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Leveraging certification marks for public health

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PART 3

Reinventing the intellectual property of health

10. Leveraging certification marks for public health

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INTRODUCTION

At least two strands of newer global regulatory governance bodies suggest a critical revisit to the enabling and constraining roles of intellectual property (IP) law as it intersects with global public health policies. The first is the global public–private partnership (PPP), which is already embedded within the future work programmes of multiple intergovernmental organizations and is emerging prominently with the post-2015 United Nations (UN) sustainable development goals. A widely recognized example is the global health PPP, whether for pharmaceutical access or product development.[3] A second and perhaps less well-recognized type is the global value network (GVN) which works primarily through coordinating regulation via markets. Examples of this second type are environmental, health or safety standards implemented by market actors around specific cross-border products or services.[4] Both

[1] The author would like to thank the editors of this volume as well as Professor Irene Calboli for their support of her work. She also gratefully acknowledges the research assistance of Stephanie Gambino (class of 2017) and Nicole Barnhart (class of 2017).

[2] Ms Fujiye contributed substantially to section 2.2.1 of this chapter.

[3] Chon, Margaret, 'PPPs in Global IP' in Graeme Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property* (Edward Elgar Publishing, Cheltenham UK and Northampton MA 2013) 261.

[4] Chon, Margaret, 'Slow Logo: Brand Citizenship in Global Value Networks' (2014) 47 *UC Davis Law Review* 935; Chon, Margaret, 'Marks of Rectitude' (2009) 77 *Fordham Law Review* **2311**, 2329–30; Büthe, Tim, and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton: Princeton University Press 2013); Bartley, Tim, 'Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards' (2011) 12 *Theoretical Inquiries in Law* 25–51.

of these emerging regulatory forms (PPPs and GVNs) complement state-based institutions, laws and policies. However, because they typically operate across state and non-state sectors, as well as across jurisdictions, they present uniquely challenging issues.

This chapter addresses how these new forms of IP institutions may affect public health. It focuses on the capacity of GVNs to provide additional information to consumers in the form of certifications and related marking of goods and services circulating in global markets. Certification marks provide alternative approaches to the mandatory disclosures and labelling discussed elsewhere in this volume. These marks exist in many (although not all) jurisdictions[5] and do not implicate amendments to treaty law. And importantly, because of the lack of overt state action in most GVNs, these alternative approaches to governing health via IP also would not pose any obvious non-tariff barriers to trade that might trigger a World Trade Organization (WTO) complaint, such as those mentioned in other chapters addressing challenges to plain packaging regulations.

This chapter first explains what certification marks are and summarizes their traditional regulatory function within trademark law as well as their possibly expanding roles within the newer frameworks such as GVNs. The second half explores how certification marks might impact health-related behaviour via consumer choice rather than by government mandate. The examples explored throughout focus on food, rather than other health-related domains such as alcohol, pharmaceuticals or tobacco. The chapter's scope also excludes consideration of environmental or safety standards, although these more common types of certification undoubtedly affect public health as well.

It is fair to state that the use of certification marks on food to enhance human health is nascent. Ultimately, marking devices such as certification marks could provide greater information to consumers related to their choices around health behaviour, but their full public health impact will be affected by the same behavioural factors that throw into question the effectiveness of other forms of disclosure, such as mandatory disclosure of nutrition labelling. These factors include consumer understanding of the information as well as consumer purchasing behaviour in response to this information. Another significant factor affecting their

[5] Heavner, B Brett and Michael R Justus, 'Worldwide Certification-Mark Registration: A Certifiable Nightmare' *Bloomberg Law Reports*, 14 December 2009 (identifying at least seven jurisdictions that do not have certification mark laws, including Chile, Czech Republic, the EU, Japan, Mexico, Russia and South Korea).

ultimate impact is the capacity for institutions to create and educate consumers about these marks as well as to maintain their integrity in the context of powerful countervailing market forces. Because of the greater reliance by GVNs upon the market forces to promote better health, the state has a crucial role in guarding and shaping core public interest goals, not only to enable newer institutions such as GVNs to come up with creative solutions to challenging public health problems, but also to constrain regulatory capture by private, market-based stakeholders.

1 CERTIFICATION MARKS AND THEIR MULTIPLE FUNCTIONS

1.1 Trademark Law and Certification Marks

Currently, trademark law and policy are dominated by a search cost rationale, which posits that the primary function of trademarks is to provide an efficient signal for rational consumers to associate a product or service with a particular origin or source of manufacture. Sometimes referred to as trademark's signalling function, this approach assumes that marks serve primarily to decrease consumers' search costs by providing them with a shorthand reference or symbol upon which they can rely repeatedly.[6] This prevailing signalling function model falls short of fully addressing the so-called 'trust function' of marks – that is, informing the consumer of the underlying and sometimes hidden attributes of goods and services.[7]

Because of this disjuncture between the trademark search function (which simply indicates origin of manufacture or business ownership) and its trust function (to indicate other, sometimes hidden qualities that consumers rely on to make their purchasing decisions), trademark law has a trust gap. Trademark law allows room for exaggerated marketing claims or even misrepresentation about the qualities of a good or service.[8] The ongoing litigation in the US over labels and trademarks that

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[6] Dogan, Stacey L and Mark A Lemley, 'Trademarks and Consumer Search Costs on the Internet' 41 *Houston Law Review* **777**, 778 (2004); Landes, William M and Richard A Posner, 'Trademark Law: An Economic Perspective' (1987) 30 *Journal of Law and Economics* **265**, 275.

[7] Katz, Ariel, 'Beyond Search Costs: The Linguistic and Trust Functions of Trademarks' (2010) *Brigham Young University Law Review* **1555**, 1563.

