

*STUDENT ESSAY COMPETITION
WINNER*

ECO-LABELS AND COMPETITION:
ECO-CERTIFICATION EFFECTS ON THE
MARKET FOR ENVIRONMENTAL
QUALITY PROVISION

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INTRODUCTION

Consumers report that they are willing to pay more for environmentally friendly products,¹ and “green” marketing has

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¹ But estimates vary widely. UNDERWRITERS LABORATORY, THE PRODUCT MINDSET 21 (2013), available at <http://productmindset.ul.com> (reporting in a

exploded in response.² Theoretically, the free market can push producers to compete on environmental quality provision. However, consumers are not actually acting on their professed desires to purchase green, a finding dubbed the “green gap.”³ A frequent explanation is that consumers do not trust environmental marketing claims, because they often do not have access to information proving the claims made.⁴

2012–2013 survey across Brazil, China, Germany, India, and the United States that 72 percent of manufacturers and 68 percent of consumers believe consumers will pay more for environmentally friendly products); Mehdi Miremadi, Christopher Musso & Ulrich Weihe, *How Much Will Consumers Pay To Go Green?*, MCKINSEY Q., Oct. 2012, at 14, available at http://www.mckinsey.com/insights/manufacturing/how_much_will_consumers_pay_to_go_green (finding more than 70 percent of European and American consumers would pay a five percent premium for an equivalent green product in automotive, building, electronics, furniture, and packaging categories); Press Release, Mintel, *Are Americans Willing to Pay More Green to Get More Green?* (Nov. 14, 2011), <http://www.mintel.com/press-centre/social-and-lifestyle/are-americans-willing-to-pay-more-green-to-get-more-green> (finding 35 percent of U.S. consumers willing to pay more for “green” products); Press Release, GfK, *Green Purchasing Still Faces Price Barriers According to New GfK Report* (Sept. 24, 2012), <http://www.gfk.com/news-and-events/press-room/press-releases/pages/green%20purchasing%20still%20faces%20price%20barriers%20according%20to%20new%20gfk%20report%20.aspx> (reporting decline in willingness to pay more for green products from 62 percent to 49 percent for less-polluting cars and from 70 percent to 60 percent for energy efficient light bulbs); *Consumer Sophistication on Environmental Issues and Global Products Affected Holiday Spending, Annual KPMG Consumer Survey Says*, PR NEWSWIRE (Dec. 26, 2007), <http://www.prnewswire.com/news-releases/consumer-sophistication-on-environmental-issues-and-global-products-affected-holiday-spending-annual-kpmg-consumer-survey-says-58907422.html> (quoting KPMG, NATIONAL SHOPPING BEHAVIOR STUDY: EXECUTIVE SUMMARY (2007)) (finding 60 percent are willing to pay more).

² See, e.g., TERRA CHOICE & UNDERWRITERS LABS., *THE SINS OF GREENWASHING: HOME AND FAMILY EDITION* 11 (2010), available at <http://sinsogreenwashing.org/index35c6.pdf> (finding “greener” product offerings grew by close to 80 percent from 2008 to 2009, and by 73 percent between 2009 and 2010 in same store visits).

³ See, e.g., GRACEANN BENNETT & FREYA WILLIAMS, OGILVY & MATHER, *MAINSTREAM GREEN: MOVING SUSTAINABILITY FROM NICHE TO NORMAL* 4 (2011), available at https://assets.ogilvy.com/truffles_email/ogilvyearth/Mainstream_Green.pdf; Ralph E. Horne, *Limits to Labels: The Role of Eco-Labels in the Assessment of Product Sustainability and Route to Sustainable Consumption*, 33 INT’L J. OF CONSUMER STUD. 175 (2009); Ken Peattie, *Green Consumption: Behavior and Norms* 35 ANN. REV. ENVTL. RESOURCES 195, 213–14 (2010).

⁴ Ibon Galarraga Gallastegui, *The Use of Eco-Labels: A Review of the Literature*, 12 EUR. ENV’T 316, 318 n.4 (2002). Other rationales abound: higher costs, lower perceived quality, and so forth, *id.* at 319–20, but trust is critical to environmental claims because they are “credence” attributes.

Certification is a potential solution to this asymmetric information problem: Consumers trust third-party certification marks, which act as a signal for environmental quality and thus can facilitate competition on environmental attributes.⁵ But what are the potential benefits and challenges of employing certification to motivate competition on environmental attributes? Certification by well-intentioned and trusted sources—for example, non-governmental organizations (NGOs) dedicated to the environment—can help build the trust required to compete. However, following the relative success of these NGO-led eco-labels, producers with less sustainable methods looking to reap the same marketing benefits may enter the market and compete with the NGO label. This can destroy trust in the market because the producer-led standards are often less stringent and confuse consumers about the relative environmental quality conveyed by the competing marks.⁶ Moreover, even well-intentioned certification organizations should consider competing scale and exclusivity pressures in their design; achieving greater scale likely requires lowering standards, while exclusivity likely entails higher ones. This Article employs antitrust law as both a framework for discussion and potential tool for competitive reinforcement, exploring how certification may be pro- or anti-competitive depending on the market context.

Part I lays out the factual and legal context surrounding eco-labeling. Part II explores the rationale behind eco-label certification as a setup for Part III's discussion of the pro- and anti-competitive effects of the producer-led label entrance. Part IV discusses the scale versus exclusivity tension that even well-intentioned NGO-led labels face.

⁵ See, e.g., Olivier Bonroy & Christos Constantatos, *On the Economics of Labels: A Review of the Theoretical Literature* 10 (Grenoble Applied Economics Laboratory, Working Paper No. 2013-01 2013), available at <http://www.grenoble.inra.fr/Docs/pub/A2014/gael2014-03.pdf>.

⁶ Examples have arisen in the forestry, fisheries, and building industries. See, e.g., Benjamin Cashore, Graeme Auld & Deana Newsom, *The United States' Race to Certify Sustainable Forestry: Non-State Environmental Governance and the Competition for Policy-Making Authority*, 5 *BUS. & POL.* 219 (2003) (forestry); David Jolly, *Salmon Fishermen Battle Walmart on Certification*, N.Y. TIMES, Oct. 21, 2013, http://www.nytimes.com/2013/10/22/business/salmon-fishermen-battle-walmart-on-certification.html?_r=0 (fisheries); Joel Makower, *Will the Plastics Industry Kill LEED?*, GREENBIZ (Jul. 19, 2012, 9:11 AM), <http://www.greenbiz.com/blog/2012/07/19/will-plastics-industry-kill-leed> (building).

I. ASSUMPTIONS AND LEGAL CONTEXT

Eco-label certification can take many forms and implicate a variety of legal doctrines. To focus the discussion, this Section walks through key factual assumptions and the underlying legal context that this Article will examine.

A. *Factual Assumptions*

The Oxford Dictionary defines eco-labeling as “the practice of marking products with a distinctive label so that consumers know that their manufacture conforms to recognized environmental standards.”⁷ This Article adopts this definition with the additional qualification that the label covers multiple producers and is developed and granted by a third party, though producers may strongly influence development.⁸

This Article makes several further assumptions. First, for simplicity, it assumes a collapsed supply chain comprised of only producers and consumers.⁹ Second, producers differ in environmental quality provision, and producer costs increase monotonically with environmental quality provision.¹⁰ Consumers

⁷ Definition of Eco-Labeling in English, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/english/eco-labeling> (last visited Nov. 23, 2013).

⁸ The International Standardization Organization (ISO) famously classifies three types of eco-labels: “Type I is a multi-attribute label developed by a third party; Type II is a single-attribute label developed by the producer; Type III is an eco-label whose awarding is based on a full life-cycle assessment.” *The ISO 14020 Series*, INT’L INST. FOR SUSTAINABLE DEV., http://www.iisd.org/business/markets/eco_label_iso14020.aspx (last visited Nov. 1, 2014). Labels of different types will have different effects on competition because of the information revealed to and understood by consumers. For example, a single-attribute eco-label (e.g., dolphin-safe tuna) might take into consideration fewer environmental impacts but be more persuasive to consumers (because of its simplicity) than a label that discloses life cycle impacts. For simplicity, I assume that each label considers a single attribute.

⁹ Certification has interesting competitive effects on vertical relationships, because certification can act as a means to control suppliers. For a discussion, see, for example, PETER DAUVERGNE & JANE LISTER, *ECO-BUSINESS: A BIG-BRAND TAKEOVER OF SUSTAINABILITY* (2013). However, the effect of certification on vertical relationships is beyond the scope of this paper.

¹⁰ Of course, there are win-win measures that companies can take that improve both their bottom line and their environmental impact. For example, 3M’s Pollution Prevention Pays program saved the company \$1.7 billion while reducing pollution by more than 3.8 billion pounds. *3P-Pollution Prevention Pays*, 3M, http://solutions.3m.com/wps/portal/3M/en_US/3M-Sustainability/Global/Environment/3P/ (last visited Aug. 14, 2014). However, I assume companies are fairly rational and are thus generally deterred from pursuing

cannot distinguish products by environmental quality ex-ante or ex-post on their own, but accurately perceive which types of environmental quality provision generally improve social welfare. For example, I assume that consumers would accurately disregard a “unicorn-safe” tuna fish label as being nonsensical.¹¹ Third, consumers differ in their desires for environmental quality provision.¹² Fourth, obtaining certification itself is costly, but the benefit of certification for those products close to or exceeding the certified standard will outweigh these costs (in other words, already environmentally sustainable producers are more likely to certify).¹³ Producers voluntarily choose whether to certify, and organizations require only that producers meet specified environmental quality standards (in other words, membership requirements are not pretexts to exclude producers from certification). Finally, certification organizations are non-governmental¹⁴ and are comprised of some combination of producers and NGOs. NGOs may be producer-sponsored.

Because this Article considers more subtle effects on competition, it addresses neither outright fraud nor sham

environmental measures because of the costs involved.

¹¹ This is not an idle concern. Labels could create added competition on a metric that does not matter or that might even *harm* the environment by signaling that the metric matters (consumers might assume that the label’s presence indicates relevance). This can be detrimental to welfare. For example, if consumers believe the “unicorn-safe” tuna label, a less efficient producer claiming “unicorn-safe” fishing might get a leg up over a more efficient producer not making this claim. For a real-world example, “dolphin-safe” tuna fishing methods can reduce dolphin bycatch but increase the bycatch of many other species. Martin Hall, *An Ecological View of the Tuna-Dolphin Problem: Impacts and Trade-Offs*, 8 REVS. FISH BIOLOGY & FISHERIES 1, 25 (1998). Whether this is better or worse for welfare generally is outside the scope of this Article, but the example illustrates the potential for even accurate labels to cause environmental harm in other domains.

¹² If consumers were homogenous, it might be more efficient for the government to mandate a minimum level of environmental quality (for example, nobody wants *E. coli* food poisoning, so it makes sense that the government requires a minimum level of food safety).

¹³ This seems to be a reasonable assumption because if producers close to or exceeding the standard did *not* reap net benefits from certification, then none would certify.

¹⁴ The 2010 Global Ecolabel Monitor Report found that only eight percent of eco-labels were government-run. BIG ROOM & WORLD RES. INST., *THE GLOBAL ECOLABEL MONITOR REPORT: TOWARD TRANSPARENCY 2* (2010), http://www.ecolabelindex.com/downloads/Global_Ecolabel_Monitor2010.pdf. However, government-run eco-labels often gain market share more readily, an implication discussed below.

certification as a pretext for price collusion, both of which are clearly illegal.¹⁵ Instead, the motivating concern is that producer-led labeling or other anti-competitive incentives will reduce consumer trust in certifications generally, thus impairing competition on environmental attributes because consumers do not believe any claims made.

Producer entry into the eco-label market (producer entry) will likely affect competition in multiple arenas: competition on environmental quality (producer versus producer), competition on products themselves (producer versus producer), and competition among eco-labels (certification versus certification). This Article focuses on competition on environmental quality, but will consider competition at the eco-label level insofar as it affects environmental quality competition.

