

2009

Marks of Rectitude

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Recommended Citation

Margaret Chon, *Marks of Rectitude*, 77 Fordham L. Rev. 2311 (2009).

Available at: <https://ir.lawnet.fordham.edu/flr/vol77/iss5/10>

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Cover Page Footnote

Donald & Lynda Horowitz Professor for the Pursuit of Justice, Seattle University School of Law. Thanks to Bob Cumbow, Deven Desai, Daniele Giovannucci, Ellen Goodman, Gareth Green, Justin Hughes, Sue Jackels, Jack Kirkwood, Dan Ravitcher, Stewart Sterk, Tony Taubman, and Jane Winn for helpful comments and useful leads. Both the essay and its title owe their genesis to Errol Meidinger's insights during our joint preparation for the Law & Society Association Annual Meeting in July 2007. I appreciate the opportunities to present versions at the Eighth Annual Intellectual Property Scholars Conference at Stanford Law School in August 2008, the Third Access to Knowledge Conference in September 2008, the When Worlds Collide Symposium at Fordham University School of Law in October 2008, and the Cardozo Intellectual Property Speakers Series in February 2009. I am also grateful to the organizers of the World Export Development Forum 2008 at the International Trade Centre for their hospitality. Much gratitude and warmth is felt toward research assistants Christina Bailey, Debbie Boe, Forrest Carlson, Diana Chaikin, Rob Chang, Kathy Cho, Jessica Creager, Anne-Marie Marra, Teru Olsen, Van Ngo, Brian Rowe, Jeff Siegmeth, and Nancy Yamashiro, as well as to Dean Kellye Testy and Vice Dean Annette Clark, for their support of this project. All mistakes and viewpoints are mine.

MARKS OF RECTITUDE

*Margaret Chon**

INTRODUCTION

We are not used to thinking of trademarks as representing standards governing products such as cruelty-free cosmetics. But, a tighter and more transparent connection between standards and marks ought to exist. Since the Lanham Act was enacted in 1946, and especially since the World Trade Organization (WTO) came into existence in 1996, private standard setting has become a popular alternative to public regulation. One commentator has recently estimated that, since 1995, “more private international food-related standards have emerged than in the previous five decades combined.”¹ Increasingly as well, trademarks, service marks, collective marks, and certification marks (CMs) (collectively, marks)² denote sustainability standards of some sort, such as fair trade.³ In this context,

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1. Daniele Giovannucci, *How New Agrifood Standards Are Affecting Trade, in TRADE—WHAT IF? NEW CHALLENGES IN EXPORT DEVELOPMENT: CONSUMERS, ETHICS AND ENVIRONMENT* 99, 100 (2008) [hereinafter *WHAT IF?*].

2. A “trademark” in this essay denotes trademarks and service marks, registered or not. Collective marks and certification marks (CMS) are treated as separate categories, unless otherwise noted.

3. Although there is no consensus on this definition, “sustainability standard” in this essay denotes a standard that addresses some aspect of ethical or fair trade, such as labor or environmental practices. Both ethical trade and fair trade focus on management of a product’s value chain according to principles of social, environmental, and financial responsibility, but the latter addresses specifically the trading relationship between the global North and the global South. Carlos Fortin, *International Commerce and Ethical Trade, in WHAT IF?*, *supra* note 1, at 37, 38. Through this essay, global “North” is used

trademark and unfair competition law (collectively, trademark law)⁴ can and already does mediate among various stakeholders and standards in the global marketplace. Yet, intellectual property scholars have examined the issues surrounding international standard setting primarily through the lenses of patent or copyright law.⁵ This essay considers afresh the potential for instruments such as trademarks and certification marks to facilitate consumer protection and access to quality market information in light of these new regulatory trends. Marks of rectitude should represent accurately the standards purported to be embodied within the products (and services) being purchased by consumers in this disaggregated global marketplace.

Trademark law, typically territorial in its reach, is nonetheless part of a greater global regulatory regime. Links to significant international standard-setting and harmonizing organizations, such as the International Organization for Standardization (ISO),⁶ or agreements, such as the WTO Agreement on Technical Barriers to Trade (TBT),⁷ can contribute to sundry objectives. These include development-oriented trade, sustainable global production, regulatory harmonization of private standards, and the curbing of potential market abuses across borders. At a minimum, stronger links between national and international regulatory regimes may assure that more private ordering does not result in less public health and safety along global value (or alternately) supply chains.⁸ At best, sustainability standards can

interchangeably with the term “developed countries” and global “South” with “developing countries.”

4. As used in this essay, the term “trademark law” covers federal law as well as the common law of trademarks and unfair competition.

5. See generally Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1904 (2002) (focusing on patents); Joseph Scott Miller, *Standard Setting, Patents, and Access Lock-In: RAND Licensing and the Theory of the Firm*, 40 IND. L. REV. 351 (2007); Janice M. Mueller, *Patent Misuse Through the Capture of Industry Standards*, 17 BERKELEY TECH L.J. 623, 628 n.31 (2002) (focusing on patents but also citing cases on copyright).

6. International Organization for Standardization, Discover ISO, http://www.iso.org/iso/about/discover-iso_isos-name.htm (last visited Feb. 18, 2009). Because the acronym for “International Organization for Standardization” would vary across languages, its founders also gave it the short, “all-purpose” name “ISO.” The official U.S. representative to ISO is the American National Standards Institute (ANSI), and its documents indicate reliance on certification marks without much elaboration of their role in standard setting. AM. NAT’L STANDARDS INST., NATIONAL CONFORMITY ASSESSMENT PRINCIPLES FOR THE UNITED STATES 8 (2002), available at <http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Brochures/NCAP.pdf>.

7. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Agreement on Technical Barriers to Trade, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TBT Agreement]. See generally Gabrielle Marceau & Joel P. Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36 J. WORLD TRADE 811 (2002), reprinted with revisions in 18 WTO DISPUTE SETTLEMENT SYSTEM 1995–2003, at 275 (Federico Ortion & Ernst-Ulrich Petersmann eds., 2004).

8. Increasingly, health and safety issues along the value or supply chain may be implicated in standards (melamine contamination in agrifood products or heparin in

discipline markets by maintaining a floor or even raising the ceiling of potentially beneficial social activity. For example, private labor standards reinforce International Labour Organization baselines.⁹ In addition, environmental standards implement climate change technologies such as the Voluntary Carbon Standards (VCS) for measuring carbon offsets,¹⁰ or eco-labels for energy-efficient appliances.¹¹ This standard-setting activity relies heavily on soft law¹² within a loose treaty framework.

Sustainability standards in particular potentially restructure markets for farmers or other producers of commodities and goods, as well as third parties in the global supply or value chains, through the value added to products from social premiums.¹³ Because they attempt to shape the

pharmaceutical products). Giovannucci, *supra* note 1, at 99 (estimating five thousand deaths and seventy-six million illnesses in the United States per year from food-related conditions). This essay focuses more on labor and environmental standards and less on health and safety standards, which are subject to different overlapping regulatory regimes, both nationally and internationally. See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 550, 558–62 (2004) (discussing the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) on the international level, and the Food and Drug Administration (FDA) and U.S. Department of Agriculture (USDA) jurisdiction over genetically modified organisms and organic foods on the national level).

9. Margaret M. Blair, Cynthia A. Williams & Li-Wen Lin, *The Roles of Standardization, Certification and Assurance Services in Global Commerce* 3–4 (Vanderbilt Law & Econ., Research Paper No. 08-16, 2008), available at <http://ssrn.com/abstract=1120503>.

10. *Id.* at 4; see also Ricardo Meléndez-Ortiz, *Trade and Equity in a World Where Goods Carry Carbon Passports*, in WHAT IF?, *supra* note 1, at 79; John H. Barton, *Intellectual Property and Access to Clean Energy Technologies in Developing Countries: An Analysis of Solar Photovoltaic, Biofuel and Wind Technologies* 2 (Int'l Ctr. for Trade & Sustainable Dev., Issue Paper No. 2, 2007) (describing how the Kyoto Protocol created a Clean Development Mechanism (CDM), “leading to a supervised market in ‘carbon credits’”).

11. Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479, 487 (1995). The 1992 United Nations Conference on Environment and Development (UNCED) provided impetus for “eco-labelling.” *Id.* at 481–91; accord Errol Meidinger, *Multi-Interest Self-Governance Through Global Product Certification Programs*, in RESPONSIBLE BUSINESS? SELF-GOVERNANCE IN TRANSNATIONAL ECONOMIC TRANSACTIONS 259 (Dilling et al. eds., 2007). These eco-labels now include energy efficiency, management of biodiversity, animal welfare, low carbon footprint, no use of chemicals, wildlife protection, and more.

12. Mary E. Footer, *The Role of “Soft” Law Norms in Reconciling the Antinomies of WTO Law* 2–3 (Soc’y of Int’l Econ. Law, Working Paper No. 54/08, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159929 (“The term ‘soft law’ in international law and international relations is often used to characterize a variety of extra-legal or non-legal norms, which are ‘in the twilight between law and politics’ and which, while deliberately of a non-binding character, have legal relevance.” (footnotes omitted)); see also *id.* at 12–14 (discussing relationship between ISO and TBT).

13. DOUGLAS MURRAY, LAURA T. RAYNOLDS & PETER LEIGH TAYLOR, ONE CUP AT A TIME: POVERTY ALLEVIATION AND FAIR TRADE COFFEE IN LATIN AMERICA 27 (2003), available at <http://www.colostate.edu/depts/sociology/FairTradeResearchGroup/doc/fairtrade.pdf> (“Fair Trade seeks to challenge existing relations in the global economy by example, using consumer/producer alliances: to create an alternative pricing system based as much on social justice concerns as on economic factors; to eliminate unnecessary

market according to principles other than reduction of tariffs, some argue that they have the potential to create a sustainable and possibly more ethical alternative to mainstream trade.¹⁴ They may have positive spillover effects for all stakeholders in the form of increased environmental quality. Consumers drive this decentralized global regulatory environment—by their choices of what to buy, based on labels and marks. Because sustainable trade foregrounds consumer ethics,¹⁵ and because the figure of the confused consumer is still the crux of U.S. unfair competition law, this essay analyzes these newer regulatory practices primarily from consumer perspectives. Within both mainstream and sustainable trade channels, consumers require more accurate information in order for these sorts of transactions to have integrity—whether this requirement is expressed as a consumer’s right to information, a right to participate meaningfully in a civic realm, or as a right of expression.¹⁶

intermediaries who capture excessive portions of the price attached to commodities; and to transform transnational corporate practices, at times in spite of corporate efforts to the contrary, to address social and environmental concerns at both ends of the production/consumption continuum. It is an alliance with the capacity to transform participants throughout the Fair Trade continuum.”). *See generally* FAIR TRADE: THE CHALLENGES OF TRANSFORMING GLOBALIZATION (Laura T. Reynolds, Douglas L. Murray & John Wilkinson eds., 2007) [hereinafter FAIR TRADE].

14. The International Trade Centre, which is a joint agency of the WTO and the United Nations, views this trade paradigm as a viable alternative to the pure WTO model. Its slogan is “Export Impact For Good.” *See generally* International Trade Centre, Export Impact for Good, <http://www.intracen.org/welcome.htm> (last visited Feb. 18, 2009). Other agencies, such as the Food and Agriculture Organization, support this view. *See generally* ALICE BYERS, DANIELE GIOVANNUCCI & PASCAL LIU, VALUE-ADDING STANDARDS IN THE NORTH AMERICAN FOOD MARKET: TRADE OPPORTUNITIES IN CERTIFIED PRODUCTS FOR DEVELOPING COUNTRIES (2008), available at <ftp://ftp.fao.org/docrep/fao/010/a1585e/a1585e.pdf>.

15. GAVIN FRIDELL, FAIR TRADE COFFEE: THE PROSPECTS AND PITFALLS OF MARKET-DRIVEN SOCIAL JUSTICE 63 (2007) (quoting fair trade coalition FINE statement: “Fair Trade is a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalised producers and workers—especially in the South. Fair Trade organisations (backed by consumers) are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade.” (emphasis added)). Gavin Fridell calls this the “decommodification” perspective. Gavin Fridell, *Fair Trade and Neoliberalism: Assessing Emerging Perspectives*, 33 *LATIN AM. PERSP.* 8, 20–21 (2006).

16. TOM ROTHERHAM, TRADE KNOWLEDGE NETWORK LABELLING FOR ENVIRONMENTAL PURPOSES: A REVIEW OF THE STATE OF THE DEBATE IN THE WORLD TRADE ORGANIZATION 12–14 (2003) (expressing a right of information); Peter S. Menell, *Structuring a Market-Oriented Federal Information Policy*, 54 *MD. L. REV.* 1435, 1445 (1995) (framing the issue as one of informed consumer choice); Kysar, *supra* note 8, at 610–17 (positing a right to expression and participation in civic life through consumer choices). This essay excludes the perspectives of buyer firms and other stakeholders in the middle part of the value chain. Others have examined how firms might discipline each other through private ordering to ensure quality control throughout the chain. *See generally* Blair et al., *supra* note 9; Meidinger, *supra* note 11, at 262 (describing pressures brought by nongovernmental organizations (NGOs) upon Home Depot and Lowes to commit to buying certified wood products); Roht-Arriaza, *supra* note 11, at 534–37 (proposing a system for better third-party certification). A certification carries producer-specific paperwork and very tangible

The tangle of standards, certifications, labels, and marks is largely left alone in the intellectual property literature. Of course, certifications do not always lead to marks, whether trademarks or CMs. This is because a standard may not be directed to an end-consumer in a retail context, but rather to a middle firm in a value chain. Trademark law to date has focused on what will be called here first-party certifiers, that is, the firm itself that markets a particular brand of good or service, signaling source of origin directly to consumers via trademarks. The classic trademark paradigm of first-party certifiers assumes that a firm will act in its own self-interest and maximize quality assurance of its product or services. In this conventional narrative, the roles of second-party certifiers (voluntary industry associations or buyer firms in a value chain)¹⁷ or third-party certifiers (independent third-party, nongovernmental standard-setting, inspection, assurance, and certification services¹⁸) in providing quality assurance to consumers has also not been rigorously evaluated.