[8] Dillbary, J Shahar, 'Trademarks as a Media for False Advertising' (2009) 31 *Cardozo Law Review* 327.

include the term 'natural' is an example of this trust gap.[9] A recent check of the United States Patent and Trademark Office (USPTO) database discloses close to 15,000 registered marks using the term 'natural' as part of the mark. Food products bearing the 'natural' label may contain ingredients that are decidedly not so healthy and possibly not even natural, such as '[h]igh-fructose corn syrup, partially hydrogenated oils, genetically modified organisms (GMOs)[] and more …'.[10]

Certification marks could bridge this trust gap to some extent. What are certification marks? As I have written elsewhere:

> '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 or consumer through a marketing campaign such as a firm's corporate social responsibility (CSR) literature, or implicitly through a trademark's assurance of quality, or more explicitly through adherence to the standards required by a [certification mark]. Certification marks can inform … 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 a multitude of other process measures.'[11]

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[9] Preston Smith, Joel, 'More Lawsuits Over "Natural": "Natural" Claims are Disappearing from Food Labels' (2014) (March) *Sound Consumer*, accessed 8 April 2016 at www.pccnaturalmarkets.com/sc/1403/more-lawsuits-over-natural.html; Hetu, Jennifer M and Anessa Owen Kramer, 'It's Not Easy Being Green: Use of the Terms "Organic," "Sustainable," and "Natural" in Trademarks and Advertising' (2011) 4 (1) *Landslide* **46**, 47 (stating that the USPTO 'has started to address the use of the terms "organic," "natural," and "sustainable" within trademark applications and has also subjected these terms to a higher standard of review, most notably when these terms are used in relation to "food products, cosmetics, cleaning preparations, and pharmaceuticals." For example, the USPTO has addressed false and deceptive matter in trademark applications through Section 2(a) of the Trademark Act.').

[10] Smith (n 9 above). See for example *Class Action Compl, Howerton v Cargill, Inc* No 13-CV-00336 (D Haw, 8 July 2013); *Class Action Compl and Jury Demand, Martin v Cargill, Inc* No 13-CV-02563 (D Minn, 18 September 2013).

[11] Chon, Margaret, 'Marks and More(s): Certification in Global Value Chains' in Irene Calboli and Edward Lee (eds), *Trademark Protection and Territoriality Challenges in a Global Economy* (Edward Elgar Publishing, Cheltenham UK and Northampton MA 2014) **79**, 83. The Lanham Act defines a certification mark 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

Figure 1 sets forth examples of geographic certification marks that are registered with the USPTO.[12]

Figure 1 Geographic certification marks registered with the USPTO

An application to the USPTO for a certification mark such as the one for Florida Orange Juice above must be accompanied by a certification statement, for instance: 'The mark certifies that the goods bearing the mark either consist of citrus fruit grown in the state of Florida, under specified standards, or are processed or manufactured from or with such fruit.'[13] In the USA, certification marks have been used as geographical indications,[14] as shown by Figure 1, but they are not limited to geographic marks. Certification marks can indicate conformance to safety standards, environmental standards and standards related to certain types

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a bona fide intention to permit a person other than the owner to use in commerce … to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services …' 15 USC §1127.

[12] USPTO, Examination Guide 2–14: Geographic Certification Marks (July 2014).

[13] Ibid.

[14] TRIPS Article 22, 15 April 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 UNTS 401 (mandating legal means for WTO Member States to mark 'quality, reputation or other characteristic of a good … essentially attributable to its geographic origin' via geographical indications).

of food preparation, such as halal or kosher. The LEED mark, for example, is registered by the US Green Building Council and its certification statement provides: '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 US Green Building Council.'[15] These standards themselves are not apparent from the certification mark itself, but are a required part of the application for registration in the USPTO.[16] Certification marks may be recognized not only by statute, but also at common law in jurisdictions like the USA.[17]

While the examples discussed in this chapter are US-based, certification marks can serve to coordinate standards across different regulatory regimes within GVNs. In previous work, I have explored the role of certification marks in the context of fair trade coffee and apparel.[18] These marks convey information about certain qualities of a product that are not immediately apparent to a consumer (so-called credence attributes)[19] and are potentially useful legal tools to supplement the largely marketing-driven information conveyed by trademarks. They have the potential of being able to convey human health-relevant standards, which may be objectively verifiable compared to standard marketing claims associated with trademarks, which are typically not verifiable.[20] They may also supplement state-based food safety standards, by providing higher than minimum standards of health and safety which may appeal to certain market segments. In addition, certification marks are more symbolically

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[15] US Green Building Council LEED Certified USGBC, Registration No 77, 199, 331.

[16] USPTO (n 12 above) 3: 'A copy of the relevant certification standards must be submitted when the mark owner claims use of the mark. The certification standards need not have been created by the mark owner, and may instead be standards established by another party, such as those promulgated by a government agency or developed by a private research organization.'

[17] Hughes, Justin, 'Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications' 58 (2006) *Hastings Law Journal* **299**, 310 (discussing common-law rights in regional certification marks).

[18] Chon, 'Marks of Rectitude' (n 4 above) 131–6; Chon, 'Slow Logo' (n 4 above) 958–66.

[19] Chon, 'Slow Logo' (n 4 above) 946.

[20] Lane, Eric L, 'Greenwashing 2.0' (2013) 38 *Columbia Journal of Environmental Law* 279.

efficient than labels generally, as a consumer can easily learn to recognize a mark that signifies a particular health issue of concern rather than spend time locating and reading small print on the back of a jar or package.

Certification marks are beginning to emerge in health-related food products. Products in the grocery store bearing a certification mark can help consumers to locate food more easily that has other health-promoting qualities of interest. Thus consumer health could benefit from a greater creation and circulation of these types of mark. Figure 2 shows some examples of health-related certifications applied to food.

Sources: National Foundation for Celiac Awareness www.celiaccentral.org/gluten-free-certification and American Heart Association www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/Heart-CheckMarkCertification/How-the-Heart-Check-Food-Certification-Program-Works_UCM_300133_Article.jsp, both accessed 8 April 2016

Figure 2 Examples of health-related certifications applied to food

Despite these potential health benefits, however, it is important to understand the limitations of certification marks. One key weakness of certification marks is that the certification process, which purports to measure adherence to objective standards, may not be robust. Third-party certifying bodies are often compensated by the very organizations whose products they are certifying. Currently, there is inconsistent oversight of the enforcement of certification standards and almost no information provided readily to consumers directly about the standards themselves. As stated above, standards are a mandatory part of the application to the national office (for example USPTO) but only infrequently challenged and even more infrequently used as a basis for cancelling the mark in those jurisdictions that recognize them.[21]

[21] Chon, 'Marks of Rectitude' (n 4 above). For a recent example of an unsuccessful challenge to a certification mark, see *Swiss Watch International, Inc*

Another problem with certification marks is that consumers often have difficulty interpreting them,[22] a concern to which this chapter will return in the last section. This stems from at least two different issues. First, certification marks represent underlying standards (such as 'organic') which are not discernible from the face of the mark. In addition, they may also proliferate so that multiple and competing marks may exist, resulting in consumer confusion about their differences. For instance, conflicting certifying schemes exist for organic agriculture, which has resulted in efforts by the UN Conference on Trade and Development (UNCTAD), the Food and Agriculture Organization (FAO) and the non-governmental organization (NGO) International Federation of Organic Agriculture Movements (IFOAM) to harmonize organic agriculture in Europe.[23]

And, not least, certification marks carry substantial administrative costs. They require a separate certifying body, which can be a government, industry association or NGO (whether for profit or not-for-profit). In some sectors, this certifying may be feasible because the infrastructure and resources may be relatively easy to amass. An example is the Washington Apple Commission, a state government agency that oversees certification of apples in Washington State. In others, this requirement poses a substantial barrier to entry. This point is driven home by the

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*v Federation of the Swiss Watch Indus*try 101 USPQ2d 1731 (TTAB 2012) (refusing to cancel the certification 'SWISS MADE').

