent deceptive marks from being improperly added onto the trademark register.

The Article proposes increasing the upstream disclosure of information by producers at the trademark prosecution stage in order to improve the downstream understanding of environmental terms that are used in the trademarks. By increasing the upstream disclosure of information that clarifies the precise meaning that producers intend environmental terms to have as the terms are used in their trademarks, the downstream interpretations of these terms—by consumers and examiners—can align with the intended meaning and, consequently, with each other. Specifically, the Article proposes modifications in two areas, the criteria that examiners apply when evaluating the deceptiveness issue and the amount of time allowed for third parties to oppose a mark on grounds of deceptiveness.

I set forth my argument as follows. In Part I, I explain the deceptive marks test that examiners apply to determine whether a mark is deceptive under Section 2(a) of the Lanham Act.²³ Part II reviews findings from past studies on consumers' understanding of six environmental terms that are commonly used on consumer products: "green," "eco," "natural," "recycled," "recyclable," and "biodegradable."²⁴ This Part groups the terms into the categories of general environmental terms and specific environmental terms in

²³ See *infra* notes 28–90 and accompanying text.

²⁴ See *infra* notes 91–165 and accompanying text.

presenting the findings, adopting a manner of grouping that a number of past studies have implemented.²⁵ With regard to the general environmental terms “green,” “eco,” and “natural”—terms that producers use to communicate that a product as a whole benefits the environment—past studies show that consumers usually understand them to mean that a product possesses a certain set of specific qualities, but the exact qualities that constitute the set vary widely depending on the consumer and the product type. Further, past studies indicate that consumers are uncertain of the truthfulness of these terms as applied to a given product because of a lack of information from producers supporting the accuracy of these terms as applied to their products.

With regard to the specific environmental terms “recycled,” “recyclable,” and “biodegradable”—terms that producers use to communicate that a product possesses a specific environmental attribute—past studies show that consumers tend to share a more uniform understanding of these terms, in contrast to the wide range of variation in consumers’ understanding of the general environmental terms. Consumers generally understand “recycled” to mean that most, if not all, of a product is made with recycled material and “recyclable” to mean that most, if not all, of the communities across the United States have recycling plants that are able to recycle a product. Consumers generally understand “biodegradable” to mean that a product can degrade in a relatively short period of time, regardless of the way in which the product is disposed.

Part III presents my analysis of the definitions that examiners apply to environmental terms when evaluating the deceptiveness issue and demonstrates that a mismatch exists between examiners’ definitions and consumers’ understanding for the same terms.²⁶ For marks containing the general environmental terms “green,” “eco,” and “natural,” examiners apply definitions that are either so ambiguous as to not refer to any specific product qualities or that only refer to one or two specific qualities that may or may not coincide with the set of specific qualities that a given consumer understands the term to indicate. In other words, examiners’ definitions set a bar for evaluating an applicant’s goods that is different from, not necessarily higher or lower than, that of consumers. For marks containing the specific environmental terms “recycled,” “recyclable,” and “biodegradable,” examiners apply definitions that omit important components of consumers’ understanding. In other words,

²⁵ See, e.g., Morris et al., *supra* note 8, at 328 (stating that producers use both general environmental claims and specific environmental claims to communicate environmental benefits that their products provide); Polonsky et al., *supra* note 10, at 284 (comparing general claims such as “eco-safe” with specific claims such as “biodegradable”).

²⁶ See *infra* notes 166–251 and accompanying text.

examiners' definitions set a bar for evaluating an applicant's goods that is lower than that of consumers.

This mismatch reflects the underlying approach that examiners apply when defining environmental terms. When defining an environmental term, examiners do not provide references, such as advertisements that use the term, to show how consumers would understand the term in connection with the applicant's goods or to show that their definition is consistent with consumers' understanding. Examiners either provide no references or, occasionally, provide a dictionary entry as the sole reference. Dictionary entries alone are insufficient to show how consumers would understand a term in the context of the particular goods that a mark is used on. The lack of references showing consumers' understanding indicates that consumers' understanding is not at the center of examiners' approach to defining environmental terms.

In Part IV, I present recommendations for fixing this mismatch and, relatedly, for strengthening the ability of third parties to prevent deceptive marks from being improperly added onto the trademark register.²⁷ I propose increasing, at the trademark prosecution stage, the disclosure of information on producers' intended meaning for the environmental terms that are used in their trademarks. For trademarks containing general environmental terms, I propose that examiners require applicants to include a clarification statement on their goods specifying the specific product qualities related to environmental protection that they intend for the term to indicate. The clarification would greatly diminish, if not completely eliminate, the variability in consumers' understanding of the term as it is used on the applicant's goods. Examiners can then adopt the clarification as the definition for the term, thus matching their definition with consumers' understanding of the term. For marks containing specific environmental terms, I propose that examiners require applicants to include a qualifying statement on their goods providing product information on the components of consumers' understanding that are currently omitted from examiners' definitions. Examiners can then request applicants to confirm that the qualifier accurately describes their goods. In this way, the qualifier effectively serves to supplement examiners' definitions with the components of consumers' understanding that are currently omitted. Additionally, I recommend extending the amount of time allowed for third parties to initiate opposition proceedings on grounds of deceptiveness to give third parties sufficient time to detect marks that are deceptive as to the environmental impact of an applicant's goods.

²⁷ See *infra* notes 252–290 and accompanying text.

I. DECEPTIVE MARKS TEST

This Part sets forth the deceptive marks test that examiners apply when evaluating a trademark for potential deceptiveness under Section 2(a).²⁸ A trademark is a word, phrase, symbol, or design that identifies to consumers the source of a particular product or service.²⁹ Trademarks convey information from sellers to buyers that help consumers make purchasing decisions with minimum search costs.³⁰ For example, when a consumer sees the same trademark on two different goods, the consumer will know that the two goods originate from the same seller and share certain characteristics. In this way, trademarks help consumers efficiently identify and purchase goods that fit their personal preferences. Relatedly, by identifying the source of goods, trademarks help protect the investments that producers make in maintaining the quality of their goods, thus facilitating a competitive market for quality goods.³¹

Although trademarks are protectable under common law, federal registration grants trademark owners a number of important benefits.³² For example, registration grants a presumption of validity for the mark in any subsequent legal proceedings³³ and nationwide rights.³⁴ A registrant is treated as the first to use the mark nationwide as of the date of the trademark application, even if the registrant had not used the mark nationwide. Registration also renders a mark eligible to become “incontestable” after five years of use. Marks that are incontestable may only be canceled on a limited number of grounds.³⁵ Additionally, registrants enjoy benefits such as eligibility for assistance from the Customs Services in preventing imports of goods that infringe the mark³⁶ and eligibility to receive statutory damages for counterfeits.³⁷

²⁸ See *infra* notes 29–90 and accompanying text.

²⁹ *What Is a Trademark?*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/what-trademark> [<https://perma.cc/7273-A2GJ>] (Nov. 30, 2023).

³⁰ See *supra* note 20; Alexandra J. Roberts, *Trademark Failure to Function*, 104 IOWA L. REV. 1977, 1996 (2019) (commenting that the Lanham Act defines a trademark as serving to “identify[] goods, distinguish[] them from others’ goods, and indicat[e] the source of goods” to consumers).

³¹ Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867, 874 (2017) (discussing the function of trademark law in protecting producers’ investment in promoting their marks); see Roberts, *supra* note 30, at 1996.

³² 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:1.75 (5th ed. 2024); Tushnet, *supra* note 31, at 879 (discussing the benefits that trademark registration provides to registrants).

³³ 15 U.S.C. § 1057(b) (stating that registration constitutes prima facie evidence of validity and ownership).

³⁴ *Id.* § 1072 (stating that registration provides nationwide constructive notice of ownership, even without actual nationwide use).

³⁵ *Id.* § 1065 (setting forth the conditions for a mark to become incontestable and providing the limited number of grounds on which an incontestable mark may be challenged).

³⁶ *Id.* § 1125(b).

³⁷ *Id.* § 1124.

Registration also yields benefits for society. The trademark register provides valuable information to the public by serving as a publicly available database of registered and pending trademarks.³⁸ Businesses can quickly and cheaply search the trademark register to determine whether a mark has already been claimed. New businesses can search the register for potential conflicts with registered marks when choosing among several possible marks for their products. By helping businesses avoid adopting marks that are identical or confusingly similar to registered marks, the trademark register also protects consumers from confusion about the source of products.

The trademark registration process begins with an applicant submitting a trademark application to the USPTO, the agency that is responsible for reviewing trademark applications. A trademark examiner then reviews the application. The examiner may approve the mark for publication after finding it to satisfy the requirements for registration and, absent opposition from third parties, register the mark.³⁹ Alternatively, the examiner may issue a non-final office action that raises preliminary grounds for refusal, such as on grounds of deceptiveness under Section 2(a) of the Lanham Act.⁴⁰ After receiving the office action, the applicant may respond and address the issues that the examiner raised. For example, the applicant may amend the application or argue that a stated basis for refusal does not apply.⁴¹ An application may involve several office actions and responses before the mark is approved for publication or the examiner issues a final office action denying registration.

Section 2(a) of the Lanham Act is one possible basis for denying registration. Section 2(a) bars the registration of deceptive marks.⁴² In essence,

³⁸ Tushnet, *supra* note 31, at 877 (discussing the benefits that trademark registration provides to society).

³⁹ U.S. PAT. & TRADEMARK OFF., TRADEMARK BASICS: REGISTRATION TOOLKIT 14, <https://www.uspto.gov/sites/default/files/documents/TM-Registration-Toolkit.pdf> [<https://perma.cc/4R4C-DAPR>].

⁴⁰ *Possible Grounds for Refusal of a Mark*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/additional-guidance-and-resources/possible-grounds-refusal-mark> [<https://perma.cc/DM3Y-2969>] (Mar. 20, 2024); TMEP § 1203.02(e)–(f) (describing the steps that an examiner must take when finding a mark to be potentially deceptive).

⁴¹ TMEP § 1203.02(e).

⁴² 15 U.S.C. § 1052(a) (providing that a trademark consisting of or comprising deceptive matter shall be refused registration); TMEP § 1203.02 (“Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), is an absolute bar to the registration of deceptive matter on either the Principal Register or the Supplemental Register.”). Some scholars have commented that a Section 2(a) deceptiveness bar to registration should also be a bar to other forms of trademark protection. See David A. Simon, *Trademark Law & Consumer Safety*, 72 FLA. L. REV. 673, 683 (2020) (arguing that a denial of registration on deceptiveness grounds under Section 2(a) should also bar a mark from trademark protection at common law due to the unclean hands doctrine); Tushnet, *supra* note 31, at 886 (commenting that marks that are unregistrable under Section 2(a) due to deceptiveness are also unprotectable under Section 43(a), the provision of the Lanham Act allowing federal protection

a mark is deceptive if it communicates to consumers that a product possesses a quality that the product does not in fact possess and the quality is material to consumers' purchasing decisions.⁴³ A deceptive word mark may contain a single term that is deceptive, multiple terms that include a mix of deceptive and non-deceptive terms, or a phonetic equivalent of a term that is deceptive.⁴⁴ A term is deceptive under Section 2(a) if it satisfies all three elements of the following test:⁴⁵

1. The term misdescribes the character, quality, function, composition, or use of the goods;
2. Prospective purchasers are likely to believe that the misdescription actually describes the goods; and
3. The misdescription is likely to affect a significant portion of the relevant consumers' decision to purchase.

The first element requires that the mark contain a term that misdescribes the goods. To evaluate whether a mark fulfills this element, examiners must first define the term. If the term as defined misdescribes the applicant's goods that are listed in the trademark application, then the mark fulfills this element of the test. The definition that examiners choose must reflect consumers' perception of the term's meaning as the term is used on the goods.⁴⁶ For

against infringement for unregistered marks, because Section 2(a) reflects public policies that also apply to Section 43(a)).

⁴³ TMEP § 1203.02(b); Simon, *supra* note 42, at 715.

⁴⁴ TMEP § 1203.02(a) ("A deceptive mark may be comprised of: (1) a single deceptive term; (2) a deceptive term embedded in a composite mark that includes additional non-deceptive wording and/or design elements; (3) a term or a portion of a term that alludes to a deceptive quality, characteristic, function, composition, or use; (4) the phonetic equivalent of a deceptive term; or (5) the foreign equivalent of any of the above." (citations omitted)).

⁴⁵ TMEP § 1203.02(b)–(c).

⁴⁶ See *In re E5 LLC*, 103 U.S.P.Q.2d (BNA) 1578, 1581–84 (T.T.A.B. 2012) (finding that consumers perceived the term "CU" in a trademark used on dietary supplements to refer to copper and concluding that the term misdescribed the dietary supplements because the supplements did not contain copper); see also *In re Tapco Int'l Corp.*, 122 U.S.P.Q.2d (BNA) 1369 (T.T.A.B. 2017) (holding that the trademarks KLEER MOULDINGS and KLEER TRIMBOARD were not deceptive because no evidence existed as to the likely consumer perception of the term "clear" (or KLEER) when used in connection with the identified PVC building products; thus, the record did not establish that the term KLEER misdescribed the goods); *Stabilisierungsfonds für Wein v. Peter Meyer Winery GmbH*, 9 U.S.P.Q.2d (BNA) 1073, 1076 (T.T.A.B. 1988) ("We believe that purchasers who encounter applicant's relatively inexpensive German table wine under the designation GOLDENER TROPFEN are likely to believe that the mark is a misspelling of the certification mark GOLDTROPFCHEN and that applicant's product therefore is a wine produced from grapes grown in the Goldtropfchen vineyard of West Germany in accordance with the German wine laws and regulations, when in fact applicant's product does not contain wine from this region."); *Bureau Nat'l Interprofessionnel Du Cognac v. Int'l Better Drinks Corp.*, 6 U.S.P.Q.2d (BNA) 1610, 1616 (T.T.A.B. 1988) ("Accordingly, we conclude that purchasers who encounter applicant's cola liqueur bearing the mark 'COLAGNAC'

instance, when reviewing an application for a trademark containing the term CU for use on dietary supplements, the examiner stated that the term CU, when used in connection with the applicant's goods, "would be understood by consumers to refer to the chemical element 'copper.'"⁴⁷ As evidence of this interpretation of CU by consumers, the examiner submitted a number of references that used the term CU to refer to the element copper, including a dictionary definition and various advertisements.⁴⁸ The examiner found the term to misdescribe the goods because the applicant's dietary supplements did not contain copper and, after finding the other two elements of the test to also be satisfied, concluded that the trademark was deceptive.⁴⁹ The applicant appealed the decision to the Trademark Trial and Appeal Board (TTAB) and contended that consumers would understand the term CU used in connection with the goods to mean "Controlled Uptake" rather than "copper."⁵⁰ The TTAB rejected the applicant's argument on the basis of a lack of evidence showing that consumers would understand CU to mean "Controlled Uptake" in connection with the goods.⁵¹

When no evidence exists in the record to show consumers' perception of a term's meaning, the TTAB has found this element of the test to not be satisfied. For example, the TTAB found the term KLEER in the marks KLEER MOULDINGS and KLEER TRIMBOARD to not be misdescriptive of the applicant's PVC building products because the examiner had provided no evidence to show how consumers would understand the term "clear," the phonetic equivalent of KLEER, in connection with the applicant's goods.⁵² Although the examiner had provided a number of references to support his definition of the term, the TTAB concluded that the references did not establish consumers' understanding of the term "clear" in connection with the applicant's PVC building products because all of the references used the term "clear" in the context of describing wood products rather than PVC products.⁵³

are likely to believe that the mark is a misspelling of 'COGNAC' or a combination of the terms 'Cola' and 'COGNAC' and hence that applicant's product contains 'COGNAC' brandy . . .").

⁴⁷ *E5 LLC*, 103 U.S.P.Q.2d (BNA) at 1579.

⁴⁸ *Id.* at 1579–80.

⁴⁹ *Id.* at 1584.

⁵⁰ *Id.* at 1580.

⁵¹ The TTAB concluded that even though the applicant's specimen label described the goods as "Alpha Lipoic Acid Controlled Uptake Formula" and the phrase "Alpha CUTM (Controlled Uptake)" appeared on the side panel of the specimen, it was not clear that consumers would make the connection between CU in the trademark and the phrase "Controlled Uptake." *Id.* at 1580–81.

⁵² *In re Tapco Int'l Corp.*, 122 U.S.P.Q.2d (BNA) 1369, 1371 (T.T.A.B. 2017).

⁵³ *Id.* at 1376 ("The Examining Attorney's evidence shows that the term 'clear' has an understood meaning when used in connection with wood lumber; however, the record does not establish what prospective consumers are likely to understand when 'clear' is used on a different product, namely, synthetic trim and mouldings.").