A good or service's labels and marks (and any underlying standards and certifications) increasingly signify characteristics within global value chains. Typically an entity (often a third party) will certify that a good or service conforms to a standard (which can be set privately—through a firm itself, a civil society organization, a trade association, or a combination of some or all of the above). This certification then may be communicated to a buyer through a marketing campaign such as a firm's corporate social responsibility (CSR) literature,¹⁹ implicitly through a trademark's assurance of quality, or more explicitly through adherence to the standards required by a CM. Marks can thus inform intermediate buyers (variously referred to as buyer or purchaser firms, or second parties) or end-consumers of product qualities related to the largely opaque steps of the process leading to the product to which they are affixed. These process standards include not only quality assurance standards, which are within the classic trademark mandate, but also sustainability measures. As stated above, marks now express—whether implicitly or explicitly—environmental, human rights, and labor characteristics, as well as classic health and safety standards (e.g., Underwriters Laboratory). These marks place a proverbial stamp of ethical approval upon standards developed largely outside of public view.

The traditional trademark law framework largely ignores these newer process-related quality claims, just as process characteristics are generally

traceability and thus may be more important to intermediaries in the value chain than *certification marks*, which are aimed at consumers.

17. Laura T. Reynolds & John Wilkinson, *Fair Trade in the Agriculture and Food Sector: Analytical Dimensions*, in FAIR TRADE, *supra* note 13, at 33, 41.

18. U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, OTA REP. NO. TCT-512, GLOBAL STANDARDS: BUILDING BLOCKS FOR THE FUTURE 2 (1992) [hereinafter OTA REPORT].

19. Sustainability has become a huge factor within marketing and advertising of goods. Notes from WEDF Conference, Trade, What If? (Oct. 8–11, 2008) (on file with author) [hereinafter WEDF Notes]. For example, Marks & Spencer's sustainability advertising campaign is "There is no Plan B." *Id.* Price Waterhouse has a similar slogan: "Doing nothing is not an option." *Id.*

compartmentalized from product characteristics in other areas of law such as international trade law.²⁰ The use of wholly proprietary standards by firms (for example, the Starbucks Coffee and Farmer Equity (CAFE) standards) raises the issue of whether a consumer might view them plausibly as explicit characteristics of the quality guaranteed by a trademark. Moreover, while usually viewed as an inconsequential backwater of trademark law, CMs are playing an ever-expanding role in the explicit certification of goods, such as “organic” commodities that are certified to meet certain standards, or services such as “LEED” certifications of the U.S. Green Building Council.²¹ Yet, curiously, the function of CMs in the private standard-setting context has been almost as underexamined as that of trademarks.

In this initial foray, my primary purpose is to identify the major lacunae in this complex emerging global governance framework. One immediately apparent issue is a systematic lack of accountability among certifying firms. Several commentators have observed that virtually no overarching entity, whether public or private, is monitoring certification quality.²² Consumers may be removed from this process altogether, or at the very least, several steps from quality control. Another gap has to do with a lack of transparency, evidenced by a newer kind of consumer confusion. This confusion (or what might accurately be called ignorance) is created simultaneously by lack of information as well as informational clutter about standards.²³ Currently, consumer trust in certified goods and services can only operate at the caveat emptor level, because so much of the standard-setting and certification process is beyond public oversight. At the same time, standard-setting activities can result (and have indeed resulted) in different, inconsistent regimes governing the same area.

Therefore, an updated public law framework for this growing trend towards market-based regulation seems not only sensible but critically

20. See generally Kysar, *supra* note 8.

21. U.S. Green Bldg. Council LEED Certified USGBC, U.S. Trademark Serial No. 77199311 (filed June 6, 2007). CMs are also emerging from relative obscurity, partly because they are the legal mechanism through which the United States implements protection of geographical indications as obligated by the WTO Trade-Related Aspects of Intellectual Property (TRIPS). Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, Legal Instruments—Results of the Uruguay Round, arts. 22–24, 33 I.L.M. 1125 (1994) [hereinafter TRIPS Agreement]; see *infra* Part I.

22. See OTA REPORT, *supra* note 18, at 9–10; Blair et al., *supra* note 9, at 10; Daniele Giovannucci & Stefano Ponte, *Standards as a New Form of Social Contract? Sustainability Initiatives in the Coffee Industry*, 30 FOOD POL'Y 284, 289 (2005).

23. Meidinger, *supra* note 11, at 270–73 (describing confusion in competing standards in organic agriculture, apparel, and fisheries sectors). For example, Wall Street firms supposedly are being certified for compliance to standards in the single area in which there are generally accepted standards—financial auditing. And yet, we have recently seen a number of financial scandals related to lack of regulatory oversight, both public and private. See Michael Lewis & David Einhorn, Op-Ed., *The End of the Financial World as We Know It*, N.Y. TIMES, Jan. 4, 2009, at 9 (recommending checks on misleading ratings created by credit agencies Moody's and Standard & Poor's).

overdue. While the Lanham Act cannot bear the sole burden of addressing these gaps, it should be synchronized more carefully with this emerging private ordering regime. And although not all certifications are administered through federally registered trademarks or CMs, common-law rights can nonetheless inhere in certifications that are used like marks under the Lanham Act.²⁴ Either explicitly or implicitly, standard setting and certifications operate under the shadow of the law of unfair competition, and should be viewed as an integral part of that long-standing body of common law, as well as of the law of international trade.

I. PRIVATE REGULATION AND ITS DISCONNECTS

A. Multistakeholder Governance

Private standards—taxonomized in the next section—function as normative technical components of a transnational regulatory system.²⁵ These standards are set, implemented, interpreted, monitored, and marketed by regulatory entrepreneurs²⁶ engaging in what (in the context of sustainable forestry certification) Errol Meidinger has termed multistakeholder governance.²⁷ Standard-setting organizations (SSOs) are often composed of private actors, such as industry, producer, or trade associations and/or nongovernmental organizations (NGOs) representing

24. *Institut Nat'l Des Appellations d'Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d (BNA) 1875, 1885 (T.T.A.B. 1998); see also 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:90 (4th ed. 2008) [hereinafter MCCARTHY] (citing *Florida v. Real Juices, Inc.*, 330 F. Supp. 428 (M.D. Fla. 1971); Restatement (Third) of Unfair Competition § 11 (1995)).

25. Meidinger, *supra* note 11, at 268 (“Labeling requirements, rather than being mere technical matters, are forums for policy debate and competition.”); Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125 (2002) (noting that standards are simultaneously technical and legal); Jane Winn & Nicholas Jondet, *Better Regulation for Consumers: Integrating ICT Standards and Consumer Protection* (Dec. 4, 2008), available at <http://ssrn.com/abstract=1303061> (evaluating the possibility of embedding consumer protection within ICT standards). Standards are as old as trade itself because merchants have needed to know precisely what is being bought and sold through weights and measures. Philip Weiser claims that the first notable U.S. national standard was for railroads during the Civil War, which “helped the North win the war (on account of its superior supply chain management).” Philip J. Weiser, *Making the World Safe for Standard Setting* 4 (Univ. of Colo. Legal Studies Research Paper No. 08-06, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003432#.

26. Steve Charnovitz, *Accountability of Nongovernmental Organizations (NGOs) in Global Governance* 38 (George Washington Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 145, 2005), available at <http://ssrn.com/abstract=716381> (“Just as private corporations are being subjected to claims of triple bottom line and corporate social responsibility, similar transfigurational ideas are being applied to international organizations and their treaties. In my view, it is the NGOs, acting as ‘transnational norm entrepreneurs,’ who, along with the publicists, are leading the way in these developments.”).

27. Errol Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems* 2 (Univ. of Buffalo Law Sch., Buffalo Legal Studies, Research Paper No. 2006-019, 2006), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=917952.

particular perspectives or interests. Standard setting, certification, and labelling have major implications with respect to global trade and trademark law, supposedly driven by consumer choice. As Douglas Kysar states, “consumer process preferences can be understood not from the standpoint of their effect on the external world or their utility as mechanisms for public expression, but rather simply from the premise that consumption often is an intensely personal activity with significant moral consequences.”²⁸

Consumers are not the only stakeholders who must trust standards, however. At the firm level, third-party standards allow the development of trust between far-flung buyers and sellers, thus facilitating private ordering beyond close-knit communities.²⁹ They also encourage the creation of more horizontal, rather than vertical, lines of trade and enhance the ability of firms to engage with complementary assets provided by other firms.³⁰ However, because these standards are increasingly privatized, they can be developed and enforced largely outside of public oversight. The questions of due process within the standard-setting process, potential abuse of market position, and related issues have long been a concern with respect to the decentralized promulgation of standards.³¹ Furthermore, once the standards are in place, Margaret Jane Radin observes, “What’s good about standards? Often mentioned are network effects and fostering interoperability[,] . . . but standardization is often thought to be harmful, too. In particular, standardization is associated with the possibility of lock-in, the possibility of lock-out, and the possibility of coercion.”³²

From a producer (e.g., farmer or exporter) perspective, standards can pose barriers to market entry (lock-out) because they may be hard to locate and therefore difficult to comply with (i.e., certify). This is especially true for competitors hailing from information- or resource-poor regions.³³ Even SSOs with relatively open standards and policies may still charge a fee for access to their written standards, certification processes, and/or marks; a revenue-generating model of standards licensing is common.³⁴ Because of this, competitors may perceive unequal access to information about standards, even where a standard is theoretically open, especially to the

28. Kysar, *supra* note 8, at 617; *see also* Steve Charnovitz, *International Standards and the WTO* 13–14 (George Washington Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 133, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=694346.

29. Blair et al., *supra* note 9, at 16.

30. David J. Teece, *Profiting from Technological Innovation: Implications for Integration, Collaboration, Licensing and Public Policy*, 15 RES. POL’Y 285 (1986) (arguing that “complementary assets” such as distribution and service mechanisms are necessary for innovators to benefit from newly developed product protected by law).

31. OTA REPORT, *supra* note 18, at 18.

32. Radin, *supra* note 25, at 1130–32.

33. Giovannucci, *supra* note 1, at 107 (noting that most producers encounter five barriers in dealing with standards: difficulty selecting a standard; facilitating adopting standards; generating and acquiring capital; transaction costs; and managing risks).

34. For example, the international standard-setting organization, ISO, charges for standards published in documents available through its website.

extent that it has become an industry norm or a de facto requirement for doing business.³⁵

Reverting to a consumer perspective, standards and certifications represented by marks purportedly privilege consumer choice, based on what these marks represent in the marketplace. But private standards are simultaneously a decentralized form of market regulation and a vehicle of market manipulation—the latter to the extent that the mark is opaque and the consumer may not know what he or she is getting. By implication, consumer trust can be breached through indifference to conformity with standards or even by outright deceit.

The transaction costs associated with these consumer choices come in two major forms, both informational. The first form is of subtle market positioning, where a firm may play upon consumer perceptions of social responsibility and other amorphous measures represented by a mark. Here, the potential for abuse is large, and even consumers seem to be aware of this. Consumer surveys indicate that the public is skeptical of ethical claims by companies, retailers, and even governments.³⁶ Consumers are not often in a position to be able to assess the truthfulness of a claim made about a product's qualities; thus, the issue of consumer trust is central to the legitimate functioning of this regulatory regime. The second type of transaction cost could be viewed as the failure of success. Certain sustainability standards have proliferated to the point that consumers are unable to differentiate among them.³⁷

Both of these consumer-related costs are different from the typical costs associated with standards, such as lock-in or lock-out. The danger of the capture of standards does not occur in the same manner in the trademark area as it does in patent or copyright law. In the latter realms, the potential refusal of intellectual property owners to license standards that have been widely adopted in the market can create anticompetitive effects.³⁸ However, the anticompetitive effects of standards through trademarks may not be through outright refusals to license; indeed, CM holders are bound to

35. Roht-Arriaza, *supra* note 11, at 500 (“The quality control standard also portended the possibilities and dangers ahead. The ISO 9000 series quickly became a de facto requirement for doing business in Europe and other parts of the world. Companies required proof through an independent, registered ‘certifier’ that their suppliers and subcontractors complied with the standard.”). The standards associated with good agricultural practices of the Global Partnership for Safe and Sustainable Agriculture (Global-GAP) have become a de facto requirement for agrifood trade with most European Union (EU) countries. WEDF Notes, *supra* note 19.

36. Harriet Lamb, *Fairtrade: Working to Make Markets Fair*, in *WHAT IF?*, *supra* note 1, at 59; Meléndez-Ortiz, *supra* note 10, at 79, 84.

37. This issue of proliferation has also affected agricultural producers, who find it hard to “keep up with and even to understand the standards. [One researcher] finds that many standards and codes of practice have been driven by Northern consumer and NGO perceptions of business responsibility and have been more *ad hoc* rather than comprehensive and consultative.” Giovannucci, *supra* note 1, at 106.

38. Lemley, *supra* note 5, at 1901–03. This is especially true in industries such as information and communications technology (ICT) where compatibility and interoperability are keys to market participation. Miller, *supra* note 5, at 351–54.

license their marks through a statutory rule of nondiscrimination.³⁹ Rather, multiple stakeholders operate within this decentralized framework to shape a regulatory environment that is based on trust. A mark may represent much more than a product's surface qualities. If the point is to nudge the market toward more ethical choices through consumer-driven purchases, marks can represent a critical point of potential accountability.⁴⁰

B. Standards

What is a standard? In a broad sense, it can be described simply as a "norm for market-based activity."⁴¹ Indeed, Radin supports this expansive definition by including language (such as English) as a kind of standard.⁴² Other more commonly understood standards include measurements such as the inch, technical specifications such as a computer operating system, or form contracts such as Creative Commons licenses. Mark Lemley defines a standard "as any set of technical specifications that either provides or is intended to provide a common design for a product or process."⁴³ As these definitions imply, standards can be set by any entity. Indeed, SSOs can be intergovernmental organizations (e.g., the contracting states of the WTO, which set the minimum standards for the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)),⁴⁴ a government, or a combination of these and other regulatory entrepreneurs, including but not

39. 15 U.S.C. § 1064(5)(D) (2006); MCCARTHY, *supra* note 24, § 19:92 ("This obligation distinguishes a certification mark from a trademark and creates a kind of 'compulsory licensing.'").

