

# TRADEMARK LAW AND THE NATIONAL ORGANIC PROGRAM

RITA-MARIE REID<sup>1</sup>

## ABSTRACT

*This research analyzes the comprehensive marketing restrictions in USDA’s National Organic Program (NOP) and how trademark law of the United States might view USDA’s complete ownership of “organic” for food and personal products. First, the paper briefly explains the NOP framework and its restrictions on organic marketing. Then the paper explains free speech issues in trademark law. The author looks at the trademark requirement of distinctiveness and how it might apply to USDA’s organic marketing scheme. The author also examines “organic” against the tests for generic trademarks. The paper concludes with recommendations for organic marketing reform.*

## CONTENTS

Abstract.....	541
Contents .....	541
I. Introduction.....	542
II. USDA Regulation of Organic Production, Certification and Marketing.....	543
III. Free Speech Issues in Trademark Law .....	547
A. Trademark Law’s Apparent Willingness to Give Away Words, Pictures, and Colors.....	547

---

<sup>1</sup> Retired Professor of Business Law, Bloch School of Management, University of Missouri-Kansas City, 2019.

1.	Likelihood of Confusion versus False or Misleading Speech .....	548
2.	Likelihood of Dilution .....	552
B.	Free Speech Concepts Inherent in Trademark Scrutiny .....	553
1.	Distinctiveness .....	553
2.	Loss of Protection for Generic Marks.....	557
3.	Trademark Law’s Defenses .....	559
IV.	Could USDA Use and Register “Organic” as a Trademark? .....	561
A.	Distinctiveness of USDA’s “Organic”? .....	561
B.	Fair Use Defense.....	565
C.	Genericity of Organic .....	566
V.	Conclusions and Recommendations .....	569

## I. INTRODUCTION

Recently, this author analyzed the comprehensive marketing restrictions in USDA’s National Organic Program (NOP),<sup>2</sup> which suggested that USDA’s complete monopolization of the term “organic” for food and personal products violates the free speech rights of producers who practice organic methods but opt not to be USDA certified.<sup>3</sup> Applying the commercial speech standard to the NOP marketing regulations revealed that USDA’s prohibitions on these “alternative organic” producers cannot pass intermediate First Amendment scrutiny.<sup>4</sup>

---

<sup>2</sup> Rita-Marie Cain Reid, *Alternative Organic: Legal Issues in Marketing Uncertified Organic Products*, 73 FOOD AND DRUG L.J. 570 (2018).

<sup>3</sup> *Id.* at 586–87.

<sup>4</sup> *Id.* at 600.

This paper examines trademark law and how it might view USDA's complete ownership of "organic." Because "trademark law does not play by the usual First Amendment rules,"<sup>5</sup> the author analyzes whether USDA's organic labeling restrictions could be constitutionally permissible if "organic" were a USDA trademark rather than a labeling term.<sup>6</sup> First, the paper briefly explains the NOP framework and its restrictions on organic marketing.<sup>7</sup> Then the paper explains free speech issues in trademark law.<sup>8</sup> On one hand, trademark cases usually pay scant attention to their restrictions on speech rights of alleged infringers. On the other hand, some requirements inherent in trademark law play a role in protecting free speech. In particular, the author looks at the trademark requirement of distinctiveness and how it might apply to USDA's organic marketing scheme.<sup>9</sup> The author also examines "organic" against the tests for generic trademarks.<sup>10</sup> The paper concludes with recommendations for organic marketing reform.

## **II. USDA REGULATION OF ORGANIC PRODUCTION, CERTIFICATION AND MARKETING**

In 1990, the United States adopted its National Organic Program (NOP) in the Organic Foods Production

---

<sup>5</sup> Jonathon Weinberg, *On Commercial - and Corporate - Speech*, 99 MARQ. L. REV. 559, 579 (2016).

<sup>6</sup> *See generally*, Dan Glickman, *Release of Final National Organic Standards*, U.S. DEP'T OF AGRIC. (Dec. 20, 2000), <http://www.ecomall.com/greenshopping/usdafinal.htm> [<https://perma.cc/7G48-STN4>] (explaining that the organic label is a marketing tool, not any indicia of quality or safety).

<sup>7</sup> *See infra* Part I.

<sup>8</sup> *See infra* Parts I – II

<sup>9</sup> *See infra* Part II.B.1.

<sup>10</sup> *See infra* Part II.B.2.

Act (the 1990 Act).<sup>11</sup> The 1990 Act establishes a few general standards and a few specific prohibitions for organic production, but the National Organics Standards Board (NOSB) determines most substances that can and cannot be used in organic production.<sup>12</sup> The NOSB recommendations of permissible and prohibited organic substances are known as the National List.<sup>13</sup> The 1990 Act grants the Secretary of Agriculture oversight of the NOP, including the NOSB and the National List.<sup>14</sup>

The 1990 Act also creates the organic certification system.<sup>15</sup> Farms and handlers are certified by certifying agents.<sup>16</sup> Certification mandates address a wide array of issues such as soil fertility and crop nutrient management,<sup>17</sup> pest, weed and disease management,<sup>18</sup> and a three-year land conversion process from conventional agriculture.<sup>19</sup> Certified operations must establish and maintain detailed organic plans of practices and procedures,<sup>20</sup> and maintain records for five years.<sup>21</sup> The NOP requires annual recertification.<sup>22</sup>

The 1990 Act controls on organic marketing occupy the field:

---

<sup>11</sup> The Organic Foods Production Act of 1990, Pub. L. No. 101–624, 104 Stat 3359.

<sup>12</sup> 7 U.S.C. § 6518 (2018).

<sup>13</sup> 7 U.S.C. § 6518(k).

<sup>14</sup> *Id.*

<sup>15</sup> 7 U.S.C § 6503(a) (2018).

<sup>16</sup> 7 U.S.C § 6503(d).

<sup>17</sup> 7 C.F.R. § 205.203 (2018).

<sup>18</sup> 7 C.F.R. § 205.206 (2018).

<sup>19</sup> 7 C.F.R. § 205.202(b) (2018).

<sup>20</sup> 7 C.F.R. § 205.400(b) (2018).

<sup>21</sup> 7 C.F.R. § 205.201(a)(4) (2018); 7 C.F.R. § 205.103(b)(3) (2018).

<sup>22</sup> *Organic Enforcement*, U.S. DEP'T OF AGRIC, <https://www.ams.usda.gov/services/enforcement/organic/> [<https://perma.cc/SD6F-8LUH>] (last visited Feb. 14, 2018).

(A) a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and

(B) no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies, directly or indirectly, that such product is produced and handled using organic methods, except in accordance with this chapter.<sup>23</sup>

“In accordance with this chapter” includes all the production and certification mandates mentioned above. In other words, if farmers even hint that their output is “organic,” every aspect of its production and handling must be certified under USDA’s system.<sup>24</sup> The only exemptions from these marketing constraints are for small farmers selling no more than \$5000 in agricultural products,<sup>25</sup> and for processed foods.<sup>26</sup> Various marks and terms restricted under this marketing system are the USDA Organic seals,<sup>27</sup>

---

<sup>23</sup> 7 U.S.C. §§ 6505(a)(1)(A)-(B) (2018).

<sup>24</sup> 7 C.F.R. § 205.100(a) (2018).

<sup>25</sup> 7 U.S.C. § 6505(d) (2018).