After defining the term, the examiner must determine whether the term, as it is defined, misdescribes the goods that are listed in the application. If the application does not clearly state whether the applicant's goods possess the characteristics described by the term, as the term is defined by the examiner, the examiner must issue an office action containing an information request asking to clarify whether the goods possess the characteristics indicated by the term.⁵⁴ If the applicant responds that the goods do not possess the qualities indicated by the term, then the term is misdescriptive and the first element of the test is satisfied.⁵⁵ If the applicant responds that the term accurately describes the goods, the examiner may request the applicant to provide a written statement confirming that the goods are consistent with the term at issue. Then, the applicant must amend the identification of goods, which lists in the application the goods that the mark is used on, to include the relevant characteristics and to remove any ambiguity about whether the term accurately describes the goods.⁵⁶ For example, an applicant for a mark containing the term RECYCLED can amend the identification of goods from "plastic containers and paper packages" to "recycled plastic containers and recycled paper packages," if this amendment is an accurate description of the goods.⁵⁷ When an applicant amends the identification of goods, examiners assume that the goods contain a sufficient amount of relevant material, for example recycled material, to obviate deceptiveness.⁵⁸ Applicants are not required to state the amount or percentage of the relevant material or feature in the goods.

The second element of the test requires that prospective purchasers be likely to believe that the term actually describes the goods.⁵⁹ To show that a description is believable, the examiner must present evidence demonstrating that consumers regularly encounter similar goods with the characteristics that the term describes.⁶⁰ For example, the Trademark Manual of Examining Procedure specifies that to support this element of the test, examiners must provide evidence that demonstrates consumers often encounter such goods or

⁵⁴ TMEP § 1203.02(e)(ii).

⁵⁵ *Id.* § 1203.02(e)(i)–(ii).

⁵⁶ *Id.* § 1203.02(e)(i)–(ii), (f)(i) ("Generally, an applicant may avoid or overcome a deceptiveness refusal by amending the identification of goods or services, if accurate, to include the potentially deceptive term.").

⁵⁷ *See id.* § 1203.02(f)(i) ("[T]he applicant may amend 'ties' to 'silk ties,' 'milk and cheese' to 'organic milk and cheese,' and 'jewelry' to 'gold jewelry' or to 'jewelry made in whole or significant part of gold.'").

⁵⁸ *Id.* § 1203.02(f)(i).

⁵⁹ *Id.* § 1203.02(e)(i) (stating that if the misdescription is not believable, no refusal should be made under Section 2(a)).

⁶⁰ *Id.* §§ 1203.02(c), 1209.04 (providing that evidence may consist of, for example, advertisements from third parties and from the applicant).

services with the features or characteristics present in the mark.⁶¹ For example, in the case of the mark LOVEE LAMB, which was used on seat covers that were not made of lambskin, an examiner may provide evidence that seat covers can be and are made from lambskin.⁶²

Similarly, when the mark CHOCOLATE CRUNCH is used on erasers, prospective purchasers of the erasers are unlikely to believe that the word CHOCOLATE in the mark actually describes the erasers because consumers do not regularly encounter chocolate erasers. Thus, even though the word CHOCOLATE in the mark misdescribes the erasers, the mark is not deceptive because the misdescription is not believable. By contrast, when the same CHOCOLATE CRUNCH mark is used on cupcakes, prospective purchasers of the cupcakes are likely to believe that the word CHOCOLATE in the mark describes the cupcakes because consumers regularly encounter chocolate cupcakes.

The third element requires that the misdescription be material to the relevant consumer's purchasing decision.⁶³ To show materiality, examiners must provide evidence showing that the misdescription makes the product more appealing to prospective purchasers according to objective criteria rather than mere personal preferences.⁶⁴ The Trademark Manual of Examining Procedure provides several examples of objective criteria that examiners may consider when evaluating the materiality element. These criteria include superior quality of goods that feature the term compared to other goods from the same industry that do not, health benefits provided by goods that feature the term, price premium of goods that feature the term compared to other goods in the same industry that do not, and evidence that goods featuring the term satisfy certain desirable social policies such as reducing environmental impact.⁶⁵ Given the Biden administration's issuance of Executive Order 14008 calling for urgent climate change mitigation action across all sectors and the need for sustainable consumption, environmental terms are likely to satisfy at

⁶¹ *Id.* § 1209.04.

⁶² *Id.*

⁶³ This element distinguishes a Section 2(a) deceptive mark from a Section 2(e)(1) deceptively misdescriptive mark, for which only the first two elements of the above test apply, and which may be registered on the Supplemental Register upon a showing of acquired distinctiveness. *Id.* § 1203.02(c) ("The third inquiry, whether the misdescription is likely to affect the decision to purchase, distinguishes marks that are deceptive under § 2(a) of the Act from marks that are deceptively misdescriptive under § 2(e)(1)."); Simon, *supra* note 42, at 715.

⁶⁴ TMEP § 1203.02(d). Evidence can include dictionary definitions, advertisements, and internet search results using the term at issue as the search term. *Id.*

⁶⁵ *Id.* § 1203.02(d)(i).

least the desirable social policy criteria and be material to consumers' purchasing decisions when they are used in trademarks.⁶⁶

In contrast to objective criteria, mere personal preferences cannot establish materiality.⁶⁷ The Trademark Manual of Examining Procedure provides LAVENDER for dish soap and BLUE for bicycles as examples of terms that are likely to reflect mere personal preferences of scent and color and not satisfy the materiality element of the test.⁶⁸

Examiners must issue an office action containing a deceptiveness refusal if an application satisfies all three elements of the deceptive marks test.⁶⁹ Examples of marks that examiners have found to satisfy all three elements and, consequently, to be deceptive include LOVEE LAMB for automobile seat covers not made with lambskin,⁷⁰ BIOSILK for clothing not made with silk,⁷¹ GREEN SEAL for tape with no environmentally friendly features,⁷² and SUPER SILK for shirts not made with silk.⁷³

By barring the registration of deceptive marks, Section 2(a) furthers trademark law's aim of minimizing consumer search costs and facilitating a competitive market for quality products.⁷⁴ Section 2(a) protects consumers from being misled about a product's qualities and from making purchasing decisions based on false beliefs about a product. It allows consumers to rely on trademarks to efficiently find products that possess the qualities that they prefer, including qualities related to a product's environmental impact. Section 2(a) also protects producers by allowing them to efficiently communicate to consumers the preferable qualities that their products possess and, consequently, to profit from the investments that they make in maintaining those product qualities.⁷⁵

⁶⁶ Jennifer M. Hetu & Anessa Owen Kramer, *It's Not Easy Being Green: Use of the Terms "Organic," "Sustainable," and "Natural" in Trademarks and Advertising*, 4 LANDSLIDE 46, 48 (2011).

⁶⁷ TMEP § 1203.02(d)(ii).

⁶⁸ *Id.*

⁶⁹ *Id.* § 1203.02(e)(i).

⁷⁰ U.S. Trademark Application Serial No. 73507974 (filed Nov. 8, 1984); *In re Budge Mfg. Co.*, 857 F.2d 773, 775–76 (Fed. Cir. 1988).

⁷¹ U.S. Trademark Application Serial No. 78646723 (filed June 19, 2008).

⁷² U.S. Trademark Application Serial No. 85211019 (filed Mar. 26, 2013).

⁷³ *In re Phillips-Van Heusen Corp.*, 63 U.S.P.Q.2d (BNA) 1047, 1052–53 (T.T.A.B. 2002); *see also* TMEP § 1203.02(g) (listing examples of marks found to be deceptive).

⁷⁴ *See* Simon, *supra* note 42, at 717 (discussing the role of Section 2(a) in protecting consumers from being misled about a product's "character, quality, function, composition, or use"); Tushnet, *supra* note 31, at 916 (arguing that trademark registration serves the two partially compatible goals of "helping businesses order their affairs and matching rights with consumer understanding").

⁷⁵ Some debate exists about the role of producer protection in trademark law and how it interacts with the aim of minimizing consumer search costs. *See, e.g.,* Jake Linford, *A Linguistic Justification for Protecting "Generic" Trademarks*, 17 YALE L.J. & TECH. 110, 120–21 (2015) (explaining that even if consumers perceive a term that was once a generic term as being source-identifying and thus a trademark, the term cannot acquire trademark protection because a seller cannot deprive other

Additionally, Section 2(a) helps alleviate the depletion of unclaimed marks that a number of scholars have identified in recent years and diminish the associated costs for consumers and producers. Scholars have demonstrated that contrary to the traditional notion of an infinite supply of word marks, the supply of word marks that can effectively serve as a trademark is severely depleted.⁷⁶ Barton Beebe and Jeanne Fromer's empirical analysis of over six million trademark applications spanning three decades shows that the depletion of unclaimed marks that can serve as effective trademarks, ones that are easy for consumers to remember and associate with a product, is worsening and that more businesses are being forced to resort to second-best marks. Businesses in some instances may need to choose marks that consist of random alphanumeric combinations, such as XC47D, that are difficult for consumers to remember and to distinguish from other alphanumeric combinations.⁷⁷ The costs of choosing a mark that is not yet claimed by another business and not confusingly similar to another mark can pose a barrier to entry for new market entrants, which in turn reduces competition and the availability of product

competing sellers of the right to call an item by its name); Tushnet, *supra* note 31, at 874 (citing Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935)) (arguing that producer protection is decidedly secondary in trademark law because producers' investment into promoting their products and their marks can only have value if it is matched by consumers' response); cf. Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 98 TRADEMARK REP. 1345, 1373–74 (2008) (“[T]he ultimate purpose of reducing consumer search costs is to facilitate the operation of th[e] marketplace. If trademark law interferes with competition, trademark law must give way, or it will end up destroying the village in order to save it.”). This Article does not attempt to weigh in on the discussion about the role that protecting producers' interests plays in trademark law. This Article simply notes that to the extent that protecting the investments of producers is one of the aims of trademark law, Section 2(a) helps to further this aim.

⁷⁶ See Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945, 951 (2018) (“The supply of word marks that are at least reasonably competitively effective as trademarks is finite and exhaustible. This supply is already severely depleted, particularly in certain sectors of the economy, and levels of depletion continue to rise.”); Daniel J. Hemel & Lisa Larrimore Ouellette, *Trademark Law Pluralism*, 88 U. CHI. L. REV. 1025, 1049–51, 1077–78 (2021) (arguing for using a plurality of legal and policy tools to respond to the crowding of the available linguistic space for trademarks and to address the proximity-distance dilemma in trademark law); Michael D. Frakes & Melissa F. Wasserman, *Are There as Many Trademark Offices as Trademark Examiners?*, 69 DUKE L.J. 1807, 1812 (2020) (“Thus, if the Trademark Office incorrectly granted the federal trademark application on ‘The Vegan Butcher’ because the mark merely describes meat substitutes, then Sweet Earth Foods [the trademark owner] would be able to unfairly burden new entrants’ ability to communicate with consumers in the marketplace.”); see also Tushnet, *supra* note 31, at 918 (arguing for removing “deadwood” from the trademark register).

⁷⁷ See Beebe & Fromer, *supra* note 76, at 1024 (“[If] trademark length, complexity, and bulkiness” increase, consumers will face a commensurate increase in their inability to efficiently identify the sources marks indicate).

options for consumers.⁷⁸ Section 2(a) helps alleviate this depletion by barring the registration of deceptive marks and rendering those marks available for other businesses to use on products that do in fact possess the qualities that the mark conveys. This allows businesses to use those marks to efficiently communicate to consumers information about their products. Consumers can also more easily remember the businesses associated with those marks, which helps minimize consumer search costs.

The weight that the Section 2(a) deceptiveness inquiry places on consumers' understanding is reflective of the central role that consumers' perspective plays in trademark law more broadly. Trademark law requires use of a mark in a consumer-facing manner to grant registration,⁷⁹ and consumers' perspective is the cornerstone of the analysis for common issues such as trademark infringement, genericness, and failure to function.⁸⁰ When ruling on trademark infringement, courts evaluate whether the defendant's use of its trademark in connection with its goods likely causes consumers to be confused as to the true source of the goods due to the similarity between the defendant's trademark and the plaintiff's trademark.⁸¹ Courts apply a multifactor test when evaluating the likelihood of consumer confusion and consider several factors, such as the similarity of the trademarks and the proximity of the goods, from the perspective of the consumer.⁸² Further, evidence of actual consumer confusion, either in the form of anecdotes or consumer surveys, is often decisive for the case outcome.⁸³

⁷⁸ *Id.* at 1021 (explaining that market entrants face higher costs than incumbents when choosing a mark that is both effective and not confusingly similar to an already-registered mark and that the costs for entrants in a variety of industries, such as music and cosmetics, are substantial and represent a barrier to entry).

⁷⁹ 15 U.S.C. § 1127 (requiring use in commerce for trademark registration); *Kelly Servs., Inc. v. Creative Harbor, LLC*, 124 F. Supp. 3d 768, 775 (“[T]here has to be an ‘open’ use, that is to say, a use has to be made to the relevant class of purchasers or prospective purchasers” (quoting *Sterling Drug, Inc. v. Knoll A.-G. Chemische Fabriken*, 159 U.S.P.Q. (BNA) 628, 631 (T.T.A.B. 1968))), *subsequent determination*, 140 F. Supp. 3d 611 (E.D. Mich. 2015), *aff’d in part, vacated in part*, 846 F.3d 857 (6th Cir. 2017); *Roberts*, *supra* note 30, at 1995.

⁸⁰ *See infra* notes 81–83 and accompanying text; *Roberts*, *supra* note 30, at 1995 (stating that a trademark’s functions all turn on whether consumers perceive the trademark to perform those functions).

⁸¹ *See supra* note 20 (elaborating on the search-cost theory underlying trademark law); *Deere & Co. v. MTD Holdings Inc.*, No. 00 Civ. 5936, 2004 WL 324890, at *9 (S.D.N.Y. Feb. 19, 2004) (“[T]he central inquiry is whether there exists a likelihood of confusion, either because consumers are misled or confused as to the source of the goods in question, or there is confusion as to the sponsorship of the junior mark.”); *Tushnet*, *supra* note 31, at 874 (arguing that the likelihood of consumer confusion is largely determined by what courts think consumers would think when seeing the defendant’s mark); *cf. Tushnet*, *supra* note 31, at 873–74 (stating that protection against consumer confusion is the core of modern trademark law).

⁸² *Coty Inc. v. Excell Brands, LLC*, 277 F. Supp. 3d 425, 442 (S.D.N.Y. 2017) (“Application of the Polaroid test is ‘not mechanical, but rather, focuses on the ultimate question of whether, looking at the products in their totality, consumers are likely to be confused.’” (quoting *Star Indus., Inc. v.*

Similarly, when determining whether a mark is generic and not trademark protectable, courts and the USPTO focus on consumers' perception of the mark.⁸⁴ A mark is generic if it identifies a class of goods rather than a producer, such as the mark COMPUTER when used on laptops. In the recent case *United States Patent & Trademark Office v. Booking.com*, the Supreme Court held that a domain name consisting of an otherwise generic term combined with a generic top-level domain, such as ".com", may be protected as a trademark as long as consumers perceive it as being capable of distinguishing among the members of a class of goods or services and not as a reference to the class itself.⁸⁵ The USPTO also requires examiners to determine whether the relevant public would understand a mark to primarily refer to a class of goods or services when deciding on the genericness issue.⁸⁶ Examiners must review evidence of consumer perception, such as use of the term in newspapers and in other publications, when evaluating marks for potential genericness.⁸⁷

When determining whether to refuse registration on the basis of the failure to function issue, examiners again place consumers' perception at the center of their assessment.⁸⁸ The failure to function inquiry asks whether a

Bacardi & Co., 412 F.3d 373, 384 (2d Cir. 2005)); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1582 (2006) (stating that district courts apply the multifactor test for the likelihood of consumer confusion to answer the question of whether the defendant's trademark is causing or likely to cause consumer confusion as to the true source of the defendant's goods due to its similarity with the plaintiff's trademark); cf. *Gucci Am., Inc. v. Guess?, Inc.*, 843 F. Supp. 2d 412, 423 (S.D.N.Y. 2012) (stating that identifiers of source on the product that are not visible to consumers in post-sale settings do not dispel post-sale confusion and are therefore irrelevant to the post-sale confusion analysis).

⁸³ Beebe, *supra* note 82, at 1609 (finding evidence of actual consumer confusion to be one of the three factors that correlate with the highest win rate for the plaintiff).

⁸⁴ See Linford, *supra* note 75, at 111 ("Trademark law thus turns in large part on when a word or symbol acquires and loses source-signifying meaning in the eyes of consumers."); see also U.S. PAT. & TRADEMARK OFF., EXAMINATION GUIDE 3-20: GENERIC.COM TERMS AFTER *USPTO V. BOOKING.COM* 2 (2020), <https://www.uspto.gov/sites/default/files/documents/TM-ExamGuide-3-20.pdf> [<https://perma.cc/E8L8-ZJM5>] (stating that when evaluating whether a mark is generic, "examining attorneys must continue to assess on a case-by-case basis whether, based on the evidence of record, consumers would perceive a generic.com term as the name of a class of goods and/or services or, instead, as at least capable of serving as a source indicator").

⁸⁵ U.S. Pat. & Trademark Off. v. *Booking.com B.V.*, 591 U.S. 549, 555 (2020).

⁸⁶ TMEP § 1209.01(c)(i).

⁸⁷ U.S. PAT. & TRADEMARK OFF., *supra* note 84, at 2 (requiring examiners to examine evidence of consumer perception on a case-by-case basis); TMEP § 1209.01(c)(i).

