

## Trademarks to Communicate Ecological Commitments



Consumers today are increasingly conscious of environmental issues. [A recent study](#)

found that 50% of CPG (consumer packaged goods) growth from 2013 to 2018 came from sustainably marketed products. [Younger generations in particular](#) have a clear preference for environmentally friendly products—74% of millennials and 62% of Generation Z are willing to pay more for sustainable goods. It's no surprise, then, that sustainability is front and center in the fashion and apparel industry—and as a major polluter, this is a welcome shift in the United States. However, with limited transparency and little regulation, consumers struggle to differentiate between ethical and "greenwashed" products.

Trademarks play an important role in marketing eco-friendly products and engendering consumer trust. This update highlights that role, potential pitfalls to avoid, and best practices to consider.

### Effective Trademark Use to Convey Environmental Commitments

Trademarks identify the origin of goods, but they also convey brand values—the emotions, missions, and purposes a brand stands for. Thus, trademarks are particularly effective for communicating sustainability.

For example, global sustainability leader Patagonia uses sustainable materials and encourages consumers to reduce consumption by repairing or purchasing secondhand products. Patagonia has adopted trademarks like WORN WEAR, BETTER THAN NEW, and WE'RE IN BUSINESS TO SAVE OUR HOME PLANET to communicate its ecological commitments, and to induce behavioral changes from consumers.

Eileen Fisher—another longtime leader in sustainability—uses a circular or regenerative production system to extend product life cycles. Under trademarks like WASTE NO MORE, EILEEN FISHER RENEW, and CIRCULAR BY DESIGN, Eileen Fisher sells new ("first life") clothes made with sustainable fabrics, gently used ("second life") clothes, and art and pillows made from damaged ("third life") clothes.

Many top brands have taken Eileen Fisher's and Patagonia's lead in leveraging trademarks to communicate social and environmental commitments. Examples include Nordstrom's short-run secondhand store called SEE YOU TOMORROW, Banana Republic's BETTER REPUBLIC sustainability goal program, and Theory's GOOD WOOL garments. Newcomer Everlane has adopted trademarks like RECASHMERE, REWOOL, RECOTTON, and REKNIT to market products made from recycled fabrics, and RADICAL TRANSPARENCY to embody its ethical commitments.

## **Avoid Plainly Descriptive Marks**

When selecting trademarks, companies should avoid choosing common phrases or terms that plainly describe their products' sustainable nature. The U.S. Patent and Trademark Office (USPTO) carefully scrutinizes marks and can refuse registration on a number of grounds, including where a mark "merely describes" an attribute or characteristic of a product or service—for example, where the mark's dictionary definition relates to the product or service, or where the mark is commonly used by others to describe the product or service. In the sustainability space, this means that brands generally can't claim exclusive rights to terms like "zero waste," "green," "sustainable," and "eco."

On the other hand, terms that allude to or hint at sustainability may be protectable under U.S. trademark law. For example, the USPTO recently refused registration of ZERO WASTE TEE and SUSTAINABLE SCHOOLWEAR for clothing, but it allowed registration of Everlane's RECASHMERE, REWOOL, RECOTTON, and REKNIT, Eileen Fisher's CIRCULAR BY DESIGN, and Banana Republic's BETTER REPUBLIC.

The USPTO will also refuse to register common terms or phrases that "fail to function" as trademarks. For example, the USPTO refused registration of LET'S BUILD A SUSTAINABLE FUTURE and NO WASTE for allegedly being too common to act as source identifiers. A "failure to function" refusal is often fatal, though, Eileen Fisher recently overcame a refusal of WASTE NO MORE with evidence that the phrase is *not* commonly used.

The line between protectable and unprotectable terms is not always clear, but outside counsel can help guide businesses toward trademarkable brands.

## **Avoid Greenwashing**

With market pressures has come increased scrutiny for "greenwashing"—or promoting environmental initiatives without implementing practices to reduce environmental impact. Greenwashing takes many forms—one key example is through vague and unsubstantiated marketing. For example, an apparel brand could vaguely market its clothing as "eco-friendly" or "ethical," but omit important facts about its supply chain, fabric sourcing, and/or ecological footprints. The Federal Trade Commission (FTC) also warns against using broad environmental terms for marketing purposes, such as "eco-friendly" or "green," without qualification because they convey multiple advertising claims, and it is unlikely marketers can substantiate all such claims. According to the FTC, even narrower terms and claims must be truthful, not misleading, and supported by a reasonable basis (often competent and reliable scientific evidence).

Trademarks communicate a company's values and signify its reputation. However, to avoid backlash and reputational harm, brands must be transparent and should not overstate their ecological commitments.

Pioneers like Patagonia and Eileen Fisher have successfully leveraged trademarks to further their sustainable images—but their market leadership is largely due to their commitment to transparency. For example, Patagonia's website details how its products are sustainable, along with its animal welfare efforts and ecological footprint. Likewise, Eileen Fisher's website describes its supply chain, fiber sourcing, and fair trade commitments. Fashion and retail brands can enjoy similar success by pairing their branding efforts with achievable goals and transparent messaging.

## **Protecting Brand Assets**

Taking the additional steps to conduct trademark clearance prior to a campaign launch and, if appropriate, filing to register trademarks, will help ensure brand availability and protectability, as well as protection for the businesses' most important assets.

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