40. Giovannucci & Ponte, *supra* note 22, at 286 ("In the last decade or so, ever more awareness of the socio-economic plight of developing country farmers, increased interest in the health and safety of food, and scientific recognition that expansion of the agricultural frontier constitutes the greatest threat to global biodiversity have further popularized several agricultural sustainability initiatives. As a result, sustainability (or cause-related) standards have enjoyed a much greater recognition and a fast-growing market value."). Fair trade is concerned with developing markets and relationships between the global North and South through standards and certification. More recent efforts involve South-South trade or direct marketing by Southern producers without intermediaries such as certifiers. Murray et al., *supra* note 13, at 24–31; *see also* CATHY FARNWORTH & MICHAEL GOODMAN, GROWING ETHICAL NETWORKS: THE FAIR TRADE MARKET FOR RAW AND PROCESSED AGRICULTURAL PRODUCTS 10–11 (2008), available at http://siteresources.worldbank.org/INTWDR2008/Resources/2795087-1191427986785/FarnworthC&GoodmanM_GrowingEthicalNetworks%5B1%5D.pdf.

41. Charnovitz, *supra* note 28, at 2 ("The broad definition pursued here should be contrasted with the narrower definition of 'standard' used in the WTO Agreement on Technical Barriers to Trade (TBT). In TBT, a standard is defined as a: Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is *not* mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, *process or production method.*" (emphasis added) (citing TBT Agreement, *supra* note 7, Annex 1, para. 2)); *id.* at 4.

42. Radin, *supra* note 25, at 1126–27.

43. Lemley, *supra* note 5, at 1896.

44. TRIPS Agreement, *supra* note 21.

limited to civil society organizations such as NGOs, trade groups, or even individuals such as activist law professors.⁴⁵

Analyses of standard-setting processes differentiate among product standards,⁴⁶ control standards,⁴⁷ and process standards.⁴⁸ Other enduring axes are voluntary as opposed to mandatory standards,⁴⁹ and open versus proprietary standards; each of these axes may be more of a continuum than a dichotomy.⁵⁰ Yet another distinction is between de jure versus de facto standards, although this may be another false dichotomy because of the increasingly hybrid nature of some standards. Meidinger observes that “governments interact with [standards and] certification programs in a bewildering and sometimes contradictory variety of ways.”⁵¹ Examples of standards shaped through classic public regulation include U.S. Department of Agriculture (product) classifications or the Transmission Control Protocol (TCP)/Intellectual Property (IP) (process) standards for Internet interoperability promulgated by the U.S. Department of Defense.⁵²

In the United States, standard setting typically is more decentralized and privatized than in many other parts of the world.⁵³ Although the U.S. government tends to be hands-off, it takes the following official position on private SSOs:

(1) “Voluntary consensus standards bodies” are domestic or international organizations which plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. . . . A voluntary consensus standards body is defined by the following attributes:

- (i) Openness.
- (ii) Balance of interest.
- (iii) Due process.

45. Ian Ayres & Jennifer Gerarda Brown, *Privatizing Employment Protections*, 49 ARIZ. L. REV. 587 (2007) (proposing a certification mark that allows employees and applicants to enforce the Employment Non-Discrimination Act, prohibiting discrimination on the basis of sexual orientation).

46. OTA REPORT, *supra* note 18, at 99 (“[Product] standards [are those that] embody information. By specifying the characteristics of a product, they allow for product identification, interoperability, and quality control.”).

47. *Id.* at 100 (“Control standards are designed to address a societal hazard or problem. They generally define a range of acceptability with respect to the design, performance, and/or use of a product. Often taking the form of regulations, they range from such things as building codes to fuel economy standards.”).

48. *Id.* (“[P]rocess standards facilitate and support socioeconomic transactions and interactions. They define roles and relationships, establish the rules for interpreting behavior, and specify the way in which a particular procedure or process is executed.”). A PPM standard represents the process or method by which a product is produced. Charnovitz, *supra* note 28, at 6.

49. TBT Agreement, *supra* note 7.

50. See Lemley, *supra* note 5, at 1962–63.

51. Meidinger, *supra* note 11, at 273; see also *id.* at 273–76 (describing state actions ranging from procurement to incorporation of standards into public regulations).

52. OTA REPORT, *supra* note 18, at 6, 28, 42.

53. See *id.* at 14.

(iv) An appeals process.

(v) Consensus⁵⁴

In this context, the

pull for following the standard is not legal compulsion, but rather enlightened self-interest. Of course, once adherence to a certain standard becomes expected in the marketplace, a producer may feel economically motivated to follow it (e.g., international accounting standards). Often standards are accompanied by labels, marks, or seals that rely on information as a means of reinforcing the standard.⁵⁵

Nonetheless, as described above, well-developed norms governing the relationship of standards and certifications to labels and marks are lacking, at least within the context of the Lanham Act. The pieces (national and international, especially) are not often viewed as part of the same regulatory puzzle.

Part of the impetus for the growth of standards is the expansion of international markets, which rely on longer supply chains and outsourcing,⁵⁶ along with a greater complexity of products and division of labor.⁵⁷ One observer claims that the typical commodity transaction involves no fewer than eighteen links.⁵⁸ Driving factors are also the international institutions that facilitate trade and development. Among these is ISO, which is a “world-wide federation of national standards bodies from over 100 countries.”⁵⁹ Neither fish nor fowl, ISO is not an intergovernmental trade organization such as the WTO, nor is it part of the United Nations (U.N.) system. Rather, it is an outsized NGO that functions as an (some might say the) international standards development institution where “[s]tandards are developed by a consensus process in order to be inclusive of the views of all stakeholders. They represent industry-wide interests, seek to promote global solutions and are voluntary.”⁶⁰ Yet despite ISO’s growing influence “there are only limited opportunities for public involvement.”⁶¹

The so-called “ISO 9000” standards of quality management, promulgated in 1987, were a huge leap forward with respect to third-party certification and standard setting. An early observer noted,

54. U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-119 (1998), available at <http://www.whitehouse.gov/omb/circulars/a119/a119.html>.

55. Charnovitz, *supra* note 28, at 3.

56. See OTA REPORT, *supra* note 18, at 11.

57. See *id.* at 11–12.

58. JACQUELINE DECARLO, FAIR TRADE: A BEGINNER’S GUIDE 14 (2007) (citing MICHAEL BARRATT BROWN, FAIR TRADE: REFORM AND REALITIES IN THE INTERNATIONAL TRADING SYSTEM (1993)).

59. MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 151 (2d ed. 1999); accord Charnovitz, *supra* note 28, at 25–26.

60. TREBILCOCK & HOWSE, *supra* note 59, at 151.

61. Charnovitz, *supra* note 28, at 25–26.

ISO 9000 represented a departure from conventional ISO work products in two ways. First, ISO 9000 was the first international standard that did not simply harmonize existing, uniform national standards. Second, the standards were applicable to a wide range of industries and services, rather than to a specific product, process, or plant.

The ISO 9000 quality control standards, published in 1987, contain guidelines for companies to use both in their own implementation of a quality assurance system and in specifying contract requirements for suppliers and subcontractors. *The explicit goal was to harmonize quality assurance requirements to facilitate international trade.*⁶²

These ISO 9000 standards resulted in “certification [becoming] rapidly a de facto requirement for doing business in Europe and other parts of the world.”⁶³ Some examples of other international SSOs besides the ISO include the International Telecommunications Union (ITU), a specialized UN agency, the Organisation for Economic Cooperation and Development (OECD), a non-UN intergovernmental organization, and the Codex Alimentarius Commission (Codex), an intergovernmental body established jointly by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO).⁶⁴

Another important driving factor behind standard setting is international trade law—in particular, the WTO Agreement on Technical Barriers to Trade.⁶⁵ The TBT distinguishes between “technical regulation[s]” and “standard[s].”⁶⁶ Compliance with the former is mandatory; with the latter, compliance is optional.⁶⁷ (This essay refers to both categories—voluntary and mandatory—as “standards.”) In relation to certification and labeling, the TBT defines both technical regulations and standards to “include or deal exclusively with terminology, *symbols, packaging, marking or labeling requirements* as they apply to a product, process or production method.”⁶⁸ The TBT provides that, where international standards exist, national governments should use these standards as the basis for their own technical

62. Roht-Arriaza, *supra* note 11, at 499 (emphasis added) (footnotes omitted).

63. *Id.* at 500 (emphasis omitted).

64. Charnovitz, *supra* note 28, at 23–29.

65. *See id.* at 10.

66. TBT Agreement, *supra* note 7, Annex 1.

67. *Id.*

68. *Id.* Annex 1.1, paras. 1–2 (defining the term “[t]echnical regulation” as a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is *mandatory*” (emphasis added)). The narrower definition of “[s]tandard” is a [d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is *not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Id. Annex 1.2, para. 1 (emphasis added).

requirements.⁶⁹ Furthermore, under the TBT regime, compliance with an international standard provides a procedural presumption in a complaint filed with the WTO Dispute Settlement Understanding (DSU) that a particular process is not a trade barrier.⁷⁰

Steve Charnovitz notes that the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (TBT Code), which is Annex 3 of the TBT Agreement, has certain provisions related to transparency of substantive standards, process, and results:

For example, the Code states that standardizing bodies shall make every effort to achieve a “national consensus” on the standards they develop (para. H). The TBT Code also contains cutting-edge participation provisions. Specifically, it provides that before adopting a standard, the body shall allow a period of at least 60 days for comments on a draft standard by interested parties in any WTO Member country (para. L). The body is further directed to take these comments into account and, if requested, to reply as promptly as possible (para. N). Another rule is that standardizing bodies shall provide adequate opportunities for consultation with other standardizing bodies (para. Q).⁷¹

While the TBT Code by its text “is open to acceptance” by nongovernmental bodies,⁷² it is only binding on central government standardizing bodies.⁷³ Thus,

[a]lthough the procedural guidelines in the Standards Code are generally considered robust, there is a fundamental flaw in their implementation: the WTO cannot impose requirements on private bodies, only on governments. As a result, the Standards Code only has legal weight if member governments have effective control over national standards bodies. This is not always the case.⁷⁴

Nonetheless, some major SSOs such as the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance, have adopted all or some of its provisions.⁷⁵ Furthermore,

69. *Id.* art. 2.4; see also TREBILCOCK & HOWSE, *supra* note 59, at 143; Charnovitz, *supra* note 28, at 15.

70. TBT Agreement, *supra* note 7, art. 2.5 (“Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.”).

71. Charnovitz, *supra* note 28, at 10.

72. TBT Agreement, *supra* note 7, Annex 3B.

73. *Id.* art. 4.

74. ROTHERHAM, *supra* note 16, at 15.

75. ISEAL ALLIANCE, ISEAL CODE OF GOOD PRACTICE FOR SETTING SOCIAL AND ENVIRONMENTAL STANDARDS 4 (public version 4 2006), available at http://www.fairtrade.net/fileadmin/user_upload/content/P005_ISEAL_Code_PD4_Jan_06.pdf. (“The ISEAL Alliance defines and codifies best practice, at the international level, for the design and implementation of social and environmental standards systems. ISEAL Alliance members are committed to meeting this best practice in order to ensure their systems are credible and accessible. The ISEAL Alliance provides a global framework for the social and environmental standards movement to coordinate, cooperate and build its capacity to deliver positive global impacts.”).

[s]everal governments advocated the adoption of a TBT Committee Decision on Principles for the Development of International Standards, and this has now been done. Attaining such disciplines was also endorsed by ISO and the [International Electrotechnical Commission].

The TBT Committee Principles are meant to guide international standard-setting organizations.⁷⁶

Despite these nonbinding principles and voluntary initiatives, the process by which the private standards themselves come into being is largely shielded from public view. The “fair trade” standards are an example of a stated grassroots collaborative approach toward relatively open standards, explicitly involving producers (farmer associations) as well as the third-party certifier Fairtrade Labelling Organizations (FLO International), the nonprofit international fair trade certification consortium.⁷⁷ By contrast, purely proprietary standard setting by a firm, such as the CAFE standards set by Starbucks, may not necessarily involve regulatory entrepreneurs or stakeholders other than the firm itself and also may be less transparent.⁷⁸

C. Certifications

Third-party certifications to standards are key components of this private form of regulation. As Meidinger explains,

A central actor in implementing multi-interest self-governance is the certifier, who is conceived as a trustworthy expert who can verify for outsiders that a firm is performing to standard. The certifier is directly

76. Charnovitz, *supra* note 28, at 21 (citing Communication from Brazil, G/TBT/W/140 (July 28, 2000)). Steve Charnovitz further observes,

The listed principles include: Transparency, Openness, Impartiality and Consensus, Effectiveness and Relevance, Coherence, and a Development Dimension. As of now, the principles are non-binding, but there have been suggestions that adherence to these principles be made a condition for recognizing a particular set of international standards in the WTO. The standardizing institutions have not questioned the audacity of the TBT Committee in propounding these principles, but there would certainly be grounds for doing so. The problem is not the substance of the principles; most of them reflect conventional wisdom on good governance. The problem is that the WTO itself does not honor these principles in its own activities.

Id. (citing Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/9, Annex 4 (Nov. 13, 2000)).

77. Fairtrade Labelling Organization, <http://www.fairtrade.net/> (last visited Feb. 21, 2009). Fairtrade Labelling Organization International (FLO) is an umbrella organization that unites 20 labelling initiatives in 21 countries and 3 producer networks in Latin America, Africa, and Asia. Other stakeholders in setting fair trade certification standards for commodities could include trade associations (including various intermediaries such as coffee roasters in the case of coffee, exporters, distributors, as well as the retailers) and consumers, as well as public regulatory agencies (e.g., the FDA on the domestic level or the FAO on the international level).