⁸⁸ See Mark McKenna, *Trademark Use Rides Again*, 104 IOWA L. REV. ONLINE 105, 106 (2020), <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2022-11/ILROnline-104-McKenna-v2.pdf> [<https://perma.cc/J2AH-K7WA>] (arguing that trademark use is evaluated from the perspective of the consumer; an indicator is "used as a mark" when consumers are likely to regard it as source-indicating); Roberts, *supra* note 30, at 1995-96 (citing the TTAB's statement that "the critical enquiry in determining whether a designation functions as a mark is how the designation would be perceived

trademark applicant uses the mark at issue as a trademark. The TTAB has stated that the relevant question when evaluating the failure to function issue is how the mark would be perceived by the relevant public, and the answer to this question depends on the evidence in the record showing how the mark is actually used in the marketplace.⁸⁹ For example, factors such as the mark being placed where consumers would expect a trademark to be placed on a product, the use of a TM symbol, and the use of a large font size and stylization weigh in favor of a finding that consumers would perceive the mark to function as a trademark.⁹⁰

II. CONSUMERS' UNDERSTANDING

This Part reviews findings from past studies on consumers' understanding of six environmental terms that are commonly used on consumer products: "green," "eco," "natural," "recycled," "recyclable," and "biodegradable."⁹¹ A number of past studies have grouped environmental terms into two broad categories—general environmental terms and specific environmental terms.⁹² General environmental terms, such as "green," are terms that producers use to

by the relevant public" in arguing that a trademark's function is defined from the perspective of consumer perception (quoting *In re Eagle Crest, Inc.*, 96 U.S.P.Q.2d (BNA) 1227, 1229 (T.T.A.B. 2010))).

⁸⁹ *Eagle Crest, Inc.*, 96 U.S.P.Q.2d (BNA) at 1229; *In re Aerospace Optics, Inc.*, 78 U.S.P.Q.2d (BNA) 1861, 1862 (T.T.A.B. 2006) ("A critical element in determining whether matter sought to be registered is a trademark is the impression the matter makes on the relevant public.").

⁹⁰ Roberts, *supra* note 30, at 2006–09.

⁹¹ See *infra* notes 92–165 and accompanying text; Daniele Asioli et al., *Making Sense of the "Clean Label" Trends: A Review of Consumer Food Choice Behavior and Discussion of Industry Implications*, 99 FOOD RSCH. INT'L 58, 65 (2017) (stating that "natural" is one of the most commonly used terms on foods); Morris et al., *supra* note 8, at 328–29 (discussing marketers' use of the words "eco-safe," "biodegradable," "recycled," "recyclable" on products in response to consumers' interest in environmentally friendly products); Sdrolia & Zarotiadis, *supra* note 8, at 151 (commenting on the prevalence of companies' use of the word "green" in marketing); e.g., U.S. Trademark Application Serial No. 97663642 (filed Nov. 4, 2022) (ReCharge to ReUse, ReCycle to ReCover); U.S. Trademark Application Serial No. 97607381 (filed Sept. 26, 2022) (DANI naturals); U.S. Trademark Application Serial No. 97594353 (filed Sept. 16, 2022) (GREEN LIGHTNING); U.S. Trademark Application Serial No. 97251785 (filed Feb. 3, 2022) (RECY-COOL); U.S. Trademark Application Serial No. 97976464 (filed Jan. 6, 2022) (PHADE OCEAN FRIENDLY MARINE BIODEGRADABLE); U.S. Trademark Application Serial No. 88184878 (filed Nov. 7, 2018) (ECOPEDIC); see also Beebe & Fromer, *supra* note 76, at 956–57 (stating that the majority of trademarks are word marks, with 75% of the total registered marks as of the end of 2016 consisting only of text).

⁹² See, e.g., Morris et al., *supra* note 8, at 328 (stating that producers use both general environmental terms and specific environmental terms to communicate information about the environmental benefits that their products provide); Polonsky et al., *supra* note 10, at 284 (comparing general environmental terms such as "eco-safe" with specific environmental terms such as "biodegradable").

communicate to consumers that a product as a whole benefits the environment.⁹³ These terms do not specify which part of the product provides the benefit or exactly what the benefit is. Specific environmental terms, such as “recycled,” are terms that producers use to communicate to consumers that a product possesses a certain specific environmental attribute.⁹⁴

I adopt this manner of grouping the terms in this Article. To be clear, a number of other ways exist for classifying environmental terms when studying consumer perception, such as grouping them according to a process versus end-product divide or placing them along multiple axes that characterize environmental impact.⁹⁵ This Article adopts the manner of grouping terms into the categories of general and specific because these two categories are broad enough to capture most, if not all, environmental terms and may allow generalizing some of the findings from this Article to other terms within the same category, although the feasibility of doing this warrants its own detailed analysis.

This Part first reviews findings from past studies on consumers’ understanding of the general environmental terms “green,” “eco,” and “natural.” Then, it reviews findings from past studies on consumers’ understanding of the specific environmental terms “recycled,” “recyclable,” and “biodegradable.” My goal is not to comprehensively review the findings of all past studies on how consumers understand these terms or on the nuances that different product types and contexts present. Rather, I aim to illustrate, through this Part and Part III below, that a mismatch exists between, at minimum, the consumers’ interpretations found by the studies reviewed in this Part and the examiner’s definitions for the same terms in Part III.

Section A shows that past studies indicate that consumers understand the general environmental terms “green,” “eco,” and “natural” to mean that a product possesses a certain set of specific qualities, but the exact qualities that constitute the set vary depending on the consumer and the product type.⁹⁶

⁹³ Atkinson & Rosenthal, *supra* note 5, at 35 (describing general environmental terms as being “much more generic—for example, unsubstantiated claims on various food items [claiming the items] to be ‘natural’ or ‘healthy’”); Polonsky et al., *supra* note 10, at 284 (“A general environmental claim is an attempt to portray a general environmental benefit that the product exhibits.”).

⁹⁴ Polonsky et al., *supra* note 10, at 284 (explaining that specific environmental terms are scientific terms such as “biodegradable,” “recycled,” and “CFC free”).

⁹⁵ See, e.g., Rosa Maria Dangelico & Pierpaolo Pontrandolfo, *From Green Product Definitions and Classification to the Green Option Matrix*, 18 J. CLEANER PROD. 1608, 1609–11 (2010) (proposing a matrix for characterizing products and practices along three dimensions: the phase of the product lifecycle during which green features are expressed, the category of environmental impact or focus, and the type of environmental impact); Taufique et al., *supra* note 2, at 2180 (discussing environmental terms that convey information about a single product attribute and ones that convey information about a life cycle assessment).

⁹⁶ See *infra* notes 99–138 and accompanying text.

Consumers do not have a uniform understanding of these terms, but they do, however, share a common sense of distrust of these terms when the terms are used by producers. This distrust stems from a lack of information from producers supporting the accuracy of the terms as the terms are used on their products.

Section B shows that past studies indicate that, in contrast to the wide range of variation in consumers' understanding of the general environmental terms, consumers tend to share a more uniform understanding of the specific environmental terms "recycled," "recyclable," and "biodegradable."⁹⁷ Consumers tend to understand "recycled" to mean that most, if not all, of a product is made with recycled material and "recyclable" to mean that most, if not all, of the communities across the United States have recycling plants that are able to recycle a product. Consumers are uncertain as to the meaning of "biodegradable," but they generally understand it to mean that a product can degrade in a relatively short amount of time, regardless of how the product is disposed. Part III will return to these findings on consumers' understanding in analyzing the definitions that examiners apply for these same terms when evaluating the deceptiveness issue under Section 2(a) and will show that a mismatch exists between consumers' understanding and examiners' definitions.⁹⁸

A. General Environmental Terms

This Section reviews findings from past studies on consumers' understanding of the general environmental terms. The findings show that (1) consumers understand these terms to indicate that a product possesses a set of specific qualities, (2) the exact set of qualities differs depending on the consumer and the product type, and (3) consumers are uncertain as to whether the product in fact possesses this set of qualities because consumers do not trust producers to be truthful in their use of these terms on their products.

The specific qualities that consumers understand these terms to indicate can relate to various aspects of a product, ranging from aspects related to the end product to those related to the manufacturing process. These qualities are ones that consumers find to be desirable because consumers perceive them to yield either environmental benefits or personal health benefits. Although consumers do not have a uniform understanding of these terms, they share a common sense of distrust of the truthfulness of these terms as they are used on products. This distrust stems largely from a lack of information from producers,

⁹⁷ See *infra* notes 139–165 and accompanying text.

⁹⁸ See *infra* notes 166–251 and accompanying text.

both about how producers define these terms and about the accuracy of these terms as they are used on a given product.

1. “Green” and “Eco”

Past studies show that consumers generally view “green” and “eco” as being interchangeable.⁹⁹ When consumers see these words on a product, they understand them to mean that a product possesses a certain set of specific qualities, with the exact qualities varying depending on the individual and the context.¹⁰⁰ For example, some consumers perceive “green” and “eco” as indicating that a product’s packaging is made with recyclable materials, such as glass, and that the product’s manufacturing process does not waste materials.¹⁰¹ In the context of cosmetic products, consumers tend to understand “green” and “eco” as indicating that a product contains fewer chemicals and more plant extracts and essential oils.¹⁰² In a 2011 study, some respondents commented that they believed that skincare products with the words “green” and “eco” on the packaging do not contain chemicals, whereas other respondents commented that they believed that these words do not necessarily convey that a product is chemical-free.¹⁰³ In the context of clothing, consumers sometimes understand the word “green” as indicating that an article of clothing is made with fabric that is gentler and better for individuals with sensitive skin.¹⁰⁴ Many respondents in the 2011 study commented that they would purchase these articles of clothing for their kids for this reason.¹⁰⁵ In the context of food products, some consumers understand “green” and “eco” as indicating superior taste.¹⁰⁶

⁹⁹ Ethan Pancer, Lindsay McShane & Theodore J. Noseworthy, *Isolated Environmental Cues and Product Efficacy Penalties: The Color Green and Eco-labels*, 143 J. BUS. ETHICS 159, 162 (2017) (stating that consumers and producers often use the term “green” interchangeably with “environmentally friendly” and associate the term with being ecological); Sdrolia & Zarotiadis, *supra* note 8, at 162 (“[G]reen and eco in terminology are used interchangeably.”).

¹⁰⁰ Cervellon & Carey, *supra* note 3, at 122 (finding that consumers interpret the word “green” to indicate certain health benefits, environmental benefits, or superior performance); Taufique et al., *supra* note 2, at 2188 (finding that consumers associate “green” with certain private benefits, such as the product being healthier or tasting better).

¹⁰¹ Cervellon & Carey, *supra* note 3, at 130.

¹⁰² *Id.* at 129.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 126–27.

¹⁰⁵ *Id.* at 128. *But see* Sheila Bonini & Jeremy Oppenheim, *Cultivating the Green Consumer*, STAN. SOC. INNOVATION REV. 56, 59 (2008) (finding that consumers may perceive some products that are marketed as being “green,” such as hybrid cars, to be less preferable due to perceived inferior performance to conventional options).

¹⁰⁶ Cervellon & Carey, *supra* note 3, at 122; Taufique et al., *supra* note 2, at 2188.

In addition to qualities relating to the end product, some consumers understand “green” and “eco” to indicate certain specific qualities relating to the production process. For example, some consumers understand the word “green” on cosmetic products to mean that a product was prepared using a traditional rather than industrial process, such as with a simple formula consisting of argan oil and other natural ingredients.¹⁰⁷

For certain types of products, consumers may perceive the words “green” and “eco” to primarily indicate health-related benefits.¹⁰⁸ For example, a number of respondents in the 2011 study commented that when they purchase cosmetic products, they understand the word “green” to mean that a product contains a higher concentration of natural ingredients and thus has better performance and is more protective of their skin.¹⁰⁹ The respondents indicated that they were doubtful that these products would yield any environmental benefits.¹¹⁰

2. “Natural”

“Natural” is currently one of the most prevalently used environmental terms on consumer products, but past studies show that consumers’ understanding of the term varies greatly.¹¹¹ As with the words “green” and “eco,” consumers generally understand the word “natural” to mean that a product possesses a certain set of desirable qualities, but consumers do not have a uniform understanding as to exactly what the qualities are. Some studies have found consumers to perceive the word “natural” as indicating certain product qualities that relate to the reliability of the product’s performance or to the product’s impact on personal health.¹¹² Other studies have found that consumers

¹⁰⁷ Cervellon & Carey, *supra* note 3, at 129.

¹⁰⁸ *Id.* at 131 (quoting one respondent, “I purchase environment-friendly detergents but for cosmetics, no. I purchase green cosmetics because it is good for me”).

¹⁰⁹ *Id.* (finding respondents to understand “green” and “eco” to primarily indicate health benefits when used on cosmetics and environmental benefits when used on detergents).

¹¹⁰ *Id.*

¹¹¹ Asioli et al., *supra* note 91, at 65 (“[T]he attribute ‘natural’ is one of the most-used claims in food marketing”); Sajida Rahman et al., *Assessing Consumers’ Understanding of the Term “Natural” on Food Labeling*, 85 J. FOOD SCI. 1891, 1891 (2020) (“[H]owever, inconsistencies in how ‘naturalness’ was defined or measured make it difficult to ascertain the decision-making attributes of a food or ingredient that consumers determine as natural.”); *see also* Paul Rozin, *Naturalness Judgments by Lay Americans: Process Dominates Content in Judgments of Food or Water Acceptability and Naturalness*, 1 JUDGMENT & DECISION MAKING 91, 91 (2006) (“Natural foods are generally considered more desirable, and worth more, than corresponding ‘non-natural,’ ‘artificial’ or ‘processed’ alternatives.”).

¹¹² Asioli et al., *supra* note 91, at 65 (“The word natural evokes to consumers mostly positive associations, leading to the perception of natural products as tastier, healthier or more environment-friendly.”); Maura Franchi, *Food Choice: Beyond the Chemical Content*, 63 INT’L J. FOOD SCI. & NUTRITION 17, 23 (2012) (“An example of the role of ‘nature’ is the increasing preference for biological products The choice of biological food expresses an ethical orientation . . . [related to]

understand the word “natural” to mean “found in nature” or “without chemicals or human transformations.”¹¹³

In the context of food products, consumers understand the word “natural” to indicate the use of sustainable farming methods, fresh or raw ingredients, or a food preparation process that is traditional rather than industrial.¹¹⁴ Some studies show that consumers understand the word “natural” on food products to mean that the food has a high nutritional content.¹¹⁵ In a 2020 study, respondents that chose a bowl of granola labeled as natural over a bowl of granola without the label commented that they made the choice based on the belief that the word “natural” indicated that the granola was nutritious, fresh, and minimally processed.¹¹⁶ A 2017 study similarly shows that the respondents believed that an “all-natural” peanut butter contained more protein and vitamins than its regular peanut butter counterpart.¹¹⁷

Another line of studies found that consumers sometimes define the word “natural” with reference to the absence of certain undesirable qualities, such as the absence of additives, rather than the presence of desirable qualities.¹¹⁸ One study concluded that respondents understood the word “natural” to mean the absence of artificial ingredients in food, but the respondents interestingly did

cultural orientation and health protection.”); Rebecca Liu, Neal H. Hooker, Efthimios Parasidis & Christopher T. Simons, *A Natural Experiment: Using Immersive Technologies to Study the Impact of “All-Natural” Labeling on Perceived Food Quality, Nutritional Content, and Liking*, 82 J. FOOD SCI. 825, 825–26 (2017) (“Interestingly, healthfulness is often given as the reason for preferring foods labeled as natural”).

¹¹³ Cervellon & Carey, *supra* note 3, at 119.

¹¹⁴ Asioli et al., *supra* note 91, at 65 (“[C]onsumers perceive naturalness as a multidimensional concept referring to sustainable, traditional, or organic farming methods, presence of fresh and raw ingredients, and time for preparing and cooking food.”); Nicole E. Negowetti, *A National “Natural” Standard for Food Labeling*, 65 ME. L. REV. 581, 595–96 (2013) (finding that respondents understood “natural” as indicating that the product was made with ingredients that are also found in homecooked food).

¹¹⁵ Liu et al., *supra* note 112, at 833 (“[O]ur data indicate that consumers may well perceive these products [that have a ‘natural’ label] as having higher quality and nutritional content.”); Rahman et al., *supra* note 111, at 1891 (“Studies have demonstrated that when food items were labeled ‘all-natural’ consumers viewed the product as having higher quality and were more nutritious.”).

¹¹⁶ Rahman et al., *supra* note 111, at 1895.

¹¹⁷ Liu et al., *supra* note 112, at 831.