<sup>26</sup> 7 U.S.C. § 6505(c) (2018). A processed food can use the word “organic” on its primary label to describe its ingredients as organically produced only if the process food contains “at least 50 percent organically produced ingredients by weight, excluding water and salt.” *Id.* at § 6505(c)(1). If the processed food product contains less than 50 percent organically produced ingredients (by weight, excluding water and salt), the word “organic” still can appear in the list of ingredients for that processed food, but only to describe those ingredients that are organically produced. *Id.* at § 6505(c)(2).

<sup>27</sup> 7 C.F.R. § 205.311 (2018).

all organic certifiers' seals,<sup>28</sup> “organic,”<sup>29</sup> “100% organic,”<sup>30</sup> “certified organic,”<sup>31</sup> and “made with organic (*specified ingredients or food group(s)*).”<sup>32</sup> For a variety of reasons that will not be repeated here, the author's previous research concluded that “[n]othing in USDA's extensive and intensive organic regulatory scheme satisfies the letter or spirit behind *Central Hudson's* lower scrutiny for commercial speech regulation.”<sup>33</sup> Nevertheless, USDA's description of its organic seal, with its specific Pantone shades of green and brown and the requirement of lines resembling a cultivated field,<sup>34</sup> sounds much like a special form trademark depiction that would be filed with the U.S. Patent & Trademark Office.<sup>35</sup> Thus, it is appropriate to determine whether USDA's organic marketing regulations could survive free speech scrutiny under trademark law.

---

<sup>28</sup> 7 C.F.R. § 205.305(b) (2018). For a table of the various permissible uses of USDA and organic certifier seals see Chenglin Liu, *Is “USDA ORGANIC” A Seal of Deceit?: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond*, 47 STAN. J INT'L L. 333, 341 (2011).

<sup>29</sup> 7 C.F.R. § 205.305(b) (2018).

<sup>30</sup> 7 C.F.R. § 205.301(a) (2017).

<sup>31</sup> 7 C.F.R. §§ 205.303(a)(4)-(5) (2018).

<sup>32</sup> 7 C.F.R. § 205.301(c) (2018) (emphasis added).

<sup>33</sup> See Reid, *supra* note 2, at 600 (citing Cent. Hudson Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980)).

<sup>34</sup> *The Organic Seal*, U.S. DEP'T OF AGRIC., <https://www.ams.usda.gov/rules-regulations/organic/organic-seal> [<https://perma.cc/F4LY-RR9G>] (last visited May 22, 2018).

<sup>35</sup> UNITED STATES PATENT AND TRADEMARK OFFICE [USPTO], PROTECTING YOUR TRADEMARK: ENHANCING YOUR RIGHTS THROUGH FEDERAL REGISTRATION 17–18 (2018), <https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf> [<https://perma.cc/R6DM-L3SQ>] [hereinafter USPTO, PROTECTING YOUR TRADEMARK]. A special form trademark depiction includes a logo, and the particular lettering or color because that is important to the filer. *Id.* at 17. It states the color features in the mark and describes where the colors appear in the mark. *Id.* at 17–18.

### III. FREE SPEECH ISSUES IN TRADEMARK LAW

To determine if trademark law might be more accommodating to USDA's monopolization of "organic" than the First Amendment commercial speech test, trademark law's free speech approaches (or lack thereof) are discussed next.

#### A. *Trademark Law's Apparent Willingness to Give Away Words, Pictures, and Colors*

Every time a competing mark is deemed infringing on an existing trademark, the law is telling the competing user it has no right to certain words, pictures, colors, fonts, or combinations thereof.<sup>36</sup> This seems like a classic government restraint on free speech. Yet trademark cases seldom analyze the conflicts as such.<sup>37</sup> On its face, then, trademark law seems less protective of free speech than the

---

<sup>36</sup> See generally, *About Trademark Infringement*, UNITED STATES PATENT AND TRADEMARK OFFICE [USPTO], <https://www.uspto.gov/page/about-trademark-infringement> [<https://perma.cc/CAT6-RUH2>]. The page notes:

If the trademark owner is able to prove infringement, available remedies may include the following:

- a court order (injunction) that the defendant stop using the accused mark;
- an order requiring the destruction or forfeiture of infringing articles;
- monetary relief, including defendant's profits, any damages sustained by the plaintiff, and the costs of the action; and
- an order that the defendant, in certain cases, pay the plaintiffs' attorneys' fees.

*Id.*

<sup>37</sup> Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. Rev. 381, 385 (2008).

scrutiny imposed on other marketing regulations.<sup>38</sup> That leniency is multi-faceted, as shown next.

### 1. Likelihood of Confusion versus False or Misleading Speech

*Central Hudson* established truthfulness as a basis for any advertising protection under its First Amendment commercial speech analysis.<sup>39</sup> Trademark cases often avoid all free speech debate because infringing marks are presumed misleading, and, thus, unprotected.<sup>40</sup> Nevertheless, most allegedly infringing trademarks are not subject to scrutiny as “false” or “misleading.” Rather, the traditional standard for trademark infringement is “likelihood of confusion,”<sup>41</sup> which is not the same as false or misleading.

The statutory analysis makes clear that an allegedly infringing trademark need not be misleading to be potentially confusing. Lanham Act §43(a) prohibits the unqualified use of a mark in commerce that is likely to cause confusion.<sup>42</sup> In that same section, by contrast, falsity is an express qualifier for civil actions based on “designation of

---

<sup>38</sup> Weinberg, *supra* note 5, at 578–85. Weinberg explains that trademark law is a subset of false advertising regulation, which does not follow traditional First Amendment analysis. *Id.* at 575–82; *see also* Mark Lemley & Mark P. McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 415 (2010); Ramsey, *supra* note 37. Others characterize false advertising law as an “adjunct” to trademark law. Lemley & McKenna, *supra* note 38. *But see*, William McGeeveran, *Four Free Speech Goals for Trademark Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1205, 1206 (2008) (espousing that most free speech concerns in trademark cases are eventually addressed correctly).

<sup>39</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 563–64 (1980).

<sup>40</sup> Ramsey, *supra* note 37, at 383–84, 413–16.

<sup>41</sup> Lanham Act § 43(a) (2012) (codified at 15 U.S.C. § 1125(a)(1)(A) (2012)) [hereinafter Lanham Act § 43(a)].

<sup>42</sup> *Id.*



origin” that is likely to “cause confusion”.<sup>43</sup> Further, “false or misleading” is required for a claim for “description of fact,” or “representation of fact” that is likely to cause confusion.<sup>44</sup> In other words, actionable designations of origin, descriptions of fact, and misrepresentations of fact must be likely to confuse, and must also be false or misleading. By contrast, trademarks are actionable as likely to confuse without any proof that they are misleading. Clearly, trademark cases that presume no First Amendment protection applies because “likelihood of confusion” equals “false and misleading,” and thus they are not applying the express language of the Lanham Act. Because “likelihood of confusion” is not the same as “false or misleading,” trademark law restricts the speech of potential mark users without the basic First Amendment scrutiny that *Central Hudson* establishes.

Further, even if confusing marks equaled false or misleading speech, trademark case history is replete with examples in which users were enjoined from marketing under an allegedly confusing mark, even though the vast majority of consumers had NOT been confused.<sup>45</sup> One study found that “actual confusion” was only part of the second stage in courts’ “likelihood of confusion” analysis<sup>46</sup> (after finding the similarity of marks and proximity of products).<sup>47</sup>

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See Daniel J. Gervais & Julia Latsko, *Who Cares About the 85 Percent? Reconsidering Survey Evidence of Online Confusion in Trademark Cases*, 96 J. PAT. TRADEMARK OFF. SOC’Y 265, 267 (2014); see also Weinberg, *supra* note 5, at 572–73. Weinberg makes the same point about lack of actual confusion in false advertising law.