78. STARBUCKS CORP., CORPORATE SOCIAL RESPONSIBILITY, FISCAL 2007 ANNUAL REPORT: OUR COMMITMENT TO ETHICAL COFFEE SOURCING 11 (2007) [hereinafter STARBUCKS CSR REPORT].

analogous to a government inspector or hearing officer in a traditional regulatory scheme, except that the firm, rather than the state, chooses and pays the certifier.⁷⁹

Firms providing ISO 9000 quality assurance certification grew rapidly from roughly 28,000 in 1993 to 670,400 in 2004.⁸⁰ After the advent of environmental certification in 1996 (the ISO 14,000 environmental management standards), the number of firms and facilities meeting those standards rose to 90,569 in 2004.⁸¹

Certification is also fueled by a growing demand for products that embody workplace safety, labor, and environmental minimum standards by, for example, Socially Responsible Investment (SRI) funds.⁸² This demand for socially responsible trade also correlates with the decided rise in NGO activity during the 1990s.⁸³ Some of these NGOs catalyze the standard-setting process; others are involved as third-party certifiers; some are mark holders; some do all three. The American National Standards Institute (ANSI), the U.S. representative to ISO, has noted the growing trend toward social performance certification.⁸⁴ ISO is currently developing ISO 26,000 standards for social responsibility.⁸⁵

A number of social-responsibility-oriented certifying firms came into existence in the 1990s. One major firm specializing in third-party social accountability certification is Social Accountability International (SAI), which is a U.S.-based, nonprofit organization that promulgates “an auditable certification standard [SA8000] based on international and workplace norms.”⁸⁶ Socially responsible trade is evident as well in

79. Meidinger, *supra* note 11, at 267.

80. OTA REPORT, *supra* note 18, at 6.

81. Blair et al., *supra* note 9, at 7.

82. *Id.* at 8.

83. *Id.*; see also James McGann and Mary Johnstone, *The Power Shift and the NGO Credibility Crisis*, INT’L J. NOT-FOR-PROFIT L., Jan. 2006, at 65, 67 (“*The Economist* estimates that the number of international non-governmental organizations rose from 6,000 in 1990 to 26,000 in 1996. According to the 2002 UNDP Human Development Report, nearly one-fifth of the world’s thirty-seven thousand INGOs (international non-governmental organizations) were formed in the 1990s.”).

84. See generally Blair et al., *supra* note 9, at 6 (also noting trend toward social performance certification); American National Standards Institute, <http://www.ansi.org/> (last visited Feb. 21, 2009).

85. International Organization for Standardization, ISO Social Responsibility, <http://isotc.iso.org/livelink/livelink/fetch/2000/2122/830949/3934883/3935096/home.html?noid=4451259&vernum=0> (last visited Feb. 21, 2009).

86. Social Accountability International, Overview of SA8000, www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473 (last visited Feb. 21, 2009). According to its website, Social Accountability International (SAI) “works with companies, consumer groups, non-governmental organizations (NGOs), workers and trade unions, local governments—as well as a network of agencies accredited for SA8000 auditing, to help ensure that workers of the world are treated according to basic human rights principles.” Social Accountability International, <http://www.sa-intl.org> (last visited Feb. 21, 2009); see also Fortin, *supra* note 3, at 51 (“[T]here is no single set of internationally recognized standards for ethical trade . . . some of its components—notably labour standards—have been elaborated by non-governmental international organizations . . . [such as] the Social

voluntary CSR standards adopted by second-party certifiers such as industry associations.⁸⁷ For example, the Kimberley Process Certification Scheme is a system administered through the diamond industry, and functions both to certify diamonds in accordance with a U.N. resolution to address the problem of conflict diamonds⁸⁸ and to meet demand for conflict-free diamonds by wealthy, socially aware consumers.⁸⁹ Transfair USA is a U.S.-based nonprofit responsible for certifying commodities as complying with fair trade standards developed by FLO International.⁹⁰ FLO International is a nonprofit, multistakeholder association established in 1997 and based in Germany. It bills itself as the leading standard setting and certification organization for labeled Fairtrade.⁹¹ Because it separates the certification process from the standard-setting process, it complies with the ISO standards.⁹² It is the subject of a more detailed case study in a subsequent section of this essay.

Whether within or without the ISO framework, certification itself is ironically not an area that is highly supervised. The financial services industry has developed generally accepted financial auditing practices and professional standards that constrain the overall lack of oversight over certification firms.⁹³ However, only one international professional organization offers services to audit and monitor third-party certifiers generally.⁹⁴ In the social responsibility field, a move toward developing best practices for standard setting and certification is underway, and the same is true in the area of environmental certification.⁹⁵ ANSI has developed what are called “conformity assessment measures” for firms to comply with standards in accordance with ISO and TBT guidelines; the ISO/IEC guide defines “conformity assessment” as “any activity concerned

Accountability 8000 (or SA8000) Standards and the Ethical Trading Initiative (ETI) Base Code and Principles of Implementation.”); Blair et al., *supra* note 9, at 9.

87. OTA REPORT, *supra* note 18, at 20.

88. See G.A. Res. 55/56, U.N. Doc. A/RES/55/56 (Jan. 29, 2001).

89. Footer, *supra* note 12, at 17–18 (discussing the 2003 WTO waiver covering conflict diamonds).

90. Fair Trade Labelling Organizations International, <http://www.transfairusa.org/content/about/aboutus.php> (last visited Feb. 21, 2009).

91. Fairtrade Labelling Organizations, *supra* note 77.

92. Stephanie Barrentios & Sally Smith, *Mainstreaming Fair Trade in Global Production Networks*, in FAIR TRADE, *supra* note 13, at 118–19; Laura T. Reynolds & Michael A. Long, *Fair/Alternative Trade: Historical and Empirical Dimensions*, FAIR TRADE, *supra* note 13, at 15, 19 (referencing INT’L ORG. FOR STANDARDIZATION, ISO/IEC GUIDE 65: 1996 (1996)).

93. Blair et al., *supra* note 9, at 10.

94. *Id.* at 5 (“Moreover, there appears to be only one significant professional organization that offers any standardization and assurance of the assurance professionals themselves. This is the International Register of Certificated Auditors (IRCA), a UK organization based in London that was founded in 1984 as part of a UK government initiative to establish and certify quality management standards.”).

95. Meidinger, *supra* note 11, at 269; Elizabeth Guttenstein, ISEAL Alliance, Private Standards and their Implications for Market Access, Development, WTO/Trade Rule, Presentation at the UNCTAD-SPS Committee Information Session (June 2007), [available at http://r0.unctad.org/trade_env/test1/meetings/wto1/ISEAL%20Guttenstein%20revised.pdf](http://r0.unctad.org/trade_env/test1/meetings/wto1/ISEAL%20Guttenstein%20revised.pdf).

with determining directly or indirectly that relevant requirements are fulfilled.”⁹⁶ Conformity assessment includes sampling and testing, inspection, supplier’s declaration of conformity, certification, and management system assessment and registration. It also includes accreditation of the competence of those activities by a third party and recognition (usually by a government agency) of an accreditation program’s capability.

In the forestry certification area, public standard-setting agencies have converged with the private third-party certifiers.⁹⁷ However, it is unclear whether this observation can be extrapolated to standard setting in all the areas now covered by third-party certification, particularly in countries like the United States that have a tradition of private sector standard setting, or developing countries lacking full institutional capacity for standard-setting activities. The fair trade social movement has explicitly participatory goals, but other spheres not proclaiming such inclusionary values may have a less transparent approach to developing, publicizing, and enforcing private standards and their accompanying certification processes.

Within a third-party certification framework generally, the potential for abuse of consumer trust exists because supplier firms requiring certification to do business with purchaser firms may pick the third-party certifier—resulting in an obviously less than fully disinterested certifier.⁹⁸ This problem is quite apparent in the financial services industry where credit rating agencies such as Moody’s have contributed to the misleading nature

96. AM. NAT’L STANDARDS INST., NATIONAL CONFORMITY ASSESSMENT PRINCIPLES FOR THE UNITED STATES 5 (2002), available at <http://publicaa.ansi.org/sites/apdl/Documents/News%20and%20Publications/Brochures/NCAP%20second%20edition.pdf>; see also *id.* at 8 n.5 (“Where relevant, any certification mark, number or other identification that will be required on the product’s label or on the product’s manual/accompanying documentation/packaging/carton should be provided to the applicant at the time of application rather than after completion of the assessment. Approval for its use on the product will of course be dependent on the applicant’s successful fulfillment of all conformity assessment requirements. If the certification mark, number or other identification is only provided after completion of the assessment, the applicant cannot begin to prepare for product distribution. This will delay time-to-market for the product. If, on the other hand, the mark, number or other identification is provided up-front, the applicant can proceed with preparation for distribution if the applicant is willing to assume the risks associated with cancellation of packaging in the event that the product fails the assessment.”).

97. Meidinger, *supra* note 11, at 260–61.

98. *Id.* at 267 (noting that certification programs do not seem to have focused very carefully on this risk thus far, but rather have dealt with it by primarily relying on professionalism in accreditation standards and, in some cases, random external auditing); Roht-Arriaza, *supra* note 11, at 534 (pointing to evidence of massive industry violations of a voluntary code of conduct with respect to the use of pesticides); Blair et al., *supra* note 9, at 5 (“[The assurance business] is a business that is rife with the potential for abuse.”); see also Michael Moss & Andrew Martin, *Food Problems Elude Private Inspectors*, N.Y. TIMES, Mar. 6, 2009, at A1 (noting that the Peanut Corporation of America paid for private audits of its facilities).

of financial viability on Wall Street.⁹⁹ There may be other issues related to misreporting of information by producers to the third-party certifier.¹⁰⁰ And the third-party certifiers themselves may be under-resourced, be untrained or unable to check for certain standards, and/or engage in less than due diligence; for example, after the recent salmonella outbreak traced to the Peanut Corporation of America, the director of the national organic program issued a directive emphasizing that inspections should include potential health violations and “while [they] do not expect organic inspectors to be able to detect salmonella or pathogens . . . their potential sources should be obvious from evidence as bird, rodent and other animal feces or other pest inspections.”¹⁰¹ These all raise the question: who is watching the watchdogs?¹⁰² Measures are needed to encourage verification of certification results,¹⁰³ in order to increase the checks and balances within this system.

D. Marks

The growth of standards and certifications raises the question of what “quality assurance” is represented by their accompanying labels and marks, if any. How are these labelling initiatives understood by the various market actors? Drawing upon Graeme Dinwoodie’s and Mark Janis’s insight that the social construction of trademark meaning is an active process between mark holders and consumers,¹⁰⁴ I posit that the current meaning-making environment for trademarks and CMs is highly dynamic. It involves overt interplay among the usual suspects: courts, agencies such as the U.S. Patent and Trademark Office (USPTO), competitors in the realms of products and standards, and mark holders and consumers. But, the discourse also

99. Lewis & Einhorn, *supra* note 23 (describing how short-term interests of credit rating agencies led to dubious ratings, and recommending reforms so that issuers do not pay for ratings).

100. Giovannucci & Ponte, *supra* note 22, at 291–92 (listing issues ranging from inspections that may take place only once to the employment of untrained college students to verify standards).

101. Kim Severson & Andrew Martin, *It’s Organic, but Does That Mean It’s Safer?*, N.Y. TIMES, Mar. 4, 2009, at D1; *see also* Blair et al., *supra* note 9, at 9.

102. *See, e.g.*, Carbon Emissions Offset, http://www.ecobusinesslinks.com/carbon_offset_wind_credits_carbon_reduction.htm (last visited Feb. 21, 2009). My research assistant’s Internet research into the carbon credits listed in this handy table ended up in cold trails with respect to how they are certified to comply with standards. This is not to cast aspersions on the certifications made by the firms; rather, the point is that consumers have no way of verifying the information.

103. Meléndez-Ortiz, *supra* note 10, at 84 (“New Zealand lamb exporters cannot be the authority with the final say on whether their own meat is more energy-efficient than British lamb, even with shipping included.”).

104. Graeme B. Dinwoodie & Mark D. Janis, *Confusion over Use: Contextualism in Trademark Law*, 92 IOWA L. REV. 1597, 1604 (2007) (“Trademark law has become a leading instrument for shaping the forces by which consumer understanding is developed. A proactive view of trademark lawmaking embraces the proposition that trademark law should be used to influence the norms that govern consumers’ shopping habits. In contrast, a reactive view relegates trademark law to the role of discerning and protecting extant consumer understanding.”).

expands beyond this predictable epistemic community to include multiple other stakeholders: SSOs like ISEAL; third-party certifiers (which may or may not be the same as the mark holders); other actors in the value chain; competing standard-setting bodies and their constituents, such as industry associations, consumer organizations, other NGOs, and other intergovernmental agencies;¹⁰⁵ as well as other government agencies. The norm-setting and interpretation arena is vastly enlarged by these multiple stakeholders and, more significantly, the meanings generated in this arena are often hidden to the consuming public. Current trademark law funnels all these perspectives through the proxy of the consumer confused with respect to the claims of competing firms. However, the consumer confusion generated by standards is of a very different sort than that generated by passing off.

1. Quality

The conventional narrative of trademark law is that the firm's trademark functions to indicate the source of manufacturing origin of a product, so as to provide cognitive shortcuts to a consumer who will then repurchase the same product if satisfied with the product's quality.¹⁰⁶ The underlying rationale of trademark protection is based upon a decentralized and privatized consumer protection scheme, where enforcement is provided by competitors, who act as proxies for the consumers. Liability attaches to "passing off"—that is, a competitor's labelling that "is likely to cause confusion, or to cause mistake, or to deceive,"¹⁰⁷ so as to mix up the quality-assurance signal performed by the mark. But as the Office of Technology Assessment (OTA) has noted,

[t]he concept of "quality" of a product has become more complex over the last decade, incorporating aspects of product differentiation, health, safety, social and environmental implications of both products and processes, trends that would otherwise seem to require more managerial involvement and thus movement of production into vertically-integrated firms. Yet ISO and other reliable standards have been developed that permit standardization of these otherwise complex phenomena, including the management systems to address them, permitting clear communication to industrial buyers and consumers through third-party assurance and *certification to credible quality standards*.¹⁰⁸

105. The International Trade Centre (ITC) and the UN Conference on Trade and Development (UNCTAD) have been active in promoting ethical trade via standards. WEDF Notes, *supra* note 19.