B. *Legal Context*

Before analyzing whether certification is pro- or anti-competitive, this Section first discusses why the rule of reason is the appropriate legal standard. Both Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act (FTC Act) are implicated. Section 1 forbids unreasonable restraints of trade among competitors,¹⁶ and Section 5 forbids unfair methods of competition.¹⁷ Because eco-label certification might be characterized as an agreement among competitors to produce a certain level of environmental quality, one might argue that these competitors are effectively agreeing not to compete among themselves on this attribute.¹⁸ Certification can thus be considered

¹⁵ See, e.g., Press Release, Fed. Trade Comm'n, FTC Settlement Ends "Tested Green" Certifications That Were Neither Tested Nor Green (Jan. 11, 2011), <http://www.ftc.gov/opa/2011/01/testedgreen.shtm> (describing an FTC settlement shutting down a company that sold fake environmental certifications); Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 426–27 (7th Cir. 1965) (upholding conclusion that trade association agreement to limit durum wheat purchases in order to lower durum wheat prices constituted per se illegal price fixing).

¹⁶ "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2012).

¹⁷ "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *Id.* § 45.

¹⁸ See, e.g., Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1947 (2002) ("[Standard-setting organizations] must recognize that they are built on agreements among

a horizontal restraint of trade under Section 1 or an unfair method of competition under Section 5—a broader standard¹⁹ that the FTC has interpreted to encompass and surpass practices condemned by the Sherman or Clayton Acts.²⁰ As in antitrust law generally, treble damages apply.²¹

Within the Section 1 inquiry, rule of reason (not per se) analysis applies. The Standards Development Organization Advancement Act of 2004 explicitly applies the rule of reason analysis to standard development organizations “engag[ing] in standards development activity.”²² Eco-label certification organizations develop voluntary consensus standards that fall under the SDOAA, such that their certification activities will likely fall within the rule of reason.²³ Moreover, per se liability applies to

horizontal competitors, and that their conduct will be subject to scrutiny under section 1 of the Sherman Act.”).

¹⁹ See, e.g., *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454–55 (1986) (concluding that “unfair” within the FTC Act encompasses both Sherman Act violations and practices that the FTC finds “against public policy for other reasons”); *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948) (stating that the FTC Act was meant to restrain practices that do not yet meet Sherman Act standards).

²⁰ Joshua D. Wright, *Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, FED. TRADE COMMISSION, (June 19, 2013), <http://www.ftc.gov/speeches/wright/130619umcpolicystatement.pdf>.

²¹ 15 U.S.C. § 15(a) (2012) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . .”).

²² *Id.* § 4302(2). Note that while standard-setting organizations must register with the Federal Trade Commission and the Department of Justice in order to benefit from the SDOAA’s single (instead of treble) damages regime, the SDOAA’s rule of reason provision “automatically appl[ies] to all SDOs covered by [the SDOAA].” Press Release, Fed. Trade Comm’n, *FTC Notice on Implementation of the Standards Development Organization Advancement Act of 2004*, (Jun. 24, 2004), <http://www.ftc.gov/news-events/press-releases/2004/06/ftc-notice-implementation-standards-development-organization>.

²³ The SDOAA defines “standards development organization” as “a domestic or international organization that plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus in a manner consistent with the Office of Management and Budget [OMB] Circular Number A-119” 15 U.S.C. § 4301(a)(8) (2012). OMB Circular Number A-119 basically requires that voluntary consensus standards be crafted by entities embodying the openness, balance of interests, due process, appeals process, and consensus cited in the SDOAA above. OFFICE OF MGMT. & BUDGET, OMB CIRCULAR NO. A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (1998), *available at* http://www.whitehouse.gov/omb/circulars_a119#4. Notably, however, “industry

“only those agreements that are ‘so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.’”²⁴ As discussed below, certification likely has many pro-competitive benefits, further justifying application of the more flexible standard.²⁵

Under the rule of reason, courts generally weigh the pro- and anti-competitive effects of the restraint on the market.²⁶ Typically, the plaintiff must demonstrate anti-competitive effects, after which the burden shifts to the defendant to demonstrate pro-competitive benefits outweighing those anti-competitive concerns.²⁷

Turning to the FTC Act, the analytical path is less clear, because the scope of Section 5 is heavily debated,²⁸ but would

standards” are distinct from voluntary consensus standards, so may not be protected by the SDOAA. *Id.*

²⁴ *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *Nat’l Soc’y of Prof. Engineers v. United States*, 435 U.S. 679, 692 (1978)).

²⁵ Moreover, the Supreme Court, though not always consistently, has on occasion voiced discomfort with the dichotomy between per se and rule of reason analysis, preferring instead to answer the simpler question of “whether or not the challenged restraint enhances competition.” *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999) (quoting *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984)); see also HERBERT HOVENKAMP, MARK JANIS, MARK LEMLEY & CHRISTOPHER LESLIE, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 35.2b (2d Ed., 2011 Supplement) (arguing that the pro-competitive benefits of standard setting organizations should keep them out of per se illegal territory, though largely in the context of standards that foster product compatibility).

²⁶ The SDOAA discusses this analysis as follows: “[S]uch conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets.” 15 U.S.C. § 4302 (2012). See also *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 244 (1918) (“The true test of legality [under the rule of reason] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”).

²⁷ See, e.g., *In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 271–72 (6th Cir. 2014); see also *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (explaining that an anti-competitive agreement cannot be sustained under the rule of reason without evidence of a countervailing pro-competitive benefit). Note that we can skip the initial step of the Sherman Act analysis. Because certification organizations require voluntary compliance, we can assume that there is an agreement among competitors.

²⁸ For debates on the proper scope of Section 5, see, for example, Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1 (2014) (arguing that Section 5 should protect competition, without regard to other social objectives, such as domestic industry development, employment, or the like); Robert H. Lande, *Revitalizing Section 5*

likely be similar to the rule of reason analysis. In a proposed policy statement, FTC Commissioner Joshua Wright recommended that the Commission define “unfair method of competition” as “an act or practice that (1) harms or is likely to harm competition significantly and (2) lacks cognizable efficiencies.”²⁹ This emulates the rule of reason approach in the evaluation of pro- and anti-competitive effects, though it is not clear whether these effects are to be weighed against each other or whether a practice must *entirely* lack “cognizable efficiencies” in order to be deemed unfair.³⁰ Nonetheless, one possible difference between the two standards is that the FTC, under its proposed policy, would be able to attack acts “likely to harm” competition, in addition to acts for which the agency can prove anti-competitive effects.³¹ For simplicity, this Article generally relies on Sherman Act analysis³² while noting the possibility of illegality under the FTC Act for practices that threaten likely (but not yet proven) anti-competitive

of the FTC Act Using “Consumer Choice” Analysis, ANTITRUST SOURCE, Feb. 2009, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb09_Lande2_26f.authcheckdam.pdf (arguing that the consumer choice framework should guide Section 5 enforcement); Susan A Creighton et al., Some Thoughts About the Scope of Section 5, Workshop on Section 5 of the FTC Act (Oct. 17, 2008), available at http://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/screighton.pdf; Thomas B. Leary, A Suggestion for the Revival of Section 5, Workshop on Section 5 of the FTC Act (Oct. 17, 2008), available at http://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/tleary.pdf.

²⁹ Wright, *supra* note 20.

³⁰ Given that Section 5 is often said to be broader than Section 1 of the Sherman Act, the likely interpretation is that the pro- and anti-competitive effects are to be weighed. Otherwise, Section 1 violations with pro-competitive effects that do not outweigh anti-competitive effects would be cleared of Section 5 responsibility because of the mere existence of those pro-competitive effects. Section 5 would thus not reach these Section 1 violations.

³¹ Under Section 1, the Supreme Court has sometimes not required proof of specific anti-competitive effects when a restraint is “sufficiently suspicious.” Herbert Hovenkamp, *Competitor Collaboration After California Dental Association*, 2000 U. CHI. LEGAL F. 149, 150 (2000). But certification ostensibly to create competition on environmental quality likely would not qualify for such *per se* or even quick look treatment, as discussed above, and so likely requires proof of anti-competitive effects. Some courts have also held that “market power” can substitute for proof of anti-competitive effects under Section 1. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993). But this is still narrower than Section 5’s proposed “likely to harm” standard.

³² Indeed, the Sixth Circuit analyzed only Section 1 of the Sherman Act where the overlap between the Sherman Act and the FTC Act governed. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011).

effects.

Finally, a clarification on the relevant type of injury is helpful. The anti-competitive effects most frequently discussed are higher prices. Certification increases environmental quality competition by making environmental attributes more visible and readily comparable. However, this increases product differentiation—Products A and B become more distinct as Product A acquires a certification label and Product B refrains—and this differentiation can reduce price competition, thus allowing prices to rise.³³ Thus, it is important to note that antitrust law cares not only about price competition but also quality competition.³⁴

II. THE JUSTIFICATION FOR ECO-CERTIFICATION

Section A of this Part provides the factual circumstances under which eco-label certification can be helpful. Section B discusses the legal implications of eco-label certification through a weighing of its anti- and pro-competitive effects, ultimately concluding that it is likely pro-competitive.

A. *The Facts*

Eco-label certification can facilitate competition on environmental quality by helping consumers trust environmental claims. Environmental quality is a “credence” attribute,³⁵ because consumers typically cannot validate claims that producers make about the environmental impact of their products. For example, if Coca-Cola says that it uses fifty percent less water in production than Pepsi, how does Joe Consumer know whether he can believe Coca-Cola? Claims about credence attributes are thus inherently less trustworthy than claims made about “search” attributes (e.g., price), which consumers can verify pre-purchase, and “experience”

³³ Bonroy & Constantatos, *supra* note 5, at 10.

³⁴ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007) (citing as pro-competitive the provision of more options to consumers on the basis of quality differentiation); *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 785 (1999) (Breyer, J., dissenting) (“To restrict that kind of service quality advertisement is to restrict competition over the quality of service itself, for, unless consumers know, they may not purchase, and dentists may not compete to supply that which will make little difference to the demand for their services.”). Indeed, in HOVENKAMP, JANIS, LEMLEY & LESLIE, *supra* note 25, § 35.2, the authors consider the *reduction* of nonprice competition from standardization (less differentiation of products) to be a competitive harm.

³⁵ Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973).

attributes (e.g., taste), which consumers can verify immediately post-purchase.³⁶ Assessment of credence quality requires information that is often costly to obtain.³⁷

This lack of information and corresponding absence of trust can spiral into Akerlof's famous market for "lemons" (below-average quality cars): consumers estimate that all producers provide average-quality products, incentivizing only below-average producers to remain in the market.³⁸ In other words, producers no longer compete on quality. To prevent this race to the bottom, consumers must somehow obtain information on environmental quality that they trust, and they must act on that trust to encourage producers to compete on environmental quality. Fortunately, trust promotes action. The more consumers trust environmental claims generally, the more they are likely to pay attention to environmental marketing labels.³⁹ Consumers are also more likely to make green purchases if they believe they can make a difference by doing so—another effect mediated by trust in the claim.⁴⁰

But consumers do not trust environmental marketing claims. A recent study reported that only half of those surveyed trust companies to tell the truth about their environmental effects.⁴¹ What's worse, individuals who are more concerned about the environment—the probable target market for "green" products—are more skeptical than the average consumer about green

³⁶ *Id.*

³⁷ *Id.* at 69.

³⁸ George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

³⁹ John Thøgersen, *Psychological Determinants of Paying Attention to Eco-Labels in Purchase Decisions: Model Development and Multinational Validation*, 23 J. CONSUMER POL'Y 285, 305 (2000).