<sup>46</sup> Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1620 (2006).

<sup>47</sup> *Id.* This analysis posits, however, that intent to confuse, primarily, and actual confusion, secondarily, might actually “stampede” the first stage factors, similarity of the marks and proximity of the products. *Id.* at

Further, “[C]ases . . . found actionable confusion notwithstanding the fact that consumers couldn’t possibly have been confused about the actual source of the defendants’ products.”<sup>48</sup> Thus, the gap between “actual confusion” and actionable “likelihood of confusion” may be substantial.<sup>49</sup> This gap calls into question whether the competing user’s loss of speech rights would meet any of the *Central Hudson* regulatory requirements for permissible restrictions on commercial speech: that the government’s interest in constraining speech is substantial, the regulatory approach directly advances that interest, and it does not excessively impinge on the speaker’s message.<sup>50</sup> Nevertheless, speech is constrained in trademark cases without any analysis to determine if these gaps between the likelihood of confusion, actual confusion, and false or misleading speech merit sidestepping *Central Hudson*’s free speech analysis.

Further, Lanham Act § 43(a) prohibits infringement without proof of actual damage, merely the likelihood of damage.<sup>51</sup> In defamation law, another area immersed in free speech issues, damages usually will be presumed only when

---

1614-15. The second stage factors actually drive the outcome and the first stage analysis falls into line. *Id.* at 1620-21.

<sup>48</sup> Lemley & McKenna, *supra* note 38, at 421.

<sup>49</sup> *Id.* at 422. Lemley and McKenna espouse that these cases reflect a theory of confusion regarding affiliation or sponsorship, “that consumers would think there was some *relationship* between the trademark owner and the defendant based on the defendant’s use of the trademark.” *Id.* (emphasis added). Since some of these alleged affiliations would be irrelevant to consumers and their purchasing choices, the authors propose these kinds of trademark infringement actions include a materiality element, akin to false advertising law, because trademark owners are not usually harmed by this type of competing use in commerce. *Id.* at 450–51.

<sup>50</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

<sup>51</sup> Lanham Act § 43(a).

the speech is false and the falsity is intentional or reckless.<sup>52</sup> Similarly, prior restraints are presumed unconstitutional, in part, because speech could be banned based on “speculative predictions,”<sup>53</sup> rather than harms that are “great and certain.”<sup>54</sup> Seemingly, speculative harm could not survive *Central Hudson’s* requirement that the government must have a substantial interest to protect when imposing commercial speech limitations.<sup>55</sup> Yet, trademark law routinely permits injunctions and damage awards without regard to these free speech precedents. “Trademark holders should not be able to avoid the burden of proving real harm by simply invoking the misleading commercial speech exception.”<sup>56</sup> For these reasons, the trademark standards for enjoining any “word, term, name, symbol, or device, or any combination thereof,”<sup>57</sup> may be “utterly unexceptional in trademark law but ought to raise an eyebrow among First Amendment lawyers.”<sup>58</sup>

Unlike First Amendment law, which assumes readers or viewers are rational, not confused and unsophisticated,<sup>59</sup> trademark law’s “likelihood of confusion” standard is “explicitly paternalistic.”<sup>60</sup> USDA’s organic labeling restrictions reflect a similar paternalism.<sup>61</sup> As will be seen

---

<sup>52</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348–50 (1974). *But see In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (affirming a holding of presumed damages without proof of intent when the falsity was spoken by a private party, not a news outlet, to a small number of other private parties about an allegedly private matter). The plurality analogized their analysis to commercial speech. *Id.* at 472 U.S. at 758 n.5.

<sup>53</sup> *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994).

<sup>54</sup> *Id.* at 1317.

<sup>55</sup> *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

<sup>56</sup> Ramsey, *supra* note 37, at 418.

<sup>57</sup> Lanham Act § 43(a).

<sup>58</sup> Weinberg, *supra* note 5, at 579.

<sup>59</sup> *Id.* at 582.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 583.

next, however, trademark law's newer standard for infringement, a likelihood of dilution,<sup>62</sup> is more about protecting mark owners than consumers.<sup>63</sup> As such, it reflects an even greater detachment from traditional First Amendment commercial speech analysis.

## 2. Likelihood of Dilution

Lanham Act § 43(c) protects famous marks from likely blurring or tarnishment by commercial users.<sup>64</sup> For several reasons, the addition of likelihood of dilution to the traditional trademark protection against likely confusion has been criticized as a new and further encroachment on free speech.<sup>65</sup> First, as applied by courts, the “famousness” condition for dilution is expansive, not limiting.<sup>66</sup> Further, the harm of likely “blurring,” has been particularly difficult for courts to apply.<sup>67</sup> Additionally, the express protection for “noncommercial” users<sup>68</sup> has been “slippery.”<sup>69</sup> Finally, although willfulness is required to recover damages,<sup>70</sup> an

---

<sup>62</sup> Lanham Act § 43(c)(1) (2012) (codified at 15 U.S.C. § 1125(c)(1)) [hereinafter Lanham Act § 43(c)].

<sup>63</sup> See Matthew D. Bunker, *Diluting Free Expression: Statutory First Amendment Proxies in Trademark Dilution Law*, 22 COMM. L. & POL'Y 375, 378–79 (2017); see also Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1034 (2008).

<sup>64</sup> Lanham Act § 43(c).

<sup>65</sup> See Bunker, *supra* note 63, at 379–80; see also Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L. J. 1687, 1710–11 (1999).

<sup>66</sup> Barton Beebe, *The Continuing Debacle of U.S. Antidilution Law: Evidence From the First Year of Trademark Dilution Revision Act Case Law*, 24 SANTA CLARA HIGH TECH. L.J. 449, 466 (2008).

<sup>67</sup> See Kathleen B. McCabe, *Dilution-by-Blurring: A Theory Caught in the Shadow of Trademark Infringement*, 68 FORDHAM L. REV. 1827, 1829–30 (2000).

<sup>68</sup> Lanham Act § 43(c).

<sup>69</sup> William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 105 (2008).

<sup>70</sup> Lanham Act § 43(c).

injunction is available under the “likelihood” standard.<sup>71</sup> In either case, actual damages need not be proved.<sup>72</sup> All of these issues in dilution law pose significant chilling effects on speech.<sup>73</sup>

Nevertheless, free speech concerns in trademark law may be addressed preliminarily in basic trademark demands and defenses built into the trademark statute. These countermeasures to the free speech concerns are discussed next.

### ***B. Free Speech Concepts Inherent in Trademark Scrutiny***

As explained, trademark law is replete with departures from traditional commercial speech analysis and protection. Nevertheless, protections inherent in trademark law may prevent marks from achieving exclusionary status in the first place. These concepts are discussed next as foundational free speech safeguards in trademark law. These concepts then will be instructive in scrutinizing USDA’s ownership of ‘organic.’

#### **1. Distinctiveness**

A trademark owner cannot exclude others from the use of words, terms, colors, art, etc., unless its use of those expressions distinguishes the owner’s goods from others.<sup>74</sup> Further, no one can register a trademark if the mark is merely descriptive of the goods to which the mark will be attached, or merely a surname, or primarily is geographically descriptive, or functional.<sup>75</sup> All these statutory provisions

---

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Jesse A. Hofrichter, *Tool of the Trade: Brand Criticism and Free Speech Problems with the Federal Dilution Act of 2006*, 28 CARDOZO L. REV. 1931, 1952–54 (2007).