¹¹⁸ Asioli et al., *supra* note 91, at 65 (“Amos, Pentina, Hawkins, and Davis (2014) suggested that food products labeled with natural claims are perceived to be less harmful and healthier, with superior instrumental attributes, and possessing higher nutritional value and lower human contamination.”); Liu et al., *supra* note 112, at 830 (discussing previous research “indicating that many consumers define the term ‘natural’ as an absence of undesirable attributes”); Asioli et al., *supra* note 91, at 65 (“This is because consumers perceive naturalness as a multidimensional concept referring to sustainable, traditional, or organic farming methods, presence of fresh and raw ingredients, and time for preparing and cooking food.”).

not perceive “natural” to exclude pesticide residue from the ingredients.¹¹⁹ Some consumers perceive the word “natural” to indicate minimal human manipulation of ingredients during the processing stage of food products.¹²⁰ In a 2006 study, respondents found a sample of water that had its minerals removed and then replaced, a two-step transformation, to be substantially lower in naturalness compared to a sample of water that had not undergone this transformation, even though the two samples of water had identical mineral content and only differed in processing.¹²¹

3. Consumer Distrust

Although consumers attribute meaning to general environmental terms such as “green,” “eco,” and “natural,” and prefer products that have the qualities that they believe these terms to indicate,¹²² they are wary of the truthfulness of these terms when the terms are used on products by producers. Consumers do not trust producers to be truthful when using these terms to describe their products.¹²³ A study involving British consumers found that seventy-one percent of respondents believed that companies use these terms simply as an excuse to charge higher prices.¹²⁴ Respondents in another study

¹¹⁹ Liu et al., *supra* note 112, at 830–31 (noting that “pesticide” was not prefaced with the adjective “artificial” in the list of ingredients).

¹²⁰ Asioli et al., *supra* note 91, at 65; Rahman et al., *supra* note 111, at 1891; Rozin, *supra* note 111, at 91.

¹²¹ Rozin, *supra* note 111, at 92–93, 96.

¹²² See Cervellon & Carey, *supra* note 3, at 121–22 (discussing a 2010 survey involving nine thousand respondents from eight countries, including Britain, France, and the United States, finding that a third of the respondents were willing to pay a premium for environmentally friendly products in the next year); D’Souza et al., *supra* note 2, at 375 (discussing a poll by the J. Walter Thompson advertising agency finding that 82% of respondents declared that they would pay at least 5% more for an environmentally friendly product); Thøgersen, *supra* note 8, at 97 (discussing the belief that purchasing decisions are a means for consumers to protect the environment); see also Khan Md Raziuddin Taufique, Chamhuri Siwar, Norshamliza Chamhuri & Farah Hasan Sarah, *Integrating General Environmental Knowledge and Eco-Label Knowledge in Understanding Ecologically Conscious Consumer Behavior*, 37 *PROCEDIA ECON. & FIN.* 39, 43 (2016) (finding general environmental knowledge and knowledge about environmental claims to positively influence environmentally conscious consumer behavior).

¹²³ Atkinson & Rosenthal, *supra* note 5, at 34 (finding that the majority of consumers in the United States do not believe producers to be truthful when conveying environmental information about their products); Bonini & Oppenheim, *supra* note 105, at 58–59 (discussing consumers’ distrust of environmental information from corporations and the media); Cervellon & Carey, *supra* note 3, at 121 (stating that consumers’ lack of trust is particularly prominent for environmental labels originating from producers); Mehta et al., *supra* note 4, at 581 (describing consumer groups’ view that messages from producers claiming their products to be made with bio-based plastics to be a marketing strategy to increase prices); Taufique et al., *supra* note 2, at 2187 (commenting that consumers perceive general claims such as “environmentally friendly” from producers to be puffery).

¹²⁴ Thøgersen, *supra* note 8, at 91.

described these terms as being “more or less fictitious” when used by producers.¹²⁵ Consumers’ desire to purchase products that are environmentally friendly is thus forestalled by consumers’ distrust of these terms.¹²⁶ This distrust is not unfounded, as there have been past instances of deceit and a current lack of information from producers supporting the accuracy of the general environmental terms used on products.

A number of studies have shown that major companies have made unsubstantiated or false claims about their products’ environmental attributes.¹²⁷ For example, a 2007 study by TerraChoice Environmental Marketing found that all but one of the 1,753 environmental product claims that it examined were false or misleading, including advertisements stating that a product was free of certain harmful ingredients when such ingredients were in fact banned by law in the United States.¹²⁸ The Advertising Standards Authority in the United Kingdom similarly found that major skincare companies including Estée Lauder and Avon have made unsubstantiated claims about their products for a quarter of the products that it examined.¹²⁹

Consumers have expressed a need for detailed information about producers’ use of general environmental terms, including information about how a producer defines the general environmental terms that it uses and how a product is consistent with this definition.¹³⁰ Without information on these points, consumers cannot be certain that a product matches their preferences and may de-prioritize the general environmental terms found on products in

¹²⁵ Magnier & Crié, *supra* note 13, at 362.

¹²⁶ Atkinson & Rosenthal, *supra* note 5, at 33 (“For consumers, the desire to make sustainable purchases is forestalled by what many perceive to be a lack of credibility and honesty in advertising in general and in environmental claims in particular.”).

¹²⁷ See Polonsky et al., *supra* note 10, at 289 (discussing criticisms against the garbage bag industry for making exaggerated claims about the changes that were made to their products to make the products more sustainable); Taufique et al., *supra* note 2, at 2187 (discussing unsubstantiated environmental terms used on products).

¹²⁸ Bonini & Oppenheim, *supra* note 105, at 59 (“[I]nsecticides, lubricants, oven cleaner gels, cleaners, and disinfectants [were] all labeled as CFC-free. But no products sold today in the United States have CFCs, because the federal government banned the ozone-eating propellants almost three decades ago.”).

¹²⁹ Cervellon & Carey, *supra* note 3, at 124.

¹³⁰ *Id.* (stating that consumers tend to believe advertisements that use scientific arguments relating to health); Thøgersen, *supra* note 8, at 95 (“Consumers need specific and reliable information in order to be able to choose the most environmentally friendly alternative when competing options are offered or to do the right thing when asked to change a behavioral routine.”); Taufique et al., *supra* note 2, at 2187 (“Consumers tend to rely upon and find more believable those claims that are more specific or concrete.”); see also *supra* notes 10–11; Magnier & Crié, *supra* note 13, at 363 (discussing the importance of education on environmental matters for consumers to choose the most environmentally friendly alternatives).

their purchasing decisions.¹³¹ A 2009 study involving skincare products labeled with the word “natural” shows that a third of the respondents found the word “natural” to be untrustworthy without more information.¹³² They expressed the need for more information on product labels about a product’s ingredients and how the product is “natural.”¹³³ Currently, the only source of information for consumers is often the company’s environmental policies, which are vague and do not provide details about a given product.¹³⁴ Skincare brands usually do not disclose what ingredients are in their products, causing consumers to be unable to discern the precise meaning of a term such as “natural.”¹³⁵

Similarly, in the clothing context, consumers require more details about a producer’s use of general environmental terms. In one study, when shown a shirt that was labeled as “green,” respondents asked for more information about what exactly the producer meant with its use of the word.¹³⁶ Some respondents asked whether the word indicated that the tinting process for the shirt does not pollute the water.¹³⁷ Other respondents asked whether the word indicated that the assembling and sewing processes do not harm the environment.¹³⁸

B. Specific Environmental Terms

This Section reviews findings from past studies on consumers’ understanding of the specific environmental terms “recycled,” “recyclable,” and “biodegradable.” In contrast to the wide range of variation in consumers’ understanding of the general environmental terms discussed above, the past findings show that consumers tend to share a more uniform understanding of each of these three specific environmental terms. Consumers generally

¹³¹ William Young, Kumju Hwang, Seonaidh McDonald & Caroline J. Oates, *Sustainable Consumption: Green Consumer Behavior When Purchasing Products*, 18 SUSTAINABLE DEV. 20, 26 (2010) (finding that a barrier to purchasing environmentally friendly products is the lack of available information on the environmental performance of products, with producers generally only providing vague environmental policy statements).

¹³² Taufique et al., *supra* note 2, at 2187.

¹³³ *Id.* (“[W]here it was reported that when general or ambiguous information is presented to consumers, they usually require further evidence that can have a marked effect on product perceptions.”).

¹³⁴ Young et al., *supra* note 131, at 26.

¹³⁵ See Cervellon & Carey, *supra* note 3, at 125 (“[E]ven for the scientifically-aware customer, lack of transparency in the cosmetics business makes it difficult to even establish with certainty which ingredients exist in the bottle . . .”).

¹³⁶ *Id.* at 127 (“I understand that it respects the environment . . . but what does that mean exactly? Not sure.”).

¹³⁷ *Id.* (“To what extent is it actually a green shirt? . . . It is marketing. . . . But in fact in the manufacturing process, they do not respect the environment. They pollute the water when tinting.”).

¹³⁸ *Id.* (“I am not sure if it is enough to be considered green. What about assembling, sewing etc.”).

understand “recycled” to mean that most, if not all, of a product is made with recycled material and “recyclable” to mean that most, if not all, of the communities across the United States have recycling plants that are able to recycle a product. Consumers generally understand “biodegradable” to mean that a product can degrade in a relatively short amount of time, regardless of the way in which the product is disposed, but consumers have expressed uncertainty as to the exact meaning of the word.

1. “Recycled” and “Recyclable”

Past studies show that consumers generally view the words “recycled” and “recyclable” to indicate a high level of recycled material and of recyclability. Specifically, consumers generally understand “recycled” to mean that most, if not all, of a product is made with recycled material.¹³⁹ One study found that the minimum amount of recycled material acceptable to the respondents was, on average, sixty-six percent.¹⁴⁰ Consumers generally understand “recyclable” to mean that most, if not all, of the communities across the United States have recycling plants that are able to recycle a product.¹⁴¹ When asked to estimate the minimum percentage of communities across the United States with a recycling facility that is able to recycle a “recyclable” product, respondents in the study estimated the number to be, on average, fifty-one percent.¹⁴² When asked about the hypothetical scenario in which only one recycling facility in the country was able to recycle a product, sixty-three percent of the respondents commented that they would not consider such a product to be recyclable.¹⁴³

Consumers disagree as to what constitutes recycled material. About half of consumers consider post-consumer waste, which refers to material that has been extracted from the solid waste stream and then reprocessed to form a new

¹³⁹ See Morris et al., *supra* note 8, at 340 (finding that 32.6% and 22.1% of respondents, respectively, believed that either all or most of the materials used to make a product that is labeled as recycled have been recycled); see also Taufique et al., *supra* note 2, at 2188 (commenting that consumers may “be misled by the overestimation of the amount of environmental benefit of [the] product”).

¹⁴⁰ Morris et al., *supra* note 8, at 340.

¹⁴¹ Cude, *supra* note 11, at 210 (finding respondents to believe that “recyclable where facilities exist” means that a recycling facility for the product exists in their home community); Morris et al., *supra* note 8, at 343 (finding respondents to believe 51% to be the minimum portion of communities with a recycling facility that is able to recycle a product labeled as recyclable).

¹⁴² Morris et al., *supra* note 8, at 343.

¹⁴³ *Id.*; see also Cude, *supra* note 11, at 210 (finding that 33% of respondents believed that purchasing recyclable goods without recycling the goods still benefits the environment).

product, to be recycled material.¹⁴⁴ Some consumers consider pre-consumer waste, which refers to raw material that has been, for instance, spilled onto the factory floor during the manufacturing process and is routinely incorporated back into the manufacturing process, to also be recycled material.¹⁴⁵

2. “Biodegradable”

Past studies show that consumers have some uncertainty as to their understanding of the word “biodegradable.”¹⁴⁶ Respondents in a 2021 study commented that they did not know “what biodegradable really mean[t]” and were uncertain about whether “lower or higher carbon emissions [are] associated with [biodegradable] products.”¹⁴⁷ Some consumers understand the word “biodegradable” to refer to plastic that breaks down, dissolves, or decomposes.¹⁴⁸ Some consumers believe that exposure to sunlight or the presence of bacteria is required for biodegradable plastic to degrade.¹⁴⁹

Consumers usually do not take into account variabilities in the amount of time or the conditions needed for degradation to occur in their interpretations of the word “biodegradable.”¹⁵⁰ Degradation refers to the process that biodegradable materials go through to decompose into carbon dioxide, water, and biomass.¹⁵¹ The speed of degradation depends on biotic and non-biotic

¹⁴⁴ Morris et al., *supra* note 8, at 333 (finding roughly half of respondents to understand recycled material to refer to material that had been previously used and had been either diverted from the solid waste stream or reprocessed).

¹⁴⁵ *Id.* at 337 (finding 56% of respondents to understand recycled material to also include raw materials that had been spilled onto the factory floor); Cude, *supra* note 11, at 217 (describing pre-consumer waste as scraps from the manufacturing process).

¹⁴⁶ Ayse Lisa Allison, Fabiana Lorencatto, Susan Michie & Mark Miodownik, *Barriers and Enablers to Buying Biodegradable and Compostable Plastic Packaging*, 13 SUSTAINABILITY 1, 6 (2021) (“I am not sure what these terms [including ‘biodegradable’] really mean. . . . These terms are confusing and can misleading [sic].”); Nazareth et al., *supra* note 14, at 3 (discussing a study showing that 56.7% of the assessed public did not know the meaning of the term “biodegradable”).

¹⁴⁷ Allison et al., *supra* note 146, at 6, 8.

¹⁴⁸ Cude, *supra* note 11, at 212 (“Those that used a term to define degradable most often said that it meant that the plastic breaks down (13%). Other common definitions were that the plastic dissolves, disintegrates, or decomposes.”).

¹⁴⁹ *Id.* (“Seven percent described degradable in terms of the process; many believed the plastic had to be exposed to sunlight or required some type of additive to degrade.”).

¹⁵⁰ See Amos et al., *supra* note 8, at 283 (“[P]eople misunderstand the static structure of a landfill and even if a material is biodegradable, the conditions of a landfill may inhibit the degradation process.”); Imogen E. Napper & Richard C. Thompson, *Environmental Deterioration of Biodegradable, Oxo-biodegradable, Compostable, and Conventional Plastic Carrier Bags in the Sea, Soil, and Open-Air Over a 3-Year Period*, 53 ENV’T SCI. & TECH. 4775, 4780 (2019) (stating that the rate of degradation depends on the local conditions to which the material is exposed, including light, heat, abrasion, moisture, chemical composition, and biological activity).

¹⁵¹ Bojanowska & Sulimierska, *supra* note 4, at 13983 (stating that the initial material must be organic matter for degradation to occur); Napper & Thompson, *supra* note 150, at 4776 (explaining

conditions, including light, temperature, humidity, and microorganisms.¹⁵² These conditions may inhibit the degradation process if they are not within a suitable range.¹⁵³ Landfills, for example, may be too cold and dark for degradation to occur.¹⁵⁴ Studies have shown low or zero degradation of materials that have been labeled as biodegradable after a three-year period of the material being immersed in soil, open air, and sea environments.¹⁵⁵ A 2019 study found that shopping bags that had been labeled as biodegradable were still able to carry grocery items after being buried in soil or submerged in sea water for three years.¹⁵⁶

Consumers do not perceive the word “biodegradable” to be specifying any particular method of disposal.¹⁵⁷ Industrial composts are usually the best disposal option for facilitating a fast degradation process, but consumers are often uncertain about whether biodegradable products are compostable.¹⁵⁸ Only a third of the participants in a 2020 study disposed of biodegradable plastic waste into the compost.¹⁵⁹ Several participants commented that they believed

that biodegradation consists of two steps, with the first step involving the breakdown of polymers into lower molecular masses and the second step involving the assimilation of these masses by microorganisms).

¹⁵² *Supra* note 150; Nazareth et al., *supra* note 14, at 4 (noting that the cold and dark conditions in landfills may inhibit biodegradation).

¹⁵³ *Supra* notes 150, 152; Nazareth et al., *supra* note 14, at 4 (commenting that some materials can only degrade under a narrow range of controlled biotic and non-biotic conditions).

¹⁵⁴ Nazareth et al., *supra* note 14, at 4.

¹⁵⁵ Napper & Thompson, *supra* note 150, at 4779 (finding bags immersed in either a soil or a marine environment for three years to be able to hold typical groceries with no breakages); *see also id.* at 4780 (discussing studies showing low or no degradation of polymers after prolonged periods of time in environmental conditions); Monick Nazareth, Mônica R.C. Marques, Marcia C.A. Leite & Ítalo Braga Castro, *Commercial Plastics Claiming Biodegradable Status: Is This Also Accurate for Marine Environments?*, 366 J. HAZARDOUS MATERIALS 714, 720 (2019) (“The present study showed, through a 180 days exposure protocol in natural seawater, that 4 of the 6 samples of plastic products claiming biodegradable or compostable status did not display evidences of chemical and morphological degradation.”).

¹⁵⁶ Napper & Thompson, *supra* note 150, at 4779.

¹⁵⁷ Allison et al., *supra* note 146, at 8 (stating that consumers do not know where to put biodegradable waste or the collection options for such waste); Nazareth et al., *supra* note 14, at 5 (“[T]he widespread unfamiliarity of people about the biodegradability of polymers lead[s] to misguided purchase decisions and possibly to littering behavior”); Danny Taufik, Machiel J. Reinders, Karin Molenveld & Marleen C. Onwezen, *The Paradox Between the Environmental Appeal of Bio-Based Plastic Packaging for Consumers and Their Disposal Behaviour*, 705 SCI. TOTAL ENV'T, Feb. 25, 2020, at 1, 8 (“[T]he actual environmental benefits of such compostable bio-based plastic packages might be partly voided, because consumers relatively often dispose of them in the wrong waste bin”).

¹⁵⁸ *See* Taufik et al., *supra* note 157, at 8 (stating that industrial composts are better suited to composting biodegradable plastic packaging compared to home composts).