106. See generally Deven R. Desai & Sandra L. Rierson, *Confronting the Genericism Conundrum*, 28 CARDOZO L. REV. 1789 (2007).

107. 15 U.S.C. § 1114(1)(a) (2006).

108. Blair et al., *supra* note 9, at 16 (emphasis added) (citing Peter Gibbon & Stefano Ponte, *Quality Standards, Conventions and the Governance of Global Value Chains*, 34 ECON. & SOC'Y 1, 5 (2005)).

The assumptions underlying the “credible quality standards” upon which this system rests are dubious. They do not account for, or even anticipate, the possible miscommunication resulting from a global marketplace characterized by longer value chains, greater outsourcing, growing complexity of products, and increased division of labor.

First, the traditional trademark guarantee of quality is not typically mediated by third parties—rather, the consumer directly experiences the quality of the good or service bearing a mark. By contrast, as described in previous sections, standards and certifications inevitably make what is being signaled by the mark quite intricate and opaque. And, the consumer is located a fair distance in the value chain from an entity (certifier) that creates a potentially false signal. The quality guaranteed by a certifying firm may or may not be reflected in a mark per se; many sustainability standards are used in addition to a mark as part of a marketing strategy.¹⁰⁹ For a product and process method (PPM) standard, the quality of a process is typically not something that the consumer can verify directly. The consumer simply must trust the certifier. A consumer is not going to be able to tell whether a firm claiming that its products are not tested on animals has in fact tested its mascara on bunnies.

Compared to trademarks, the purpose of certification marks is to guarantee characteristics of the goods or services, rather than to brand the goods and services themselves.¹¹⁰ Indeed the conventional wisdom is that CMs are the appropriate vehicle within the Lanham Act to represent standards and certifications. For example, the USPTO has advocated the use of CMs as geographical indications, which are often based upon standards developed by regional producer associations. Upon closer examination, however, CMs have numerous drawbacks, preventing them from being a consistent basis for oversight of this complex area.

109. See, e.g., The Body Shop, Against Animal Testing, http://www.thebodyshop.com/_en/_ww/values-campaigns/against-animal-testing.aspx? (last visited Feb. 13, 2009) (owning a registered mark in its business name and having a well-honed reputation for sustainable business practices); see also Ben & Jerry’s Ice Cream, 2007 Social & Environmental Assessment, Milk & Cream, http://www.benjerry.com/company/sear/2007/sear07_4.1.cfm?mid=menu4 (last visited Mar. 21, 2009).

110. Both collective marks and certification marks were added to the federal trademark statute in 1938 in order to comply with obligations under the Paris Convention for the Protection of Industrial Property Article 7bis, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention], as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979). See *Hearing on S. 2679 Before the J. Comm. on Patents*, 68th Cong. 153–54 (1925) (statement of Bernard A. Kosicki, Bureau of Foreign and Domestic Commerce, Department of Commerce), reprinted in 3 TRADEMARK PROTECTION AND PRACTICE: SECTION BY SECTION LEGISLATIVE HISTORY OF THE LANHAM ACT § 4, at 4–5 (Jerome Gilson ed., 1988) [hereinafter TRADEMARK PROTECTION AND PRACTICE] (“That would also, I believe, meet with our international obligations, in article 7 1/2 [sic] of the Paris convention of 1883, which provides for the registration of association trade-marks. So far we have not given effect to that measure because no machinery was available.”).

It is not clear whether firms have incentives to invest in or market CMs, unless standards are already widespread or a firm wants to encourage the adoption of new standards. On the one hand, CMs can generate revenue for a CM holder (especially where standards are de facto requirements for legitimate business). And they can convey rectitude to the consuming public. On the other hand, the CM holder is obligated to license the mark to all firms that meet the standard and may not market its own products bearing a CM.¹¹¹ Until a standard is dominant in a market or unless the mark holder is committed to something other than profit, there may be little motivation to nurture a CM to maturity. When the mark holder is a nonprofit or NGO, marketing may not be as high a priority as developing standards or working with producers.¹¹²

Even if a firm does invest in and register a CM, the same issue arises as discussed above in the context of a trademark. The relevant consumer confusion may be due more to the opacity of the characteristics guaranteed by the CM than to the inability to distinguish between a real and a fake mark. For these and other reasons, conflicts may exist between objectives of a certification program and that of marketing or licensing a trademark affiliated with the CM.¹¹³

The flip side of opacity is too much information. Consumers may face a confusing proliferation of certifications, labels, and marks.¹¹⁴ While competition among standards can lead to innovation and increased quality of goods, it can also lead to the transactional costs associated with informational clutter in the market. Plainly stated, consumers are faced with an absence of transparency when differences among multiple competing standards are not readily ascertainable. The plethora of certified organic standards¹¹⁵ has led to a recent successful effort on the part of U.N.

111. 15 U.S.C. § 1064.

112. Transfair 2005 marketing figures from 2005 Federal Tax Statements, 41-1848081 (showing \$55,628 in advertising and \$54,498 in promotional and PR expense) for Form 990, Part II, Line 43.

113. The Ethiopian Coffee Network, for example decided to use a trademark licensing strategy rather than a CM approach to promoting Ethiopian coffees in Northern markets. See Ethiopian Coffee Network, About the Trademark and Licensing Initiative, <http://www.ethiopiancoffeenetwork.com/about6.shtml> (last visited Feb. 21, 2009) (“Ethiopia did consider another avenue, Certification Marks. CMs indicate and assure the coffee buyer of the origin of a specific sack of coffee beans. Yet this legal tool, while valuable, would not confer to Ethiopia legally binding rights and powers with respect to a relationship with the companies that trade and retail its coffees. With trademarks secured, the Ethiopian coffee sector can achieve more equitable leverage in this process of dialogue and planning. [Trademarks] give Ethiopian coffee growers and exporters rights and therefore opportunities they did not have before.”); see also Posting of Douglas Holt to Coffee Politics, <http://poorfarmer.blogspot.com/> (Nov. 17, 2006). *But see* Justin Hughes, *Coffee and Chocolate: Helping Developing Country Farmers Through Geographical Indications* (2009) (unpublished manuscript, on file with author) (divining contradictory reasons for Ethiopia’s decision).

114. Giovannucci & Ponte, *supra* note 22, at 289–90.

115. Meidinger, *supra* note 11, at 270 (“[A]s many as [sixty] governments have promulgated their own, often less stringent standards [than the International Federation of Organic Agriculture Movement’s]. Moreover, the United States, Japan, and to a lesser

Conference on Trade and Development (UNCTAD), FAO, and the International Federation of Organic Agriculture Movements (IFOAM) to harmonize organic agriculture.¹¹⁶ Outside of intergovernmental cooperation, standards may coalesce when a single standard-setting firm becomes dominant or if firms are encouraged to cooperate toward umbrella standards in the public interest (with or without the cooperation of a public agency) without fear of being accused of anticompetitive conduct.¹¹⁷

In an ideal system, firms should be rewarded more explicitly for making standards more transparent. A strong incentive should be provided to link standards to CMs, which could be licensed broadly, whether for a royalty or on a royalty-free basis.¹¹⁸ Conversely, firms should be discouraged from developing completely private, proprietary standards that are problematically opaque and potentially unlicensed. These changes would address the twin dangers of lack of accountability and lack of transparency, explored at greater length below in the context of conventional domestic doctrine.

2. Accountability

The present guidelines and practices of the USPTO, as well as judicial interpretations of the Lanham Act, give great leeway to firms to set standards. They demand, however, very little of the registrant in the way of additional information to the market in the form of the content or potential oversight of the standards themselves. Moreover, consumer input is minimal or minimized.

A trademark signifies the commercial source of a good or service. Historically, the function of a trademark has been distinct from the question of standards, except in the context of licensing to related companies. While this is doctrinal dogma, it may be time to reconsider the signaling function of a trademark so that it includes private standards that may be adopted by a firm, regardless of licensing.

extent Europe, appear to have developed their organic agriculture regulations with relatively little reference or deference either to the IFOAM standards or to each other.” (citations omitted)).

116. INT’L TASK FORCE ON HARMONIZATION & EQUIVALENCE IN ORGANIC AGRIC., COMMUNIQUÉ FROM THE 8TH INTERNATIONAL TASKFORCE MEETING (2008).

117. The Standards Development Organization Advancement Act of 2004 provides for a number of incentives and safe harbors for SSOs, including the evaluation of their conduct under an antitrust rule of reason. 15 U.S.C. § 4302 (2006).

118. Giovannucci & Ponte, *supra* note 22, at 289 (“One of the clear signals emerging from market surveys is that retailers in both the US and Europe would like to see simpler messages for consumers. They would also prefer single sustainability labels that cover both social and environmental aspects. [Moreover, s]ustainable coffee initiatives have limited systems of monitoring and evaluation. Often, they cannot consistently and accurately document levels and distribution of benefits that accrue to various actors in the value chain.”); accord KAREN ELLIS & MICHAEL WARNER, OVERSEAS DEV. INST., IS THE TIME RIPE FOR A GOOD FOR DEVELOPMENT PRODUCT LABEL? 1 (2007), available at <http://www.odi.org.uk/resources/odi-publications/opinions/88-karen-ellis-michael-warner-good-for-development.pdf>.

By contrast, certifications are thought to be the domain, not surprisingly, of certification marks. The Lanham Act defines a CM as,

any word, name, symbol, or device, or any combination thereof—

(1) used by a person other than its owner, or

(2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this chapter,

to certify regional or *other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services* or that the work or labor on the goods or services was performed by members of a union or other organization.¹¹⁹

Arguably then, CMs are more directly connected to standards and certification, although those terms are not referenced in the statute per se. With respect to the quality control dimension of trademarks and CMs, a trademark owner can control the quality of a mark under voluntary license agreements. A CM holder must control the quality of the standards not the goods:

A trademark owner controls the nature and quality of the goods or services under a license agreement. Unlike a trademark owner, a certifier is not responsible for the nature and quality of the goods or services to which the certification mark is applied. *A certifier guarantees certain qualities or characteristics of the goods or services but does not guarantee the nature and quality of the goods or services themselves.* The trademark and service mark owners continue to be responsible for their own goods and services.¹²⁰

Moreover, the Trademark Trial and Appeal Board (TTAB) has provided the following insight:

[T]here is a basic difference in the concept of a [trade]mark which is used through related companies and a certification mark. This involves the right of a licensor to choose the licensees that use its [trade]mark as against the obligation of the owner of a certification mark to certify the goods or services of any person who meets and maintains the standards and conditions which such mark certifies.¹²¹

Thus, trademark holders have more autonomy in choosing licensees, whereas CM holders are under an obligation to license to any firm that meets its stated standards.¹²²

119. 15 U.S.C. § 1127 (emphasis added).

120. Terry E. Holtzman, *Tips from the Trademark Examining Operation: Certification Marks: An Overview*, 81 TRADEMARK REP. 180, 183 (1991) (emphasis added).

121. *In re Monsanto Co.*, 201 U.S.P.Q. (BNA) 864, 870 (T.T.A.B. 1978) (emphasis omitted); see also 15 U.S.C. § 1064(5)(D).

122. 15 U.S.C. § 1064(5)(D); see also MCCARTHY, *supra* note 24, § 19:92 (“This obligation distinguishes a certification mark from a trademark and creates a kind of compulsory licensing”); Holtzman, *supra* note 120, at 183.

The USPTO's requirement for a description of standards is flexible.¹²³ While the registration application for CMs requires a "copy of the standards" and the criteria used to determine whether a product or service will in fact be certified,¹²⁴ the actual level of detail required is not specified.¹²⁵ It requires that the standards be attached to the application,¹²⁶ but the language of the issued registration itself is quite general.¹²⁷ Once the registration issues, neither the USPTO nor any other public agency regularly oversees the "origin, material, mode of manufacture, quality, accuracy, or other characteristics"—i.e., the standards supposedly represented by a CM.

The closest thing to oversight of standards guaranteed by CMs is provided by section 14(5)(A) of the Lanham Act. However, even this is somewhat attenuated. A petition to cancel registration may be "filed . . . by *any person* who believes that he is or will be damaged,"¹²⁸ if the CM owner "does not control, or is not able legitimately to exercise control, over the use of such mark."¹²⁹ "[A]ny person" having standing to file such a petition definitely includes the Federal Trade Commission (FTC).¹³⁰ A rule-making attempt by the FTC over standards and certification from the late 1970s to the mid-1980s ended in an impasse, with the FTC deciding to proceed on an ad hoc basis in its oversight activities.¹³¹ It is unclear

123. J. Thomas McCarthy gives an example of CMs functioning as geographical indications (i.e., Parma ham), whereby the specific process and standards for certification remain quite vague by the very terms of the U.S. registration. MCCARTHY, *supra* note 24, § 19:91, n.16.

124. U.S. PATENT & TRADEMARK OFFICE, USPTO TRADEMARK MANUAL OF EXAMINING PROCEDURE ch. 1306.06(g)(ii) (5th ed. 2007), available at, <http://tess2.uspto.gov/tmdb/tmep/> [hereinafter USPTO TME] ("The applicant (certifier) must submit a copy of the standards established to determine whether others may use the certification mark on their goods and/or in connection with their services." (citing 37 C.F.R. § 2.45 (2007))). For an intent-to-use application, under section 1(b) of the Act, see 15 U.S.C. § 1051(b). The standards are submitted with the amendment to allege use or the statement of use. See 37 C.F.R. § 2.45(b). The standards do not have to be original with the applicant. They may be standards established by another party, "such as specifications promulgated by a government agency, or standards developed through research of a private research organization." USPTO TME, *supra*, § 1306.04.

125. Alan Oskowski, Certification Marks: Should the Federal Government Regulate Standards Protecting the Consumer? (2008) (unpublished manuscript, on file with author).