[22] Professor Dev Gangjee has noted this problem as well with geographical indications in the form of the European Protected Designation of Origin. See Gangjee, Dev S, 'Proving Provenance and Authenticating Authenticity? Geographical Indications Certification and its Ambiguities' (forthcoming 2015) 7 *World Development*.

[23] Chon, 'Marks of Rectitude' (n 4 above) 122–3. Nonetheless, Professor Jim Chen asserts that organic standards generally have converged towards global harmonization: '[T]he United States and the European Union have adopted definitions of organic agriculture and labeling that converge toward a global standard. The American and European definitions are readily reconciled with the aspirational global definition of organic agriculture in the United Nations Food and Agriculture Organization's Codex Alimentarius.' Furthermore, he reminds us that '[f]oods should only refer to organic production methods if they come from an organic farm system employing management practices which seek to nurture ecosystems which achieve sustainable productivity, and provide weed, pest and disease control through a diverse mix of mutually dependent life forms, recycling plant and animal residues, crop selection and rotation, water management, tillage and cultivation.' See Chen, Jim, 'Food and Superfood: Organic Labeling and the Triumph of Gay Science Over Dismal and Natural Science in Agricultural Policy' (2012) 48 *Idaho Law Review* **213**, 219.

recent example of the Ethiopian Government's decision to license coffee from the Sidamo region of Ethiopia as a trademark, rather than as a certification mark. This decision was purportedly due to the significant administrative cost of certifying coffee, prohibitively high even for a national government body.[24] Moreover, from the perspective of the producer, who is often asked to bear some or all of the additional costs of certification, the additional expense may make it impossible for agricultural smallholders to participate in certification schemes. Where costs are not prohibitive barriers to entry, they can nonetheless lead to a net non-increase (or even decrease) in revenue for smallholders.[25]

Finally, certification marks require marketing in addition to a trademark, so that consumers can recognize them and make purchasing decisions based upon them. Beyond these general issues, some countries do not have certification laws and this lack of uniformity poses another obstacle to cross-border enforcement of standards through certifications.[26]

Despite the drawbacks associated with certification marks, they are the sole form of trademark law that addresses credence attributes, that is, qualities of a good that are not immediately discernible to a consumer. Thus, they could be deployed more intentionally to promote information about products that can lead to better health.

1.2 Certification Marks in Global Value Networks

Certification marks interface with GVNs by providing norms or standards for market-based activity. Ideally, such marks achieve enough consumer recognition that they become an important part of the market 'conversation' and lead the market into more ethical or health-promoting directions through consumer choice. Part of the impetus for the growth of standards is the expansion of international markets, which rely on longer 'supply chains' (termed GVNs in this chapter) and outsourcing, along with a

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[24] Rotstein, Fiona and Andrew Christie, 'Blood, Toil, Tears and Sweat: The Battle of Sidamo' (2010) 32 *European Intellectual Property Review* 421; and Light Years Intellectual Property, *Distinctive Values in African Exports: How Intellectual Property can Raise Export Income and Alleviate Poverty* (2008) accessed 8 April 2016 at www.slideshare.net/webgoddesscathy/distinctive-values-in-african-exports-how-intellectual-property-can-raise-export-income-and-alleviate-poverty-presentation.

[25] Cramer, Christopher, Deborah Johnston, Carlos Oya and John Sender, *Fairtrade, Employment and Poverty Reduction in Ethiopia and Uganda: A Final Report* (DFID, London April 2014).

[26] Heavner and Justus (n 5 above).

greater complexity of products and division of labour. One observer claims that the typical commodity transaction involves no fewer than 18 links.[27] When various components of a product are sourced from different jurisdictions, it is important to make sure that cross-border standards regarding health, safety and other criteria for optimum consumption are met. Additional drivers are the international institutions that facilitate trade and development, such as the International Trade Centre – a joint agency of the WTO and UN.[28]

Standards embedded in certification marks have the potential to promote public health, both in terms of health impacts on the producer as well as the consumer. For instance, the fair trade certification mark promulgated by the Fairtrade Organization purports to guarantee a certain level of income to farmworkers, thereby indirectly promoting their health. A certification mark (such as the heart-healthy mark illustrated above) works directly to benefit health through facilitating better choices of food by the consumer.

Of course, public institutions exert a powerful impact as conveners and facilitators of information markets related to public health on national and intergovernmental levels. Pursuant to various US statutes, various federal agencies mandate in some manner disclosure of health information not apparent from the product itself.[29] These initiatives in the USA and analogous ones in other countries exemplify the recognition that disclosure of health-related information is critical to informed consumption of particular goods and services.[30] Under provisions of the 2010 Affordable Health Care Act, for example, chain restaurants with at least 20 US locations must display calorie information on their menus.[31]

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[27] Chon, 'Marks of Rectitude' (n 4 above) 112.

[28] International Trade Centre, *How ITC Works*, accessed 8 April 2016 at www.intracen.org/itc/about/how-itc-works.

[29] See e.g. Patient Protection and Affordable Care Act, 42 USC § 4205 (2010) (mandating calorie displays for retail restaurants with over 20 establishments); Federal Trade Commission, *Green Guides* (2012). Other examples include the Tracking Label for Children's Products (enforced by the Consumer Product Safety Commission) and the Food Modernization Act (enforced by the FDA).

[30] Vaver, David, 'Brand Culture: Trade Marks, Marketing and Consumption – Responding Legally to Professor Schroeder's Paper' in Lionel Bently, Jennifer Davis and Jane C Ginsburg (eds), *Trademarks and Brands: An Interdisciplinary Critique* (Cambridge University Press, Cambridge 2008) **177**, 197.

[31] Patient Protection and Affordable Care Act (n 29 above); see also Block, Jason P and Christina A Roberto, 'Potential Benefits of Calorie Labeling in Restaurants' (2014) 312 *Journal of the American Medical Association* 887.