¹⁵⁹ *See id.* at 4 (“Of the participants who had a compostable bio-based package only 37.1% disposed of the package correctly in the organic waste (54.6% chose recycling waste & 8.2% chose residual waste)”).

that plastic waste, regardless of whether it was biodegradable or not, should not go into the compost.¹⁶⁰ A 2021 study found that consumers often dispose of biodegradable waste in a haphazard way, partly depending on which bin is empty.¹⁶¹

Consumers generally associate the word “biodegradable” with only positive environmental attributes and overlook any potential negative environmental effects that are associated with biodegradation.¹⁶² For example, a 2017 study found that respondents associated the word “biodegradable” with the product being good for improving landfill ecosystems, less toxic, less corrosive, and nonhazardous.¹⁶³ The respondents overlooked, for example, the production of methane gas during the degradation process, which may be more detrimental to landfill ecosystems than some nonbiodegradable materials,¹⁶⁴ and the creation of anoxic conditions in the soil, which may disturb the local ecosystem.¹⁶⁵

III. EXAMINERS’ DEFINITIONS

This Part presents my analysis of USPTO trademark examiners’ definitions for environmental terms when evaluating the deceptiveness issue under Section 2(a) of the Lanham Act. The analysis focuses on how examiners currently define environmental terms when determining whether a term is misdescriptive of an applicant’s goods under the first element of the deceptive marks test. This Part builds on the findings from Part II to illuminate whether the definitions that examiners currently apply for environmental terms are consistent with consumers’ understanding.

¹⁶⁰ *Id.* at 5 (“Even though it is compostable, I would count it as plastic and therefore chose the recycling waste bin.”).

¹⁶¹ Mehta et al., *supra* note 4, at 581 (“I have a lot of friends who, well it depends what day of the week it is—what bin it goes in.”).

¹⁶² Amos et al., *supra* note 8, at 282 (“[I]t appears that biodegradable claims may have a halo effect on consumers’ judgments.”); *see also id.* at 281 (commenting that consumers associate “biodegradable” with being environmentally friendly and view the purchase of biodegradable products as sustainable behavior); Mehta et al., *supra* note 4, at 581 (commenting that consumers associate “plastic” with “waste”).

¹⁶³ Amos et al., *supra* note 8, at 286.

¹⁶⁴ *Id.* at 283 (“Another expressed concern is the assumptions consumers make about biodegradable products and the benefits such products provide for landfills. Biodegradable materials may benefit landfills, but they also increase landfill methane gas production”); *see also* Nazareth et al., *supra* note 14, at 4 (stating that some materials release toxic molecules during degradation); Nazareth et al., *supra* note 155, at 715 (discussing the production of methane, water, carbon dioxide, and biomass during the biodegradation process).

¹⁶⁵ Nazareth et al., *supra* note 14, at 2 (“[R]ecent literature has pointed out biological adverse effects related to BBBCP [bio-based, biodegradable and compostable plastics], due to microplastic formation with high affinity to hazardous substances, creation of anoxic conditions in sediment layers and ecological disturbances.”).

The analysis is based on a sample of trademark filings that I retrieved from the USPTO's Trademark Electronic Search System (TESS) in October 2023. TESS is a search engine that provides access to USPTO's database, which includes all registered and applied-for trademarks.¹⁶⁶ To retrieve the sample, first, I obtained from TESS search results for the following search terms: "green," "eco," "natural," "recycle," and "biodegradable." The search results included all filings in the database for marks containing common variations of each search term, so the results for the term "recycle" included filings for marks containing the words "recycled" and "recyclable."¹⁶⁷ The search results thus included all filings for marks containing at least one of the six environmental terms discussed in Part II above.

Next, for each search term, I used filters in TESS to apply the following criteria to the universe of search results. The trademark filing must be (1) live and (2) for a word mark applied for use on goods rather than services.¹⁶⁸ Live filings are either pending applications or trademarks that have been registered and maintained. An application becomes dead, or no longer "live," when the application becomes abandoned for failure to meet a deadline or overcome a refusal.¹⁶⁹ A registered trademark becomes dead when the registration is not maintained or is canceled through a cancellation proceeding.¹⁷⁰ I included "live" as a criterion because live filings can block the registration of other

¹⁶⁶ *Trademark Search*, U.S. PAT. & TRADEMARK OFF., <https://tmsearch.uspto.gov/help> [<https://perma.cc/WLM8-EERV>]. The USPTO retired the TESS on Nov. 30, 2023, because it relied on a proprietary search language that was no longer supported and replaced it with a cloud-based trademark search system, which is a search platform that searches the same database of registered and applied for trademarks as the TESS. *Retiring TESS: What to Know About the New Trademark Search System*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/subscription-center/2023/retiring-tess-what-know-about-new-trademark-search-system> [<https://perma.cc/BPE7-S6LH>] (May 21, 2024).

¹⁶⁷ I retrieved common variations of each term by inputting each search term in the form of *term* into the search system.

¹⁶⁸ Goods are classified in Classes 1–34 under the Nice Classification, a system for classifying the types of goods that a mark is used on, and services are in Classes 35–45. This study's sample only includes trademarks in Classes 1–34. *See Nice Agreement Current Edition Version—General Remarks, Class Headings and Explanatory Notes*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/trademark-updates-and-announcements/nice-agreement-current-edition-version-general-remarks> [<https://perma.cc/3RLL-JDHN>] (Dec. 30, 2024) ("[T]he [Nice Agreement] international classification of goods and services is the controlling classification system used by the United States and applies to all trademark applications filed on or after September 1, 1973 . . ."); *see also* TMEP § 1401.03 (citing requirements for a Complete Trademark or Service Mark Application under 37 C.F.R. § 2.32(a)(7) (2024)); Barton Beebe & Jeanne C. Fromer, *Fake Trademark Specimens: An Empirical Analysis*, 120 COLUM. L. REV. F. 217, 222 (2020) (stating that applicants must indicate in the trademark application in which of the forty-five Nice Classification classes the goods or services are classified).

¹⁶⁹ *See Keeping Your Registration Alive*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/maintain/keeping-your-registration-alive> [<https://perma.cc/VS8G-C8HE>] (Jan. 16, 2024).

¹⁷⁰ *Id.*

trademarks, for example through a likelihood of confusion refusal, and prevent the use of those trademarks on products. A live trademark that is deceptive can prevent the use of that trademark on other products that do in fact possess the qualities conveyed by the trademark. Relatedly, live trademarks can pose a barrier for new market entrants who need to choose a trademark for their products. I included “word mark applied for use on goods” as a criterion to focus on comparing examiners’ definitions in this Part with the findings from Part II above on consumers’ understanding of the same terms when used on goods.¹⁷¹

In addition to satisfying the above two criteria, the trademark filing must (1) be for registration on the Principal Register and (2) have reached at least the notice of publication stage. Registration on the Principal Register signifies that a trademark has met all of the requirements for registration.¹⁷² If a trademark does not meet all of the requirements, it may be registered on the Supplemental Register in some circumstances,¹⁷³ but it would lack a number of important rights that are reserved for trademarks that are on the Principal Register, such as the presumption of validity and the nationwide exclusive right to use the trademark in commerce on the products listed in the registration.¹⁷⁴ Because the key benefits of trademark registration only apply to trademarks that are on the Principal Register, I included registration on the Principal Register as a criterion. I included notice of publication as a criterion because the issuance of a notice of publication indicates that the trademark examiner has concluded his review of the application and has raised all relevant issues, including deceptiveness, pertaining to the application.¹⁷⁵

No options existed to automatically filter for trademark filings that satisfy these latter two criteria, so determining whether a filing satisfied these two criteria required manually reviewing the filing. First, I sorted the filings

¹⁷¹ Additionally, scholars have found that the majority of registered marks are word marks consisting solely of text. Beebe & Fromer, *supra* note 76, at 956–57 (stating that the majority of trademarks are word marks, with 75% of the total registered marks as of the end of 2016 consisting only of text).

¹⁷² 15 U.S.C. § 1052.

¹⁷³ *Id.* § 1091(a) (allowing marks that are capable of serving as source-indicators but not registrable on the Principal Register and not otherwise barred from registration to be placed on the Supplemental Register).

¹⁷⁴ See *In re Federated Dep’t Stores Inc.*, 3 U.S.P.Q.2d (BNA) 1541, 1543 (T.T.A.B. 1987) (“It is overwhelmingly agreed that a Supplemental Register registration is evidence of nothing more than the fact that the registration issued on the date printed thereon. It is entitled to no presumptions of validity, ownership, use or priority.” (citations omitted)).

¹⁷⁵ 15 U.S.C. § 1063; Beebe & Fromer, *supra* note 168, at 222 (“The PTO publishes marks in the Official Gazette if it determines that they qualify for registration.”); Frakes & Wasserman, *supra* note 76, at 1819 (“If no oppositions are filed or the applicant successfully overcomes an opposition, the use-based applications proceed directly to registration. With respect to intent-to-use applications, the Trademark Office will issue a notice of allowance, which states that the applicant must file a satisfactory statement of use of the mark before the Trademark Office will register the mark.”).

according to the date of their most recent status update after applying the filters for the first two criteria, and then, starting from the top of the sorted list, I reviewed each filing until I reached thirty filings that satisfied both criteria. A status update included any updates to the filing's electronic file record, such as a communication between the examiner and the applicant or the issuance of a notice of publication. I included in the sample the filings with the most recent status update to focus on the *current state* of examiners' definitions. The manual review process consisted of clicking on a filing to open its electronic file record, checking whether the filing was for registration on the Principal Register, and then reviewing the list of correspondences between the examiner and the applicant to check whether the application had reached the notice of publication stage.

The total number of filings in the sample is 150, consisting of 30 filings for each search term. After retrieving this sample, for each filing that is in the sample, I systematically reviewed the initial application, the office actions, and the applicant's responses to the office actions that discuss the deceptiveness issue and the definition of the environmental term. All of the office actions and applicant's responses that discuss the deceptiveness issue clearly indicate the discussion with a headline. The office actions also clearly indicate the examiner's definition with a variation of the phrase "the term indicated [definition]," often with colons preceding the definition.

The aim of the analysis of this sample of filings is not to present a comprehensive view of examiners' definitions for all trademark filings that have ever been filed for marks containing the terms studied. In fact, the relatively large amount of time required for manually filtering for filings that satisfy the latter two criteria discussed above poses a constraint on the number of filings that can be studied. Rather, the aim of this analysis is to present the current state of examiners' definitions. The sample of thirty filings for each term includes all of the applications that have been filed for marks containing the term in a period spanning at least two years back in time from October 2023. For example, as Table 1 below shows, for the terms "green," "natural," and "recycled," the sample includes all of the filings for marks containing these terms that were filed in the period from 2021 to 2023. This Part thus sheds light on how current examiners' definitions compare with consumers' understanding of the terms, and, in doing so, presents and analyzes in Parts III.A and III.B below each examiner's definition that is included in the sample.

Table 1 below shows, for each search term, the year span of the filing dates and the percentage of filings out of the sample of thirty (N=30) that involve discussions of the term's meaning in each of the following contexts: (1) in evaluating the deceptiveness issue, (2) in evaluating whether the term is merely descriptive, and (3) in no contexts (no discussion of the term's meaning by either the examiner or the applicant). Given the limited number of filings

that discuss the deceptiveness issue, I have included in the analysis filings that discuss the term’s meaning in the context of evaluating whether the term is merely descriptive.¹⁷⁶ The merely descriptiveness issue can shed light on the present issue because it involves defining the term to answer the similar question of whether the term describes—rather than *misdescribes*, as is the case with the deceptiveness issue—the applicant’s goods. Table 1 also shows, in the bottom row, the year span and the mean of the percentage values across all of the search terms (N=150).

For example, Table 1 shows that for the thirty filings for marks that include the word “green,” the filing dates span from 2021 to 2023. The oldest trademark application was filed in 2021, and the newest one filed in 2023. Of the thirty filings, only three percent—one out of thirty filings—involve discussions of the term’s meaning in the context of evaluating the deceptiveness issue. Another seven percent—two out of thirty—involve discussions of the term’s meaning in the context of evaluating whether the term was merely descriptive. The vast majority of filings, ninety percent (twenty-seven out of thirty), do not involve any discussions of the term’s meaning. For the words “eco” and “biodegradable,” the year span is up to 2022 instead of 2023 because no applications were filed for marks containing either of these two terms in 2023.

Term	Filing Date Year Span	Meaning (deceptiveness)	Meaning (merely descriptiveness)	No Discussion of Meaning
Green	2021–2023	3%	7%	90%
Natural	2021–2023	7%	23%	70%
Eco	2008–2022	7%	23%	70%
Recycled / Recyclable	2021–2023	7%	10%	83%
Biodegradable	1998–2022	17%	3%	80%
All Terms	1998–2023	8%	13%	79%

Table 1: Percentage of trademark filings, for each environmental term (N=30) and across all terms (N=150), that involve discussions of the term’s meaning in an office action or applicant’s response

My main conclusion is as follows: (1) most trademark applications for marks containing environmental terms proceed to the notice of publication stage without the examiner raising the deceptiveness issue, and (2) of the trademark

¹⁷⁶ When evaluating whether a term is merely descriptive, examiners analyze whether the term merely describes the goods and is not sufficiently distinct to serve as a source identifier. TMEP § 1209.01(b) (“A mark is considered merely descriptive if it describes an ingredient, quality, characteristic, function, feature, purpose, or use of the specified goods or services.”).

applications that do encounter the deceptiveness issue, examiners' definition for the term is inconsistent with consumers' understanding of the term—a mismatch exists. Notably, examiners raised the deceptiveness issue for only eight percent of the filings.¹⁷⁷ For seventy-nine percent of the filings, the filing proceeded to the notice of publication stage without any discussion of the environmental term's meaning, either by the examiner or the applicant.¹⁷⁸

When evaluating the deceptiveness issue for trademarks containing the general environmental terms “green,” “natural,” and “eco,” examiners apply a definition that is either highly ambiguous, such as defining “green” to mean “eco-friendly,” or only refers to one or two specific product qualities that relate to a narrow aspect of the product. Both of these types of definitions are inconsistent with consumers' understanding of the terms. As discussed in Part II.A above, consumers understand the terms to indicate that a product possesses a set of specific qualities that are desirable.¹⁷⁹ The first type of definition is so ambiguous as to not include any specific qualities, while the second type of definition only touches on one or two specific qualities that may or may not coincide with the set of specific qualities that a given consumer understands the terms to indicate, as a wide variation exists amongst consumers in the specific product qualities that they perceive the terms to indicate. In sum, examiners' definitions for the terms set a bar for evaluating an applicant's goods that is different from, not necessarily higher or lower than, that of consumers.

When evaluating the deceptiveness issue for trademarks containing the specific environmental terms “recycled,” “recyclable,” and “biodegradable,” examiners apply a definition that omits important components of consumers' understanding of the term so that the definition only describes a subset of consumers' expectations for the product. In other words, examiners' definitions for the terms set a bar for evaluating an applicant's goods that is lower than that of consumers.

Figures 1 and 2 below present a conceptualization of this mismatch between examiners' definitions and consumers' understanding. Figure 1 illustrates the mismatch that exists for the general environmental terms, and Figure 2 illustrates the mismatch that exists for the specific environmental terms. In both Figures, the bracket on the left represents consumers' understanding of a term and the bracket on the right represents examiners' definition for the same term.

¹⁷⁷ See *supra* Table 1.

¹⁷⁸ See *supra* Table 1.

¹⁷⁹ See discussion *supra* Part II.A.

In Figure 1, we can imagine the bracket on the left to be the set of specific product qualities that a given consumer understands a general environmental term to indicate, with each shape representing a specific product quality. The shapes and the exact number of them can vary from consumer to consumer. We can imagine the bracket on the right to be examiners’ definition for the same term, with each shape representing a specific product quality. As the Figure illustrates, the two brackets contain different shapes and do not map onto each other—thus giving rise to a mismatch. In some instances, the bracket on the right may be empty, which would be the scenario in which the examiner’s definition is entirely ambiguous and contains no reference to any specific product qualities.

In Figure 2, we can imagine the bracket on the left to be a consumer’s understanding of one of the specific environmental terms, with each shape representing a component of the consumer’s understanding of the term. Due to the relative uniformity in consumers’ understanding of the specific environmental terms, the shapes in the bracket and the number of them do not vary significantly from consumer to consumer. As Figure 2 illustrates, the bracket on the right contains a subset of the shapes from the bracket on the left. Some overlap exists between the two brackets, but the one on the right is missing some components—thus giving rise to a mismatch again.