126. See, e.g., State of Idaho Potato Comm'n, U.S. Trademark Serial No. 77335656 (filing date Nov. 21, 2007).

127. See U.S. Green Bldg. Council, U.S. Trademark Serial No. 77199331 (filing date June 6, 2007) ("The certification mark, as intended to be used by authorized persons, is intended to certify that an individual or organization has met the educational, experience, and ethical standards adopted by the U.S. Green Building Council.").

128. 15 U.S.C. § 1064 (emphasis added).

129. *Id.* § 1064(5)(A); see also Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 310 (2006) (discussing common-law rights in regional certification marks).

130. 15 U.S.C. § 1064 ("[T]he Federal Trade Commission may apply to cancel on the grounds specified in paragraphs (3) and (5) of this section . . .").

131. MCCARTHY, *supra* note 24, § 19:91 n.7 ("[I]n an end to the F.T.C.'s eight-year attempt to lay down rules for the setting of private product standards and use of certification marks, the Commission voted in 1985 to terminate its standards and certification rulemaking

whether “any person” also includes a consumer as well as the traditional injured competitor.¹³² In the context of geographical indications (GIs), the USPTO has recently stated ambiguously that “[c]ompetitors and consumers—those with the greatest interest in maintaining accuracy and high standards—ensure that certifiers maintain the requisite quality.”¹³³

In a leading case, the U.S. Court of Appeals for the Federal Circuit affirmed a finding that a CM owner adequately controlled its mark through a decentralized process of setting product standards that required firms using the CM to engage in their own testing to ensure compliance with the standards.¹³⁴ In that case, the CM owner also employed its own inspectors to ensure that the firms were in fact carrying out testing in an adequate manner.¹³⁵ The Court established a “reasonableness” standard for determining whether a mark owner has exercised the requisite control so as to prevent cancellation of a mark.¹³⁶ It stated that “[t]he ‘control’ requirement of [the Lanham Act] means the mark owner must take reasonable steps, under all the circumstances of the case, to prevent the public from being misled.”¹³⁷ The court further defined “control” to be “such control as is practicable under all the circumstances of the case” and that the sufficiency of control is a question of fact.¹³⁸

Another basis for cancellation is if the CM holder “engages in the production or marketing of any goods or services to which the certification mark is applied.”¹³⁹ If dual usage of marks were permitted, certifiers might be allowed to compete directly in the market in which they are establishing standards, compromising the objectivity of the CM holder or even the certifier.¹⁴⁰ Further, the source-identifying function of the mark would be

proceeding. Henceforth, the F.T.C. said that it would proceed in such matters only on a case-by-case basis.”)

132. *Halicki v. United Artists Comm'ns Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987) (finding that only competitors have standing to allege unfair competition under section 43(a) of the Lanham Act).

133. U.S. Patent and Trademark Office, Geographical Indications, Protection, www.uspto.gov/web/offices/dcom/olia/globalip/gi_protection.htm (last visited Feb. 21, 2009) (“With respect to protection of geographical indication certification marks, affected parties can oppose registration or seek to cancel registrations, all within the existing trademark regime in the United States. So, if a party believes that the certifier is not following its own standards or is discriminating by denying use of the mark to a qualified party, that party can file an opposition or cancellation proceeding against the certification mark or an action in federal court.”).

134. *Midwest Plastic Fabricators, Inc. v. Underwriters Labs., Inc.*, 906 F.2d 1568, 1571 (Fed. Cir. 1990).

135. *Id.* at 1569–70.

136. See Holtzman, *supra* note 120, at 186.

137. *Midwest Plastic Fabricators*, 906 F.2d at 1572.

138. *Id.* at 1573.

139. See *In re Monsanto*, 201 U.S.P.Q. (BNA) 864, 870 (T.T.A.B. 1978) (denying registration of a mark as a certification mark even though it performed a certification-mark function because a similar mark was registered as a trademark).

140. MCCARTHY, *supra* note 24, § 19.94.

blurred, and a possible unfair competitive edge would result.¹⁴¹ In *In re Florida Citrus Commission*, the TTAB stated that,

there was a continuing deep concern on the part of the framers of the Statute over the possible use of the certification mark as weapon to create a monopoly in a particular field and to perpetuate a fraud upon the purchasing public To permit the indiscriminate use of a certification mark with different goods or services will only lead to the dilution and impairment of the purpose and function of a certification mark as well as to practices wholly inconsistent with the public desirability of safeguarding the consuming public from confusion and damage not of its own making.¹⁴²

However, the TTAB in *In re Monsanto* also noted that a party is permitted to market goods or services and, at the same time, run a certification program, so long as certain conditions are met.¹⁴³

It is fair to state that accountability over the substantive aspect of standards is not a rigorous design feature of the Lanham Act. Features relevant to standards are largely procedural. Even the control provision of section 14 is largely ornamental; very few if any mark holders have lost their marks through a finding of lack of control.¹⁴⁴ Despite the “any person” language, enforcement of “control” by competitors or by public agencies has not been particularly rigorous or vigorous. The current categories of “abandonment”—lack of use, naked license, estoppel by acquiescence—do not account for standards. Both the abandonment and control doctrines have been undertheorized with respect to the growing embodiment of standards within marks.

It is not obvious whether consumers have standing under section 14 of the Lanham Act. Legislative history in the context of proposals for heightened FTC enforcement suggests that Congress briefly considered but did not resolve this question.¹⁴⁵ The only direct means of consumer oversight is by voting with dollars—presumably by refusing to purchase

141. As stated by the Trademark Trial and Appeal Board in *In re Monsanto*, the owner of a certification mark cannot use said mark in connection with goods and services of its manufacture or design to certify their quality or accuracy—the objectivity of a certifier as reflected by the certification mark would obviously be lacking and therefore the use of the mark would be misleading.

201 U.S.P.Q. (BNA) 864.

142. *In re Fla. Citrus Comm'n*, 160 U.S.P.Q. (BNA) 495, 498–99 (T.T.A.B. 1968).

143. *In re Monsanto*, 201 U.S.P.Q. (BNA) at 869.

144. Telephone Interview with Deven Desai, Assistant Professor, Thomas Jefferson Sch. of Law (Sept. 22, 2008).

145. TRADEMARK PROTECTION AND PRACTICE, *supra* note 110, at 14–81 (statement of Sidney A. Diamond, Assistant Commissioner for Trademarks, Patent and Trademark Office, U.S. Department of Commerce) (“[T]he standing of consumers to petition for cancellation of generic marks is . . . dubious. Obviously, too, litigating a trademark case can be enormously expensive, and each consumer has relatively little financial stake in cancellation. Without public counsel to represent the interest of consumers and potential competitors, their voice in generic trademark litigation would be faint indeed.”).

products marked with false certifications.¹⁴⁶ And yet, whether a CM is infringed is judged by the standard consumer confusion test.¹⁴⁷ In the context of certifications of GIs, the TTAB has explicitly “rejected the argument that a designation cannot be deemed to be a certification mark unless the public is expressly aware of the certification process which controls use of the designation.”¹⁴⁸ This admixture of a “source of origin” infringement test with CMs leaves a hole within the Lanham Act with respect to the accountability of mark holders over the standards represented by their marks.

3. Transparency

Except for geographically descriptive CMs (i.e., GIs), distinctiveness is a requirement for federal registration of both trademarks and CMs.¹⁴⁹ Nonetheless, the purpose of even distinctive CMs is to attribute characteristics to a good or service, rather than to differentiate among competing goods and services. CMs do not, and in fact must not, indicate commercial source or distinguish goods of one producer from those of another.¹⁵⁰

It is theoretically possible that competing standards (through competing marks) can stake out differential semiotic values vis-à-vis each other.¹⁵¹ However, without dominant industry standards, consumers can experience lack of transparency in at least two ways: lack of accessible information about the substance of standards and informational clutter when many competing standards exist. The dilemma of navigating between these two transactional costs can be illustrated through the example of GIs.

In the wake of TRIPS, commentators have focused on GIs as a specific type of CM.¹⁵² Both kinds of CMs—whether GIs as source of “regional . . . origin” or CMs generally as a source of “other origin, material, mode of manufacture, quality, accuracy, or other characteristics,”¹⁵³ are deeply

146. The doctrine of CMs gives consumers another avenue of indirect impact. The question of whether the mark should be registered as a CM depends on whether the consumer views it as a certification as opposed to conveying some noncertified characteristic of the good or service. MCCARTHY, *supra* note 24, § 19:93.

147. *Institut Nat'l Des Appellations d'Origine v. Brown-Forman Corp.*, 47 U.S.P.Q.2d (BNA) 1875, 1885–89 (T.T.A.B. 1998).

148. MCCARTHY, *supra* note 24, § 19:91 (citing *Institut Nat'l*, 47 U.S.P.Q.2d (BNA) at 1885).

149. 15 U.S.C. §§ 1052(e)(2), 1054 (2006).

150. USPTO TME, *supra* note 124, § 1306.01(b).

151. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 643 (2004).

152. See, e.g., Tomer Broude, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 U. PA. J. INT'L ECON. L. 623 (2005); Hughes, *supra* note 129.

153. 15 U.S.C. § 1127 (providing the definition of CM).

implicated in global trade.¹⁵⁴ While this essay is not about GIs per se, the treatment of GIs—particularly the standard-setting process underlying designation of a particular food, wine, or spirit as a GI—is pertinent. One issue is whether the proliferation of GIs actually assists rather than confuses consumers in the marketplace.¹⁵⁵ A challenge of “too much information” faces both sustainability standards and GIs.

Article 22 of the TRIPS Agreement establishes minimum standards for the protection of GIs in member countries.¹⁵⁶ Article 22 defines geographic indications as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, *where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.*”¹⁵⁷ Under Article 22(2) of the TRIPS Agreement, TRIPS members are required to provide the legal means for interested parties to prevent,

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967).¹⁵⁸

With regard to paragraph b above, Article 10*bis* of the Paris Convention for the Protection of Industrial Property (“the Paris Convention”) prohibits the use of any GI that “in the course of trade is liable to mislead the public as to the *nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.*”¹⁵⁹ Since CMs can be used to indicate geographic origin in a manner consistent with the TRIPS definition of geographic indication, the United States complies with both Article 22 of TRIPS and 10*bis* of the Paris Convention.

Justin Hughes closely analyzes the domain of CMs as applied to agricultural products. He recognizes that underlying standards can be transmitted to the consumer alternatively through the vehicles of trademarks, CMs, or GIs. He compares the French approach to wines, which is a highly bureaucratic and centralized GI system referred to as Appellation D’Origine Controllee (AOC), to the decentralized U.S. system

154. As McCarthy puts it, “[w]ith a growing world market in foodstuffs, accurate identification of the geographic origin of food and beverages has become of increasing importance.” MCCARTHY, *supra* note 24, § 14:1.

155. *See, e.g.*, Hughes, *supra* note 129, at 346 (noting that France’s share of the global wine market has decreased in inverse proportion to the increase of wine GIs).

156. *See* TRIPS Agreement, *supra* note 21, art. 22.

157. *Id.* art. 22, para. 1 (emphasis added).

158. *Id.* art. 22, para. 2(a)–(b). The TRIPS Agreement also provides heightened protection for wines and spirits. Specifically, under Article 23, geographic indications may not be used for wines and spirits even if the public would not be deceived. *See id.* art. 23, para. 1.

159. *See* Paris Convention, *supra* note 110, art. 10*bis*, para. (3)3 (emphasis added); *see also* Hughes, *supra* note 129, at 317.

of CMs and trademarks focusing on grape varieties. Arguably, the AOC approach offers the most stability in informational meaning to consumers because any change to the wine standards and labelling have to be approved by a governing body, the Institut National des Appellations d'Origine (INAO), a unit of the French ministry of agriculture. These relatively rigid controls on wine labels imply that consumers have more opportunities to learn how to read these labels and thus would acquire more relevant information about wines and their underlying standards. However, ironically, the opposite has occurred—the French are losing market share of the worldwide market because the labels have become too difficult for even the French to decipher.¹⁶⁰ The AOC labelling apparently adds little useful information to many consumers and in fact may be confusing and even “intimidating.”¹⁶¹

These observations are relevant to the parallel area of sustainability standards. The proliferation of standards and their increasing complexity mean that consumers may require a certain level of market signaling about the standards in order to have confidence and trust in their purchases. Labels and marks can provide some of that information. Informational clutter, however, can be overwhelming and can lead to consumers opting out of a particular system or market. The question is how to optimally convey information regarding standards about which consumers care. Labels and marks stand for “something” but it is not always clear what that “something” is.¹⁶² In the context of sustainability initiatives in coffee, Daniele Giovannucci has noted,

One of the clear signals emerging from market surveys is that retailers in both the United States and Europe would like to see simpler messages for consumers. They would also prefer single sustainability labels that cover both social and environmental aspects.

[Moreover,] [s]ustainable coffee initiatives have limited systems of monitoring and evaluation. Often, they cannot consistently and accurately document levels and distribution of benefits that accrue to various actors in the value chain.¹⁶³

Citing to the eighty-percent consumer recognition of the “JUAN VALDEZ” mark, Hughes points out that certification marks functioning as GIs can be an effective way to convey quality to a large number of consumers.¹⁶⁴

160. Hughes, *supra* note 129, at 337, 346.

161. *Id.* at 337.

162. See Giovannucci & Ponte, *supra* note 22, at 289.

163. *Id.*

164. Hughes, *supra* note 129, at 370 (“The oldest post-World War II development of reputational capital for a developing world GI is surely the forty year campaign by the National Federation of Coffee Growers of Colombia to convince North American coffee drinkers of the superiority of their country’s coffee. Their success is measured not just by 95% of American coffee drinkers being aware that Colombia grows coffee, but also by the fact that the trademark avatar of their efforts, JUAN VALDEZ[,] . . . is a household name for 80% of Americans.”).

Apart from the success of Colombia's marketing campaign, however, the question whether the consumers recognize what kinds of *standards* underlie this mark is a completely different matter. When standards enter the picture, the tension between not providing enough information through a mark and providing too much information requires careful calibration.