<sup>74</sup> 15 U.S.C. § 1052 (2006).

<sup>75</sup> 15 U.S.C. § 1052(e).

are intended to prevent trademark law from taking expressions out of public use and giving ownership to private parties unless the registered expression points exclusively to the owner's product or service to which the mark is attached.<sup>76</sup>

In determining distinctiveness, courts group marks into four categories, based on the relationship between the underlying product and the mark allegedly associated with it: (1) arbitrary or fanciful, (2) suggestive, (3) descriptive, or (4) generic.<sup>77</sup> In each category, the distinctiveness of a mark diminishes. Thus, the legal rights of ownership in a particular trademark, if any, depend upon where the mark falls on this distinctiveness spectrum.<sup>78</sup>

Accordingly, arbitrary or fanciful marks bear no relationship to their underlying product, are the most distinctive, and get the strongest legal protection.<sup>79</sup> Common examples are Xerox for office products, Kodak for cameras, and Apple for computers.<sup>80</sup> Next, a suggestive trademark bears some relationship to its underlying product. It evokes some characteristic or quality of the attached good or service, but through wordplay that requires some mental exercise by the consumer to associate the mark with the

---

<sup>76</sup> Dan Goldman, *When is Unauthorized Use Not Trademark Infringement*, LEGALZOOM (Nov. 2011), <https://www.legalzoom.com/articles/when-is-unauthorized-use-not-trademark-infringement> [<https://perma.cc/78KY-SQNX>].

<sup>77</sup> USPTO, PROTECTING YOUR TRADEMARK, *supra* note 35, at 6–8; *see also*, *Abercrombie & Fitch Co. v. Hunting World*, 537 F.2d 4, 9 (2d Cir. 1976).

<sup>78</sup> *Trademark Distinctiveness: Everything You Need to Know*, UPCOUNSEL (2019), <https://www.upcounsel.com/trademark-distinctiveness> [<https://perma.cc/D2UT-B78F>].

<sup>79</sup> *Abercrombie & Fitch Co.*, 537 F.2d at 10.

<sup>80</sup> Richard Brooks, *Generic Trademarks*, LOTEMPIOLAW.COM (May 26, 2017), <https://www.lotemplolaw.com/2017/05/blog-2/generic-trademarks/> [<https://perma.cc/Y7J4-EF4H>]. Xerox and Kodak are fanciful examples since they are made up words. Apple is an arbitrary example since the word for a fruit has nothing to do with computer. *Id.*

product.<sup>81</sup> Examples include CarMax for used car sales<sup>82</sup> and Quick Green for grass seed.<sup>83</sup> Both arbitrary/fanciful marks and suggestive marks are considered inherently distinctive. Accordingly, upon filing for registration, owners of fanciful or suggestive marks get full protection on the principal federal register, including a presumption of validity,<sup>84</sup> the right to sue in federal court to protect the mark,<sup>85</sup> and a right to file for protection in foreign countries.<sup>86</sup>

Moving down the distinctiveness spectrum (and up in terms of free speech concerns about private ownership) are descriptive marks. A descriptive mark describes a “function, use, characteristic, or intended purpose of the product.”<sup>87</sup> Commonly cited examples include All-Bran cereal and Holiday Inn.<sup>88</sup> Geographic terms also fall into

---

<sup>81</sup> TMEP § 1209.01(a) (5th ed. Sept. 2007) (“Suggestive marks are those that, when applied to the goods or services at issue, require imagination, thought, or perception to reach a conclusion as to the nature of those goods or services.”).

<sup>82</sup> *Circuit City Stores, Inc. v. Carmax, Inc.*, 165 F.3d 1047, 1049 (6th Cir. 1999).

<sup>83</sup> *Seaboard Seed Co. v. Bemis Co., Inc.*, 632 F. Supp. 1133, 1135 (N.D. Ill. 1986).

<sup>84</sup> 15 U.S.C. § 1057(b) (2010).

<sup>85</sup> 15 U.S.C. § 1121(a) (1998).

<sup>86</sup> TMEP § 801.02(a) (Oct. 2018).

<sup>87</sup> TMEP § 1209.01(b); *see also* *Two Pesos v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992).

<sup>88</sup> *See, e.g.*, Edward J. Heath & John M. Tanski, *Drawing the Line Between Descriptive and Suggestive Marks*, 12 COMMERCIAL & BUS. LITIG. 11, 12 (2010) (citing *Custom Vehicles, Inc., v. Forest River, Inc.*, 476 F.3d 481, 483 (2007)), <http://www.rc.com/upload/ARTICLE-Drawing-the-Line-Between-Descriptive-and-Suggestive-Trademarks-Heath-Fall-2010.pdf> [<https://perma.cc/8RJM-X5QK>]; *see also* John DiGiacomo, *Affirmative Defenses in Trademark Litigation*, REVISION LEGAL (Oct. 5, 2016), <https://revisionlegal.com/revision-legal/affirmative-defenses-in-trademark-infringement/> [<https://perma.cc/2BJQ-JXTK>].

this category.<sup>89</sup>

Despite being adjectives that describe the thing to which they are attached, All-Bran and Holiday Inn are strong trademarks. Descriptive marks are registrable when they have acquired “secondary meaning.”<sup>90</sup> A mark has secondary meaning, when the consuming public comes to primarily associate that mark with the trademark owner’s particular item, rather than the product, in general.<sup>91</sup> All-Bran may describe the ingredients in this and other cereals, but the trademark has secondary meaning because of the consuming public associates it with the specific Kellogg’s cereal, not 100% bran cereals in general.<sup>92</sup>

Five years of “substantially exclusive and continuous use” of an otherwise descriptive mark is prima facie evidence of distinctiveness and qualifies the descriptive mark to be filed on the principal register.<sup>93</sup> Otherwise, to determine if a particular trademark has acquired secondary meaning, courts look at factors such as the extent of advertising, sales volume, time in the market, and consumer survey data to find secondary meaning.<sup>94</sup> In trademark

---

<sup>89</sup> 15 U.S.C. § 1052(e).

<sup>90</sup> TMEP § 1212.

<sup>91</sup> See generally *Zatarian’s, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790-91 (5th Cir. 1983).

<sup>92</sup> DiGiacomo, *supra* note 88. See *supra* note 35 and accompanying text. As noted above, even trademarks with descriptive words can be more distinctive if they are filed as a “special form” depiction that includes logo, color, font, or any combination thereof. USPTO, PROTECTING YOUR TRADEMARK, *supra* note 35. A “standard form” depiction, however, is more common because it “protects the wording itself, without limiting the mark to a specific font, style, size, or color and therefore gives you broader protection than a special form drawing.” *Id.* at 16.

<sup>93</sup> 15 U.S.C § 1052(f) (2006).

<sup>94</sup> See, e.g., *Vision Center v. Opticks, Inc.*, 596 F.2d 111, 119 (5th Cir. 1980); *Secondary Meaning Trademark: Everything you Want to Know*, UPCOUNSEL (2019), <https://www.upcounsel.com/secondary-meaning-trademark> [<https://perma.cc/G64U-TAC4>].



litigation over secondary meaning, the burden of proof is on the trademark owner and is a fact decision that will not be reversed on appeal.<sup>95</sup> The analysis for secondary meaning, however, often is done when an owner of a descriptive trademark sues a rival user for infringement.<sup>96</sup> Thus, even though the owner of the descriptive mark must prove secondary meaning, an allegedly infringing defendant could be faced with a mark on the principal register that is presumed valid.<sup>97</sup> Much has been written about the chilling effect of a system in which a defendant must take a matter to trial, with all the expense associated with that process, in the slim hope of keeping a presumptively valid (sometimes “incontestable”) descriptive mark in the public domain.<sup>98</sup> Arguably, trademark’s requirement of distinctiveness to preserve descriptive marks in the public domain is weak free speech protection. As will be discussed below, this presumption for long-running marks may be USDA’s safe harbor for owning “organic.”