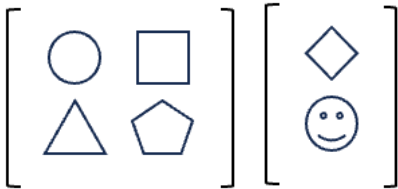


Figure 1: Comparison of consumers’ understanding (left) with examiners’ definition (right) for the same general environmental term

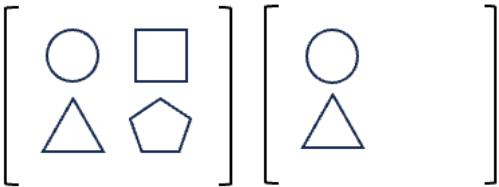


Figure 2: Comparison of consumers’ understanding (left) with examiners’ definition (right) for the same specific environmental term

This mismatch reflects the underlying approach that examiners apply when defining environmental terms. When defining an environmental term, examiners generally do not search for references that indicate how consumers would understand the term as the term is used in connection with the applicant’s goods. For all of the filings in the sample that include an examiner’s definition, the examiner either provided no references to support

the definition or only provided a dictionary entry as the sole reference. In fact, examiners provided supporting references, in the form of a dictionary entry, for only four of the thirty-two filings in the sample that include an examiner's definition.¹⁸⁰ The lack of supporting references for examiners' definitions is in direct contradiction to the instructions for examiners in the Trademark Manual of Examining Procedure (Manual).¹⁸¹ The Manual states that, when evaluating the deceptiveness issue, examiners should provide references as evidence of how consumers would understand a term as the term is used in connection with the applicant's goods. Examiners may, for example, provide references in the form of internet search results, advertisements from the applicant itself or from third parties that are in the same industry as the applicant, or dictionary entries.¹⁸² The lack of references from examiners showing the basis of their definitions or to show that their definitions are consistent with consumers' understanding reveals that examiners do not place consumers' understanding at the center of their approach to defining environmental terms. In other words, even if the examiner's definition for an environmental term in a given trademark application coincides with consumers' understanding of the term, it is not the intentional result of any systematic approach that examiners apply.

Although the Manual states that examiners may provide dictionary entries as references, dictionary entries alone do little to reveal how consumers would understand an environmental term as the term is used in connection with the particular goods listed in the trademark application. The relevant question is not what is a possible definition for the term in the abstract; rather, it is what is the definition that consumers would understand the term to have in the context of seeing the term in a trademark on the particular goods listed in the application.¹⁸³ References from the industry in which the goods belong, such as advertisements that use the term in connection with goods similar to those

¹⁸⁰ Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 97386725 (Feb. 6, 2023) (American Heritage Dictionary entry for RECYCLE); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 97469870 (Apr. 5, 2023) (American Heritage Dictionary entry for RECYCLED); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 90502312 (Sept. 1, 2021) (Merriam Webster Dictionary entry for ECO); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 86789173 (Feb. 10, 2016) (Collins Dictionary entry for ECOLOGICO).

¹⁸¹ See TMEP § 1203.02(d) ("[T]he examining attorney must provide evidence that the misdescriptive quality or characteristic would make the product or service more appealing or desirable to prospective purchasers."); see also *supra* Part I discussion; *In re Tapco Int'l Corp.*, 122 U.S.P.Q.2d (BNA) 1369 (T.T.A.B. 2017) (holding KLEER MOULDINGS and KLEER TRIMBOARD not deceptive because no evidence existed as to the likely consumer perception of the term "clear" (or KLEER) to show that the term was misdescriptive when used in connection with the applicant's identified goods).

¹⁸² TMEP § 1203.02(d)(i).

¹⁸³ See *supra* Part I discussion.

of the applicant, give more insight than dictionary entries into how consumers would understand the term in connection with the goods listed in the trademark application. Indeed, examiners more commonly rely on evidence of third-party use of a term, such as advertisements from third parties, than on dictionary entries when establishing consumers' understanding of a term for other issues in trademark law, such as the failure to function issue.¹⁸⁴ When examiners evaluate whether a proposed mark functions as a trademark or is merely informational, they look at whether the words in the proposed mark often appear in advertisements in relation to third parties' products, which would suggest that consumers would view the proposed mark as being merely informational rather than as source-identifying.¹⁸⁵

Sections A and B below present and analyze each of the examiners' definitions from the sample of trademark filings studied. Section A focuses on the definitions for the general environmental terms "green," "natural," and "eco."¹⁸⁶ Section B focuses on the definitions for the specific environmental terms "recycled," "recyclable," and "biodegradable."¹⁸⁷

A. General Environmental Terms

Examiners usually define "green" as "eco-friendly" or "environmentally sustainable" and define "eco" as "environmentally friendly." These definitions are highly ambiguous and do not refer to any of the specific product qualities that consumers understand a product to possess based on their understanding of these terms. Examiners' definitions for the term "natural" refer to some specific product qualities but do not encompass the wide array of specific product qualities that consumers understand the term to indicate. For example, an examiner may define the term "natural" with regard to a product's ingredients, such as defining "natural" to mean that the product's ingredients exist in nature. This definition may not coincide with the set of specific product qualities that a given consumer understands the word "natural" to indicate, as it does not include, for instance, qualities relating to a product's processing method.

¹⁸⁴ See Lucas Daniel Cuatrecasas, *Failure to Function and Trademark Law's Outermost Bound*, 96 N.Y.U. L. REV. 1312, 1334 (2021) (finding that trademark examiners provide evidence of third-party use more often than dictionary definitions when determining whether consumers perceive a proposed mark to function as a trademark).

¹⁸⁵ *Id.*

¹⁸⁶ See *infra* notes 188–222 and accompanying text.

¹⁸⁷ See *infra* notes 223–251 and accompanying text.

1. “Green”

Of the thirty trademark filings for marks containing the word “green” or a common variation of the word, examiners raised the deceptiveness issue for only one filing. The vast majority of the filings, ninety percent, reached the notice of publication stage without encountering the deceptiveness issue or any discussions of the word’s meaning.¹⁸⁸ These filings include, for example, the GREEN LIGHTNING mark for use on water treatment units,¹⁸⁹ the GREEN II GOLD mark for use on skincare products,¹⁹⁰ and the GREENIFY mark for use on cutlery.¹⁹¹

The only filing that encountered the deceptiveness issue is the application for the GREEN FLASH mark for use on portable work surfaces at construction sites.¹⁹² The examiner defined the word GREEN as describing, in the context of the applicant’s goods, furniture that is “eco-friendly and/or made from environmentally sustainable materials.”¹⁹³ Notably, this definition does not refer to any specific product qualities. As discussed in Part II.A above, consumers generally understand the word “green” to indicate a set of specific product qualities.¹⁹⁴ For example, in the context of the applicant’s furniture goods, consumers may understand GREEN to mean that the goods were painted with plant color pigments rather than with chemicals. They may also understand the word to mean that the goods were made with recycled wood waste rather than with plastic. Due to the ambiguous nature of the examiner’s definition, even if the applicant’s goods satisfy the definition, the goods may nonetheless fail to satisfy consumers’ expectations.

The correspondence between the examiner and the applicant does not provide details on the applicant’s intended meaning for the word GREEN. The examiner had requested the applicant to provide a written statement explaining “whether the goods do or will contain/consist of/comprise sustainable and/or environmentally friendly GREEN materials.”¹⁹⁵ In response, the applicant only

¹⁸⁸ See *supra* Table 1.

¹⁸⁹ U.S. Trademark Application Serial No. 97594353 (filed Sept. 16, 2022).

¹⁹⁰ U.S. Trademark Application Serial No. 97192587 (filed Dec. 28, 2021).

¹⁹¹ U.S. Trademark Application Serial No. 97507645 (filed July 18, 2022).

¹⁹² Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97011491 (June 9, 2022).

¹⁹³ The examiner reasoned that the mark would be deceptive if the goods did not possess the feature of being “eco-friendly and/or made from environmentally sustainable materials” because consumers would likely believe that the mark indicated that the goods possessed this feature, as it was common for furniture to be made with materials beneficial to the environment. *Id.*

¹⁹⁴ See *supra* Part II.A.1.

¹⁹⁵ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97011491, *supra* note 192.

stated that the goods were “prepared through economically-sound processes with consideration for the environment.”¹⁹⁶

When evaluating the merely descriptiveness issue, examiners also generally define the word “green” to mean eco-friendly or environmentally sustainable. For example, for the SIBERIAN GREEN mark application, the examiner defined the word GREEN to mean “relating to the protection of the environment.”¹⁹⁷ The examiner had required the applicant to disclaim the word GREEN on the grounds that the applicant’s specimens, which were articles of clothing, showed “that the goods [were] touted as ‘eco-friendly’” and that the word would thus merely describe an aspect of the goods.¹⁹⁸ Similarly, for the PURPLE POWER GREEN POWER mark application, applied for use on all-purpose household cleaners, the examiner defined the word as “environmental[ly] friendly.”¹⁹⁹

2. “Eco”

Examiners raised the deceptiveness issue for two of the trademark filings for marks containing the word “eco” or a common variation of the word. The majority of the filings, seventy percent, reached the notice of publication stage without encountering the deceptiveness issue or any discussions of the word’s meaning.²⁰⁰ These filings include, for example, the FRECOTEX Flame Resistant Ecological Textiles mark for use on clothing and safety products for medical workers,²⁰¹ the ECOPEDIC mark for use on mattresses and pillows,²⁰² and the ECOLOGICA SKIN CARE THAT MAKES A DIFFERENCE mark for use on skincare creams and cleansers.²⁰³

¹⁹⁶ Response to Office Action, Serial No. 97011491 (Aug. 17, 2022). The applicant also argued that the word GREEN in the mark was not deceptive regardless of whether the goods comprised sustainable or environmentally friendly materials because the good was green in color. *Id.* This argument, however, directly contradicts the TTAB decision in *In re Kitaru Innovations Inc.*, where it found that the GREEN SEAL mark at issue was deceptive because it “falsely and materially indicate[d] that applicant’s goods [were] environmentally friendly when, in fact, they are not.” 2013 WL 3090489, at *1–3 (T.T.A.B. 2013). The TTAB had rejected the applicant’s argument that the word GREEN denoted the color of the packaging tape, which was listed in the identification of goods in the filing, on the grounds that the word GREEN is frequently used to convey the increasingly common feature of packaging tape being environmentally friendly and that consumers are thus likely to believe that the word as used in the mark referred to the tape being environmentally friendly. *Id.*

¹⁹⁷ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97694160 (Sept. 8, 2023).

¹⁹⁸ *Id.*

¹⁹⁹ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97182440 (Aug. 9, 2022).

²⁰⁰ See *supra* Table 1.

²⁰¹ U.S. Trademark Application Serial No. 90566679 (filed Mar. 8, 2021).

²⁰² U.S. Trademark Application Serial No. 88184878 (filed Nov. 7, 2018).

²⁰³ U.S. Trademark Application Serial No. 88122561 (filed Sept. 19, 2018).

When evaluating the deceptiveness issue, examiners usually define “eco” simply as “environmentally friendly” and then request applicants to provide additional details on how their goods are environmentally friendly. For example, when evaluating the ECOLOGICO EARTH mark application, the examiner found ECOLOGICO to translate to “ecological” in English and then requested the applicant to clarify “whether the goods do or will consist of products that are more environmentally friendly than conventional versions.”²⁰⁴ The examiner also recommended the applicant to amend the identification of goods to include the modifier “all more environmentally friendly than conventional versions.”²⁰⁵ In response to the examiner’s request, the applicant specified that the goods were “wood free and . . . either made out of recycled paper or from other elements of agricultural waste fibers.”²⁰⁶ The applicant further stated that “the concept of [the] ‘Ecologico Earth’ brand is to encourage the use of products that are more environmentally friendly than conventional versions.”²⁰⁷

Similarly, when evaluating the deceptiveness issue for the E3 E3EXPANDER EFFICIENT, ECOLOGICAL & ENVIRONMENTALLY FRIENDLY mark application, the examiner simply interpreted ECOLOGICAL & ENVIRONMENTALLY FRIENDLY to mean that the goods “exhibit[ed] ecological or environmentally friendly characteristics.”²⁰⁸ The examiner then requested the applicant to provide a written statement confirming that the goods possessed these characteristics and to amend the identification of goods to indicate that the applicant’s agricultural products were “[e]cological and environmentally-friendly.”²⁰⁹ The applicant agreed to the amendment and explained that the goods used “non-toxic nano technology [that] can be used wherever herbicides, pesticides, fungicides and other chemicals especially nitrogen are used in agriculture/turf management [to] . . . reduce chemical application rates by 30 percent.”²¹⁰

In the context of evaluating the merely descriptiveness issue, examiners have also defined “eco” as “environmentally friendly.” For example, for the ECO EPS mark application, the examiner found ECO to mean “environmental” and then referred to the applicant’s website stating that the applicant’s paper products were produced in a way that “[was] as environmentally sound as possible” to conclude that the word ECO in the mark was merely descriptive of

²⁰⁴ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 86789173, *supra* note 180.

²⁰⁵ *Id.*

²⁰⁶ Response to Office Action, Serial No. 86789173 (Aug. 5, 2016).

²⁰⁷ *Id.*

²⁰⁸ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 86396193 (Jan. 5, 2015).

²⁰⁹ *Id.*

²¹⁰ Response to Office Action, Serial No. 86396193 (Jan. 27, 2016).

a feature of the applicant's goods.²¹¹ Similarly, for the ECO mark application, the examiner found the word ECO to mean "environmentally friendly or sensitive" and concluded that it merely described the energy efficient feature of the applicant's vehicle fuel gauges.²¹²

3. "Natural"

Examiners raised the deceptiveness issue for two of the trademark filings for marks containing the word "natural" or a common variation of the word. The majority of the filings, seventy percent, reached the notice of publication stage without encountering the deceptiveness issue or any discussions of the word's meaning.²¹³ These filings include, for example, the DANI NATURALS mark for use on bath lotions and soaps,²¹⁴ the SIENNA NATURALS mark for use on hair care products,²¹⁵ and the THE FLOWER REMEDY NATURAL PRODUCTS mark for use on homeopathic pharmaceutical products.²¹⁶

The examiners for the KAIAGERBE NATURAL GENE and the KII NATURALS mark applications raised the deceptiveness issue and defined the word NATURAL in both marks in reference to certain qualities relating to the goods' ingredients.²¹⁷ For the KAIAGERBE NATURAL GENE mark, which

²¹¹ Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 90502312 (Sept. 1, 2021).

²¹² Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 85282232 (June 29, 2011); *see also* Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 97118302 (Aug. 26, 2022) (finding ECOLOGICAL in the mark ECOLOGICAL FIBERS, INC. to mean "(of a practice, policy, product, etc[.]) tending to benefit or cause minimal damage to the environment" in the context of the applicant's paper products); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 88746443 (Jan. 27, 2020) (finding ECOLOGICO in the mark PANERAI ECOLOGICO to mean "environmentally friendly" in the context of the applicant's watches and related products); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 87686370 (Jan. 4, 2018) (finding ECOLOGICAL in the mark TOE THE ORIGINAL ECOLOGICAL to mean "protective of the environment" in the context of the applicant's jewelry products); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 87224077 (Feb. 22, 2017) (finding ECOLOGICAL in the mark SÚPER BLANKO UNIVERSAL ECOLÓGICA to mean "working to protect the environment" in the context of the applicant's paper napkin products); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 86607701 (May 21, 2015) (finding ECO-DISCOVERY in the mark MANATEE LAGOON AN FPL ECO-DISCOVERY CENTER to refer to "educational programs, activities, and/or information services which relate to *ecology and environmental* education" in the context of the applicant's brochures containing information concerning ocean life (emphasis added)).

²¹³ *See supra* Table 1.

²¹⁴ U.S. Trademark Application Serial No. 97607381 (filed Sept. 26, 2022).

²¹⁵ U.S. Trademark Application Serial No. 97604235 (filed Sept. 23, 2022).

²¹⁶ U.S. Trademark Application Serial No. 97066461 (filed Oct. 8, 2021).

²¹⁷ Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 97720280 (Aug. 9, 2023); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 97696123 (June 13, 2023).

was applied for use on herbal extracts, the examiner found that the word NATURAL indicated that the “applicant’s goods [were] comprised in whole or significant part of ingredients existing in nature” and stated that “this feature or characteristic [is] considered desirable for applicant’s goods because such products are generally deemed healthier than products that are highly processed or comprised of artificial ingredients.”²¹⁸ For the KII NATURALS mark, which was applied for use on bakery goods, the examiner found that the word NATURAL indicated that the “applicant’s goods [were] made with ‘natural’ ingredients—those that are not highly processed or artificial” and stated that “[t]his feature or characteristic [was] considered desirable for applicant’s goods because research shows that consumers seek out such items.”²¹⁹

These definitions only reference a narrow set of qualities relating to a product’s ingredients, but consumers’ understanding of the word NATURAL can include a wide range of specific product qualities spanning multiple aspects of the product.²²⁰ For example, a consumer might understand NATURAL to mean that a product contains more vitamins than other products of the same category, was prepared using home-cooking methods, or was made entirely with freshly harvested raw ingredients. Examiners’ definitions for the word NATURAL thus may not coincide with a consumer’s understanding of the word.

The definitions that examiners apply to the word “natural” in the context of evaluating the merely descriptiveness issue also only reference a narrow set of specific product qualities. For example, the examiner for the EBI NATURALS mark, which was applied for use on cosmetics, concluded that in the context of the applicant’s cosmetics goods, the word NATURAL indicated that the goods had “undergone little or no processing, or with little to no chemical additives.”²²¹ Similarly, the examiner for the NATURAL NUTRITION PET TREATS mark, which was applied for use on pet foods, defined the word NATURAL to mean “having undergone little processing and containing no chemical additives.”²²²

²¹⁸ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97720280, *supra* note 217.

²¹⁹ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97696123, *supra* note 217.

²²⁰ See Part II.A.2.

²²¹ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97664699 (Aug. 23, 2023).