II. CONSUMERS AS REGULATORY ENTREPRENEURS

Decentralized rather than top-down approaches toward promoting social welfare are encouraged by the neoliberal trade framework, characterized by the "decline of state intervention and of market regulation and the rise of NGO-led development projects."¹⁶⁵ This pluralistic framework can be normatively attractive in that it has the potential to promote grassroots participation, the inclusion of local knowledge, and flexibility—all elements of institutional design that have been advocated for a healthy development model through intellectual property.¹⁶⁶ As stated earlier, effective functioning of this model depends on the motivation of regulatory entrepreneurs, who may consist of a variety of entities including consumers. However, there are also possible costs and pitfalls to this decentralized model, including where to locate points of accountability, participation, and transparency within this heavily privatized global neoliberal framework. This section first sets forth a case study of coffee standards and certification. It then connects this example to larger global governance issues of due process and development. It concludes with suggested directions in domestic doctrine, to connect the regulatory dots in a more discerning fashion.

A. Coffee

The coffee industry provides a relatively textured case study of how standards, certifications, and marks can operate, because of the recent surge in academic interest in evaluating this subset of fair trade.¹⁶⁷ Coffee is one of the first internationally traded commodities for which sustainability standards emerged through collective, voluntary efforts. It is also a commodity that starkly illustrates the divide between southern producers and northern consumers. Virtually all coffee is produced in developing countries, and most of the importing countries are the wealthier, relatively more industrialized countries.¹⁶⁸ Coffee is the second-most heavily traded

165. FRIDELL, *supra* note 15, at 94.

166. Margaret Chon, *Intellectual Property "from Below": Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007) [hereinafter Chon, *Copyright*]; Margaret Chon, *A Substantive Equality Principle in International Intellectual Property Norm-Setting*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 475, 479 (Daniel J. Gervais ed., 2007).

167. See generally FAIR TRADE, *supra* note 13; FRIDELL, *supra* note 15.

168. Chile and some South Pacific islands are coffee importers; otherwise the vast majority of coffee importers are high-income countries. See Coffee Imported per Country in

commodity globally, after oil.¹⁶⁹ And yet the average \$3.00 latte in the United States provides less than two cents to the coffee farmer.¹⁷⁰ A worldwide glut of coffee, as well as newer processing techniques, have resulted in a decrease in coffee commodity prices since the collapse of the International Coffee Agreement in 1989.¹⁷¹ Since then, the price of coffee has consistently decreased, to a thirty-year low of forty-five cents per pound in October 2001.¹⁷² By contrast, the fair trade price guaranteed by FLO-certified coffee is currently \$1.21 per pound (with a ten-cent premium).¹⁷³

In addition to the labor issues associated with coffee farming, coffee implicates environmental issues:

Coffee is farmed on about 12 million hectares (30 million acres) worldwide, an area larger than Portugal and nearly the size of England. Most of the farms are in areas regarded as high priorities for conservation.

....

For more than 150 years, coffee was widely grown under the leafy canopy of native rainforest trees. [A]gronomists in the 1970s began promoting a new farm system where the sheltering forest is cleared, and coffee bushes are packed in dense hedgerows and doused with agrochemicals. These monoculture farms produce more beans, but at a tremendous environmental cost.¹⁷⁴

Efforts to address these harsh economic and environmental realities have resulted in a plethora of different labelling organizations and initiatives. Many have noted the confusion over these various competing sustainability SSOs.¹⁷⁵ FLO International is considered by most to be the leading international SSO for fair trade coffee; Equal Exchange is a U.S.-based alternative.¹⁷⁶ Rainforest Alliance is another major SSO, focusing on environmental aspects of coffee.¹⁷⁷ These organizations are NGOs or alternative trade organizations (ATOs); other SSOs are industry alternatives

2005, http://en.wikipedia.org/wiki/Image:Coffee_Imported_per_Country_in_2005%28USA%29v2.png (last visited Feb. 18, 2009).

169. Douglas L. Murray & Laura T. Reynolds, *Globalization and Its Antinomies: Negotiating a Fair Trade Movement*, in FAIR TRADE, *supra* note 13, at 9.

170. *Id.* at 86.

171. *Id.* at 139.

172. FAIRTRADE FOUND., THE ARABICA COFFEE MARKET 1989–2007: COMPARISON OF FAIRTRADE AND NEW YORK PRICES (n.d.), http://www.fairtrade.net/fileadmin/user_upload/content/Arabica_Price_Chart_89-07_01.pdf.

173. FAIRTRADE LABELING ORGS. INT'L, FAIRTRADE MINIMUM PRICE AND FAIRTRADE PREMIUM TABLE 5–6 (2009), available at http://www.fairtrade.net/fileadmin/user_upload/content/Feb09_Fairtrade_Minimum_Price_and_Premium_Table_EN.pdf.

174. Rainforest Alliance, Substance Agriculture, <http://www.rainforest-alliance.org/agriculture.cfm?id=coffee> (last visited Feb. 18, 2009).

175. See, e.g., Catholic Relief Services, What's the Deal with the Seals?, <http://www.crsfairtrade.org/coffee/certified.cfm> (last visited Feb. 27, 2009).

176. Equal Exchange, <http://www.equalexchange.com> (last visited Feb. 18, 2009).

177. Rainforest Alliance, <http://www.rainforest-alliance.org/> (last visited Feb. 18, 2009).

to fair trade (e.g., UTZ-certified).¹⁷⁸ More recent initiatives include direct trade coffee, which attempts to minimize costs by eliminating third-party certifiers as well as the middle portion of the distribution chain by buying directly from producers.¹⁷⁹

Some labels and marks signify certification of fair trade goods; others signify relationships or networks among fair trade producers, bearing acronyms such as World Fair Trade Organization (WFTO),¹⁸⁰ Fair Trade Federation (FTF),¹⁸¹ or FINE.¹⁸² Some of these fair trade organizations have registered marks (e.g., Transfair USA); others, such as FTF, do not.¹⁸³ Some independent labels for retail coffee are 100% fair trade certified,¹⁸⁴ others purchase a certain percent of FLO-certified coffee but also have their own proprietary standards implemented through CSR programs.¹⁸⁵ Some coffee suppliers have no certification link to FLO International but purport to be governed by social justice principles similar to those advanced by it.¹⁸⁶ Some certified fair trade coffees are also double-certified organic.¹⁸⁷ As stated previously, the organic area as well has been particularly plagued with competing standards and certifiers.¹⁸⁸

Literally thousands of fair trade organizations (using the term loosely) exist, most of which cooperate to some extent with FLO International and/or other large fair trade networks (e.g., Ten Thousand Villages). Most coffee organizations participating in fair trade are small, often consisting of individual retailers, wholesalers, roasters, importers, or producer associations and cooperatives. In addition to these NGO or industry association efforts, individual for-profit firms are increasingly engaging in

178. Utz-Certified, <http://www.utzcertified.org/> (last visited Feb. 18, 2009).

179. Counter Culture Direct Trade is an outgrowth of Fairtrade and, unlike the direct trade model, does rely on certifiers. It differentiates itself from Fairtrade by offering a much higher premium to farmers.

180. World Fair Trade Organization, <http://www.wfto.com> (last visited Feb. 18, 2009).

181. Fair Trade Federation, <http://www.fairtradefederation.org/> (last visited Feb. 18, 2009).

182. FINE is an informal organization of the four main international trade networks (Fairtrade Labelling Organizations International, International Fair Trade Association, Network of European Worldshops, and European Fair Trade Association).

183. The Fair Trade Federation (FTF) label signifies "membership in the Fair Trade Federation, an organization of wholesalers and retailers committed to uphold the Fair Trade principles . . . in all their trading relationships." Catholic Relief Services, *supra* note 175.

184. *See, e.g.*, Pura Vida Coffee, <http://www.puravidacoffee.com/> (last visited Feb. 18, 2009).

185. *See, e.g.*, STARBUCKS CSR REPORT, *supra* note 78.

186. *See, e.g.*, Madre Monte and Coffee, <http://www.madremonte.com/Default.aspx> (last visited Feb. 18, 2004).

187. Byers et al., *supra* note 14, at 7 (discussing double certification).

188. *Id.* at 3; *see, e.g.*, Final Meeting of the UNCTAD-FAO-IFOAM International Task Force on Harmonization and Equivalence in Organic Agriculture (ITF), Geneva, Switzerland, Oct. 6–7, 2008 (ITF Agreements); U.S. Department of Agriculture, National Organic Program, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=NationalOrganicProgram&leftNav=NationalOrganicProgram&page=NOPNationalOrganicProgramHome&acct=nop> (last visited Feb. 18, 2009) ("The Department of Agriculture accredits the certifying agents (foreign and domestic) who inspect organic production and handling operations to certify that they meet USDA standards.").

CSR-driven initiatives.¹⁸⁹ For example, Starbucks is the single largest purchaser of FLO-certified coffee, although the FLO-certified coffee still constitutes less than two percent of its entire coffee output.¹⁹⁰ The difference between the original activist approach to coffee certification and the newer marketing approaches has led to the suspicion that,

the space so slowly won by fair trade practitioners for transforming the international commodity chain may be captured by agro-food corporations able to transform this progressive initiative into a niche marketing scheme for products re-packaged under “green” [and/or] “ethical” symbols. . . . This leads to the situation where consumers may believe a company to be a fair trade practitioner (labeling used to brand), whereas in reality a small percentage of its product lines are actually bought under the terms of fair trade labeling. The challenge for the fair trade is to maintain stringent fair trade standards whilst competing against the entry of transnational companies using weaker fair trade standards.¹⁹¹

Thus fair trade mark holders must compete against multinational advertising and relatively large marketing budgets of firms that may have their own competing standards.¹⁹² On the other side of the political coin, the decision of FLO International to work toward ISO 65 (an international standard for bodies operating product certification services) has been somewhat controversial within the fair trade social movement because these “principles of nondiscrimination mean that [it] cannot distinguish between one producer and another, or one trader and another. This potentially opens the gate for any conventional company to enter Fair Trade, regardless of their background and motivations.”¹⁹³ The upside of this broad licensing strategy, however, is that the FLO International-controlled marks might exert an influence against information clutter created by competing multiple standards.

Though the various domestic labelling initiatives play a predominant role managing the use of the marks within their respective nations, FLO International is responsible for developing and reviewing the standards to which participating producers and traders are held. It also sees its mission as facilitating and developing fair trade business as well as making the case

189. FARNWORTH & GOODMAN, *supra* note 40, at 10–11 (“In the UK the Ethical Trading Initiative’s Base Code was developed by a consortium of companies, trades unions and NGOs anxious to improve working conditions and human rights in the workplace. Although codes like the ETI Base Code focus chiefly on organized labor—and hence on workplace practices rather than trading standards—some actors, including several supermarkets, are embracing codes of conduct.”).

190. Interview with Dub Hay (Jan. 5, 2006) (estimating around one percent of coffee sold by Starbucks is FLO-certified and sold under the Starbucks Café Estima brand and the premium paid to Transfair as ten cents per pound).

191. FARNWORTH & GOODMAN, *supra* note 40, at 11.

192. TRANSFAIR U.S.A., 2005 ANNUAL REPORT (2005), available at <http://www.transfairusa.org/content/Downloads/AnnualReport2005.pdf>.

193. See Stephanie Barrientos & Sally Smith, *Mainstreaming Fair Trade in Global Product Networks: Own Brand Fruit and Chocolate in UK Supermarkets*, in FAIR TRADE, *supra* note 13, at 103, 118–19.

for trade justice.¹⁹⁴ FLO International publishes its standards on its website, and posts updates to those standards as changes occur.¹⁹⁵ As described previously, the USPTO is minimally involved in regulating the content of these standards.¹⁹⁶

An independent third-party certifier, FLO-Cert GmbH, based in Bonn, Germany, is responsible for holding inspections and enforcing the standards. As stated earlier, the split between the standard-setting function of FLO International and the certifying function allows it to be more compliant with ISO international standards.¹⁹⁷ FLO-Cert performs both physical and “desktop” (i.e., paperwork) inspections of producers and traders on a regular basis. The regularity, duration, and intensity of the inspections depend upon the size, location, and level of risk of the operator being inspected. The level of risk is calculated via an unpublished “risk matrix.”¹⁹⁸ FLO-Cert keeps nearly all producer-specific and trader-specific information confidential. Therefore, there is no public record of when or how any individual inspection was made. Nonetheless, there appears to be some rigor to its certification processes, in that there are reports of decertification.¹⁹⁹

From a producer perspective, the standards both include and ignore farmers’ interests. There is evidence to support the claim that the fair trade premium does have a positive impact on farmer livelihood through the value added to commodities.²⁰⁰ On the other hand, critics commonly charge that standards tend to exclude producer input and/or form barriers to entry for developing countries because of the cost of complying with the certifications, which is primarily borne by the suppliers (farmers, processors, and exporters).²⁰¹ One FLO standard that has come under fire from within the fair trade movement is its insistence on working with farmer associations like cooperatives, rather than with individual farmers.²⁰² As Cathy Farnworth and Michael Goodman put it,

194. FLO International, FLO’s Main Tasks, <http://www.fairtrade.net/tasks.html> (last visited Feb. 20, 2009).

195. FLO International, Standards <http://www.fairtrade.net/standards.html> (last visited Feb. 20, 2009).

196. In the UK, “Fairtrade” is not a certification mark; it is registered as a trademark. WEDF Notes, *supra* note 19 (information from Harriet Lamb).

197. See Laura T. Reynolds & Michael A. Long, *Fair/Alternative Trade: Historical and Empirical Dimensions*, in FAIR TRADE *supra* note 13, at 19.

198. FLO International, The Fairtrade Certification Mark, http://www.fairtrade.net/certification_mark.html (last visited Feb. 20, 2009).

199. MURRAY ET AL., *supra* note 13, at 12 (describing two cooperatives that had been decertified); WEDF Notes, *supra* note 19 (estimating that ten percent of certifications are not recertified).