⁴⁰ Consumers are more likely to purchase environmentally friendly goods and services the higher their "perceived consumer effectiveness," which is a stronger predictor of green purchases than even pro-environmental attitudes. *See, e.g.,* Pam Ellen, Joshua Wiener & Cathy Cobb-Walgren, *The Role of Perceived Consumer Effectiveness in Motivating Environmentally Conscious Behaviors*, 10 J. PUB. POL'Y & MARKETING 102 (1991); Robert Straughan & James Roberts, *Environmental Segmentation Alternatives: A Look at Green Consumer Behavior in the New Millennium*, 16 J. CONSUMER MARKETING 558 (1999). For consumers to believe their purchases make a difference, they must trust the labels they see.

⁴¹ *Consumers Take Responsibility for "Green" Actions But Aren't Following Through, According to Latest Cone Communications Research*, CONE COMMS., Apr. 2, 2013, http://www.conecomms.com/stuff/contentmgr/files/0/a70891b83b6f1056074156e8b4646f42/files/2013_cone_communications_green_gap_trend_tracker_press_release_and_fact_sheet.pdf.

claims.⁴²

Consumers are right to be suspicious; producers have little incentive to be forthright in claims about credence attributes. Consider a simple model to illustrate these incentives—a classic problem of information asymmetry. Assume a world with two firms. The “Good” firm would like to make investments in environmental quality provision if it can benefit from them.⁴³ The “Bad” firm is not averse to exaggerating its environmental quality levels. Assume the following:

- Each firm faces cost $a > 0$ for advertising and cost $i > 0$ for investment into environmental quality provision.
- If a firm advertises alone, it reaps benefit $m > 0$. Because this is a zero sum game and m can be conceptualized as market share, the non-advertising firm loses m .⁴⁴
- If both firms advertise, neither gains anything because they are not differentiated.
- $m > a + i$, so that “Good” has an incentive to invest and advertise.
- Consumers cannot verify that advertising is backed by investment, such that m depends only on advertisement (not advertisement *and* investment). Thus, “Bad” has no incentive to actually invest in improvements.

The game would play out as follows:⁴⁵

		The “Good”			
		No action		Invest & Advertise	
The “Bad”	No action	<i>Bad</i>	<i>Good</i>	<i>Bad</i>	<i>Good</i>
	Advertise	0	0	-m	m - (a + i)

⁴² Armanda Maria Finisterra do Paco & Rosa Reis, *Factors Affecting Skepticism Toward Green Advertising*, 41 J. ADVERTISING 147, 153 (2012). But see Barbara Bickart & Julie Ruth, *Green Eco-Seals and Advertising Persuasion*, 41 J. ADVERTISING 51, 60 (2012) (finding that consumers care with more care for the environment trust manufacturer claims more).

⁴³ This qualification—that the “Good” firm invests *only if it benefits*—implies that the “Good” firm may at some later point conclude that it is not benefiting from such investments, and thus stop investing. Note, however, that this cessation of investments in environmental quality provision does *not* turn the “Good” firm into a “Bad” firm.

⁴⁴ Certification might also increase demand overall for the product in question, but I assume a zero sum game for simplicity.

⁴⁵ Note that the structure within each box is roughly Marginal Revenue minus Marginal Cost.

Taking each firm's perspective in turn, "Bad" will always advertise, because:

- If "Good" takes no action: $m - a > 0$ (If $m > a + i$, and $i > 0$, then $m > a$).
- If "Good" invests and advertises: $0 - a > -m$ (again because $m > a$).

"Good" will always invest and advertise, because:

- If "Bad" takes no action: $m - (a + i) > 0$, by assumption.
- If "Bad" advertises: $0 - (a + i) > -m$, by the same assumption.

Thus, both firms will advertise. Given that "Good" knows that "Bad" will always enter, it is in "Good's" interest in the long run to stop investing; the investments will not pay off.⁴⁶ In this manner, neither firm will end up actually investing and competing on environmental quality. Low-quality producers thus are motivated to add noise to the environmental marketing space to reduce competition. Producers appear to be acting on these incentives: a recent study found that nearly a third of "green" products carry fake labels,⁴⁷ and the general proliferation of environmental claims has overwhelmed and confused consumers.⁴⁸

Certification might help address this mess. Theoretically, certification signals higher quality in credence attributes by relying on the representations of a reputable agent that consumers trust.⁴⁹ This resolves the information asymmetry issue as certification acts as an understandable and trustworthy signal of quality,⁵⁰ thereby

⁴⁶ Alternatively, "Good" may be driven out of the market.

⁴⁷ TERRACHOICE & UNDERWRITERS LABORATORIES, *supra* note 2, at 20.

⁴⁸ *Consumers Take Responsibility*, *supra* note 41 (finding nearly half of consumers overwhelmed by environmental messages); OECD, ECO-LABELLING: ACTUAL EFFECTS OF SELECTED PROGRAMMES 67 (2005).

⁴⁹ Bonroy & Constantatos, *supra* note 5, at 6.

⁵⁰ Michael Kuhn, *Green Lemons—Environmental Labels and Entry into an Environmentally Differentiated Market Under Asymmetric Information* (University of Rostock, Working Paper No. 20, 1999).

reducing consumer search costs. Further, certification can benefit from network effects, as more producers adopting the label will increase the familiarity of the label to consumers and reduce the confusion consumers experience from the proliferation of environmental claims.⁵¹ Empirically, third party organization endorsements have been shown to improve perceptions of product quality.⁵²

B. *Legal Analysis*

Given these benefits, antitrust law, though highly skeptical of horizontal agreements among competitors, would likely find certification more pro- than anti-competitive. The analysis here begins with anti-competitive effects and then considers pro-competitive effects, in line with a rule of reason analysis.⁵³

Certification can be exclusionary if some firms cannot meet the standards set; indeed, some scholars argue that the purpose of eco-label certification is to create exclusive “green clubs.”⁵⁴ Furthermore, an oft-cited rationale for eco-label adoption is the well-known survey data demonstrating consumer willingness to pay premiums for environmentally superior goods and services.⁵⁵ Together, the exclusionary nature of certification programs and consumer willingness to pay premiums suggest that the purpose and effect of certification may be to raise prices. Indeed, horizontal agreements “for the purpose and with the effect of raising [prices]” are considered so inherently anti-competitive that they are condemned as per se illegal.⁵⁶ But this erroneously assumes that antitrust law cares only about price competition and not quality competition.⁵⁷ Firms may justifiably charge higher prices for products of better quality or to recoup higher advertising costs.⁵⁸

⁵¹ See *infra* Section V.

⁵² Dwane Hal Dean & Abhijit Biswas, *Third-Party Organization Endorsement of Products: An Advertising Cue Affecting Consumer Prepurchase Evaluation of Goods and Services*, 30 J. ADVERTISING 41, 54–55 (2001).

⁵³ See *supra* note 27.

⁵⁴ ASEEM PRAKASH & MATTHEW POTOSKI, *THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY ENVIRONMENTAL REGULATIONS* 19 (2006).

⁵⁵ See *supra* note 2.

⁵⁶ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Nonetheless, as discussed above, certification organizations will likely be evaluated under the rule of reason.

⁵⁷ See *supra* note 34.

⁵⁸ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S.

More importantly, as long as firms that raise their environmental quality provision can gain access to certification, that certification can foster increased competition on environmental quality notwithstanding the anti-competitive effects discussed here.

Moreover, although certification is effectively an agreement among competitors to achieve a preset level of environmental quality, it should not necessarily be considered an agreement not to compete on that attribute.⁵⁹ Certification might dull interbrand competition as brands agglomerate under one standard. Nonetheless, certification signals quality just as brands themselves do, such that competition on environmental attributes can increase between brands with certification and brands without.⁶⁰ Because certification helps consumers trust the claims made, this might create more competition than would otherwise exist.

This signaling effect underlies much of certification's pro-competitive effects. Without trustworthy eco-labels, manufacturers might not compete on environmental quality at all, as illustrated by the simple model above. An analogy to *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI)*⁶¹ is helpful. In *BMI*, blanket licenses for copyrighted songs reduced transaction costs by obviating the need to negotiate individual licenses among the "thousands" of users and copyright owners.⁶² The resulting economies of scale made "the whole truly greater than the sum of its parts," even "a different product" altogether.⁶³ Much in the

877, 896–97 (2007) (noting that although improved quality or extra advertising might lead to higher prices through concerted action, "no one would think these actions violate the Sherman Act" because the "antitrust laws do not require manufacturers to produce generic goods that consumers do not know about").

⁵⁹ Competition across certification schemes could affect this in two ways. If consumers can distinguish the differing levels of environmental quality provision that each certification offers, then competition proceeds on environmental quality in much the same way that brands compete on quality provision, albeit across groups of firms rather than single brands. If consumers cannot tell the difference, then a restraint on firms at a higher level of quality provision might be rendered ineffective as producers defect to the lower level. *See infra* Section IV.

⁶⁰ Note that the competition that increases here is on *environmental quality*. Because of product differentiation, price competition may subside. But within those firms that have certified, price competition could conceivably increase as these firms are now more comparable on environmental quality.

⁶¹ 441 U.S. 1 (1979).

⁶² *Id.* at 20–21.

⁶³ *Id.* These pro-competitive effects justified reviewing the blanket licenses under the rule of reason instead of per se illegality. *Id.* at 23–24. On remand, the Second Circuit upheld the district court's finding that CBS failed to prove the blanket license's anti-competitive effects. *Columbia Broad. Sys., Inc. v. Am.*

same manner, certification can reduce the transaction costs of monitoring and verifying each producer's environmental impacts, creating "a different product" because consumers might both trust and recognize certified labels. Just as the blanket license created a new market,⁶⁴ so too can certification create competition on a new plane—environmental quality. Both certification and blanket licenses create one-stop shops that reduce consumer search and transaction costs.

Moreover, some of the widely acknowledged pro-competitive effects of standard setting generally apply in the eco-label certification context. Certification generates the "integrative efficiencies" that the Department of Justice Antitrust Guidelines state can arise from "the integration . . . of research and development . . . and marketing capabilities" when horizontal competitors collaborate through licensing agreements.⁶⁵ Instead of firms touting their individual achievements, a subset of firms cooperating to develop and educate consumers on shared standards creates the network effects described above; each firm's research and marketing efforts has positive externalities for the other firms.⁶⁶ For this and other reasons, the SDOAA has applied a rule of reason analysis to standard-setting activities, and case law has similarly recognized the pro-competitive effects of standard setting.⁶⁷

However, the pro-competitive effects of eco-label certification differ from those of the technical standard-setting organizations

Soc'y of Composers, 620 F.2d 930, 939 (2d Cir. 1980).

⁶⁴ *BMI*, 441 U.S. at 22–23 ("ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively.").

⁶⁵ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.1 (1995), available at <http://www.justice.gov/atr/public/guidelines/0558.htm#t50>.

⁶⁶ The educational benefit for consumers is especially meaningful for environmental quality provision, where "better" quality may be difficult for consumers to ascertain. In contrast, consumers can easily surmise from other technical standards (for example, computer processing speed) what might constitute an improvement.

⁶⁷ See, e.g., 15 U.S.C. § 4302 (2012) (dictating that the rule of reason applies in the SDOAA); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500–01 (1988) (acknowledging significant pro-competitive advantages from standard setting); see also *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 487 (1st Cir. 1988) ("[T]he joint development and promulgation of the specification would seem to save money by providing information to makers and to buyers less expensively and more effectively than without the standard. It may also help to assure product quality.").

that foster compatible standards.⁶⁸ These technical standards organizations attempt to coordinate the whole industry on one standard to facilitate competition among compatible products. In contrast, eco-labels foster quality competition, which relies on *differentiating* products and certifying only the top firms. The point is to create some exclusivity on the high end of environmental quality provision to push producers to race to the top. Thus, eco-label certification does not attempt to achieve the industry-wide intercompatibility that supports the pro-competitive nature of other standard-setting organizations, though both types of standard-setting share the pro-competitive effects of lower search costs and higher quality provision.⁶⁹

Finally, what is pro-competitive depends in large part on the counterfactual—are we comparing certification to a world with no regulation or one in which the government mandates a specific level of environmental quality? Eco-label certification might be pro-competitive in a more general sense if it preempts command-and-control government regulation that might mandate a particular level of environmental quality provision rather than leveraging the market to encourage competition on this attribute.⁷⁰ Maxwell, Lyon, and Hackett, for example, developed a model in which

⁶⁸ For a more extensive discussion of the benefits of standardization for compatibility, see Lemley, *supra* note 18, at 1896–98.