²²² Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97625917 (Mar. 8, 2023); *see also* Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97486744 (Apr. 25, 2023) (finding NATURAL in the mark WAY NATURAL to mean “not altered, treated, or disguised” in the context of the applicant’s soap products); Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97470825 (Apr. 10, 2023) (finding NATURAL in the mark R R HAIR NATURAL HAIR EXTENSIONS to mean “not cultivated; existing in or produced by nature: not artificial” in the context of the applicant’s hair

B. Specific Environmental Terms

Examiners generally define “recycled” as being made with reused material and “recyclable” as having the ability to extract and reuse the product. Examiners generally define “biodegradable” as being able to decompose into organic matter. Although these definitions encompass some of the product attributes that consumers expect an applicant’s goods to possess based on their understanding of the terms, the definitions also omit important components of consumers’ understanding.

1. “Recycled” and “Recyclable”

Examiners raised the deceptiveness issue for two of the trademark filings for marks containing either the word “recycling” or the word “recyclable,” or a common variation of them. The majority of the filings, eighty-three percent, reached the notice of publication stage without encountering the deceptiveness issue or any discussions of the word’s meaning.²²³ These filings include, for example, the RECY-COOL mark for use on boxes and storage containers,²²⁴ the ReCharge to Reuse, ReCycle to ReCover mark for use on battery cables and battery packs,²²⁵ and the OCEAN KIND RECYCLED MARINE ROPES mark for use on ropes for marine use.²²⁶

Examiners raised the deceptiveness issue for the MADE WITH RECYCLED MATERIAL and the EZCICLO mark applications. For the MADE WITH RECYCLED MATERIAL mark, the examiner found the word RECYCLED to indicate that the applicant’s goods were “composed of material that have been recycled [sic]/reused.”²²⁷ The examiner required the applicant to state for the record whether the goods, which were various types of beachwear, were made with recycled material and to amend the identification

extensions products); Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97336071 (Jan. 18, 2023) (finding NATURAL in the mark IS IVEL & SALIS IS NATURALS to mean “existing in or produced by nature; not artificial” in the context of the applicant’s bath oils and herbs products); Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97128240 (Sept. 15, 2022) (finding NATURAL in the mark RN BEESOLINE 100% ALL NATURAL to mean “being or composed of ingredients that are from nature and not artificial” in the context of the applicant’s skincare products); Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97126781 (Sept. 7, 2022) (finding NATURAL in the mark M MALIKA PURE NATURAL MALIKA PURE NATURAL to mean “existing in or formed by nature (opposed to artificial)” in the context of the applicant’s cosmetic products).

²²³ See *supra* Table 1.

²²⁴ U.S. Trademark Application Serial No. 97251785 (filed Feb. 3, 2022).

²²⁵ U.S. Trademark Application Serial No. 97663642 (filed Nov. 4, 2022).

²²⁶ U.S. Trademark Application Serial No. 97457791 (filed June 14, 2022).

²²⁷ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 90667278 (Dec. 23, 2021).

of goods to specify that the goods possessed this feature.²²⁸ In response, the applicant confirmed that the goods were made with recycled material and amended the identification of goods to include the modifier “made in whole or substantial part of recycled materials.”²²⁹ Notably, the examiner’s definition does not address the percentage of recycled material in the goods or specify whether the recycled material was post-consumer or pre-consumer waste, which are important components of consumers’ understanding of the word RECYCLED.²³⁰

For the EZCICLO mark, the examiner found the mark to include stylized Chinese characters that translated to CAN RECYCLE and defined these two words as “possession of a specified capability or skill” and “[t]o extract and reuse (useful substances found in waste).”²³¹ The examiner requested the applicant to amend the identification of goods to specify the goods that are recyclable, which the applicant responded to with the relevant amendments.²³² Notably, the examiner’s definition does not address the percentage of communities across the country that have recycling facilities that are able to recycle the applicant’s goods, which is an important component of consumers’ understanding of the word RECYCLABLE.²³³

Examiners’ definitions for the word “recycled” in the context of the merely descriptiveness issue also omit components of consumers’ understanding of the word. For example, for the RECYCLEDBOYFRIEND mark, the examiner concluded that in the context of the applicant’s clothing goods, the word meant “repurposed or made with reused or reconditioned materials.”²³⁴ This definition does not address the percentage of recycled material in the applicant’s goods or whether the recycled material is post-consumer waste. For the REDUCE RECYCLE REUSE RE COVER A FAMILY OF PRODUCTS FROM GOEX MADE WITH RECYCLED CONTENT trademark filing, the examiner found the word RECYCLED to mean, in the context of the applicant’s plastic goods, “recycle/reuse old plastic to create their new goods.”²³⁵ The examiner recommended the applicant to amend the identification of goods to include the qualifier “made predominantly of

²²⁸ *Id.*

²²⁹ Response to Office Action, Serial No. 90667278 (Dec. 27, 2021).

²³⁰ See *supra* Part II.B.1.

²³¹ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97386725, *supra* note 180.

²³² *Id.*; Response to Office Action, Serial No. 97386725 (May 2, 2023).

²³³ See *supra* Part II.B.1.

²³⁴ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97469870, *supra* note 180.

²³⁵ Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97722517 (Feb. 21, 2023).

recycled post-industrial content.”²³⁶ Although this amendment clarifies that the recycled material is post-consumer waste, it does not specify the percentage of recycled material in the goods.²³⁷

2. “Biodegradable”

Examiners raised the deceptiveness issue for five of the trademark filings for marks containing the word “biodegradable” or a common variation of the word. The majority of the filings, eighty percent, reached the notice of publication stage without encountering the deceptiveness issue or any discussions of the word’s meaning.²³⁸ These filings include, for example, the PHADE OCEAN FRIENDLY MARINE BIODEGRADABLE mark for use on drinking straws and cups,²³⁹ the BGB BIODEGRADABLE GOLF BALLS mark for use on golf balls,²⁴⁰ and the ECOELEMENT BIODEGRADABLE & CARBON NEUTRAL mark for use on earbuds and smartwatches.²⁴¹

When evaluating the deceptiveness issue, examiners generally define the word “biodegradable” as being able to decompose into organic matter. For example, for the BIOTRUST BIODEGRADABLES mark, the examiner concluded that BIODEGRADABLES indicated that the applicant’s goods, which were plastic bags for wrapping, were comprised of materials “that [could] be broken down or decomposed into safe organic matter” and that this feature was desirable for consumers because consumers viewed goods with this feature to be “an environmentally friendly option to help aid in the world’s problem with waste.”²⁴² The examiner requested the applicant to amend the identification of goods to include the modifier “all the foregoing made in whole or substantial part of biodegradable ingredients.”²⁴³ Notably, this definition does not address the amount of time needed for the goods to decompose, which consumers usually assume to be a short period of time

²³⁶ *Id.*

²³⁷ See Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97468826 (Apr. 7, 2023) (finding the phrase RECYCLED CANVAS in the mark LIQUITEX PROFESSIONAL SUSTAIN A POSITIVE MARK ON OUR FUTURE RECYCLED CANVAS to refer to the applicant’s canvases being made with 100% recycled material, without stating whether recycled material refers to pre-consumer or post-consumer waste).

²³⁸ See *supra* Table 1.

²³⁹ U.S. Trademark Application Serial No. 97976464 (filed Jan. 6, 2022).

²⁴⁰ U.S. Trademark Application Serial No. 97671719 (filed Nov. 10, 2022).

²⁴¹ U.S. Trademark Application Serial No. 97399076 (filed May 6, 2022).

²⁴² Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 97026342 (Dec. 16, 2021).

²⁴³ *Id.*

regardless of disposal methods and is an important component of consumers' understanding of the word.²⁴⁴

Similarly, for the ECO BEST TECHNOLOGY BIODEGRADABLE and the KANEKA BIODEGRADABLE POLYMER marks, examiners defined the word BIODEGRADABLE as being able to be decomposed.²⁴⁵ This definition does not address the timescale or the environmental conditions necessary for decomposition. For the ECO BEST TECHNOLOGY BIODEGRADABLE mark, the examiner defined BIODEGRADABLE, in the context of the applicant's clothing goods, as "capable of being decomposed by biological agents, especially bacteria."²⁴⁶ For the KANEKA BIODEGRADABLE POLYMER mark, the examiner defined BIODEGRADABLE as "capable of being broken down especially into innocuous products by the action of living things (such as microorganisms)."²⁴⁷ The examiner additionally requested the applicant to state whether the applicant's plastic packing cushioning goods were biodegradable and whether they were made with polymers that could be broken down through natural processes.²⁴⁸ The applicant simply replied "yes" to both questions and did not provide additional details.²⁴⁹

Examiners apply the same definition in the context of the merely descriptive issue. For example, for the BIODEGRADABLE BIODÉGRADABLE mark, the examiner also defined BIODEGRADABLE to mean "capable of being broken down especially into innocuous products by the action of living things."²⁵⁰ The examiner found that the word merely described the feature of the goods being able to "be naturally broken down."²⁵¹

²⁴⁴ See *supra* Part II.B.2.

²⁴⁵ Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 86346950 (July 7, 2015); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 90565723 (Oct. 4, 2021); see also Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 88779357 (Sept. 30, 2020) (finding BIODEGRADABLE in the mark I AM MARINE BIODEGRADABLE to indicate that the applicant's paper pulp-based plates and bowls were "made in whole or part of biodegradable materials"); Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 88946847 (Sept. 9, 2020) (finding BIO in the mark BIOEPS to stand for "biodegradable" and to indicate that the applicant's molded foam packaging goods featured biodegradable EPS (expanded polystyrene)).

²⁴⁶ Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 86346950 (Jan. 7, 2015).

²⁴⁷ Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 90565723 (Oct. 4, 2021).

²⁴⁸ *Id.*

²⁴⁹ Response to Office Action, Serial No. 90565723 (Mar. 10, 2022); U.S. Trademark Application Serial No. 90565723 (filed Mar. 8, 2021).

²⁵⁰ Office Action (Official Letter) About Applicant's Trademark Application, Serial No. 87778289 (May 15, 2018).

²⁵¹ *Id.*

IV. SOLUTIONS FOR THE MISMATCH

The previous Parts show that a mismatch exists between consumers' understanding of environmental terms and the definitions that examiners apply to these terms when evaluating the deceptiveness issue. This Part presents my recommendations for fixing this mismatch and, relatedly, for strengthening the ability of third parties to prevent deceptive marks from being improperly added onto the trademark register. I propose increasing the upstream disclosure of information about producers' intended meaning for environmental terms to bring the downstream interpretations of these terms—both consumers' understanding and examiners' definitions—closer to the intended meaning and, consequently, to each other. The modifications that I propose are in two areas: (1) examiners' evaluation of the deceptiveness issue and (2) the amount of time that third parties have to challenge a mark on grounds of deceptiveness. Section A proposes having examiners require an applicant to include on its goods a clarification or qualifying statement about the applicant's intended meaning for the environmental term as it is used in the trademark to avoid a deceptiveness refusal.²⁵² Section B explores extending the amount of time allowed for third parties to initiate opposition proceedings on grounds of deceptiveness.²⁵³

A. Examiners' Evaluation of the Deceptiveness Issue

This Section presents my recommendations for modifying examiners' evaluation of the deceptiveness issue for the evaluation criteria to more closely reflect consumers' understanding of environmental terms. For trademarks containing general environmental terms, I propose that examiners require an applicant to include a clarification statement identifying the specific product qualities related to environmental protection that the applicant intends for the term to indicate. In particular, the clarification should state what environmental benefits the term indicates that the product provides, and which part of the product provides the benefits. This clarification would greatly diminish, if not eliminate, the amount of variability in consumers' understanding of the term, and examiners could then use this clarification as the definition for the term when evaluating the mark for deceptiveness, thus matching examiners' definitions with consumers' understanding.

For trademarks containing specific environmental terms, I propose that examiners require an applicant to include on the applicant's goods a qualifying statement that provides information about the components of consumers' understanding that are currently omitted from examiners' definitions.

²⁵² See *infra* notes 254–282 and accompanying text.

²⁵³ See *infra* notes 283–290 and accompanying text.

Examiners could then request the applicant to provide a written statement confirming the truthfulness of the information that the qualifier provides. The qualifier would then effectively serve as a supplement to the definitions that examiners currently apply for the terms.

1. General Environmental Terms

As shown in Part II.A above, considerable variability exists in consumers' understanding of general environmental terms.²⁵⁴ Consumers understand these terms to indicate a set of specific qualities in a product, but the exact set of specific qualities differs from consumer to consumer. Given this variability, it is not presently possible for examiners to define the terms in a way that matches a given consumer's understanding, or the majority of consumers' understanding, of the term. Thus, to fix the mismatch, we need to minimize the amount of ambiguity in the term so that consumers can have a more uniform understanding of the term. Examiners can then match their definitions to consumers' understanding.

To do so, I propose that examiners require an applicant to include a clarification statement on his goods clarifying what the applicant intends the general environmental term to mean as it is used in the trademark. The clarification can be one or two sentences providing details on what specific environmental benefits the product provides and which part of the product provides the benefits. In other words, the clarification should state the precise product qualities related to environmental protection that the applicant intends for the term to indicate. Examiners can then use this clarification as the definition for the term. Examiners can also request the applicant to provide a written statement confirming that his goods indeed possess the qualities that the clarification states.

As an example, an applicant with a trademark containing the word GREEN, for use on shirts, might include a clarification on the shirt label stating that the word GREEN in the trademark refers to the shirt having been "colored with dyes from plants (including seeds and barks) and minerals, rather than with chemicals or toxic coloring."²⁵⁵ This clarification communicates to consumers that the word GREEN in the trademark refers to the shirt having the quality of being colored with plant and mineral dyes,

²⁵⁴ See discussion *supra* Part II.A.

²⁵⁵ See, e.g., *Mineral Dyed Denim*, MUD JEANS (May 28, 2020), https://mudjeans.eu/blogs/geen-categorie/blog-mineral-dye-denim?oid=106&affid=1&source_id=GoY-article&sub1=%2Fnaturally-dyed-clothing-brands%2F&utm_medium=referral&utm_source=GoodOnYou&utm_campaign=GoY-article&utm_content=%2Fnaturally-dyed-clothing-brands%2F [https://perma.cc/ELB3-HH9U] (stating that the Dutch denim brand MUD Jeans uses pigments extracted from rocks to create the light blue color of its denim).

which yields the benefit of the shirt having no chemical dyes in it. Another example is that a producer of cupcakes with a trademark containing the word NATURAL can include a clarification on the cupcake packaging stating that the word NATURAL in the trademark refers to the cupcakes being “made with locally sourced ingredients from small-scale farms, resulting in a smaller carbon footprint.” This clarification informs consumers that the word NATURAL refers to the fact that the product’s ingredients are from local small-scale farms, which yields the benefit of the cupcakes having a smaller carbon footprint.

The addition of a clarification statement for general environmental terms used in trademarks provides several benefits to consumers, examiners, and producers. First, the clarification narrows, if not removes, the range of variability in the set of specific product qualities that consumers understand a general environmental term to indicate. Rather than leaving the entirety of the interpretive space for consumers to infer the specific product qualities that a term indicates, the clarification directly tells consumers exactly what the specific product qualities are. At a minimum, it provides information for consumers to understand the term in the context of a specific producer and product, diminishing the amount of room for interpretation. When examiners adopt the clarification as the definition for the term, the definition will thus reflect the majority of consumers’ understanding of the term.

Second, clarity regarding the exact specific product qualities that a general environmental term such as “green” indicates allows consumers to more efficiently identify the products that match their preferences. Without a clarification, a consumer might understand “green” differently from what the producer of the product intends the term to mean as it is used on the product. By requiring producers to explicitly state the specific product qualities that a term indicates, consumers can have the information to determine whether a product matches their preferences. If a consumer prioritizes a certain specific product quality, he can more easily identify the products that possess this quality and choose the product that is best suited to his preferences.²⁵⁶

Third, the clarification will diminish consumers’ distrust of these terms as they are used by producers on products. Although consumers are not able to verify the information that the clarification provides, the increase in the amount of detailed information will likely in itself lead to higher levels of

²⁵⁶ See Atkinson & Rosenthal, *supra* note 5, at 40 (stating that detailed labels are more effective in helping consumers weigh different products’ potential environmental impacts); Mehta et al., *supra* note 4, at 584 (explaining that information on environmental attributes, such as life cycle impacts and the percentage of bio-based raw materials, help consumers select products based on features that would otherwise go unnoticed).

trust.²⁵⁷ Past studies show that detailed information supporting a producer's environmental claims usually gives consumers a more positive impression of the brand and results in more trust.²⁵⁸ Further, studies suggest that consumers perceive information about specific product qualities to be more easily verifiable compared to more general claims, which can lead to higher levels of trust in producers that provide such information.²⁵⁹

Fourth, requiring applicants to provide a clarification narrowing the scope of a general environmental term is consistent with the Federal Trade Commission's guidance to marketers in its Green Guides (Guides). The Guides help marketers avoid environmental marketing claims that are unfair or deceptive under Section 5 of the FTC Act.²⁶⁰ The Guides caution marketers that general environmental claims likely convey to consumers that a product has specific and far-reaching environmental benefits with no negative environmental impacts and that marketers are unlikely to be able to substantiate all of the varied reasonable interpretations of these claims.²⁶¹ To avoid a deceptiveness finding under Section 5 of the FTC Act, the Guides recommend producers narrow general environmental claims with language that limits the claim to one or multiple specific benefits.²⁶² As an example, the Guides explain that the brand name "Eco-friendly" would be deceptive because it conveys that the product has far-reaching environmental benefits and no negative environmental impacts.²⁶³ Because a producer is unlikely to be able to substantiate this interpretation of the brand name, the name would be deceptive under Section 5 of the FTC Act. To avoid a deceptiveness finding, the Guides recommend that the producer revise the name to, for example, "Eco-friendly: made with recycled materials."²⁶⁴ If the statement "made with

²⁵⁷ See Atkinson & Rosenthal, *supra* note 5, at 38 (noting that consumers have greater trust in labels that include specific information about a product's environmental attributes compared to ones with only general claims).