200. See Byers et al., *supra* note 14, at 3.

201. See *id.* at 2.

202. See, e.g., Counter Culture Coffee, Counter Culture Direct Trade, http://www.counterulturecoffee.com/index.php?option=com_content&task=view&id=594&Itemid=88 (last visited Feb. 20, 2009) (This standard excludes large numbers of farmers, and has led to the formation of “Counter Culture Direct Trade.” This latter organization is a licensee of Transfair USA but also independently certifies farmers that do not meet the coop

Questions like “Who are standards for?” “How, and by whom, are they created?” “How are they maintained?” are important. There is much tension involved in the development of standards, and the indicators used to measure them. The intended beneficiaries—smallholders and workers—sometimes see them as exclusionary, unrealistic and imposed by stronger stakeholders. . . . Producers in developing countries are concerned that the development of new labels may form yet another barrier to entry into the European market, along with technical and health protection barriers.²⁰³

The Ethiopian Coffee Network chose to work as a “first-party certifier” through trademark ownership rather than working through a certification mark or fair trade model.²⁰⁴ Thus it chose to rely on standards not set by third-party SSOs. This is a model of “value-added” that is increasingly being chosen by firms or governments based in the developing world.²⁰⁵

From a consumer perspective, specific certification standards can be found on the websites of the larger SSOs, but they are not available in a form that provides meaningful shorthand to consumers.²⁰⁶ Thus, a consumer will have to engage in a fair amount of research to compare and contrast the various standards. To the extent that marks are supposed to function as cognitive shortcuts for fair trade *processes* (e.g., minimum price supports, democratic decision making, ecological practices, gender equity), do they and can they convey those signals effectively to the consumer?

B. *Due Process and Development*

Adequate global accountability may be lacking among *all* of the institutions engaged in global governance, and accountability itself should be looked at as a comparative phenomenon. Thus, one should expect the attributes of accountability for nonstate actors to be different than for states or others.²⁰⁷ In regard to standards, the OTA has stated that,

Due process . . . is not a constant. Agreement about what is a fair and open standardization process changes over time and in different circumstances. Today, the rapid advance of technology, the shift to a global economy, the rise of user groups, and the desire to substitute voluntary standards for regulation will likely put the issue of due process into much starker relief.²⁰⁸

membership requirement, and sets minimum prices that exceeds the fair trade certified minimum by nineteen percent.)

203. See FARNWORTH & GOODMAN, *supra* note 40, at 10.

204. Ethiopian Coffee Network, About the Trademark and Licensing Initiative, <http://www.ethiopiancoffeenetwork.com/about.shtml> (last visited Mar. 25, 2009).

205. See MURRAY ET AL., *supra* note 13, at 24.

206. My very able and motivated research assistants spent many hours discerning the differences among coffee standards, based on publicly available information on the Internet.

207. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

208. OTA REPORT, *supra* note 18, at 18 (emphasis omitted); see also *id.* (“Due process issues are inherent in standardization. Safeguards must be built into the process, because

As Meidinger notes, these multistakeholder governance systems “are best understood as *compound* accountability systems, resting on . . . open and transparent decisional procedures, and dynamic competition among certification programs for business and public acceptance.”²⁰⁹

Nonetheless, while accountability may be different for nonstate actors than for public agencies, many observers have noted that the nature of standard setting may leave too much discretion in the hands of self-interested firms. While it makes sense for standards to be set in part by the firms involved in the relevant industries, it is not equally sensible that they should be the only actors involved in enforcement through certification. Additionally, meaningful opportunity for consumer and producer involvement in the standards must be provided.

The case study of coffee illustrates some of the pitfalls of these approaches to regulation of knowledge goods. Private standards and CSR alternatives not only raise questions about industry capture, but also of clutter in the signals, which Michael Trebilcock and Robert Howse view as a type of “regulatory inefficiency.”²¹⁰ Private standard setting in the sustainable forestry area have led to regulatory competition between one major NGO and an industry substitute.²¹¹ By contrast, the multiplicity of signals in the agrifood marketplace suggests possible limits to alternative governance. They raise questions not only of “what is sustainable trade” but also what we mean by “civil society.” The general history of private standard setting within the United States shows domination by corporate interests, and even a relatively recent OECD report expressed ongoing unease with the possibility of private capture of *de facto* regulation.²¹²

Furthermore, while competitive standards may be useful (one size of standard may not fit all),²¹³ a plethora of standards may lead to an “anticommons” analogy to patent law in the informational market created by trademark law. Standards also raise issues of informed consent or choice of participation in forms of political economy—whether designated as “alternative trade,” “fair trade,” “corporate social responsibility” programs, or mainstream trade. Developing countries and their

manufacturers and users can use standards to set prices and constrain trade. In a pluralistic society such as the United States, competition and countervailing forces provide such safeguards. It is assumed that no one party can dominate the standards setting process because it is transparent and everyone can participate.”)

209. Meidinger, *supra* note 11, at 284.

210. *Id.* at 278.

211. *Id.* at 261 (alliances centered around the Forest Stewardship Council (FSC) versus the Programme for the Endorsement of Forest Certification); see also Misty L. Archambault, *Making the Brand, Using Brand Management to Encourage Market Acceptance of Forestry Certification*, 81 N.Y.U. L. REV. 1400, 1408 (2006) (explaining differences between FSC and the Sustainable Forestry Initiative (SFI)). FSC is a certification promulgated by the NGO sector as opposed to SFI being pushed by trade associations. See *id.*

212. TREBILCOCK & HOWSE, *supra* note 59, at 228–29 (citing ORG. FOR ECON. CO-OPERATION & DEV., OECD REPORT ON REGULATORY REFORM: SYNTHESIS (1997), available at <http://www.oecd.org/dataoecd/17/25/2391768.pdf>).

213. Charnovitz, *supra* note 26, at 13.

stakeholders have complained about the anticompetitive effects of standards, even sustainability standards, especially in areas where they may have a comparative advantage, such as agriculture or labor costs. This has been evident, for example, in the debate over “eco-labelling.”²¹⁴

The fierce debate over TRIPS and development illustrates that one size may not fit all, especially with beyond the borders standards.²¹⁵ Therefore, regulatory diversity as well as regulatory competition among different standards should be encouraged. Yet decentralized, privatized standard setting through certifying firms—while posing a different model from the “top-down” global framework of TRIPS—may or may not contribute robustly to an intellectual property “from below,” which builds innovation capacity from and for human development, local freedom to design systems of innovation, and access to knowledge.²¹⁶

C. Doctrinal Directions

How can the U.S. trademark and unfair competition law be tweaked to improve the global governance mechanisms created by these certifications of standards? From a consumer perspective, which lies at the heart of trademark law’s consumer confusion test, he or she must be able to trust what a mark symbolizes. If a mark is supposed to represent quality via standards and certification, then the current framework clearly lacks mechanisms for accountability to those standards. What possible changes to the statutory framework might encourage greater accountability and transparency? I suggest very briefly a few creative possibilities.

More information about standards could be demanded as a *quid pro quo* for registration on the federal register for both trademarks and CMs and especially for enforcement of any mark, registered or not. The rise of wholly proprietary standards also suggests a principle of nondiscrimination between trademarks and CMs. That is, to the extent that a firm is promulgating standards that are arguably integral to a product’s mark through its marketing regime, those standards should be disclosed as prerequisite to registration or to enforcement of the mark. Perhaps a separate searchable register for standards associated with registered marks would allow consumers to find information relatively efficiently. Conditioning registration and/or enforcement of rights on disclosure would be one method of leveraging information technology to create more access to standards based on consumers’ right to information about standards.²¹⁷

Moreover, to the extent that standards are not followed consistently, or certifications are proved to be false, the doctrines of “abandonment” under

214. ROTHERHAM, *supra* note 16, at 15, 18.

215. See Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2813, 2833–34 (2006).

216. Chon, *Copyright*, *supra* note 166.

217. Tom Rotherham suggests a right to information. ROTHERHAM, *supra* note 16, at 12–14. Leveraging information technology and disclosure as a *quid pro quo* for protection is an alternative to address the same question.

section 14(3) and “control” under section 14(5) of the Lanham Act²¹⁸ suggest templates for expanding the quality control roles of trademarks, collective marks, and CMs. Where a mark is unregistered or where common-law rights have accrued, courts should be willing to recognize the existence of a mark—as well as be willing to overcome their antipathy toward canceling a mark if necessary.²¹⁹ Furthermore, in order to ensure that a firm’s stated standards indeed are substantively enforced, whether by itself or through a third-party certifier, an expanded doctrine of trademark misuse (where intentional deceit or outright fraud is involved) could be a basis for nonenforcement of a mark.

Finally, a generous view of standing would allow a consumer (through class actions or through a consumer protection association) to bring an action against licensees that do not meet the standards represented by a CM.²²⁰ Concomitantly, the consumer confusion test for infringement can and should be modified to allow challenges to a mark under section 43(a) that would take into account fraud or deceit with respect to certification of standards. Another possible expansion is a *qui tam* provision, similar to the current version in the Patent Act, to address false marking; such a provision could address either the actions of the certification mark holder or its licensee in failing to police standards correctly.²²¹ Perhaps as well, a statutory damages provision (analogous to that provided in the Lanham Act for violations of its domain name provisions) would obviate the need for calculation of damages or lost profits, which would be difficult in a consumer class action.²²²

While these proposals may seem immodest, the proliferation of standards and certifications are black boxes that current trademark law does not address adequately. These more expansive interpretations would be consistent with our obligations under Paris Convention Article 7*bis*(2), which states with respect to collective marks that “[e]ach country . . . may refuse protection if the mark is contrary to the public interest.”²²³ They are also consistent with the broader notion of unfair competition set forth in Paris Convention Article 10*bis*(3) regarding “indications or allegations the use of which in the course of trade is liable to mislead the public as to the

218. 15 U.S.C. § 1064(3), (5) (2006).

219. Jordan S. Weinstein, *Inter Partes Cases II*, 98 TRADEMARK REP. 22 (2008) (discussing general unwillingness to cancel marks in a case about control over the CM “Darjeeling,” *Tea Board of India v. Republic of Tea, Inc.*, 80 U.S.P.Q.2d (BNA) 1881 (T.T.A.B. Aug. 23, 2006)).

220. The rise of NGOs makes this plausible. As stated earlier, the legislative history regarding “any person” suggests that the statute could be read broadly. See generally TRADEMARK PROTECTION AND PRACTICE, *supra* note 110.

221. 35 U.S.C. § 292 (2000); *cf.* Bookshire Bros. Holding, Inc. v. Total Containment, No. 04-1150, 2006 WL 1896065, at *8 (W.D. La. July 7, 2006) (finding no cause of action based on promissory estoppel against the certification mark holder and holding that “[t]he application of a certification mark to a particular product constitutes a declaration of the manufacturer—not a representation of the registrant of the certification mark”).

222. See 15 U.S.C. § 1117(d).

223. Paris Convention, *supra* note 110, art. 7*bis*, para. (2).

nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods.”²²⁴ While U.S. courts have split over how this international unfair competition provision is incorporated within section 44 of the Lanham Act,²²⁵ section 43(a) permits a liberal construction.

Changes are necessary to both the Lanham Act as well as the judicial doctrines of trademarks and CMs to address these global regulatory shifts. More specifically, more accountability and transparency are required for these newer regimes of quality assurance.²²⁶ These proposed changes would promote the consumer protection function of certifications—currently not being enforced steadfastly by any government agency.

CONCLUSION: THINKING AND ACTING GLOBALLY

The ascendancy of standards is part of a discernable pluralistic trend in global intellectual property, which includes several notable features:

- (1) new normative actors (or the de-centering of the state); (2) new normative domains (or the de-centering of intellectual property’s master narrative of innovation and of international law’s focus on public or so-called formal “hard” law); and (3) new normative directions (the de-centering of a one-way, top-down regulatory process).²²⁷

To the extent that normative pluralism has been discussed in the international intellectual property literature, it is usually in the form of states’ “regime shifting” between and among intergovernmental organizations (e.g., between the World Intellectual Property Organization (WIPO) and the WTO).²²⁸ Here, I suggest that the nature of pluralism in standards extends very deeply into the nongovernmental “private” side of norm setting, involving nonstate actors such as NGOs, industry or producer associations, various levels of government (including within developing

224. *Id.* art. 10bis, para. (3)3.

225. *General Motors Corp. v. Lopez de Arriortua*, 948 F. Supp. 684, 689 (E.D. Mich. 1996) (endorsing a broad construction of unfair competition within section 44 pursuant to Paris Convention article 10bis); *cf. Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956) (rejecting a broad construction).

226. Outside of these proposed changes to the Lanham Act, other means such as distribution of knowledge to consumers and to small developing country producers through information technology are important. One of these initiatives is the Committee on Sustainability Assessment (COSA), which is a joint project of the Sustainable Coffee Partnership and the International Trade Centre. *See* The Committee on Sustainability Assessment (COSA), <http://www.iisd.org/standards/cosa.asp> (last visited Feb. 20, 2009).

227. Margaret Chon, *Global Intellectual Property Pluralism and the Domains of Development*, in *WORKING WITHIN THE BOUNDARIES OF INTELLECTUAL PROPERTY* (Rochelle Dreyfuss, Harry First & Diane Zimmerman eds., forthcoming 2009).

228. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT’L L.* 1, 42 n.186 (2004); *cf. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION* 564, 571 (2000) (defining forum-shifting and suggesting that it is a game that only the powerful states can play).

countries), regional coalitions, and other stakeholders.²²⁹ Consumers' interests have been underemphasized in this regulatory scheme.

The U.S. trademark and unfair competition law casts a long but uneven and overly weak shadow over international certification and standard setting. In particular, through overdelegation of quality assurance of private standards to first-, second-, and third-party certifiers, the law has not encouraged consistent quality, accountability, or transparency. Soft law initiatives such as standardization through certification and labelling should address the increasing intertwining of private and public, national and international, as well as commercial and social justice domains of law. Trademark law can and should facilitate meaningful marks of rectitude by harnessing consumer involvement and oversight.

229. Meidinger, *supra* note 11, at 273–76.

Notes & Observations