Additionally, the Food and Drug Administration (FDA) recently released revised nutrition fact label requirements, with the goal that calorie content be displayed more prominently by 2017.[32] The purpose of these new disclosure requirements is to increase awareness about food choices and inform consumers about what they are eating.[33]

Some states and other local governments within the USA have also demanded more information about supply chain management, along with related human health concerns. An interesting recent example comes from the state of Washington, which recently enacted a seed-to-sale framework for legalized marijuana, still a controlled substance at the federal level.[34] The Washington State Liquor Cannabis (formerly Control) Board (WSLCB) implemented the BioTrack THC tracking system to track marijuana through the supply chain.[35] The system uses a series of unique 16-digit barcodes to track marijuana plants[36] and also requires that each batch of marijuana harvested be tested by a third-party independent laboratory facility for a variety of defects such as mould, mildew and pesticides. If a retail customer requests the results of the lab-testing, the retailer must disclose the information.[37] Other provisions of the legislation include not labelling marijuana products as 'organic' unless independently certified by the United States Department of Agriculture (USDA) in accordance with the Organic Foods Production Act.[38]

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[32] Ibid.

[33] Ibid.

[34] Initiative Measure No 502, Washington Legislative Service (2011) (authorizes the Washington State Liquor and Cannabis (formerly Control) Board to regulate and tax marijuana for persons 21 years of age and older), accessed 8 April 2016 at sos.wa.gov/_assets/elections/initiatives/i502.pdf.

[35] The WSLCB states: '[L]icensed marijuana producers, processors, and retailers will be able to employ their own inventory tracking software solutions as long as it allows for the collection and submission of the specific information and reports required by the WSLCB's seed-to-sale inventory tracking rules for Licensees. Licensees will be required to submit specific information and reports to the WSLCB. To ensure compliance with Washington State regulations, the traceability system will provide functionality to assist with analysis of information, auditing operations, and enforcement by the WSLCB.' See 'Traceability System', Washington State Liquor Control Board, accessed 8 April 2016 at www.liq.wa.gov/marijuana/traceability_system.

[36] Staver, Anna, 'How do Washington, Colorado Track their Pot?' *Statesman Journal*, 20 November 2014, accessed 8 April 2016 at www.statesmanjournal.com/story/news/politics/2014/11/20/washington-colorado-track-pot/70013080.

[37] Washington Administrative Code § 314–55–105(3) (2015).

[38] Washington Administrative Code § 314–55–105(4)–(5) (2015).

In addition to public initiatives such as these, private non-profit organizations and NGOs provide complementary oversight through various means intended to increase the level of consumer awareness about human health and food consumption, including food safety.[39] Some NGOs work independently of the industries they monitor, as illustrated by a recent report from Oxfam about agricultural sourcing.[40]

These GVNs can be characterized as regulatory governance institutions that deploy private legal mechanisms, such as contract law and tort law, combined with social norms, to 'govern' the market via soft law in the form of protocols and standards. Standards underlying certification marks can facilitate the circulation of symbolic information related to human health consequences. This information may include information related to the production process of agricultural goods such as the use of pesticides. Competition for customers who value healthier and more environmentally sustainable products is already evident. For example, the alternative food retailer Whole Foods has recently followed in the footsteps of giant retailer Wal-Mart in announcing more transparent sourcing information about its products.[41] However, these efforts fall short of fully meeting consumer demand for credence information about food products. For

[39] Cafaggi, Fabrizio, 'Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety' Working Paper RSCAS 2010/10 (European University Institute, 2010) 26 ('Not only do consumers have low level of participation in contractual design and standard-setting within the food supply chain approach, but they also have very weak enforceability powers before courts. The accountability of these regimes is mainly based on the enforcement strengths of NGOs and, to a limited extent, competitors. The strengths and capacities of NGOs may vary across industries and countries.'); Meidinger, Errol, 'Multi-Interest Self-Governance through Global Product Certification Programs' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing, Oxford 2008) 259–91.

[40] *The Behind the Brands Scorecard Methodology* (OXFAM, August 2014), accessed 8 April 2016 at oxfam.org/sites/www.oxfam.org/files/file_attachments/btb_methodology_document_final_sept_2014.pdf.

[41] See Quality Standards, Whole Foods Market, accessed 8 April 2016 at www.wholefoodsmarket.com/about-our-products/quality-standards. See also Griswold, Alison, 'Whole Foods Desperately Wants Customers to Feel Warm and Fuzzy Again' *Slate* (20 October 2014), accessed 8 April 2016 at www.slate.com/blogs/moneybox/2014/10/20/whole_foods_ad_campaign_can_values_matter_marketing_erase_the_whole_paycheck.html.

instance, agricultural economists have identified unmet consumer demand for information about humane sourcing of beef products.[42]

Like it or not, within the current neoliberal global trade framework it is important to note that private regulatory alternatives such as certification to standards have evolved towards de facto forms of oversight over public health, more enforceable versions of which were not implemented via multilateral provisions of the General Agreement on Tariffs and Trade/ WTO. One advantage of private over public legal means for tackling the issue of encouraging health-promoting behaviours is that the question of disguised trade barriers does not rear its head. This approach leaves potential flexibility and policy space for domestic innovations in the provision of information via certification marks about environmental, health and labour issues. In an ideal world, these domestic changes towards increased health and safety standards then can and do spread through global networks to become regulatory minima for cross-border business.[43] For example, 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.[44]

At the heart of notice-based forms of regulation through certification marks is the verification of the hidden qualities of a product, essentially its credence, process and/or tacit attributes. But in order to be effective, this form of regulatory governance must be accompanied by vigorous trust mechanisms, including reliable verification systems. And the work of certification marks is ultimately limited; they are not a full substitute for other disclosure schemes and do not obviate the need for public initiatives with greater scope or for more complex labelling requirements. Because of the symbolic efficiency of certification marks, they cannot depict detailed nutritional content to consumers in a uniform shorthand manner. But they have the potential to address other health concerns such as heart-healthy content in a way that can be read easily by even non-literate consumers. More than other types of standard, certification

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[42] Olynk, Nicole J, Christopher A Wolf and Glynn T Tonsor, 'Labeling of Credence Attributes in Livestock Production: Verifying Attributes which are More than "Meet the Eye"' (2009) 5 *Journal of Food Law and Policy* 181.

[43] Scott, Colin, 'Standard-Setting in Regulatory Regimes' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, Oxford 2010) 104–19; Braithwaite, John and Peter Drahos, *Global Business Regulation* (Cambridge University Press, Cambridge, 2000).

[44] Chon, 'Marks of Rectitude' (n 4 above) 109.

marks are communicated directly to the consumer, in the hope that they can affect consumer choice. This critical issue of choice is the topic of the next section of this chapter.