⁶⁹ One could argue that eco-label certification creates some level of intercompatibility through its network effect: a consumer seeing a Marine Stewardship Council certification mark on salmon and then later on bass can surmise some level of similarity between the environmental effects of eating either fish. But unlike technical product standards that require similarity for products to actually work together (for example, consider a keyboard with a PS/2 connector, instead of the more common USB, that can only work with certain laptops), the consumer can separately consume salmon and bass with no concern for the other fish. *Cf. id.* at 1893 (“Telephones talk to each other, the Internet works, and hairdryers plug into electrical sockets because private groups have set ‘interface’ standards, allowing compatibility between products made by different manufacturers.”).

⁷⁰ Thomas B. Leary, Comm’r, Fed. Trade Comm’n, Self Regulation and The Interface Between Consumer Protection and Antitrust 7–8 (Jan. 28, 2004), available at http://www.ftc.gov/sites/default/files/documents/public_statements/self-regulation-and-interface-between-consumer-protection-and-antitrust/040128deweyballantine.pdf (“When you have a compelling social concern, when the alternative to private regulation may be even more heavy-handed government regulation, when you are actually asking your members to do something that is against their immediate economic interest—not in aid of it—I think there is a narrow window for consideration of non-economic values in trade association codes and standards.”). Of course, government regulation could set a floor above which firms can compete over environmental quality provision.

consumers are less likely to lobby the government for regulation as self-regulated firms provide higher levels of environmental quality.⁷¹ If certification improves incentives for competition on environmental quality, this should increase voluntary environmental quality provision. With more voluntary provision, the threat of consumer lobbying and thus government regulation falls, such that certification helps avoid government regulation. Note that this does not imply that a world with certification has more environmental quality provision overall than a world with government regulation.⁷² Rather, the suggestion is that the world with certification will likely have more competition on the environmental attribute than a world with *only* government regulations, depending on the government measures chosen.⁷³

⁷¹ John W. Maxwell, Thomas P. Lyon & Steven C. Hackett, *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583, 586–87 (2000).

⁷² Indeed, this is a complicated topic requiring much more in-depth analysis. For a few treatments of this issue, see Mark Bagnoli & Susan G. Watts, *Selling to Socially Responsible Consumers: Competition and the Private Provision of Public Goods*, 12 J. ECON. & MGMT. STRATEGY 419 (2003); Timothy Besley & Maitreesh Ghatak, *Retailing Public Goods: The Economics of Corporate Social Responsibility*, 91 J. PUB. ECON. 1645 (2007); Matthew J. Kotchen, *Green Markets and Private Provision of Public Goods*, 114 J. POL. ECON. 816 (2006). Moreover, government regulation and private certification can clearly coexist, as they do now.

⁷³ Government schemes (even certification programs) might also create competition, as regulatory effects obviously depend on regulatory design. But a world of traditional command-and-control regulation would likely have less competition on environmental attributes than a world where brand value increases with quality provision. Although minimum quality standards (MQS) can in some models increase competition over quality, those increases depend on consumers' ability to distinguish products by quality. See, e.g., Uri Ronnen, *Minimum Quality Standards, Fixed Costs, and Competition*, 22 RAND J. ECON. 490 (1991) (concluding that minimum quality standards can push high-quality firms to increase standards to relieve the price competition that results from low-quality firms supplying better-quality products after MQS are introduced). Moreover, private standard-setting might be preferable to government standard-setting; in the context of technical standards, Professors Hovenkamp, Janis, Lemley, and Leslie have argued that the government might have less information, be more subject to capture, and move more slowly than private organizations. See HOVENKAMP, JANIS, LEMLEY & LESLIE, *supra* note 25, at 35-14 to 35-15. For more on the trade-offs between private and governmental standard-setting for eco-labels specifically, see Anne Cole & Jane Harris, *Ecolabelling, Credence Attributes and the Role of Government* (July 2003) (unpublished manuscript), available at <http://www.energyandresources.vic.gov.au/about-us/publications/economics-and-policy-research/2003-publications/ecolabelling-credence-attributes-and-the-role-of-government>; Jane Harris & Anne Cole, *The Role for Government in Ecolabelling—On the Scenes or Behind the Scenes?*

Even without this result, however, eco-label certification is likely more pro- than anti-competitive.

III. THE LIKELY ANTI-COMPETITIVE EFFECT OF PRODUCER-LED ECO-LABEL ENTRY

Section A of this Part lays out the factual scenario of producer-led eco-label entry and, because of the complexity involved, analyzes potential anti- and pro-competitive effects separately from the legal context. Section B applies the facts to the law beyond this simple balancing approach and proposes a new test that would facilitate an antitrust complaint against producer-led entry.

A. *The Facts*

The problem under certification mirrors the problem with firm-specific environmental claims: producers have an incentive to add noise to the eco-label space and confuse consumers by creating an additional certification label. While studies have shown that consumers are more wary of industry certifications,⁷⁴ the label itself might conceal industry support and producers can cloak their involvement by forming an NGO to run the label.⁷⁵

Extending the simple model above to encompass this scenario

(Oct. 9, 2003) (conference paper, *The Future of Ecolabelling in Australia*), available at <http://www.energyandresources.vic.gov.au/about-us/publications/economics-and-policy-research/2003-publications/the-role-for-government-in-ecolabelling-on-the-scenes-or-behind-the-scenes> (suggesting government should play a support role behind the scenes but not develop its own eco-labels); Kim Mannemar Sonderskov & Carsten Daugbjerg, *Eco-Labeling, the State and Consumer Confidence* (Mar. 29, 2010) (conference paper, 60th Political Studies Association Annual Conference), available at <http://orgprints.org/17151/1/17151.pdf> (arguing that there is a role for government in eco-labeling to increase consumer confidence).

⁷⁴ Mario F. Teisl, Stephanie Peavey, Felicia Newman, JoAnn Buono & Melissa Hermann, *Consumer Reactions to Environmental Labels for Forest Products: A Preliminary Look*, *FOREST PRODS. J.*, Jan. 2002, at 44.

⁷⁵ For example, the Sustainable Forestry Initiative touts itself as an “independent, nonprofit organization” on its website, but has repeatedly been critiqued for its close ties to industry. *About Us*, SUSTAINABLE FORESTRY INITIATIVE, <http://www.sfiprogram.org/about-us/> (last visited Nov. 1, 2014); Elizabeth Stryjewski, *The Sustainable Forestry Initiative vs. The Forest Stewardship Council: Evaluating the Credibility of Competing Forest Certification Schemes* (Grad. Sch. of Int’l Relations and Pac. Studies: Univ. of Cal., San Diego, IR/PS CSR Case Study 07-25, 2007), available at <http://irps.ucsd.edu/assets/021/8433.pdf>; Cashore, Auld & Newsom, *supra* note 6, at 231 (2003).

demonstrates a similar race to the bottom. Assume now that the status quo “no action” scenario is the equilibrium from the previous model—both firms are advertising, and “Good” is both advertising and investing. But now certification is available, such that:

- If one firm certifies, it receives benefit c . The non-certifying firm loses c .
- If both firms certify, neither receives any benefit.
- Both firms incur a cost for certification (much like an advertising cost) $t > 0$.
- $c > t$, such that firms have an incentive to certify.
- Note that the certification mark would likely differ between the two firms (since the “Bad” is certifying without investing anything), but that consumers cannot tell the difference.

The game plays out as follows:

		The “Good”			
		No action		Certify	
The “Bad”	No action	<i>Bad</i> $0 - a$	<i>Good</i> $0 - (a + i)$	<i>Bad</i> $-c - a$	<i>Good</i> $c - (a + i + t)$
	Certify	$c - (a + t)$	$-c - (a + i)$	$0 - (a + t)$ ✓	$0 - (a + i + t)$

Both firms will certify, leaving consumers in a world where producers look equivalent. Taking each firm’s perspective in turn, “Bad” will always certify, because:

- If “Good” takes no action, “Bad” will certify: $c - (a + t) > 0 - a$ (because $c > t$).
- If “Good” certifies, “Bad” will certify: $0 - (a + t) > -c - a$

(again because $c > t$).

”Good” will always certify because:

- If “Bad” takes no action, “Good” will certify:
 $c - (a + i + t) > 0 - (a + i)$.
- If “Bad” certifies, “Good” will certify:
 $0 - (a + i + t) > -c - (a + i)$.

Thus, producers will be encouraged to certify without actually improving their environmental quality provision, much like they are encouraged to advertise in the non-certification scenario.

Moreover, the producer-led certification label will likely choose less stringent standards, as the only firms who might benefit from the entrance of the second label are those who cannot easily meet the first entrant’s more stringent requirements. This is in line with Fischer & Lyon’s 2012 economic model suggesting that producer labels are always less stringent than their NGO-led counterparts.⁷⁶ Note that this assumes that producer costs increase with quality provision and that consumers cannot distinguish quality on their own. If costs did not increase with quality provision, producer entry might simply target metrics for which each group of producers believes it has an advantage. And if consumers could effectively distinguish quality on their own, then competing certifications could drive standards up, if consumers demand higher standards.

Anecdotal evidence in the market suggests that, much as this model suggests, producers do enter the eco-label market with lower-standard certification labels once NGO-led eco-labels have gained some traction in their industry. In the forestry sector, the World Wildlife Fund and other environmental groups teamed up with industry players such as Home Depot to create the Forest

⁷⁶ Other implications from the Fischer & Lyon model are helpful but not quite on point, because the authors assume that labels will provide perfect information to consumers. But the authors do theorize that as environmental benefit-providing technologies spread through industry, firm costs to achieve environmental benefits will converge. As a result, labels competing to capture the same group of firms will race to the bottom. Carolyn Fischer & Thomas P. Lyon, *Competing Environmental Labels* 22–23 (2012) (unpublished manuscript), available at <http://webuser.bus.umich.edu/tplyon/PDF/Published%20Papers/Fischer%20Lyon%20JEMS%20Revision%20Doublespaced%20with%20Figures.pdf>. Of more relevance to this Article is Rick Harbaugh, John W. Maxwell & Beatrice Roussillon, *Label Confusion: The Groucho Effect of Uncertain Standards*, 57 *MGMT. SCI.* 1512, 1513 (2011), which models the negative effect of the proliferation of uncertain standards.

Stewardship Council (FSC).⁷⁷ In response, the American Forest and Paper Association, an industry group, created the Sustainable Forestry Initiative (SFI).⁷⁸ Environmentalists attacked SFI for its low standards,⁷⁹ and SFI's advertisements illustrate its strategy of simply trying to paint SFI as equally credible as (not *more* credible than) FSC.⁸⁰ In other words, SFI does not try to distinguish itself on environmental attributes but instead simply tries to counteract FSC's differentiation. In fishery products, the Marine Stewardship Council (MSC) label for sustainably caught seafood was created in 1997 from a partnership between the World Wildlife Fund and Unilever.⁸¹ In 2012, after MSC had grown significantly and obtained exclusive purchasing promises from Walmart and others, the Alaska Seafood Marketing Institute—a partnership formed to promote Alaskan seafood—created its own certification system.⁸² Environmentalists find the new label less credible than MSC.⁸³ Finally, a coalition of industry groups, including the American Chemistry Council, the Vinyl Siding Institute, and the Society of the Plastics Industry, began lobbying the federal government to incorporate the Green Globes standard into federal building codes,

⁷⁷ Cashore, Auld & Newsom, *supra* note 6, at 229.

⁷⁸ Stryjewski, *supra* note 75, at 7.

⁷⁹ Cashore, Auld & Newsom, *supra* note 6, at 223, 231.