²⁵⁸ *Id.*

²⁵⁹ Taufique et al., *supra* note 2, at 2186–87; see also Herbes et al., *supra* note 9, at 267 (arguing that product labels should clearly communicate figures relating to a product's whole-life environmental performance).

²⁶⁰ 16 C.F.R. § 260.1 (2024); 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."). The Guides serve as a resource to producers and do not bind the FTC, but the FTC can take actions under Section 5 of the FTC Act against a producer that makes an environmental claim that is inconsistent with the Guides. 16 C.F.R. § 260.1.

²⁶¹ 16 C.F.R. § 260.4.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

recycled materials” is true and is clear and prominent to consumers, this revised brand name would not be deceptive.²⁶⁵

A concern that some producers may have with including additional details on their product packaging is the possibility of overloading consumers with information.²⁶⁶ Past studies suggest, however, that consumers generally view detailed information about a product’s environmental benefits favorably and are willing to take the time to read this information.²⁶⁷ Although an upper limit likely exists for consumers’ willingness to read detailed information about a product’s environmental benefits, this limit is likely not applicable here because clarification statements can simply be a short phrase, as shown in the examples above.

Examiners can implement the requirement for a clarification statement without major modifications to their current process of evaluating the deceptiveness issue. If a producer applies to register a trademark containing a general environmental term without having provided on the product a clarification of the term’s meaning, the examiner can request the producer to add a clarification on the product packaging or on the product label to avoid a deceptiveness refusal under Section 2(a) of the Lanham Act. For example, instead of defining GREEN to simply mean “environmentally friendly,” an examiner would request the applicant to add a clarification on the product providing details on what specific product qualities related to environmental protection the word GREEN in the trademark refers to. Once the applicant has provided a clarification, the examiner would use this clarification as the definition for the term GREEN and request the applicant to provide a written statement confirming that his goods indeed possess the qualities that the clarification indicates.

One might comment that adopting a producer’s clarification as the examiner’s definition for a general environmental term would result in having different definitions for the same term when evaluating deceptiveness for different marks. This would not be the case, however, because the “item” that

²⁶⁵ The producer must also be able to substantiate that the entire product or package, excluding minor components, is made with recycled material and that making the product with recycled material renders the product more environmentally friendly overall. *Id.*

²⁶⁶ See Herbes et al., *supra* note 9, at 268 (“We think that a multilevel label as suggested by Weinrich et al. (2016) would help to provide differentiated information while keeping complexity for consumers low, since past research has pointed out the problems of over-burdening the consumer with too complex labels.”).

²⁶⁷ See Atkinson & Rosenthal, *supra* note 5, at 35 (stating that consumers prefer more detailed or specific information to support green claims); Polonsky et al., *supra* note 10, at 281 (“For example, it has been suggested that consumers are willing to ‘seek environmental information about products and to read product labels for relevant information.’” (quoting Lee Carlson, Stephen J. Grove & Norman Kangun, *A Content Analysis of Environmental Advertising Claims: A Matrix Method Approach*, 22 J. ADVERT. 27, 28 (1993))).

is being defined is the term in the context of a specific producer and product, rather than solely the term by itself. The definition may thus vary as the “item” that is being defined varies.

2. Specific Environmental Terms

As shown in Part III.B, when evaluating the deceptiveness issue for trademarks containing the specific environmental terms “recycled,” “recyclable,” and “biodegradable,” examiners apply definitions that omit important components of consumers’ understanding. In other words, examiners’ definitions only describe a subset of the qualities that consumers expect a product to possess based on their understanding of the term. To fix this mismatch, examiners should supplement their definitions with the components of consumers’ understanding that are currently omitted. I propose that examiners request applicants to include a qualifying statement on their products that provides details relating to the omitted components and then request applicants to provide a written statement confirming that the details stated in the qualifier are true. The qualifier would effectively serve as a supplement to the definitions that examiners currently apply to these terms. With the information from the qualifiers, consumers would be able to better differentiate between products to choose the ones that are best suited to their personal preferences.²⁶⁸

For the “recycled” and “recyclable” terms, examiners’ definitions omit consumers’ understanding that most, if not all, of the product is made with recycled material and that most, if not all, of the communities across the United States have recycling plants that are able to recycle the product.²⁶⁹ Further, the definitions also omit the type of recycled material that is used to make the product, specifically whether the material is post-consumer waste or pre-consumer waste.²⁷⁰ Given that it is challenging, at present, to specify an exact percentage for what constitutes “most” with respect to these components of consumers’ understanding, I propose that examiners require producers to qualify these terms by clearly stating on their products the percentage of recycled material in their products or the percentage of recycling facilities that

²⁶⁸ See Mehta et al., *supra* note 4, at 584 (“By providing information on the environmental characteristics of bio-based products, such as life cycle impacts and percentage of bio-based raw materials, consumers can select a product based on features that would otherwise go unnoticed.”); see also Cude, *supra* note 11, at 222 (arguing that producers should not be allowed to make biodegradable claims without scientific evidence showing that the product completely breaks down); Thogersen, *supra* note 8, at 90 (noting that increasing the amount of information supporting specific claims can better satisfy consumers’ expectations).

²⁶⁹ See discussion *supra* Part II.B.1.

²⁷⁰ See discussion *supra* Part II.B.1.

are able to recycle their products. Similarly, producers who use the term “recycled” in their trademarks should clearly state on their products whether the recycled material is post-consumer waste or pre-consumer waste. For example, a producer can state, as a qualifier for the term RECYCLED in his trademark, that the product is “made with 80% recycled material from post-consumer waste.” This qualifier gives consumers information about the percentage of recycled material and the type of recycled material.

For the “biodegradable” term, the omitted components are consumers’ understanding of the amount of time that a product takes to degrade and the disposal methods necessary for degradation to occur.²⁷¹ Consumers generally understand “biodegradable” to indicate that a product can degrade in a short amount of time regardless of how the product is disposed.²⁷² I propose that examiners require applicants to qualify the “biodegradable” term by clearly stating on their products the amount of time that their products take to degrade completely and the proper disposal method that consumers need to take for degradation to occur. For example, a producer could state, “users should dispose this product in an industrial compost—will degrade within one year.” The addition of this qualifier would also allow consumers to be more certain of their understanding of the word “biodegradable,” as consumers have expressed that they are currently uncertain of the exact meaning of the word.²⁷³

Requiring an applicant to provide a qualifier for any specific environmental terms that are used in the applicant’s trademark is consistent with the Guides’ guidance for recycled content claims, recyclable claims, and degradable claims. For recycled content claims, the Guides state that producers can only make unqualified claims of recycled content if the entire product, excluding minor incidental components, is made with recycled material.²⁷⁴ If the product is made partially with recycled material, the marketer should clearly qualify the recycled claim to indicate the amount or percentage, by weight, of recycled material in the product.²⁷⁵ The Guides state that recycled material may include both pre-consumer and post-consumer waste but the marketer must be able to substantiate that the pre-consumer waste would have entered the waste stream if it had not been used as part of the product.²⁷⁶ For recyclable claims, the Guides state that a marketer may make an unqualified claim if recycling

²⁷¹ See discussion *supra* Part II.B.2.

²⁷² See discussion *supra* Part II.B.2.

²⁷³ Nazareth et al., *supra* note 14, at 3 (arguing that producers should include on the product packaging complete information on product composition and appropriate disposal methods for biodegradable products); see discussion *supra* Part II.B.2.

²⁷⁴ 16 C.F.R. § 260.13 (2024).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

facilities are available to a substantial majority of consumers where the product is sold, and the Guides define “substantial majority” to be sixty percent.²⁷⁷ Otherwise, marketers should qualify recyclable claims by, for example, specifying the percentage of consumers or communities that have access to facilities that are able to recycle the product.²⁷⁸

For degradable claims, which include claims of biodegradation as well as other forms of degradation,²⁷⁹ the Guides state that marketers should qualify such claims if the product is not able to completely decompose within one year of being disposed in a manner that is customary for the product.²⁸⁰ Additionally, unqualified degradable claims for products that are customarily disposed in landfills and recycling facilities are deceptive because these methods of disposal do not present conditions in which complete decomposition can occur within one year. To avoid a deceptiveness finding, the Guides recommend marketers to qualify degradable claims by providing details on the product’s rate and extent of degradation in the environment where the product is customarily disposed.²⁸¹

Examiners can implement the requirement of adding a qualifier for specific environmental terms that are used in trademarks without major modifications to their current evaluation process for the deceptiveness issue. Examiners can continue to apply their current definition for each term and additionally request an applicant to add a qualifier on his product providing details relating to the components of consumers’ understanding that are currently omitted from the definition. For example, in addition to defining RECYCLED as “composed of material that have been recycled/reused,”²⁸² an examiner would request an applicant to qualify the term RECYCLED by stating on the goods the percentage of the product that is made with recycled material and what the recycled material consists of, the two components of consumers’ understanding of the word RECYCLED that are currently omitted from the definition. The examiner would then request the applicant to provide a written statement confirming that the information that the qualifier provides is true. For trademarks containing specific environmental terms other than the

²⁷⁷ *Id.* § 260.12.

²⁷⁸ *Id.*

²⁷⁹ Other mechanisms of degradation include, for example, photodegradation and oxo-degradation. *Id.* § 260.8.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Office Action (Official Letter) About Applicant’s Trademark Application, Serial No. 90667278, *supra* note 227 (defining RECYCLED in the applicant’s mark MADE WITH RECYCLED MATERIAL, applied for use on various types of beachwear, to mean “composed of material that have been recycled [sic]/reused”).

ones discussed in this Article, examiners can look to the Guides for what additional details, if any, to request applicants to include in a qualifier.

B. Opposition Proceedings

In addition to modifying examiners' evaluation of the deceptiveness issue, I propose extending the amount of time allowed for third parties to initiate opposition proceedings on grounds of deceptiveness. This modification serves to strengthen third parties' ability to prevent deceptive marks from being improperly added onto the trademark register. Opposition is an opportunity for a third party to challenge a mark's validity before the mark is registered. Third parties can challenge a mark's validity on grounds such as deceptiveness by initiating an administrative proceeding before the TTAB.²⁸³ Third parties may initiate opposition proceedings after an examiner has determined that a mark satisfies the requirements for registration.²⁸⁴ Third parties currently have thirty days from the mark's publication in the Trademark Official Gazette, where the USPTO publishes marks that examiners have determined to qualify for registration, to initiate an opposition proceeding.²⁸⁵ I propose extending this thirty-day period because it gives third parties little time to detect marks that are deceptive as to the environmental impact of an applicant's goods.

Because environmental terms often describe credence attributes that may not be detectable for a long period of time, it is challenging for third parties to determine with certainty that a mark is deceptive as to the environmental impact of the product without having to take a considerable amount of time to study and find relevant information about the applicant's goods.²⁸⁶ For example, if a third party suspects that a mark containing the word BIODEGRADABLE is misdescriptive of the plastic goods that the mark is used on, it would need to search for information from the producer about what materials were used to make the goods. This information might be on the

²⁸³ U.S. PAT. & TRADEMARK OFF., TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 309.03(c)(1) (June 2024), <https://tbmp.uspto.gov/RDMS/TBMP/current> [<https://perma.cc/RRQ5-GFJA>] ("A plaintiff may raise any available statutory ground for opposition or cancellation that negates the defendant's right to registration.").

²⁸⁴ 15 U.S.C. § 1062(a); *see also* TBMP § 301.01 ("An opposition is a proceeding in which the plaintiff seeks to prevent the issuance of a registration of a mark on the Principal Register."); Beebe & Fromer, *supra* note 76, at 971 n.128 ("The PTO data indicate that oppositions are very rare. For applications filed from 1985 through 2014, only 2.10% were opposed and only 0.90% were opposed successfully.").

²⁸⁵ 37 C.F.R. § 2.101(c) (2024) ("The opposition must be filed within thirty days after publication (§ 2.80) of the application being opposed or within an extension of time (§ 2.102) for filing an opposition.").

²⁸⁶ Cude, *supra* note 11, at 208 ("Advertised environmental benefits may not be evident for five, ten, fifty or more years, and even then they may occur in ways that consumers cannot verify or measure."); *see also supra* notes 10–11.

product label, the company website, or only available directly from the producer. The third party may need to conduct tests itself or additionally conduct research into scientific literature to determine how fast and in what conditions the materials can degrade. A thirty-day period is likely insufficient for completing all of these steps.

Allowing a sufficient amount of time for third parties to initiate opposition proceedings for deceptive marks is important because opposition serves to prevent registrants from improperly gaining the rights that registration confers.²⁸⁷ As Part I above explains, these rights include a presumption of the mark's validity and the registrant's ownership.²⁸⁸ Additionally, a registered mark has nationwide priority as of the date of application, even if the registrant has not used the mark throughout the nation.²⁸⁹ Granting registration to a mark that is deceptive would thus deprive new businesses of the ability to use the mark to communicate the source of its products to consumers. The depletion of unclaimed, effective trademarks—and the barriers that it poses on new market entrants—has been a focus of a number of recent works, as discussed in Part I above.²⁹⁰ Strengthening third parties' ability to challenge marks through opposition proceedings is a way to prevent the deprivation of available marks for new entrants and to protect consumers' ability to rely on the information that marks convey to efficiently identify products that have the environment-related qualities that they prefer.

CONCLUSION

The definitions that examiners apply to environmental terms when evaluating whether trademarks containing the terms are deceptive under Section 2(a) of the Lanham Act do not match consumers' understanding of the terms. This mismatch is problematic because Section 2(a) serves to bar

²⁸⁷ Use-based mark applications proceed directly to registration absent a successful opposition. For intent-to-use mark applications, the applicant must file a statement of use of the mark before the mark proceeds to registration. 37 C.F.R. § 2.81.

²⁸⁸ Beebe & Fromer, *supra* note 168, at 222; Frakes & Wasserman, *supra* note 76, at 1815–16.

²⁸⁹ Beebe & Fromer, *supra* note 168, at 222; Frakes & Wasserman, *supra* note 76, at 1815–16.

²⁹⁰ See Beebe & Fromer, *supra* note 76, at 951 (“The supply of word marks that are at least reasonably competitively effective as trademarks is finite and exhaustible. This supply is already severely depleted, particularly in certain sectors of the economy, and levels of depletion continue to rise.”); Hemel & Ouellette, *supra* note 76, at 1049–51, 1077–78 (arguing for using a plurality of legal and policy tools to respond to the crowding of the available linguistic space for trademarks and to address the proximity-distance dilemma in trademark law); Frakes & Wasserman, *supra* note 76, at 1812 (“Thus, if the Trademark Office incorrectly granted the federal trademark application on ‘The Vegan Butcher’ because the mark merely describes meat substitutes, then Sweet Earth Foods [the trademark owner] would be able to unfairly burden new entrants’ ability to communicate with consumers in the marketplace.”); see also Tushnet, *supra* note 31, at 918 (arguing for removing “deadwood” from the trademark register).

trademarks that are deceptive to consumers. Consumers need to be able to rely on trademarks to identify and purchase the products with the qualities that they prefer. Protecting consumers from being misled by deceptive trademarks furthers trademark law's aim of decreasing consumer search costs and encouraging producers to invest in the quality of their products. Section 2(a) can only protect consumers from being misled if the definition that examiners apply to a term when evaluating the deceptiveness issue reflects consumers' understanding of the term. This Article shows that examiners' definitions for the general environmental terms studied in this Article are either entirely ambiguous or refer to only a limited number of specific product qualities that may or may not coincide with consumers' understanding. For the specific environmental terms studied in this Article, examiners' definitions omit important components of consumers' understanding.

This Article presents recommendations for fixing this mismatch. For general environmental terms, I propose that examiners require trademark applicants to include a clarification statement on their goods stating the specific product qualities that they intend the term to indicate. The clarification would diminish, if not entirely remove, the variability in consumers' interpretation of the term. Examiners can then use this clarification as the definition for the term, thus matching their definition with consumers' understanding of the term. For specific environmental terms, I propose that examiners require applicants to include a qualifying statement on their goods providing details that relate to the components of consumers' understanding that are currently omitted from examiners' definitions. Examiners can request applicants to confirm that the information that qualifier provides is true, and the qualifier would then effectively serve as a supplement to the definitions. Additionally, I recommend extending the amount of time allowed for third parties to initiate opposition proceedings on grounds of deceptiveness to allow third parties sufficient time to detect marks that are deceptive as to the environmental impact of an applicant's goods.