2 CERTIFICATION MARKS, CONSUMER CHOICE, AND PUBLIC HEALTH IMPACT

2.1 Certification Marks and Consumer Choice

The turn towards market-based mechanisms through regulatory governance bodies such as certification authorities is premised on a direct causal link between the provision of greater information and better consumer choice through disclosure. Certification marks provide consumers with information that is designed to alter their behaviour. Recent behavioural economics literature posits that information design can make a difference in human choice.[45] As Alberto Alemanno points out with regard to package standardization requirements, however, this is an overly simplistic model.[46] Numerous links exist in the chain between mere information provision and ultimate consumer choice. Thus, this section first explores how certification marks can contribute to choice and then some of the reasons why their choice-enhancing potential may be problematic.

Certification marks are a type of information-based regulation, that is, a form of non-coercive regulation that addresses the 'information asymmetries typical of credence products'.[47] Along with more detailed information disclosure schemes, such as labelling, certification marks can be viewed as a type of social marketing that counters the pervasive and powerful for-profit marketing relentlessly aimed at consumers, especially in developed-country markets. Certification marks could be thought of as gently persuasive information, albeit in highly condensed and efficient form. They may work better than mandatory disclosure of information (such as detailed nutritional labelling) because, if they are designed well, they should be simple and easily recognizable as well as being presumably verifiable. Ideally, consumers who are too busy to read labels or

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[45] Thaler, Richard H and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin, London 2008. First published Yale University Press, New Haven CT 2008)) 83–7.

[46] Alemanno, this volume, Chapter 1.

[47] Ibid.

easily misled by marketing claims may benefit from them.[48] Certification marks might be a partial solution to the issue of the textual or numerical illiteracy plaguing more complex forms of informational schemes.[49]

Behavioural science literature points to the likely incentive for firms to engage in market manipulation through systematic exploitation of cognitive biases against consumer interests. Jon Hanson and Douglas Kysar point out in the context of products liability law that:

> '[o]ther things being equal, it is in the manufacturer's interest for consumers to have the lowest estimate of product risks possible: The lower the consumer's risk estimate, the more consumers will be willing to pay for the product, leading to greater sales and increased profits for manufacturers. Generating consumer underestimation of product risks in this manner is simply another means of cost externalization, a practice that manufacturers have every incentive to pursue. Manipulation goes further than just minimizing perceived costs, however. Manufacturers can also attempt to shape consumer views of product benefits. That is, manufacturers may also elevate consumer willingness to pay by manipulating the view that consumers have of a product's benefits (as opposed to its costs). In either case, consumer failure to perceive product attributes accurately can lead to undesirable levels of consumption.'[50]

As the above excerpt indicates, behavioural scientists have documented various ways in which information failures and asymmetries, along with multiple sources of consumer biases (or bounded rationality) operate. Their insights compel a hard-nosed understanding of how markets disadvantage consumers via information asymmetry and serious thought to what counterweights could be employed.[51] Recently, Richard Thaler and Cass Sunstein have advocated the concept of nudge – or libertarian paternalism.[52] As they described it, a nudge 'is any aspect of the [regulatory] choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives'.[53] This framework means that 'the goal of public

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[48] Ben-Shahar, Omri and Carl E Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, Princeton 2014) 185–90.

[49] Ibid 79–81.

[50] Hanson, Jon D and Douglas A Kysar, 'Taking Behaviorism Seriously: The Problem of Market Manipulation' (1999) 74 *New York University Law Review* **630**, 724–5.

[51] Thaler and Sunstein (n 45 above) 78.

[52] Ibid 4–6.

[53] Ibid 6.

policies should be to steer citizens towards making positive decisions as individual and for society while preserving individual choice'.[54] According to advocates, this approach to regulation allows for consumer autonomy and choice (hence the libertarian moniker), while at the same time protecting them from their own often not-so-rational behaviour (hence the paternalism). In their view, potential paternalism is justified because of the enormous scale of the information asymmetry in markets, together with widespread unconscious cognitive biases of consumers.

In the area of health policy, numerous possibilities for nudge present themselves. For instance, Thaler and Sunstein suggest the pre-assignment of consumers in the US to a prescription plan or health insurance plan best suited for their needs, with the possibility of opt-out to a different plan.[55] In the IP context, Alemanno (this volume, Chapter 1) argues that the packaging standardization schemes such as plain packaging regulations are a type of nudge. In general, as he points out, nudges present certain policy advantages relative to government-imposed mandates because they are choice-preserving and thus guard autonomy.[56] As Ryan Calo has additionally observed, techniques employing nudge are part of a larger regulatory toolkit; it is often a matter of degree whether a particular policy intervention is a nudge as opposed to a mandate or notice (also termed mandatory disclosure).[57]

Where do certification marks fit into this descriptive taxonomy? Certification marks resemble notice or mandatory disclosures rather than nudges, because they operate above the radar – that is, consumers are largely aware of their intended impact (which is to facilitate buying certain kinds of product). Nudges tend to operate below the radar, where consumers typically do not notice either them or their impact on choices. Certification marks on food products are analogous to detailed nutritional labelling, which purports to give consumers more information to aid them in making better choices. Unlike other types of notice, however, certification marks are not mandated by public law – rather, they come into being via the voluntary coordination of market actors. And unlike labelling, they provide an efficient graphic symbol with perhaps a phrase in lieu of elaborate textual summary.

Nonetheless, a certification mark may shade into a nudge where the information intervention it represents in the marketplace involves 'the

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[54] Alemanno, this volume, Chapter 1.
[55] Thaler and Sunstein (n 45 above) 159–74.
[56] Alemanno, this volume, Chapter 1.
[57] Calo, Ryan, 'Code, Nudge, or Notice?' (2014) 99 *Iowa Law Review* 773–802.

strategic use of some pattern of human irrationality (e.g., cognitive biases)[,] and the action it targets does not stem from a fully autonomous choice (e.g., lack of full knowledge about the context in which the choice is made)'.[58] For instance, certification marks used to indicate healthier food could counteract the human propensity towards 'self-control problems and mindless choosing'.[59] The trend toward gluten-free products is an example of a choice that was limited to an extremely narrow and specialized consumer base until recently, when it has begun to explode into a veritable health trend (whether or not based on actual gluten intolerance or celiac disease).[60] Thus, a certification mark such as the gluten-free mark could encourage the general human bias to follow the herd, so to speak, towards more healthful food choices.[61]

Regardless of the actual form of policy intervention (code, nudge, or notice), Calo suggests that as a normative matter, regulators 'should try to maximize… *facilitation* and resist *friction*. Facilitation refers to helping people arrive at their preferred outcome, whereas friction operates by erecting barriers qua barriers, whether physical or psychological, to undesired behavior'.[62] The plain packaging regulations discussed by Alemanno and others in this volume could be viewed as a friction-creating policy intervention which attempts to discourage undesirable consumer choices (for example, discouragement of youth smoking via branding with an 'ick' factor). By contrast, certification marks could be viewed as a type of market intervention designed to facilitate desirable

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[58] Alemanno, this volume, Chapter 1.