⁸⁰ See, e.g., Monte Paulsen, *Eco Group's Trade Complaint Targets U.S. Wood Certifier*, TYEE (Mar. 16, 2010), http://theyee.ca/News/2010/03/16/EcoGroupComplaint/?utm_source=daily&utm_medium=email&utm_campaign=160310 (citing an SFI ad that stated, "The good news is that there are a number of credible forest certifications programs. And each one, including SFI, encourages responsible forestry"); *Get The Facts*, SUSTAINABLE FORESTRY INITIATIVE, <http://www.sfiprogram.org/get-the-facts/ecolabels/> (last visited Nov. 1, 2014) (touting an endorsement of SFI by TerraChoice, a subsidiary of Underwriter's Laboratories, as a "legitimate" certification).

⁸¹ STEERING COMM. OF THE STATE-OF-KNOWLEDGE ASSESSMENT OF STANDARDS AND CERTIFICATION, TOWARD SUSTAINABILITY: THE ROLES AND LIMITATIONS OF CERTIFICATION 7 (2012), available at <http://www.resolv.org/site-assessment/files/2012/06/Report-Only.pdf>; see also *Vision and Mission*, MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/about-us/vision-mission> (last visited Nov. 1, 2014).

⁸² Daniel Zwerdling & Margot Williams, *Is Sustainable-Labeled Seafood Really Sustainable?*, NAT'L PUB. RADIO (Feb. 11, 2013), <http://www.npr.org/2013/02/11/171376509/is-sustainable-labeled-seafood-really-sustainable> (suggesting Wal-Mart had pledged to purchase MSC-only seafood by 2012); Jolly, *supra* note 6 (explaining the creation of the Alaska Seafood Marketing Institute).

⁸³ Jolly, *supra* note 6 (quoting the ocean-campaigns director at Greenpeace as saying, "I think everyone would agree that [MSC is] more credible" than the new Alaskan label).

challenging the dominance of the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) standard.⁸⁴ The Green Globes standard is less stringent than LEED, and, while nominally run by a nonprofit, is controlled and funded by the timber, paper, plastics, and chemical industry groups that founded the non-profit.⁸⁵ Finally, a study of floral farms in Colombia and Ecuador found that firms are in general more likely to adopt weaker certifications and are more likely to adopt industry-led labels than those created by NGOs.⁸⁶

On the whole, the entrance of these producer-led labels is probably more anti- than pro-competitive. The producer-led label entrance confuses consumers and thus increases search costs because consumers cannot tell that the producer marks are less stringent than the NGO certifications. A consumer viewing a certification only knows that the product has met the least stringent standard,⁸⁷ encouraging the very market for lemons that certification was supposed to fix. Moreover, the addition of labels itself confuses consumers and reduces the credibility of certification.⁸⁸ This detrimental effect on competition over environmental quality occurs regardless of whether consumers trust the new producer-led label. If consumers trust both labels, the producer-led label free rides off the NGO-label, incenting an

⁸⁴ Makower, *supra* note 6; Gosia Wozniacka, *Eco-Friendly Construction Giant Faces Attacks*, ASSOCIATED PRESS (Dec. 5, 2013, 3:08 PM), <http://bigstory.ap.org/article/eco-friendly-construction-giant-faces-attacks>.

⁸⁵ Steve Law, *LEED vs. Green Globes*, PORTLAND TRIB., Nov. 14, 2013, <http://portlandtribune.com/sl/201025-leed-vs-green-globes>; *see also Members & Supporters*, GREEN BUILDING INITIATIVE, <http://www.thegbi.org/about-gbi/who-we-are/members-and-supporters.shtml> (last visited Nov. 17, 2014) (listing Green Building Initiative members); *Members and Supporters Benefits*, GREEN BUILDING INITIATIVE, <http://www.thegbi.org/about-gbi/join/benefits.shtml> (last visited Nov. 17, 2014) (explaining membership fees).

⁸⁶ Andrea Prado, *Choosing Among Competing Environmental and Labor Standards: An Exploratory Analysis of Producer Adoption 25–26* (2011) (unpublished manuscript), *available at* <http://www.erb.umich.edu/News-and-Events/news-events-docs/11-12/eco-labels2011/AndreaPrado.pdf>.

⁸⁷ Harbaugh, Maxwell & Roussillon, *supra* note 76, at 1513 (2011) (noting that multiple labels confuse consumers and reduce the incentive to certify, as consumers only know upon viewing a certification that the firm has met the least-difficult standard).

⁸⁸ Carolyn Fischer, Francisco Aguilar, Puja Jawahar & Roger Sedjo, *Forest Certification: Toward Common Standards?* 10 (Resources for the Future, Discussion Paper No. 05-10, 2005), *available at* <http://rff.org/RFF/Documents/RFF-DP-05-10.pdf> (“The diversity of labels, which reflect the multitude of forest products certification schemes, can be confusing to consumers and thus weaken the labels’ credibility.”).

eventual race to the bottom (because costs of production at the NGO standard are higher but do not provide commensurate marketing benefits). If consumers lose faith in both labels because of the confusion induced by the producer-led label, then labeled and non-labeled products are effectively equivalent and producers again have no incentive to compete on environmental quality provision. Thus, both scenarios impair competition.

Note that the typical pro-competitive effects of advertising do not result because advertising here impedes, rather than facilitates, product comparisons. Price advertising is typically pro-competitive because it reduces search costs by facilitating price comparisons across products;⁸⁹ but advertising on more vague attributes can cloud cross-product comparisons.⁹⁰

This is not to say that there are no pro-competitive effects of the producer-led label entry. First, the agglomeration of producers creates a consolidated target that is easier for NGOs to attack in campaigns against misleading environmental claims, increasing the probability of consumer boycott. While consumers may not actively purchase “green” products, seventy-eight percent of those surveyed stated that they would boycott a product if they learned that it made misleading environmental claims.⁹¹ Indeed, after well-orchestrated NGO campaigns against SFI, twenty-four retailers dropped the label.⁹²

This threat of boycott can deter distortionary producer advertising, as demonstrated in an extension of the model described above. Higher probabilities of consumer boycott deter the “Bad” firm from advertising. For simplicity, this model considers the original world without certification, with the

⁸⁹ Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 WIS. L. REV. 941, 952 (2000).

⁹⁰ See, e.g., *id.* at 951 (“Advertising is among the leading instruments available to a firm wishing to differentiate its products from those of its rivals, thereby softening price competition.”); cf. Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 682–85 (2013) (arguing that quality—not price—advertising by personal-injury lawyers differentiated their products and reduced demand elasticity).

⁹¹ *Consumers Take Responsibility*, *supra* note 41. This also suggests that consumers would prefer *not* to be lied to or deceive themselves that they are helping the environment.

⁹² Leon Kaye, *More Brands Dump Sustainable Forest Initiative’s Paper Certification Program*, TRIPLE PUNDIT, (May 2, 2013), www.triplepundit.com/2013/05/sustainable-forest-initiative-program/?doing_wp_cron=1384051476.7544200420379638671875.

following additional assumptions:

- Consumers will boycott “Bad” with probability p . $1 \geq p \geq 0$. This might also be conceptualized as the percentage of consumers who boycott.
- If consumers boycott “Bad” when “Good” has not advertised, they treat “Bad” and “Good” as equal (no market share change, because consumers understand accurately that the two firms are identical).⁹³
- If consumers boycott “Bad” when “Good” has advertised and invested, “Good” benefits from the market share boost and “Bad” loses that market share (consumers accurately understand that “Good” is greener).

The game plays out as follows:

		The “Good”			
		No action		Invest & Advertise	
The “Bad”	No action	<i>Bad</i> 0	<i>Good</i> 0	<i>Bad</i> -m	<i>Good</i> $m - (a + i)$
	Advertise	<i>Boycott</i> $p(-a)$	<i>Boycott</i> $p(0)$	<i>Boycott</i> $p(-m-a)$	<i>Boycott</i> $p(m-(a+i))$
	<i>No boycott</i> $(1-p)(m-a)$	<i>No boycott</i> $(1-p)(-m)$	<i>No boycott</i> $(1-p)(0-a)$	<i>No boycott</i> $(1-p)(0-(a+i))$	

The easiest way to analyze this is to understand that if $p = 0$ (i.e., there is no possibility of boycott or no consumers boycott), then we are back to the original model where both “Good” and “Bad” advertise, leading to the race to the bottom. If $p = 1$ (i.e., there will certainly be a boycott or all consumers boycott), then “Bad” will not take any action and “Good” will invest and advertise. If $p = 1$, “Bad” will not take any action, because:

⁹³ It is possible that a boycott might actually entail a consumer switch from “Bad” to “Good,” such that “Bad” reaps $-m - a$ and “Good” reaps m when “Bad” advertises, “Good” doesn’t act, and consumers boycott. This does not change the ultimate equilibrium. If consumers will surely boycott, “Bad” will still maximize its returns by not acting, in which case “Good” maximizes its returns by investing and advertising. Note, however, that if consumers boycott and “Bad” does decide to advertise, “Good” will in this situation prefer not to invest and advertise and will instead choose to benefit from the added market share without incurring additional costs.

- If “Good” takes no action, then $0 > -a$ (note that $p = 1$, so $p(-a) = -a$).
- If “Good” invests and advertises, then $-m > -m - a$.

If $p = 1$, “Good” will invest and advertise, because:

- If “Bad” takes no action, $m - (a + i) > 0$
- Even if “Bad” were to advertise, the same inequality holds.

Thus, the more likely consumers are to accurately perceive “Bad’s” actions, the less likely “Bad” is to attempt to mislead them. As producer groups agglomerate into certification standards, it is more likely that NGOs will pay attention to them and divulge their true level of environmental quality provision, increasing the risk of consumer boycott. As a result, these larger producer groups may be more likely to offer some environmental quality provision than single firms that might skate under the NGO radar.

Moreover, even without resorting to boycotts, larger labels attract NGO attention that can reduce information asymmetries; NGOs can act as conduits of information by comparing the various certification schemes.⁹⁴ This facilitates certification-level competition across eco-labels that can improve overall producer-level environmental quality competition as certification organizations learn from one another. For example, negative publicity and competition with FSC has pushed SFI to court retailers and environmental groups by adopting more stringent standards and has pushed FSC to respond to industry criticism about uneven requirements across regions.⁹⁵ Similarly, after the non-profit Energy Forward label for TVs began distinguishing the most energy-efficient TVs among EnergyStar-certified models, EnergyStar itself created a “Most Efficient” label to similarly differentiate and reward high performers.⁹⁶ In this manner, competition can push certification organizations to tighten

⁹⁴ See, e.g., *Greener Choices: Eco-Labels*, CONSUMER REPORTS, <http://www.greenerchoices.org/eco-labels/> (last visited Nov. 17, 2014).

⁹⁵ Cashore, Auld & Newsom, *supra* note 6, at 242–48; Stryjewski, *supra* note 75 at 12, 14–15. However, improved producer-led standards are still unlikely to approximate NGO-certification metrics, as it would be irrational for producers to enter the eco-label market under a new standard if they could so easily approach the level required by NGO certifiers. Thus, relative to the world of the single NGO label, competition will fall.

⁹⁶ Tom Watson, *Homework, Skepticism Needed with Eco-Labels*, SEATTLE TIMES, Jan. 24, 2012, http://seattletimes.com/html/ecoconsumer/2017323186_ecoconsumer28m.html.

standards as they compete for credibility.⁹⁷

Competition across eco-label certifications can also alleviate technological “lock-in,” which might result if the dominant standard mandates that firms employ particular designs or processes rather than using performance metrics for certification.⁹⁸ Note that this healthy competition is only possible where labels are well-known enough for consumers to distinguish them by environmental quality provision. Thus, producer-led eco-label entry can enhance competition by creating notable rivalries, as compared to a world filled with single-producer claims.