## **2. Loss of Protection for Generic Marks**

At the opposite end of the spectrum of trademarks are unprotected, generic marks.<sup>99</sup> According to the U.S. Patent and Trademark Office, “[b]ecause generic words are the common, everyday name for goods and services and everyone has the right to use such terms to refer to their goods and services, they are not protectable.”<sup>100</sup>

---

<sup>95</sup> See, e.g., *American Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 12–13 (5th Cir. 1974).

<sup>96</sup> See, e.g., *Park N’ Fly Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 215–16 (1985).

<sup>97</sup> See Susan Naresh, *Incontestability and Rights in Descriptive Trademarks*, 53 U. CHI. L. REV. 953, 980 (1986).

<sup>98</sup> See, e.g., McGeveran, *supra* note 38, at 1214, 1220–23; Naresh, *supra* note 97, at 979–82; see also Ramsey, *supra* note 37 at 451–53.

<sup>99</sup> See USPTO, PROTECTING YOUR TRADEMARK, *supra* note 35, at 8.

<sup>100</sup> *Id.*

Trademark literature is replete with examples of former trademarks that lost protection to genericide.<sup>101</sup> Recently, the U.S. Patent and Trademark Office declared sriracha, the hot sauce, to be generic.<sup>102</sup> “Google” dodged that bullet in 2017, even though the court acknowledges that its name is the verb used by many to mean “search the Internet.”<sup>103</sup> Nevertheless, it was not clear to the court whether or not users of the verb intended to discriminate searching the Internet on Google’s search engine versus Yahoo, Chrome or other search engines.<sup>104</sup> Thus, “verb use does not automatically constitute generic use.”<sup>105</sup> A speaker could say they intended to “FedEx a package” and still appreciate that FedEx is a separate service from UPS or the US Postal Service.<sup>106</sup>

Thus, a trademark only becomes generic when the “primary significance” of the registered mark is the name of the *type* of goods or services, regardless of source.<sup>107</sup> Under

---

<sup>101</sup> See, e.g., *Fifteen Products that have Become the Victims of Genericization*, CONSUMERIST (July 19, 2014), <https://www.consumerreports.org/consumerist/15-product-trademarks-that-have-become-victims-of-genericization/> [<https://perma.cc/ZG45-3N6D>]. Despite the title, not all fifteen of the former trademarks in the article were adjudicated generic. *Id.* Some were abandoned in the marketplace and allowed to expire, as the source explains for each. *Id.*

<sup>102</sup> Jonathon Schmig, *The Curious Trademark History of Sriracha Sauce*, LAW, INC. (May 12, 2016), <https://www.lawinc.com/sriracha-trademark-history> [<https://perma.cc/V3FW-MWYU>]. The originator of the sauce had never attempted to trademark the name, just his rooster logo and green cap on the bottles in which he sold it. *Id.* USPTO denied attempts to control the mark by subsequent users. *Id.*

<sup>103</sup> *Elliott v. Google, Inc.*, 860 F.3d 1151, 1162 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 362 (2017).

<sup>104</sup> *Id.* at 1157.

<sup>105</sup> *Id.* at 1155.

<sup>106</sup> Jeffrey Kobulnick & Joseph Rothberg, *Court Finds ‘Google’ is Not Generic*, IPWATCHDOG (May 20, 2017), <http://www.ipwatchdog.com/2017/05/20/court-finds-google-not-generic/id=83476/> [<https://perma.cc/QQ3W-J5YW>].

<sup>107</sup> 15 U.S.C. § 1064(3) (2006) (emphasis added).

this primary significance test, a valid trademark would point to ‘who you are’ (the producer), but a generic mark to ‘what you are,’ (the product).<sup>108</sup> A party seeking to cancel a registered trademark bears the burden of proving genericity by a preponderance of the evidence,<sup>109</sup> keeping in mind that a registered mark carries a presumption of validity.<sup>110</sup>

Courts will look to dictionaries to discern whether a trademark tells the public ‘what,’ not ‘who.’<sup>111</sup> Courts also will look to consumer survey data,<sup>112</sup> and use of the trademark in the media.<sup>113</sup> Consumer surveys and media usage are subject to competing examples from the trademark owner, of course.<sup>114</sup> In light of the presumption of validity that the trademark owner enjoys, such competing survey and media examples would mean a challenger could not prove genericity.<sup>115</sup>

### 3. Trademark Law’s Defenses

The Lanham Act provides an express defense against infringement claims when the expression is a good faith, non-competing use. The Lanham Act permits use of a

---

<sup>108</sup> *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 118–19 (1938) (holding “shredded wheat” to be generic); *see also* *Elliott v. Google, Inc.*, 860 F.3d at 1156.

<sup>109</sup> *Anti-Monopoly, Inc. v. Gen. Mills Fun Grp.*, 684 F.2d 1316, 1319 (9th Cir. 1982).

<sup>110</sup> 15 U.S.C. § 1115 (2002).

<sup>111</sup> *See* TMEP § 1209.01(c)(i) (5th ed. Sept. 2007).

<sup>112</sup> J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12.14-17 (5th ed. 2017); *see, e.g.*, *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 593–94 (1993). Any such surveys would be subjected to the *Daubert* standard for expert testimony. *Id.*

<sup>113</sup> MCCARTHY, *supra* note 112, at §12.13.

<sup>114</sup> *See id.*

<sup>115</sup> *See, e.g.*, *In re Merrill Lynch, Pierce, Fenner, & Smith Inc.*, 828 F.2d 1567, 1571 (Fed. Cir. 1987) (finding that NEXIS search results did not prove that “Cash Management Account” was generic for brokerage services because the sources reflected a “mixture of usages,” including some publications that recognized applicant as the source of the services versus some showing generic use).

descriptive trademark, despite its incontestability, when the mark is not used as a trademark, but rather by a user of one's own name, or to describe a type of goods or services, or their geographic origin.<sup>116</sup> These protections offset the concern that an incontestable, descriptive trademark robs the public domain of a vocabulary word, or a geographic location, or a surname. This express defense corresponds to the restriction on registering surnames and descriptive or geographic terms<sup>117</sup> unless the mark has acquired secondary meaning.<sup>118</sup>

Notably, this Lanham Act express defense recognizes that some uses of an otherwise incontestable descriptive mark may be used, but not used as a trademark.<sup>119</sup> Nevertheless, the statute limits the defense to uses as a surname, descriptor, or geographic origin. Other uses “not as a trademark,” but beyond a surname, descriptor or geographic origin are not *expressly* protected, as many commentators lament.<sup>120</sup> The express Lanham Act defense as a free speech protection for alternative organic users will be addressed below.<sup>121</sup>

---

<sup>116</sup> 15 U.S.C. § 1115(b)(4).

<sup>117</sup> 15 U.S.C. § 1052(e).

<sup>118</sup> 15 U.S.C. § 1052(f).

<sup>119</sup> 15 U.S.C. § 1115(b)(4).