[59] Thaler and Sunstein (n 45 above) 53–60.

[60] 'Gluten-Free Labeling of Foods', US FDA, accessed 8 April 2016 at www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/allergens/ucm362510.htm. The FDA reported in 2015 that approximately 3 million people in the USA have coeliac disease. See also Strom, Stephanie, 'A Big Bet on Gluten-Free' *New York Times*, 17 February 2014, accessed 8 April 2016 at www.nytimes.com/2014/02/18/business/food-industry-wagers-big-on-gluten-free.html?_r=0. About 30 per cent of the public have reported wanting to cut back on gluten consumption. Furthermore, it is estimated that in 2016 gluten-free products will produce over $15 billion in annual sales.

[61] Thaler and Sunstein (n 45 above) 44.

[62] Calo (n 57 above) 796–97 (original emphasis): 'Whereas friction seeks to head off transgression in substitution for deterrence, facilitation tends to enhance law's capacity to assist, coordinate, and inform … Neither is the same as a traditional legal rule, which establishes an official expectation and penalizes transgression after the fact. But each substitutes for a different mechanism underlying law.'

health-enhancing behaviour (for example, encouragement of healthier eating via branding with health-signalling marks).

In market-based governance, certification marks might counter powerful marketing messages that can lead to unhealthy choices, and thus they could promote desirable health behaviour. But certification marks are also subject to the same effectiveness issues faced by friction-inducing measures such as plain packaging. These include the heterogeneity of consumer biases within diverse populations.[63] Consumers do not read and respond to information uniformly. This heterogeneity challenge is explored more in the next section, in the discussion of public health. And even when a consumer may understand the mark's message, a consumer's choice at point of purchase will be driven by multiple factors and concerns, including availability, price and time. A large gap can exist between a consumer's stated intentions and his or her actual purchasing behaviour. Consumers who may purport to be anti-GMO, for example, may nonetheless choose to purchase GMO-labelled food.[64]

Certification marks are also vulnerable on effectiveness grounds because they necessarily depend upon consumer recognition, acceptance and understanding. As discussed earlier, consumers can be confused about the message of certification marks because they convey both too little and too much information. To be widely recognized in the market requires the same kind of branding and marketing strategies that drive trademarks to legal recognition of distinctiveness (and sometimes even fame).[65] The kinds of institutions that typically have rights over certification marks (government agencies and/or non-profit organizations) usually do not have tremendous marketing capacity. In addition, the standards underlying the certification are usually quite opaque. From a consumer perspective, it is challenging to find out what 'organic' standards are, for example. Even the standards underlying the widely recognized USDA organic certification are subject to change without consumer knowledge.[66] A variety of other organic standards operate in the US market, some of which are more rigorous than the USDA

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[63] Alemanno, this volume, Chapter 1; Bonadio, this volume, Chapter 2.

[64] Sleenhoff, Susanne and Patricia Osseweijer, 'Consumer Choice: Linking Consumer Intentions to Actual Purchase of GM Labeled Food Products' (2013) 4 *GM Crops and Food: Biotechnology in Agriculture and the Food Chain* 166–71.

[65] 15 USC §1052; 15 USC §1125(a).

[66] PCC Natural Markets, 'Organic "Sunset" Lawsuit' (2015) (June) *Sound Consumer* (describing a lawsuit against the US Department of Agriculture 'over a rule changing the "Sunset" provision restricting synthetics in organic foods; [t]he lawsuit contends USDA made the rule change illegally, without following

standards (and some of which are far less). No quick and easy method exists for consumers to differentiate among these different standards.

And while certification marks have the potential to counter market manipulation, they are also subject to potential manipulation themselves by opportunistic firms. Another possibility is that they can be smothered by an avalanche of louder information by more dominant market actors. As Jeanne Fromer has pointed out in a different context, information theory 'suggests that noise in a message transmission can be reduced, if not entirely overcome, by introducing redundancy into the message … and make it more likely that consumers will gain access to the transmitted knowledge'.[67] With smaller marketing budgets compared to the food firms, it is likely that any messages conveyed by the owners of health-related certification marks will not be as redundant as information provided by concerted marketing efforts by agribusiness and other food-related companies.

Some scholars are sceptical of notice as a regulatory approach because of their belief that consumers often do not read or understand disclosures.[68] From that critical perspective, certification marks have an advantage over detailed labelling in that they provide consumers with a cognitive shortcut. This is precisely where the 'signalling function' of all trademarks, including certification marks, becomes a desideratum in addition to the certification's trust function. And another virtue of all marks (whether trademarks or certification marks) is that they can signal information to non-literate and non-numerate consumers, who comprise a substantial part of the purchasing population.[69]

Thus, while certification marks might provide an important intervention in the information marketplace, they are also subject to many possible limitations (as well as some advantages over detailed labelling). The next section explores the further links between choices guided by certification marks and their consequences on public health.

2.2 Certification Marks and Public Health Impact

To lead to positive public health outcomes, we must assume that a consumer purchases the 'right' kinds of healthy products with the

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the required process'). Accessed 8 April at www.pccnaturalmarkets.com/sc/1506/newsbites.html#1.

[67] Fromer, Jeanne, 'An Information Theory of Copyright Law' (2014) 64 *Emory Law Journal* **71**, 90.

[68] Ben-Shahar and Schneider (n 48 above).

[69] Ibid 79–81, 86.

assistance of a certification mark. These purchasing choices then contribute to larger population-level behavioural changes. Overall public health improvement requires a critical mass of individual consumers to make these choices affecting their health behaviour so as to make a difference in a population. Thus an inherent tension exists between the individualism foregrounded by consumer choice and the inescapably social nature of population-based health measures.

While several scholars, including myself, have advocated for the greater use of certification marks to provide information about credence attributes of goods, relatively little empirical evidence exists regarding individual consumer responses to existing certification marks. This section addresses the question indirectly, by reference to the more available literature on nutritional labelling. Another under-analysed issue in the certification mark scholarship is the possibility of market manipulation, for example, the certification of gluten-free products to induce consumers to buy unhealthy products that may have higher sugar or fat content. This section also addresses the question of manipulation by briefly visiting the vociferous debates about organic labelling.