However, these pro-competitive effects still depend on consumer ability to distinguish among certification marks. Studies suggest that consumers roughly recognize that third-party certifications are more credible than brand advertising alone,⁹⁹ but they are otherwise likely unaware of the differences among certification organizations themselves.¹⁰⁰ Further, even if given the opportunity to peruse eco-label comparison sites, many consumers might not bother, precluding the healthy competition these sites hope to elicit.

But other perhaps unintended pro-competitive effects might also result. Producer-led eco-labels often certify non-niche, more standard industry players, perhaps creating more of an industry norm of environmental quality provision and a consumer norm of purchasing “green” products. As more producers enter the market and more consumers demand sustainable products, competition can mature, such that producers more efficiently produce and consumers more efficiently identify sustainable products. Relatedly, certification of the majority of firms in an industry might create a de facto minimum quality standard. As all firms meet some level of quality provision, price competition intensifies, such that some producers might respond by raising quality further

⁹⁷ Helmut Karl & Carsten Orwat, *Environmental Labelling in Europe: European and National Tasks*, 9 EUR. ENV'T 212, 217 (1999). But competition might also confuse consumers. *Id.*

⁹⁸ *Id.* at 218.

⁹⁹ Hal Dean & Biswas, *supra* note 52, at 50–51, 54–55.

¹⁰⁰ See, e.g., Marc Gunther, *Who's Peddling Pulp Fiction in the SFI vs. FSC Forestry Wars?*, GREENBIZ (Mar. 30, 2011, 8:00 AM), <http://www.greenbiz.com/blog/2011/03/30/whos-peddling-pulp-fiction-sfi-vs-fsc-forestry-wars> (“Only the most dedicated deep-green consumer can be expected to understand the differences between [FSC and SFI].”).

so as to relieve price competition.¹⁰¹ However, this result depends on consumer ability to distinguish higher quality producers; if consumers cannot distinguish quality differences, producers have no incentive to produce any quality higher than the minimum standard. In sum, for competition on environmental quality to survive, certification marks must retain an ability to distinguish actual high performers.

B. *Legal Analysis*

Whether producer-led eco-label certification entry constitutes an unreasonable restraint on trade depends largely on the balance of the anti- and pro-competitive effects discussed above. The relevant jurisprudence supports the result above that this type of certification is likely more anti-competitive. Nonetheless, current doctrine could impede a successful antitrust action. After discussing the legal precedent that might support a finding of the net anti-competitive effect discussed above, this Section illustrates the challenges an antitrust suit might nonetheless face under current doctrine. It concludes with a proposal for and brief discussion of a test that might better capture the anti-competitive effects of producer-led certification entry.

Legal precedent supports the finding that this producer entry can be considered an unreasonable restraint of trade. First, raising consumer search costs can constitute antitrust injury. In an FTC settlement with the Detroit Auto Dealers Association, for example, the FTC concluded that car dealer agreements to limit Saturday and weekday operating hours increased consumer search costs by “encourag[ing] consumers to spend less time comparing prices, features, and service, and thereby reduce[d] pressure on dealers to provide the prices, features, and services consumers desire.”¹⁰² In a similar manner, producer-led eco-labels increase consumer search costs by adding confusing environmental claims, reducing pressure on producers to provide the environmental quality levels that consumers might desire. This consumer confusion also effectively increases relative costs for rivals who have already begun providing more environmental quality under the NGO label, because the cost of their environmental quality provision is higher than that of firms under the new producer label. Lower quality

¹⁰¹ Ronnen, *supra* note 73.

¹⁰² *In re Detroit Auto Dealers Ass’n*, 111 F.T.C. 417, 495 (1989).

producers under the producer-led label can now raise their own prices or squeeze higher quality producers out of the market.¹⁰³

Second, an agreement among competitors to eliminate rivalry in environmental quality provision is likely illegal. For example, the Department of Justice settled by consent decree with automobile manufacturers who allegedly coordinated to employ royalty-free cross-patent licensing to eliminate pollution-abatement innovation.¹⁰⁴ Note that this differs from certification among high-performing firms who agree to a specific level of environmental quality provision, because this type of certification *creates* competition with non-certified firms. An agreement among low-quality firms to eliminate rivalry by maintaining low standards while bluffing about higher quality *impedes* competition because no firm can effectively distinguish itself.¹⁰⁵ This loss of competition can constitute an antitrust injury.¹⁰⁶

Indeed, this conduct is similar to the allegedly anti-competitive conduct in *Retractable Technologies, Inc. v. Becton, Dickinson & Co.*¹⁰⁷ In that case, Retractable Technologies claimed that the defendant employed patent infringement “to suppress, impede, and impair any rapid adoption of [retractable syringes] by purposefully keeping bad ones in the market.”¹⁰⁸ The court

¹⁰³ Raising rivals’ costs to gain price-setting power may also be a concern of the antitrust laws. *Cf.* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 *YALE L.J.* 209, 214 (1986) (arguing that vertical restraints that raise rivals’ costs should be policed when such restraints allow the actor to raise its prices).

¹⁰⁴ *United States v. Auto. Mfrs. Ass’n*, 307 F. Supp. 617 (C.D. Cal. 1969). *But see* George Bittlingmayer, *The Application of the Sherman Act to the Smog Agreement*, 32 *ANTITRUST BULL.* 885 (1987) (arguing that the agreement among manufacturers could have actually increased research and development into smog prevention because no manufacturer wanted to act alone in implementing pollution controls that cost more and reduced car performance).

¹⁰⁵ This is not the same as the exclusionary conduct that occurred in *Allied Tube*, where steel-conduit manufacturers “packed” a standard-setting organization with other steel-conduit manufacturers who would also vote to exclude polyvinyl chloride conduit from the market. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). But, in a similar fashion, one subset of manufacturers (here, low-quality producers) are colluding to confuse consumers about quality to prevent their rivals (high-quality producers) from gaining market share.

¹⁰⁶ See HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 2234b (3d ed. 2012) (discussing loss of progressiveness or innovation as antitrust injury).

¹⁰⁷ No. 2:08–CV–16, 2013 WL 4806905 (E.D. Tex. Sept. 9, 2013)

¹⁰⁸ *Id.* at *4 (internal quotations and citations omitted).

held that patent infringement in this context, though typically pro-competitive because infringing copies create competition, could constitute anti-competitive conduct under Section 2 of the Sherman Act.¹⁰⁹ The addition of an eco-label with less stringent criteria is analogous to keeping bad retractable syringes on the market—though an addition to the market, the entrance reduces the adoption and use of the better quality product (or eco-label) by lowering or confusing consumer expectations.

Finally, antitrust law is generally more skeptical of organizations comprised of mainly self-interested firms.¹¹⁰ Most on point, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the Court recognized that the significant pro-competitive advantages of standard-setting could be subverted by “members with economic interests in stifling product competition.”¹¹¹ In that case, steel-conduit manufacturers had stacked the standard-setting organization to vote against the acceptance of plastic conduit in standards.¹¹² While a producer-led eco-label entrant may not share these exclusionary intentions, the principle that standard setting driven by self-interested players can stifle competition still applies. Similarly, former FTC Commissioner Leibowitz has argued that the state action defense¹¹³ is more appropriate when an

¹⁰⁹ *Id.*

¹¹⁰ Relatedly, a plaintiff could argue that the SDOAA’s rule of reason applies only to the development of “voluntary consensus standards,” which are explicitly differentiated from “industry standards.” OFFICE OF MANAGEMENT & BUDGET, *supra* note 23. The producer-led eco-label could likely successfully assert that its NGO still constitutes a “voluntary consensus standards body” by employing the open attitude, balance of interests, due process, ability to appeal, and consensus attributes that define a voluntary consensus standards body. *Id.* While “balance of interests” might not fall in these organizations’ favor, the term is not further defined.

¹¹¹ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (citing *Am. Soc’y of Mechanical Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570–73 (1982)).

¹¹² *Allied Tube*, 486 U.S. at 496–97.

¹¹³ Under the state action defense, “immunity from the federal antitrust laws may extend to nonstate actors carrying out the State’s regulatory program.” *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013). This immunity is disfavored, because of the importance of economic competition. *Id.* Nonetheless, Commissioner Leibowitz was speculating as to the availability of this defense in the case of industry self-regulation. Jon Leibowitz, Comm’r, Fed. Trade Comm’n, Remarks at the American Bar Association Antitrust Spring Meeting, *The Good, the Bad, and the Ugly: Trade Associations and Antitrust* 7 (Mar. 30, 2005), available at <http://www.ftc.gov/speeches/leibowitz/050510go odbadugly.pdf>.

organization is comprised of more than “simply a group of competitors, [and] includes others who would be harmed by an anticompetitive agreement.”¹¹⁴ Thus, producer-sponsored eco-labels might strike a court as inherently more suspicious.¹¹⁵

However, antitrust litigation in response to producer-led eco-labeling is unlikely to succeed under current doctrine.¹¹⁶ Plaintiffs must establish either actual detriment to competition—typically a “reduction of output . . . increase in price, or deterioration in quality of goods or services”¹¹⁷—or provide a structural analysis suggesting such effects are probable through a demonstration of market power.¹¹⁸ Both tests present unique challenges in the eco-label market, despite the likely anti-competitive effects of producer-led entry.

To establish detriment to competition, antitrust plaintiffs typically try to construct a counterfactual: what would have happened in the absence of the challenged restraint?¹¹⁹ Even when considering the better-understood metric of price, this exercise requires enormous empirical horsepower and often becomes a battle of experts.¹²⁰ Establishing a counterfactual for

¹¹⁴ Leibowitz, *supra* note 113.

¹¹⁵ Another way of looking at this is that it is easier to demonstrate anti-competitive intent when the organization is primarily comprised of low-quality producers who thus all share an interest in confusing consumers about quality levels. HOVENKAMP, JANIS, LEMLEY & LESLIE, *supra* note 25, § 35.4.

¹¹⁶ Indeed, this might be why current litigation in the space focuses on false-advertising law. See Complaint, Washington Forest Law Center (May 29, 2013), available at <http://forestethics.org/sites/forestethics.huang.radicaldesigns.org/files/ForestEthics-WFLC-Complaint-FTC-Spring2013.pdf>.

¹¹⁷ *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

¹¹⁸ Establishing a market definition and demonstrating market power are not necessary where there is “proof of actual detrimental effects,” because the “inquiry into market power . . . is but a surrogate for detrimental effects.” *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986) (internal citations and quotations omitted). See also *Brown Univ.*, 5 F.3d at 668 (citing *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 727 (3d Cir. 1991)) (noting that “courts typically allow proof of the defendant’s ‘market power,’” where actual proof of anti-competitive effects is difficult).

¹¹⁹ See, e.g., *Ind. Fed’n of Dentists*, 476 U.S. at 456 (1986) (discussing the market forces that would have been present had the concerted behavior not occurred); Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 698 (2003) (describing as an element of antitrust injury “the difference between the plaintiff’s position in a but-for world where the violation did not take place and a real world where the violation did take place”).

¹²⁰ See, e.g., Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW. U. L. REV.

environmental quality provision, already a vague and amorphous concept, will likely prove even more difficult, as environmental quality is difficult to measure objectively.¹²¹ Even anti-competitive effects premised on increased search costs would likely require a showing that actual search costs increased and thus extracted a higher “price” from consumers.¹²² If consumers ignore environmental claims because they do not trust them, search costs will not increase.

A plaintiff might thus turn to a structural analysis. Indeed, Hovenkamp’s treatise exhorts: “As a starting premise, if the standard-setting organization fails to represent a significant share of a properly defined relevant market or fails to influence a significant share, the claim is best dismissed.”¹²³ Hovenkamp argued that courts, without much technical expertise, should avoid a substantive inquiry into the merits of individual product standards by instead engaging in structural analyses.¹²⁴ But a structural analysis—defining the relevant market and demonstrating market power in that market—is also more complex with eco-labels. While the relevant market in such an analysis is typically limited to single types of products bounded by cross-price elasticity analyses,¹²⁵ the relevant market for an eco-label likely encompasses multiple types of products because labels typically cover multiple types. For example, a misleading forest-safe label on paper towels could push consumers to distrust a forest-friendly label on cardboard boxes. Thus, market definition might require a broader eco-label-level market.