<sup>120</sup> See, e.g., Ramsey, *supra* note 37, at Part II.D. Ramsey discusses at length how trademark is content-based regulation, raising greater free speech concerns than content-neutral regulations. *Id.* at 427–38. See also Todd S. Heyman, *Why the Commercial Speech Doctrine Will Prove Toxic to the USDA National Organic Program*, 39 COLUM. J. ENVTL. L. 1, 27–30 (2014). This same argument and free speech analysis have been applied to USDA's monopolization of “organic.” *Id.*

<sup>121</sup> See *infra* Part III.B and C.

#### IV. COULD USDA USE AND REGISTER “ORGANIC” AS A TRADEMARK?

If USDA monopolized “organic” as a trademark instead of a label, could the current state of that use survive trademark law expectations? That question is analyzed next.

##### *A. Distinctiveness of USDA’s “Organic”?*

The 1990 Act and USDA’s organic regulations therefrom clearly intend to distinguish *USDA-certified* organic production from any and all other agriculture that does not employ genetically modified organisms (GMOs) or chemical pesticides and fertilizers, and that does employ various practices that foster soil health. Unfortunately, ample evidence suggests that USDA’s extensive organic regulatory scheme has failed to create that clear distinction between USDA certified organic production and alternative producers who follow those same standards voluntarily.

For example, a major disconnection between the law and consumer understanding surrounds pesticide usage and exposure. Pesticide exposure was a major impetus behind the 1990 Act, which passed in the aftermath of public outcry over the pesticide brand Alar found in apples.<sup>122</sup> Nevertheless, the statute did not declare that organic products would be pesticide-free, or even establish a ceiling for pesticide residue permitted in organic products. Instead, the Act prohibited the use of synthetic pesticides in organic production and USDA imposed modest pesticide-residue testing and reporting on organic certifiers, not on organic producers.<sup>123</sup> Thus, while consumers might believe that the

---

<sup>122</sup> John Bell Clark, *Impact and Analysis of the U.S. Federal Organic Food Production Act of 1990 with Particular Reference to the Great Lakes*, 26 U. TOL. L. REV. 323, 327 (1995).

<sup>123</sup> 7 C.F.R. §§ 205.670(c)–(d) (2013). Annually, five percent of the facilities any certifier inspects must include pesticide residue testing. 7

USDA organic seal on an apple means it is pesticide-free, neither the 1990 Act, nor USDA, ever defined “pesticide-free” as an organic characteristic, nor established a threshold for pesticide residue that an organic apple could not exceed.<sup>124</sup> In fact, the legislative and regulatory history on the pesticide issue acknowledged the likely marketing concerns about the chosen legal approach: “[l]egislators made clear that the OFPA [the 1990 Act] does not affect farmers and food producers who truthfully claim that their products are produced without pesticides, as long as they do not make organic claims.”<sup>125</sup> Thus, the potential for consumer confusion over competing claims between USDA-certified organic and other producers was always recognized.<sup>126</sup> Yet, confusion is the antithesis of trademarks and preventing confusion allegedly justifies certain words, colors, fonts and other components being removed from the public domain.<sup>127</sup>

---

C.F.R. § 205.670(d). The expense of such testing is imposed on the certifiers, not the organic operations. *Id.* Accordingly, if all certifiers adopted the minimum standard, which their economic interest would motivate, 95% of certified organic operations would go untested every year for pesticide exposure. 7 C.F.R. § 205.670(c).

<sup>124</sup> See generally Michelle Friedland, *You Call that Organic? The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 382–83 (2005). Other examples of the disconnect between consumers’ and NOSB’s meaning of “organic” surfaced in the initial organic rulemaking. *Id.* USDA’s first proposed rules would have permitted GMOs, sewage sludge as fertilizer, and irradiation in organic production. *Id.* In the most public comments USDA had ever received, those three agricultural practices were universally opposed and removed from the final rules. *Id.*

<sup>125</sup> Kenneth C. Amaditz, *The Organic Foods Production Act of 1990 and its Impending Regulations: A Big Zero for Organic Food?* 52 FOOD & DRUG L.J. 537, 544 (1997).

<sup>126</sup> *Id.*; see, e.g., Valerie J. Watnick, *The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organic Foods Market*, 32 UCLA J. ENVTL. L. & POL’Y 40, 58 (2014).

<sup>127</sup> See *supra* Part II.A.

That potential for confusion that was inherent in the NOP's original statutory and regulatory scheme has played out in the marketplace throughout the twenty years of legal monopolization of the term 'organic.' In 2017, USDA acknowledged continued confusion in the marketplace over the meaning of 'organic.'<sup>128</sup> Recently, the particular issue of pesticide exposure in organic food had one commentary characterizing organic food safety as a "hoax."<sup>129</sup> Other words like "misleading," "deceit," and "meaningless," pervade mainstream and academic commentary regarding USDA's regulation of organic certification and marketing.<sup>130</sup> These contrary indicia of public understanding regarding USDA's ownership of "organic" defy the trademark law expectation of distinctiveness.

Further, observational research and the few available academic studies reveal a major gap between USDA's regulation of organic marketing and common commercial usage.<sup>131</sup> Farmers' market organizers do not properly limit the use of the word "organic" among non-certified vendors, to reflect USDA's control of the term. Nevertheless, USDA enforcement against these mistakes seems non-existent.<sup>132</sup> Unlike most trademark ownership, USDA does little to

---

<sup>128</sup> Organic Research, Promotion, and Information Order, 82 Fed. Reg. 5746, 5757 (Jan. 18, 2017) (to be codified at 7 C.F.R. pt. 1255).

<sup>129</sup> See Henry I. Miller, *The Colossal Hoax of Organic Agriculture*, FORBES (July 29, 2015), reprinted in BARFBLOG (Jul. 30, 2015), <https://www.barfblog.com/2015/07/the-colossal-hoax-of-organic-agriculture/>. [<https://perma.cc/FHD9-U3SV>].

<sup>130</sup> See John H. Cahrssen & Henry I. Miller, *The USDA's Meaningless Organic Label*, AGRICULTURE 24 (2016); Chenglin Liu, *Is "USDA ORGANIC" A Seal of Deceit?: The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond*, 47 STAN. J. INT'L L. 333, 338 (2011); Friedland, *supra* note 124, at 404–05.

<sup>131</sup> See Reid, *supra* note 2, at 582–83.

<sup>132</sup> *Id.* at 589.

police misuse of its brand, which furthers its lack of distinction with the public.<sup>133</sup>

Additionally, many of these misusers of the organic brand actually may represent the true public perception of ‘organic,’ namely local producers whom consumers meet at neighborhood farmers’ markets.<sup>134</sup> By contrast, many USDA-certified organic brands are consolidated under a few giant industrialized food producers.<sup>135</sup> Those same large food producers populate the NOSB and dictate its decisions about the National List of permitted and prohibited substances. These decisions often trigger considerable public outcry about the state of “organic” in the United States, complaints that largely go unheeded by USDA.<sup>136</sup>

---

<sup>133</sup> *Id.*

<sup>134</sup> See generally Benjamin L. Campbell et al., *U.S. and Canadian Consumer Perception of Local and Organic Terminology*, 17 INT’L FOOD AND AGRIBUSINESS MGMT. REV. 21 (2014); see also Michael D. Veldstra et al., *To Certify or Not to Certify? Separating the Organic Production and Certification Decisions*, 49 FOOD POL’Y 429, 429 (2014). Veldstra et. al. declare that “local is the new organic.” *Id.*

<sup>135</sup> See Reid, *supra* note 2, at 579–81.