2.2.1 Consumer responses to labelling: a case study of calorie information

As mentioned above, the USA has recently embarked on a policy initiative to require disclosure of calorie content in food. The purpose of these new requirements is to increase awareness about food choices and to inform consumers about what they are eating.[70] Advocacy groups claim that nutrition labelling may help combat the obesity epidemic partially caused by the increased tendency to eat meals away from home. It has been shown, for example, that children in the USA will typically consume double the calories at restaurants as compared to eating food from home.[71] Studies suggest that including calorie information on restaurant menus reduces the total amount of calories that people will order and consume at a meal.[72] Research also suggests that providing calorie information may improve a person's ability to estimate the calories consumed, thereby positively affecting their eating later in the

[70] Nestle, Marion, 'Health Care Reform in Action – Calorie Labeling Goes National' (2010) 362 *New England Journal of Medicine* **2343**, 2344.

[71] Ibid.

[72] Roberto, Christina A et al., 'Evaluating the Impact of Menu Labeling on Food Choices and Intake' (2010) 100 *American Journal of Public Health* **312**, 316.

day.[73] The majority of individuals will underestimate the number of calories in a restaurant meal.[74] And without readily available nutritional information, the decision to order the lower calorie option may be less than fully informed.[75] A cheesesteak sandwich, for instance, contains 390 fewer calories than a salad at the Chili's Bar and Grill restaurant.[76]

While various factors affect the utility of nutrition labelling, food labelling may generally enhance consumer autonomy, as discussed above. An additional important factor in consumer decision-making involves price changes. Price elasticity is important to consider because certifications may (but not always) result in higher prices of commodity goods, which may be then passed on to the consumer. Studies have found that price change may significantly influence consumption of beverages, snacks, fruits and vegetables.[77] Further, these experimental studies have demonstrated that price changes may have stronger effects than nutrition labelling because nutritional labelling may backfire due to negative taste inferences.[78] For example, children with larger budgets have responded to price increases of unhealthy food by purchasing less healthy food.[79] Even so, substantial price reductions in cafeterias have been shown to significantly increase the consumption of fruits, vegetables and snacks, while substantial price increases have shown a reduction in consumption of soft drinks.[80] With the exception of products such as wine, people also seem to believe that lower-priced foods are just as hedonically satisfying as higher-priced foods and that price is usually unrelated to the perceived quality of the packaged food item.[81]

Research studies have demonstrated the short-term feasibility and acceptability of labelling, but there is scant evidence on whether people will continually make healthier food choices over time or whether people will develop label 'fatigue' and revert to making unhealthy food choices.[82] Moreover, for adolescents and adults who regularly eat at

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[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Chandon, Pierre and Brian Wansink, 'Does Food Marketing Need to Make Us Fat? A Review and Solutions' (2012) 70 *Nutrition Reviews* **571**, 572.
[78] Ibid.
[79] Ibid 573.
[80] Ibid 573.
[81] Ibid 573.
[82] Thorndike, Ann N, 'Traffic-Light Labels and Choice Architecture: Promoting Healthy Food Choices' (2014) 46 *American Journal of Preventive Medicine* **143**, 147.

fast-food restaurants, calorie information at the point of purchase on fast-food restaurant menus has shown little effect on food selection and consumption.[83] The research is thus controversial on this matter. Research studies have found that, although calorie information may slightly improve food decisions overall, this is true only in relation to the individuals who care and when the number of calories in the food product is surprising.[84]

Different population sub-groups will have varying responses to labels, and nutrition labels on packaged food can potentially (but do not necessarily) result in altering food choices.[85] Certain subsets of the population, for example women with higher levels of education, can be influenced by nutrition labels on packaged foods.[86] However, skills must be built prior to effectively using point-of-purchase nutrition information.[87] Research has identified that, while food labels hold promise for improving public health, the food label alone is likely not sufficient for modifying healthy behaviour given that demographic characteristics such as age, sex, education, income, race/ethnicity and length of residence in the USA may lead to varying rates of label use.[88] Not surprisingly, individuals with higher levels of education and income have been found to be more frequent users of labels, while individuals with limited English language skills used labels less frequently.[89] And the same study showed that individuals between the ages of 18 and 34 generally used the nutrition labels less frequently than individuals between 34 and 85.[90] A different research study using a sample of adolescents found that basic use of nutrition facts labels on packaged food products was low, but

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[83] Harnack, Lisa J et al., 'Effects of Calorie Labeling and Value Size Pricing on Fast Food Meal Choices: Results from an Experimental Trial' (2008) 5 *International Journal of Behavioural Nutrition and Physical Activity* **1**, 8, 9 accessed 8 April 2016 at www.ijbnpa.org/content/5/1/63.

[84] Chandon and Wansink (n 77 above) 576.

[85] Roberto, Christina A et al., 'Rationale and Evidence for Menu-Labeling Legislation' (2009) 37 *American Journal of Preventive Medicine* **546**, 548.

[86] Ibid.

[87] Harnack et al. (n 83 above) 11.

[88] Ollberding, Nicholas Jay, Randi L Wolf and Isobel Contento, 'Food Label Use and its Relation to Dietary Intake among US Adults' 110 (2010) *Journal of the American Dietetic Association* **1233**, 1234.

[89] Ibid 1234.

[90] Ibid 1235.

training on the use of the label led to significant improvements in understanding.[91]

In sum, the literature analysing the effect of nutrition labelling on consumer autonomy and acceptance shows that labelling can make a positive difference in individual health behaviour and possibly therefore on public health impact, under certain conditions. However, the heterogeneity challenge is all too obvious; different groups will respond to the mandated disclosure according to significant social categories, such as age, educational level, English language proficiency and so on. Of course, certification marks differ from the nutrition labelling discussed here because they provide a symbolic shortcut to information. This efficiency may have benefits and costs. On the one hand, consumers will not have to spend as much time deciphering labels if a certification mark can substitute for a more detailed label. As discussed above, non-literate consumers could benefit from the focus on graphics rather than text. However, the very condensed nature of the symbol may also facilitate market manipulation by dominant market actors. This is discussed in the next section.