1261, 1262, 1271 (2012).

¹²¹ See, e.g., Barton H. Thompson, *Background and History: Ecosystem Services*, in 2011 ECOSYSTEM SERVICES: MEASURING NATURE’S BALANCE SHEET 9 (2012), available at <http://www.moore.org/materials/Ecosystem-Services-Full-Seminar-Series.pdf> (“While cost-benefit analyses have long incorporated health benefits from environmental regulations, agencies have had a more difficult time quantifying and thus formally incorporating their ecological benefits. . . . To the degree that agencies have been able to identify ecological benefits, they are generally included in cost-benefit analyses only as a qualitative factor.”) (citation omitted).

¹²² Where search costs have constituted antitrust injury, the FTC noted that “consumers pay higher prices as a result of the hours restriction in the form of reduced convenience and service,” which the FTC analogized to higher prices. *In re Detroit Auto Dealers Ass’n*, 111 F.T.C. 417, 499 (1989).

¹²³ HOVENKAMP, *supra* note 106, ¶ 2232c.

¹²⁴ *Id.* ¶ 2232.

¹²⁵ For example, one might ask whether red pens and blue pens are both part of the same market.

Moreover, market definition is typically useful only insofar as it helps establish market power. But market power, too, is trickier in the eco-label context. Market power has been defined as the power “to force a purchaser to do something that he would not do in a competitive market.”¹²⁶ This typically refers to an ability to raise price and is often inferred from high market share.¹²⁷ But here, the anti-competitive intent is not to raise prices but to recapture market share—indeed, the effect may even be to *lower* the prices a rival can charge. Moreover, market share is only helpful, not dispositive, in predicting injury to competition. While a misleading producer-led eco-label commanding a larger share could cause more competitive harm than a label with a smaller share, even the smaller label can destabilize competition if it undermines consumer trust by tainting the market. Indeed, the underlying problem with green marketing is the plethora of green claims, and the analysis above suggests that the agglomeration of market share here might help improve accountability. Thus, market power analysis cannot be blindly based on share, but rather must be contextualized to consider plausible effects on competition other than price changes.

A court hoping to allow an antitrust action to move forward could circumvent this complexity in current doctrine by instead employing Section 5 of the FTC Act’s proposed “likely to harm” standard. This could relax the required showing of anti-competitive effect without also requiring a market power analysis. The following is a potential two-pronged test:

1. Plaintiffs must show “likely harm,” defined by consumer confusion. This is akin to trademark law but relies on *environmental quality* instead of *source* confusion.¹²⁸ If

¹²⁶ Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 14 (1984).

¹²⁷ Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 464 (1992).

¹²⁸ Indeed, some of the NGO-led labels might even have conventional trademark claims, given the similarity of the marks used. Consider, for example, the FSC and SFI marks, and the LEED and Green Globe marks below.

consumers cannot understand differences in relative quality, then producers likely cannot compete on quality.¹²⁹ Experts could help illustrate actual differences in stringency, while survey data could demonstrate consumer confusion.

2. Courts should also require a showing of anti-competitive intent, so as to not penalize those certification organizations that do not intend to disrupt competition. Consider, for example a new certification that intends only to establish minimum quality standards and does not take into consideration every other seal on the market.

To illustrate, if consumers looking at SFI's advertisements come away believing that SFI and FSC provide similar levels of protection to forests, and the judge is persuaded by experts that FSC is in fact more stringent, then this would establish consumer confusion. The court would then consider SFI's intent; advertisements and press releases whereby SFI insists on its equivalence with FSC could be sufficient to establish anti-competitive intent. While this test would require the substantive inquiry into the merits of the standard that Hovenkamp urged courts to avoid, such an inquiry seems required to prevent over- and under-inclusion.¹³⁰

Forestry ecolabels
(FSC vs. SFI)



Building ecolabels
(LEED vs. Green Globes)



For a discussion of the difficulty of assessing the similarity of visual marks, see Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 HOUS. L. REV. 861 (2011).

¹²⁹ Of course, this may give rise to familiar questions as to how sophisticated the consumers surveyed might be, what to do when survey results conflict, and so forth. But courts frequently make complex factual findings.

¹³⁰ Hovenkamp insists that “it is not antitrust’s mission to correct standards that are substantively wrong or even irrational, but only to seek out injuries to competition.” HOVENKAMP, *supra* note 106, ¶ 2232. This is true, but in this case we are considering standards that injure competition *because* they may be substantively wrong. Hovenkamp’s other suggested factors, while useful, could ultimately also be manipulated by producers. For example, Hovenkamp advocates an analysis of the standard-setting organization’s decision-making structure. *Id.* But producers can “pack” a standard-setting organization while

This test relates closely to false advertising law. Indeed, false advertising law can be relevant¹³¹ to this area, and has been used to address deceptive eco-label certifications.¹³² However, competitive issues could arise from vague (but not deceptive) claims,¹³³ as difficult-to-compare but factually accurate labels may impede competition: for example, would “forest-safe” be more protective of forests than “forest-friendly”?¹³⁴ Moreover, the

appearing to give legitimate stakeholders a seat at the table. By examining *relative* standards, a court can evade this manipulation. Because the comparison is relative rather than absolute, the technical judgments should be simpler; it is easier to say that quality level A is higher or lower than quality level B than it is to say that quality level A is “good” generally.

¹³¹ Most on point, the Federal Trade Commission’s recently updated Green Guides, while not binding, state that “marketers should not make unqualified general environmental benefit claims” and that it is “deceptive to misrepresent, directly or by implication, that a product, package, or service has been endorsed or certified by an independent third party.” Fed. Trade Comm’n Green Guides, 16 C.F.R. § 260 (2012). These guidelines can help police the unsubstantiated claims and misleading certification marks that might harm competition on environmental attributes by reducing consumer trust in marketing claims. The Green Guides have been incorporated into California’s Environmental Marketing Law. CAL. BUS. & PROF. CODE § 17580.5 (West 2008).

¹³² For example, the FTC settled with “Tested Green” in 2011. Tested Green sold environmental certifications endorsed by “The National Green Business Association,” a fake organization created by the Tested Green founders, to any company that paid a fee. Federal Trade Commission, *supra* note 15.

¹³³ It is not clear how much false-advertising law polices vague environmental claims. *Compare* Pelayo v. Nestle USA, Inc., No. CV 13–5213, 2013 WL 5764644, at *17 (C.D. Cal. Oct. 25, 2013) (concluding that “all natural” claim on pasta did not violate California consumer protection laws because “all natural” is used in many contexts and thus is unlikely to deceive a reasonable consumer), *and* Hill v. Roll Int’l Corp., 128 Cal. Rptr. 3d 109, 115–17 (Cal. Ct. App. 2011) (holding that the green drop symbol on Fiji water did not violate the Green Guides or the California environmental marketing law because, even assuming Fiji water is not environmentally superior, companies can “tout” environmental features), *with* Standard Oil Co. v. FTC, 577 F.2d 653 (9th Cir. 1978) (finding commercials depicting car exhaust going from black to clear to convey the environmental superiority of the advertised oil were misleading in part because the public generally does not know that transparent pollutants might be worse than black smoke), *and* Koh v. SC Johnson & Son, Inc., No. C-09-00927, 2010 WL 94265, at *6–7 (N.D. Cal. 2010) (denying defendant’s motion to dismiss because a reasonable consumer could have been deceived by a “Greenlist” label, believing that it conveyed third-party certification or environmental superiority).

¹³⁴ For a discussion of the antitrust implications of deception, see Note, *Deception as an Antitrust Violation*, 125 HARV. L. REV. 1235 (2012). For a discussion on the difficulties of defining falsity in advertising, a further barrier to the application of false-advertising law in this space, see Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007).

Federal Trade Commission (FTC) Green Guides¹³⁵ and Section 5 of the FTC Act's prohibition of "unfair or deceptive acts or practices in or affecting commerce,"¹³⁶ both of which can help police false environmental advertising, largely rely on the "reasonable consumer" standard.¹³⁷ While useful for determining whether consumers are deceived, this standard is circular when considering the competitive injury to the market. If the market has fewer trustworthy claims, a reasonable consumer is likely more wary and thus less likely to be deceived. This lack of trust in the reasonable consumer is precisely what impairs competition in the market for environmental quality. Because the ultimate concern is injury to competition, the proposed test would find harm even where consumers do not believe the claims made.¹³⁸

Further research is required, both into the appropriate legal standard and also into the wisdom of applying antitrust liability to this type of conduct. While the story told here is of rather egregious producer-led labels meant only to confuse consumers and thus destabilize competition, other producer-led labels might serve to forestall regulation (while actually making some improvements) or to better control increasingly unwieldy global supply chains.¹³⁹ It is not necessarily clear that society would want the threat of treble damages to chill these activities.

IV. THE SCALE VERSUS EXCLUSIVITY TENSION FOR WELL-MEANING ECO-LABELS

This Part considers structural challenges that even well-

¹³⁵ 16 C.F.R. § 260 (2012).

¹³⁶ 15 U.S.C. § 45(a)(1) (2012).

¹³⁷ See, e.g., *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) ("The FTC may establish corporate liability under section 5 with evidence that a corporation made material representations likely to mislead a reasonable consumer."); FTC Green Guides, 16 C.F.R. § 260.7(c)(2) (2012) ("The claim misleads reasonable consumers").

¹³⁸ Note that if consumers equally *trust* both standards, it makes sense to provide some injunctive relief ordering the lower standard to make explicit its relative laxity and to cease claiming equivalence. The same could apply even if consumers *distrust* both standards, because transparency from the lower standard could help create trust in the higher standard.

¹³⁹ See DAUVERGNE & LISTER, *supra* note 9 (discussing the role of eco-labels in monitoring global supply chains); Maxwell, Lyon, & Hackett, *supra* note 71 (discussing self-regulation as a means to forestall government action). Standards thus need not fall upon producer entry, though empirical research suggests that producers select more lenient certifications. See, e.g., Prado, *supra* note 86, at 25–26.

intentioned certifications might face in attempting to create competition on environmental quality. Because these issues may not rise to the level of requiring legal intervention through antitrust law, Section B on proposed solutions, rather than an application of the law, follows Section A's discussion of the facts.

A. *The Facts*

Overall, NGO-led certification likely improves competition on environmental attributes. However, close consideration of structural incentives reveals problems that may arise. The rationale for certification has much in common with the economic justification for trademarks more generally. Judge Easterbrook's discussion on trademarks and the danger of confusion provides a useful lens through which to view the dangers of certification marks:

Trademarks help consumers to select goods. By identifying the source of the goods, they convey valuable information to consumers at lower costs. Easily identified trademarks reduce the costs consumers incur in searching for what they desire, and the lower the costs of search the more competitive the market. A trademark also may induce the supplier of goods to make higher quality products and to adhere to a consistent level of quality. . . . The value of a trademark is in a sense a "hostage" of consumers; if the seller disappoints the consumers, they respond by devaluing the trademark. . . .