<sup>136</sup> See Reid, *supra* note 2, at 581; Watnick, *supra* note 126, at 76. Watnick proposes a new USDA “local” label for production within 150 miles of its point of sale. *Id.* See also Kate L. Harrison, *Comment: Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 232-33 (2008). Another commentator advocates for a USDA “Organics Plus” model in which additional metrics could be layered on the existing organic system, such as “produced on a small family farm,” “pasture raised,” “tested GMO and pesticide residue free.” *Id.* These commentators reflect USDA’s current problem distinguishing “organic” in the minds of the consuming public. These proposals seek to reconcile public perception of organic by further USDA monopolization of more marketing differentiations, such as ‘local’ and ‘small family farm.’ *Id.* Part IV herein addresses similar approaches to the current public misunderstanding of what organic means in the United States and acknowledges that tightening USDA’s organic standards is one way to align consumer understanding for organics.



USDA's meaning of "organic" is based on a complex certification system. That system does not align with public understanding of what it means for a product to be labeled organic, a perception that is often associated with pesticide protection USDA does not enforce, and idyllic local farm images that are far from accurate. All of this marketplace reality suggests "organic" would lack any distinction as a trademark for USDA-certified production. On the contrary, the organic market reality is rife with consumer confusion under USDA's regulatory system, contrary to trademark law expectations.

USDA can rely on only one aspect of trademark jurisprudence to claim "organic" as a distinctive trademark: duration of ownership. As was explained above, trademark law presumes validity when trademark ownership and use is long-running.<sup>137</sup> USDA has legally monopolized all direct and indirect claims of "organic" in agricultural marketing since 1990.<sup>138</sup> The length of legal control could be enough for trademark law to bestow incontestable ownership of "organic" on USDA, despite all other proof that the term lacks trademark distinctiveness, as just described.

### ***B. Fair Use Defense***

If USDA could successfully claim the secondary meaning of the term "organic" by virtue of its years of control, the express Lanham Act defense could shelter alternative producers who claim to be 'organic.' Arguably, non-certified producers use the term in good faith and fairly to *describe* their goods, namely as those produced according to generally-accepted organic principles, such as without GMOs, synthetic pesticides or fertilizers, and following soil conservation practices. In other words, if USDA claimed "organic" had secondary meaning based on its ownership

---

<sup>137</sup> See *supra* note 93 and accompanying text.

<sup>138</sup> Reid, *supra* note 2, at 574–76.

since 2000, alternative organic users could claim the fair use defense: fair, non-trademark use of the same term to describe their products and processes.

This defense suggests “organic” could be deemed a generic term that describes a set of well-understood production practices, as is discussed next.

### C. *Genericity of Organic*

As explained above, courts often look to dictionary definitions to see if a trademark has lapsed into the generic vocabulary word for the type of product to which the trademark is attached, rather than pointing to who owns it.<sup>139</sup> They also look at media usage and consumer usage.<sup>140</sup>

If USDA were the trademark owner of “organic” for food production, it would fail the dictionary test for genericity. No major online English-language dictionary mentions USDA regulatory control or ownership in their definitions of ‘organic,’<sup>141</sup> even in their subheadings related to food (as opposed to medicine or chemistry). Arguably, these English-language dictionaries are not limited to a United States audience, which might justify omitting any reference to a US-only regulatory definition. These sources, however, actually differentiate British and American English, English for new learners, and usage in various fields, none with any mention of USDA.<sup>142</sup> By contrast,

---

<sup>139</sup> See *supra* note 111 and accompanying text.

<sup>140</sup> See *supra* notes 112–114.

<sup>141</sup> See, e.g., *Organic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/organic?src=search-dict-box> [<https://perma.cc/2BS8-LW32>] (last visited July 20, 2018); *Organic*, OXFORD ENGLISH LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/organic> [<https://perma.cc/9BUK-G3JQ>] (last visited July 20, 2018); *Organic*, DICTIONARY.COM, <http://www.dictionary.com/browse/organic?s=t> [<https://perma.cc/C3KU-LQ6P>] (last visited July 20, 2018).

<sup>142</sup> *Id.*

these same online dictionaries show ‘Kleenex’ as a “trademark”<sup>143</sup> (even though Kleenex is often cited as an example of a mark that could be deemed generic).<sup>144</sup>

Media usage is another way that courts determine if a mark is associated with “[w]hat” the mark is attached to, versus “[w]ho?” is the trademark owner.<sup>145</sup> Dictionary.com and Merriam-Webster Online provide media usage in their definitions and none of those media references mention USDA, even when the source is talking about food and the expectations for organic food.<sup>146</sup> USDA likely would lose on that measure of genericity, too, because media users do not associate organic with USDA.

Finally, no published academic research supports a claim that consumers associate “organic” with USDA

---

<sup>143</sup> *Kleenex*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Kleenex> [<https://perma.cc/3UVD-8NQW>] (last visited July 20, 2018); *Kleenex*, OXFORD ENGLISH LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/kleenex> [<https://perma.cc/7279-SEAT>] (last visited July 20, 2018); *Kleenex*, DICTIONARY.COM, <http://www.dictionary.com/browse/kleenex?s=t> [<https://perma.cc/LZD6-PJRM>] (last visited July 20, 2018).

<sup>144</sup> See Chris Weller, *How Kleenex, Jacuzzi and Other Big Brands Became Generic Names*, BUSINESS INSIDER, (Oct. 14, 2016) <http://www.businessinsider.com/kleenex-jacuzzi-generic-names-2016-10> [<https://perma.cc/NS69-EGPL>]; Megan Garber, ‘*Kleenex Is a Registered Trademark*’ (and Other Desperate Appeals), THE ATLANTIC, (Sept. 25, 2014) <https://www.theatlantic.com/business/archive/2014/09/kleenex-is-a-registered-trademark-and-other-appeals-to-journalists/380733/> [<https://perma.cc/M7WZ-FP4F>]. Contrary to the Weller title, Kleenex has never been declared generic legally by the USPTO or any court.

<sup>145</sup> See *supra* notes 108–11 and accompanying text.

<sup>146</sup> *Organic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/organic?src=search-dict-box> [<https://perma.cc/KDM9-KTLW>] (last visited July 20, 2018); *Organic*, DICTIONARY.COM, <http://www.dictionary.com/browse/organic?s=t> [<https://perma.cc/53XV-HLM9>] (last visited July 20, 2018).

certification.<sup>147</sup> On the contrary, “[o]rganic, while relatively clearly defined from a regulatory standpoint, appears largely misunderstood by consumers.”<sup>148</sup>

This author’s own conversations with consumers and academics over two years reflect that “organic” means “No GMOs; No chemical pesticides or fertilizers,” but not USDA’s certification.<sup>149</sup>

All these usual measures of genericity in trademark law suggest USDA’s ownership of “organic” would fail as a trademark and be deemed a generic term for a set of widely-accepted agricultural practices. As discussed above, however, genericity must apply to the mark’s association with a particular type of product or service.<sup>150</sup> Even assuming ‘Google’ is the common verb for Internet searching, that generic usage did not address whether the term had become the common name for search *engines*, which the court concluded it had not.<sup>151</sup> A similar issue would befall any attempt to claim that “organic” under USDA’s labeling scheme is generic. Generic for what? Vegetables? Milk? Meat? Any food? What about organic personal care items and clothing? The lack of distinctiveness, discussed above, inherent in USDA’s monopolization of ‘organic,’ seemingly makes it impossible

---

<sup>147</sup> See, e.g., Veldstra, *supra* note 134; see also Douglas H. Constance, et al., *Conventionalization, Bifurcation, and Quality of Life: Certified and Non-Certified Organic Farmers in Texas*, 23 SOUTHERN RURAL SOCIOLOGY 208, 208-09 (2008). Academic studies actually misuse the term and discuss non-certified producers in the U.S. as “organic.” *Id.*

<sup>148</sup> Billy Roberts, *The Natural/Organic Food Shopper – US*, MINTEL (July, 2017), <https://store.mintel.com/the-naturalorganic-food-shopper-us-july-2017> [<https://perma.cc/6MW5-YSH6>].