2.2.2 Market manipulation: a case study of organic certification

Organic certification and labelling may lead to an increase in consumer preferences through a higher willingness to pay,[92] but organic claims may not necessarily have a positive impact on calorie judgements and consumption recommendations.[93] Results from a research study found that individuals were more lenient about forgoing planned exercise after having ordered an organic over conventional dessert, for instance.[94] More relevant to the topic of certification marks, an organic certification does not guarantee that a food itself is actually healthy or consumed in healthy amounts after purchase. To take an obvious example, wine may be certified as organically produced, but that does not prevent too much of it from being harmful to one's health.

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[91] Ibid 12 (citing Hawthorne, K et al., 'An Educational Program Enhances Food Label Understanding of Young Adolescents' (2006) 106 *Journal of the American Dietetic Association* 913).

[92] Linder, NS et al., 'Organic Labeling Influences Food Valuation and Choice' (2010) 53 *Neuroimage* **215**, 219.

[93] Schuldt, Jonathon P and Norbert Schwarz, 'The "Organic" Path to Obesity? Organic Claims Influence Calorie Judgments and Exercise Recommendations' 5 (2010) *Judgment and Decision Making* **144,** 148.

[94] Ibid 48.

Those concerned with organic labelling have noted its potential for over-predicting whether a particular food item, such as wild-caught salmon, can truly be completely organic.[95] However, the bulk of concern centres around misleading claims associated with consumer confusion about what the term 'organic' really signifies.[96] One commentator argues that consumer misunderstanding of the USDA's regulations gives organic farmers an incentive to refrain from publicly complaining about the regulations or about agricultural practices that contaminate organic food:

> 'The regulations allow organic farmers whose crops have been contaminated by pesticides … to nonetheless sell those crops as organic. Organic farmers who refused to knowingly sell contaminated crops, or who paid for expensive testing of their crops to ensure that they did not do so, would be at a competitive disadvantage to organic farmers who merely complied with the [] regulations' requirements. Moreover, because consumers do not understand that the regulations allow contaminated crops to be sold as organic, and because this lack of understanding increases demand for organic food, organic farmers also have an incentive to maintain consumers' misperceptions about organic food.'[97]

'Greenwashing' practices such as this lead consumers to believe something is more environmentally sustainable or healthier than it actually is.[98] This pervasive issue of market manipulation could be addressed not only by more rigorous testing and enforcement, but also by greater

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[95] Hass, Jessica, 'Don't Take the Bait: Why USDA Organic Certification is Wrong for Salmon' (2010) 34 *William and Mary Environmental Law and Policy Review* **598**, 602 (claiming that the organic label is not appropriate for wild-caught fish and will fall short of consumer expectations because there is no way to determine a wild-caught fish's diet throughout its lifespan, and 100% organic feed is not fed to fish with an organic label).

[96] Fiser, Jennifer C, 'Harvey v Veneman and the National Organic Program: Can Organic be Synthetic?' (2007) 3 (Spring) *Journal of Food Law and Policy* 81.

[97] Friedland, Michelle T, 'You Call that Organic? – The USDA's Misleading Food Regulations' (2005) 13 *New York University Environmental Law Journal* **379**, 421; see also Kruse, Chad M, 'The Not-So-Organic Dairy Regulations of the Organic Food Production Act of 1990' (2006) 30 *Southern Illinois University Law Journal* **501**, 516–17 (describing challenge by University of Wisconsin to organic certified dairy produced by factory farms).

[98] Northern, Greg, 'Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace' (2011) 7 *Journal of Food Law and Policy* **101**, 105 (greenwashing occurs when 'disinformation [is] disseminated by an organization so as to present an environmentally responsible public image'); Hetu and Kramer (n 9 above).

reliance on information intermediaries to sift through and evaluate marketing claims. In the USA, this is typically done by national non-profit organizations, such as the Center for Science in the Public Interest[99] or locally based retailers such as Seattle's PCC Natural Markets.[100] These institutions engage with the challenge of providing analysis where needed by evaluating and making judgements about the plethora of market information about food, such as the meaning of organic certifications and labels. This can assist busy consumers in deciding what to purchase. Even with this information increasingly available online, however, the consumer still has to decide between reading an educational article about organic agriculture or, say, reading about the latest celebrity gossip. In other words, these intermediaries address but do not solve the problem of market manipulation of busy and easily distractible consumers.

In forthcoming work, I propose an additional type of information intermediary or platform to provide quick information about hidden or credence attributes of consumer goods and services. While beyond the scope of this chapter to describe fully, a 'tracermark' combines some aspects of trademarks and some of certification marks and could allow consumers to access information already available in the GVN through supply contracts and other GVN business-to-business transactions. Through a QR or UPC code read by smart phones, consumers might trace the certification and other credence qualities of a good or service.[101] A tracermark ideally could allow the consumer to have direct access to information about credence attributes such as sourcing, production specifications and other typically hidden qualities of a product or service. One of the purposes of tracermarks would be to help reduce the amount of market manipulation attributable to unsubstantiated marketing claims around goods labelled 'organic', 'natural' and the like. This proposal would not eliminate the need for vigorous enforcement against consumer fraud (for example through agencies such as the US Federal Trade Commission or through deceptive tort actions available in some states such as California), but it could provide a powerful complement that is decentralized, market-based and consumer-driven through consumers' choices of products and services to purchase.

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[99] Center for Science in the Public Interest, accessed 8 April 2016 at www.cspinet.org.

[100] PCC Natural Markets, accessed 8 April 2016 at www.pccnaturalmarkets.com.

[101] Chon, Margaret, 'Tracermarks: A Proposed Information Intervention' (2015) 53 *Houston Law Review* 101.

CONCLUSION

From policy and pragmatic perspectives, private regulatory governance mechanisms can encourage better public health outcomes. Private regulatory governance bodies can enhance the production of innovative goods and services to advance public health. They potentially do so in ways that go beyond reliance on either the market or the state acting alone. In addition, they provide complementary and possibly coordinating activities to state-based regulation. Command and control-based food safety standards may require less than optimal standards of health and safety; thus, the market can theoretically fill a gap between these minimum regulatory standards and the market potential for higher standards preferred by consumers.

This chapter points out the possible roles of market-based tools such as certification marks in global value networks or GVNs. These increasingly powerful GVNs can complement government-mandated disclosures. It is important to understand both their potential and their limitations. Whether public, private or a combination of both, the public interest should remain at the forefront of these regulatory governance bodies when they address areas such as public health and safety. Because of its focus on certification of health-promoting food products only, rather than on products that are labour, safety and environmentally certified, this chapter does not address the full public health impact of certification marks. Nonetheless (with multiple caveats), even this partial analysis indicates a considerable space for more intentional deployment of certification marks in GVNs, as potential policy levers towards the goal of promoting human health.