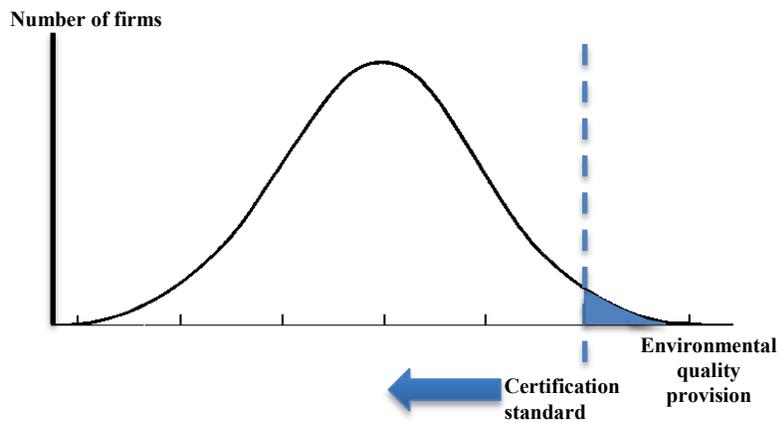
The more valuable the trademark, the more other firms will be tempted to take a free ride. By adopting similar marks, the imitators induce consumers to select their goods when the customers meant to select the goods of the firm that created the mark. Confusingly similar marks make consumers' task in searching for products harder. . . . As marks become less useful for identification, search, and hostage purposes, firms invest less in them and consumers suffer.¹⁴⁰

However, a key difference between trademarks and certification could impair the quality competition that certification is meant to foster. Trademarks gain market share by increasing quality, typically in the form of experience attributes that consumers can verify post-purchase and that thus encourage the consumer to return to the brand. In contrast, the fastest way for a certification to gain market share is by *reducing* standards and

¹⁴⁰ Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1429–30 (7th Cir. 1985).

capturing more firms. The chart below shows that while certification standards may start out as fairly stringent, labels trying to attract more firms will face pressure to lower quality levels.

Figure 1: Certification standards may fall as labels seek to attract more firms



Thus, a tension arises. Eco-labels require *exclusivity* to maintain credibility among environmentalists. Scholars and NGOs recommend that eco-labels maintain selectivity and not cover too many producers.¹⁴¹ This increases the price premium that eco-labels will command and the green innovation the

¹⁴¹ See, e.g., OECD, *supra* note 48; Kathryn Harrison, *Promoting Environmental Protection Through Eco-Labeling: An Evaluation of Canada's Environmental Choice Program*, in VOLUNTARY CODES: PRIVATE GOVERNANCE, THE PUBLIC INTEREST AND INNOVATION 291, 297–98 (2004), available at <http://carleton.ca/sppa/wp-content/uploads/ch10.pdf>; PRAKASH & POTOSKI, *supra* note 54; Alain Nadai & Benoit Morel, *Product Ecolabeling: Looking Further into Policy Considerations* 20 (2000) (unpublished manuscript).

eco-label encourages.¹⁴² But eco-labels also require *inclusivity* for credibility among consumers. This arises from a kind of network effect: the more market share Certification A captures, the more familiar and thus more credible Certification A will be.¹⁴³ The “mere familiarity effect” states that people like what they see more frequently, and, as one study noted, “[a] brand that is familiar will tend to be favored, as familiarity signals that it is tried-and-trusted.”¹⁴⁴ Another study demonstrated that consumers trust endorsements more when they are familiar with the organization making the endorsement.¹⁴⁵

Case studies in the market illustrate this tension and corresponding relaxation of NGO standards.¹⁴⁶ In a push to create demand for certified seafood, MSC extracted a promise from Walmart that all Walmart-stocked seafood would be MSC-certified by 2012.¹⁴⁷ Because this demand far outstripped the available MSC certified supply, the organization has been criticized for lowering standards and certifying poorly managed fisheries in order to meet demand.¹⁴⁸ In response, the CEO of MSC noted that “the transformation of our economic systems” requires “engage[ment] with the big guys.”¹⁴⁹ A “small niche

¹⁴² Nadai & Morel, *supra* note 141, at 20, 22 .

¹⁴³ Network effects typically mean that the value to other users increases as more users adopt the technology. The telephone is a paradigmatic example. See HOVENKAMP, *supra* note 106, ¶ 2233. Here, the value of the certification increases to other producers as more producers adopt the label, but the increase in value is due to a perception of credibility.

¹⁴⁴ Stephen J.S. Holden & Marc Vanhuele, *Know the Name, Forget the Exposure: Brand Familiarity Versus Memory of Exposure Context*, 16 PSYCHOL. & MARKETING 479, 481 (1999).

¹⁴⁵ Teisl, Peavey, Newman, Buono & Hermann, *supra* note 74, at 48.

¹⁴⁶ This is counter to the 2012 predictions of Fischer and Lyon’s economic simulation of competing NGO and producer-led labels, which found that the NGO label tends to increase in stringency in response to competition, so as to differentiate itself from the industry label. However, the NGO label might also reduce standards to recapture market share, the effect that we see anecdotally in the market. Moreover, the predicted increase in stringency requires the label to convey perfect information. Carolyn Fischer & Thomas P. Lyon, *Competing Environmental Labels* (2012) (unpublished manuscript), available at <http://webuser.bus.umich.edu/tplyon/PDF/Published%20Papers/Fischer%20Lyon%20JEMS%20Revision%20Doublespaced%20with%20Figures.pdf>.

¹⁴⁷ Zwerdling & Williams, *supra* note 82.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

organization that engages with a handful of perfect fisheries” will not drive that change.¹⁵⁰ In other words, MSC was no longer focused on creating exclusivity at the top to create competition to the top, but was focused on capturing greater market share—perhaps through lower standards.

Similarly, Fair Trade USA faced a backlash when it proposed to certify large plantations and to require only ten percent fairly traded materials (as compared to twenty percent in most countries).¹⁵¹ Its CEO echoed the concerns of MSC’s CEO regarding the tension between maintaining exclusivity and expanding the organization’s reach: “The more we grow volume, the more we can increase the [fair trade] impact.”¹⁵² Much like MSC’s CEO, he asked rhetorically, “Do we want it to be small and pure or do we want it to be fair trade for all?”¹⁵³

Finally, FSC, though once known for its stringency, struggled internally with attempts to lower standards in some regions to gain traction with landowners.¹⁵⁴ The organization has been criticized for a “general weakening” in standards and for specific questionable certifications.¹⁵⁵ Of course, given how long FSC has been battling SFI, this weakening could also be due in part to the race to the bottom predicted in Part IV.A.

In addition to this temptation to lower standards, other anti-competitive effects can result from well-intentioned certification schemes. First, high-quality producers might switch to low-quality production in certain circumstances. If certification is too costly and high-quality—but not certified—producers are thus treated as low-quality producers by consumers, these high-quality producers might as well reduce the level of environmental quality they provide, because they are not recognized for it.¹⁵⁶ Second, because

¹⁵⁰ *Id.*

¹⁵¹ William Neuman, *A Question of Fairness*, N.Y. TIMES, Nov. 23, 2011, http://www.nytimes.com/2011/11/24/business/as-fair-trade-movement-grows-a-dispute-over-its-direction.html?pagewanted=all&_r=1&.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Cashore, Auld & Newsom, *supra* note 6, at 226, 239–40.

¹⁵⁵ Gary Hughes, *Forest Products Marketing Firm Commits Major Blunder in the Redwoods*, ENV’T’L PROTECTION INFO. CENTER (Feb. 13, 2013), <http://www.wildcalifornia.org/blog/industrialforestryreform/eyeongreendiamond/forest-products-marketing-firm-commits-major-blunder-in-the-redwoods/>.

¹⁵⁶ Bonroy & Constantatos, *supra* note 5, at 16–17.

consumers are most likely to distrust the certification of traditionally low-quality products, low-quality producers are less likely to make improvements to attain this certification, stunting competition.¹⁵⁷ However, this can also improve the market because low-quality producers may stay out of certification altogether and thereby reduce the incidence of market “lemons.” Finally, certification might not adequately address competition in environmental quality once firms are certified. No incentive exists for producers to exceed the certified standard, as consumers cannot verify and credit the additional effort. Moreover, once certification standards are in place and a group of producers has begun marketing the label, entrenched interests may stunt the improvement of those standards. Nonetheless, if certification halts the single-producer race to the bottom, even the creation of a low-standard eco-label could create more competition than the status quo.¹⁵⁸

B. *Proposed Solutions*

Despite the reduction in competition that may result, an eco-label weakening its standards to attract more firms is likely not an antitrust concern. It is unclear what “restraint of trade” there is to attack. At issue is the relaxation of standards, not a new agreement to restrain trade, unlike in the producer-led label context. At most, the lower standards reduce the pro-competitive benefits that certification generally can claim, but even a somewhat weakened certification label likely can create more competition than it impedes. Moreover, courts are unlikely to delve into the intricacies of every organizational decision to update standards.¹⁵⁹

¹⁵⁷ Harbaugh, Maxwell & Roussillon, *supra* note 76, at 1513.

¹⁵⁸ Note that this differs from the producer-led-label scenario because a certification mark already exists, and the producer-led label entry reduces its credibility.

¹⁵⁹ Indeed, courts have made it difficult for plaintiffs to prove that a standard-setting organization’s standards are too lenient and are thus anti-competitive. In *ECOS Electronics Corp. v. Underwriters Laboratories*, the Seventh Circuit dismissed an antitrust claim against Underwriters Laboratories that alleged that the organization had certified the safety of what the plaintiff claimed was a low-quality product. 743 F.2d 498 (7th Cir. 1984). To state a claim against a standard-setting organization, the court held that the “plaintiff must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly

Thus, instead of an antitrust solution, structural changes might help those certification organizations that want to create competition but also establish a broad presence. Tiered certification schemes such as LEED can address both the need for inclusivity (many firms can join) and exclusivity (credibility is maintained by tiers that differentiate the highest performers). This scheme reduces search costs because consumers become familiar with “LEED” generally and can easily distinguish between the tiers (e.g. “Platinum,” “Gold,” and “Silver”). However, as of 2010, only seventeen percent of the eco-labels surveyed by the Global Ecolabel Monitor employed such tiers.¹⁶⁰ Further research into the constraints of tiered certification would be useful.¹⁶¹ Another alternative might be to rely on already-credible third parties—e.g., famous NGOs or the government¹⁶²—to certify. Because name recognition would not be an issue, these entities might more effectively resist pressure to lower standards to capture more firms.¹⁶³

Structural changes can similarly ameliorate other anti-competitive concerns. For example, certification organizations can seek outside funding to reduce certification fees, or they can rely on competition among independent certifiers to drive down costs. Organizations should also institute regularized standards updating processes with non-profit and other stakeholder input to ensure continued improvement of even already-certified producers.

anticompetitive and unreasonable.” *Id.* at 501 (internal quotations and citations omitted).

¹⁶⁰ BIG ROOM & WORLD RESOURCES INSTITUTE, *supra* note 14, at 2.

¹⁶¹ Note that Fischer and Lyon suggested through an economic model that when NGO-sponsored and industry-trade-association-sponsored eco-labels compete, an equilibrium results in which each offers a binary (not multi-tier) label and the industry eco-label is stricter than the NGO label (the NGO label effectively acts as a minimum-quality standard). But this model assumed perfect information once the labels are in place; the very rationale for multi-tiered certification in this case is that labels themselves may not completely solve the information asymmetry issue. The breadth of the certification scheme thus allows for improved credibility. Carolyn Fischer & Thomas P. Lyon, A Theory of Multi-Tier Ecolabels (2013) (unpublished manuscript), available at http://www2.toulouse.inra.fr/lerna/seminaires/Papier_Thomas_LYON.pdf.

¹⁶² Teisl, Peavey, Newman, Buono & Hermann, *supra* note 74, at 48 (finding that government-endorsed labels are considered more credible even when participants did not find government agencies themselves that trustworthy).

¹⁶³ However, regulatory capture could produce the opposite effect, if government agencies appease industry interests by lowering standards.

Thus, while certification likely improves competition on environmental quality relative to a world of single-producer environmental claims, the structure of certification organizations should be carefully considered to foster competition still further.

CONCLUSION

Competition on environmental quality provision is inherently difficult to facilitate. Certification is one solution, but certification can itself fall victim to information asymmetry issues through producer-led eco-label entry. Even absent anti-competitive intent, it must be carefully structured to promote competition.

The proposals in this Article are preliminary and require further investigation. What is clear is that simple reliance on certification will not necessarily create the competition on environmental quality that environmentalists desire. Indeed, as organizations struggle with the scale-versus-exclusivity issue, stakeholders should question the ultimate aim of certification. Is certification a method of creating competition on environmental quality provision, as this Article and others have assumed, or is it a method of creating a de facto minimum quality standard?