<sup>149</sup> Only one person, a former FTC lawyer and marketing law professor, answered “USDA-certified” when the author asked, “What does “organic” mean to you.” The author acknowledges that her conversations with shoppers and colleagues would not satisfy any U.S. evidentiary standard.

<sup>150</sup> See *supra* note 107 and accompanying text.

<sup>151</sup> See *supra* notes 103–108 and accompanying text.

for the term to be deemed generic under trademark analysis. “Organic” is not associated with any particular product or service. USDA’s ownership of “organic” actually refers to a set of production methods and certification criteria, not to any particular product or service.<sup>152</sup> Any attempt to claim genericity based on USDA’s usage seems analogous to the failed claim that ‘Google’ was generic for Internet searching, rather than for search engines.

## V. CONCLUSIONS AND RECOMMENDATIONS

Trying to fit USDA’s ownership of “organic” into the trademark legal scheme is like putting a square peg in a round hole or comparing apples to oranges. As explained above, the term “organic” lacks distinctiveness since it applies to such a variety of food and personal products and to their production methods.<sup>153</sup> Nevertheless, USDA has had regulatory control of the term for food and personal products for almost twenty years.<sup>154</sup> In the trademark realm, that long ownership and usage would create secondary meaning and presumed validity for a brand.<sup>155</sup> Similarly, “organic” has some of the qualities of a trademark gone generic, since it is widely used by the public to describe products that are non-GMO, and chemical free, but without regard to USDA certification.<sup>156</sup> It is also misused to describe locally-sourced products, and more humane treatment of livestock, neither of which is controlled under USDA’s organic brand.<sup>157</sup> However, *Google* emphasized that a trademark can only be deemed generic relative to a specific product, not a

---

<sup>152</sup> See *supra* Part III.A.

<sup>153</sup> See *id.*

<sup>154</sup> Reid, *supra* note 2, at 574–76.

<sup>155</sup> See 15 U.S.C. § 1057(b) (2010); *supra* note 81 and accompanying text.

<sup>156</sup> See *supra* Part III.A.

<sup>157</sup> See *id.*

behavior, like Internet searching.<sup>158</sup> This conclusion undermines a claim that “organic” is generic for certain agricultural production methods.

Like FDA’s recent stalled process to label ‘natural’ food,<sup>159</sup> federal control of “organic” since 1990 intended to address varying standards that had created consumer confusion and splintered markets.<sup>160</sup> Unfortunately, USDA’s efforts in the organic marketplace have been rife with problems from their beginning to today.<sup>161</sup> Further, USDA’s regulatory control of “organic” never has been subject to judicial free speech scrutiny for its monopolization of the term, a process it likely could not withstand in part because of its failure to create the clear standards and consumer protection it intended.<sup>162</sup>

Since USDA’s indefensible, pervasive control of “organic” is expressed in the 1990 Act, a statutory revision is due. Congress should limit the USDA’s brand to “USDA-Certified Organic” only. USDA could keep its entire existing certification system, or revise it, to establish which producers could use the new “USDA-Certified Organic”

---

<sup>158</sup> See *supra* notes 103–107 and accompanying text.

<sup>159</sup> Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments, 80 Fed. Reg. 69905 (Nov. 12, 2015) (to be codified at 7 C.F.R. pt. 1255). FDA’s attempts to regulate ‘natural’ have yet to produce any federal regulations, suggesting the balance between consumer protection and speech rights over food labeling is a tough one for regulators to strike. *Id.*; see “Natural” on Food Labeling, U.S. FOOD & DRUG ADMIN. (Nov. 11, 2017), <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm456090.htm> [<https://perma.cc/F58M-VMN6>]; *Food Standards and Labeling Policy Book*, USDA FOOD SAFETY INSPECTION SERVICE 108 (2005). USDA has a policy regarding “natural” claims on meat and poultry. *Id.*

<sup>160</sup> Reid, *supra* note 2, at 570.

<sup>161</sup> See Reid, *supra* note 2, at 576.

<sup>162</sup> Reid, *supra* note 2, at 586–87; see also Todd S. Heyman, *Why the Commercial Speech Doctrine Will Prove Toxic to the USDA National Organic Program*, 39 COLUM. J. ENVTL. L. 1, 6–7 (2014).

label. This statutory revision would release ‘organic,’ ‘100% organic,’ and all the other organic labeling constraints to the public domain, for a new market to emerge for alternative organic certifying and branding.<sup>163</sup>

An alternative approach would be for USDA to make all its organic marketing constraints more consistent with consumer expectations of the term. New, tougher organic standards could include humane treatment of animals (which USDA recently rejected),<sup>164</sup> “more rigorous pesticide runoff prevention, testing and reporting, and complete elimination of synthetic ingredients,” regardless of whether a natural substitute is available (as the law was originally written in 1990).<sup>165</sup> These changes would make USDA’s control of organic marketing even tighter and are not recommended here. Nevertheless, this approach would better align the marketing restrictions with consumer expectations for “organic” than the current USDA system.<sup>166</sup>

Whether as a label or a trademark, “USDA-Certified Organic” would be a major improvement—for consumer understanding and free speech rights of organic producers—

---

<sup>163</sup> See Reid, *supra* note 2, at 596–98 (providing examples of alternative certifying systems).

<sup>164</sup> Peter Whoriskey, *Should ‘USDA Organic’ Animals be Treated More Humanely? The Trump Administration Just Said No*, THE WASHINGTON POST (Dec. 15, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/12/15/should-usda-organic-animals-be-treated-more-humanely-the-trump-administration-just-said-no/?utm\\_term=.f0ad833ed2b5\\_\[https://perma.cc/QJ65-QDAU\]](https://www.washingtonpost.com/news/wonk/wp/2017/12/15/should-usda-organic-animals-be-treated-more-humanely-the-trump-administration-just-said-no/?utm_term=.f0ad833ed2b5_[https://perma.cc/QJ65-QDAU]) (stating that USDA has been developing organic requirements for animal welfare “for years.”); Lydia Wheeler, *USDA Withdraws Welfare Rules for Animals Certified ‘Organic.’* THE HILL (Dec. 18, 2017, 12:27 PM), [http://thehill.com/regulation/365432-usda-withdraws-welfare-rules-for-animals-certified-organic\\_\[https://perma.cc/BE8R-S234\]](http://thehill.com/regulation/365432-usda-withdraws-welfare-rules-for-animals-certified-organic_[https://perma.cc/BE8R-S234]) (describing the withdrawal of “Obama-era rules,” that would have taken effect in March 2018).

<sup>165</sup> Reid, *supra* note 2 at 599.

<sup>166</sup> See *supra* notes 122–130 and accompanying text.

over USDA’s current regulatory control of any and all use of the term ‘organic.’