COMBINING REFLEXIVE LAW AND FALSE ADVERTISING LAW TO STANDARDIZE "CRUELTY-FREE" LABELING OF COSMETICS

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"Cruelty-free" labeling claims are presently unregulated, resulting in market failure. Consumers make purchasing decisions with incomplete and misleading information and are therefore unable to encourage manufacturers to follow consumer preferences and alter their animal testing practices. Building on scholarship in reflexive law, this Note outlines a strategy for remedying the proliferation of misleading "cruelty-free" claims through standardization. Winders argues that standardization can most effectively and efficiently be achieved through a voluntary, third-party certification program that sets a labeling standard and then monitors labeling claims, buttressed by traditional false advertising law.

INTRODUCTION

Every year tens of thousands of nonhuman animals[1] are tortured and killed in the United States to test cosmetics, despite the existence of many effective nonanimal testing procedures. Two animal tests used for cosmetic products are the Draize eye and skin irritancy tests.[2] The Draize eye irritancy test usually uses rabbits because they are docile, their eyes are much more sensitive than human eyes, and they are unable to tear, which can wash away the test substance. Typically,

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[1] Throughout this Note I will use the term "nonhuman animals" to draw attention to the fact that humans are animals and an unscientific human/animal dualism has often operated to subordinate nonhuman animals. *See* Paul Waldau, *Will the Heavens Fall? De-Radicalizing the Precedent-Breaking Decision*, 7 ANIMAL L. 75, 94–95 (2001).

[2] *See* Megan Erin Gallagher, Student Article, *Toxicity Testing Requirements, Methods and Proposed Alternatives*, 26 ENVIRONS ENVTL. L. & POL'Y J. 253, 258 (2003); Stacy E. Gillespie, Casenote, *A Cover-Girl Face Does Not Have to Begin with Animal Cruelty: Chapter 476 Gives Legal Force to Alternative Testing Methods*, 32 MCGEORGE L. REV. 461, 464 (2001).

a young rabbit is tightly restrained in a box so that he is unable to move his neck or rub his eyes with his paws. Clips sometimes hold his eyelids open. Anesthesia is not generally administered. A researcher applies a concentrated substance to the outer layer of the eye—one of the most sensitive parts of the body—and observes it over a span of days or weeks for responses such as blindness, bleeding, hemorrhaging, and ulceration.[3] For the skin irritancy test, a researcher shaves and often abrades a rabbit's skin. To abrade the skin, adhesive tape is repeatedly applied and ripped off until several layers of skin are exposed. The researcher then applies a highly concentrated test substance to the raw area over a period of days or weeks and observes it for corrosion, weeping, inflammation, and other forms of irritation.[4] At the end of both tests, the rabbits are generally killed.[5]

Given the suffering and death intrinsic to these procedures, the existence of many cosmetic ingredients that are known to be safe, and the availability of nonanimal testing methods, many consumers consider the testing of cosmetics on nonhuman animals unnecessary and prefer not to support it. However, because "cruelty-free" claims are not standardized, consumers are often unable to make purchasing decisions that truly reflect their opposition to animal testing. The European Union has passed a directive banning the testing of cosmetics on nonhuman animals and the marketing of products so tested.[6] Meanwhile, the United States—the largest user of laboratory animals in the world[7]—lags behind, with consumers often unable even

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[3] DEBORAH RUDACILLE, THE SCALPEL AND THE BUTTERFLY: THE WAR BETWEEN ANIMAL RESEARCH AND ANIMAL PROTECTION 160 (2000); Gallagher, *supra* note 2, at 258.

[4] Gallagher, *supra* note 2, at 258.

[5] *Id.*

[6] The Seventh Amendment to the Cosmetics Directive bans the testing of finished cosmetic products within the European Union (EU) and the marketing of cosmetic products and ingredients tested on nonhuman animals outside the EU where validated alternative tests exist. Council Directive 2003/15, art. 1, 2003 O.J. (L 66) 26, (EC) (amending Council Directive 76/768, 1976 O.J. (L 262) 169 (EEC)) (effective Sept. 2004). Beginning in 2009, the amendment will additionally prohibit the marketing of cosmetic products and ingredients tested on nonhuman animals regardless of the availability of alternatives. *Id.*

Given this lengthy phase-in period, there is still an important role for standardized "cruelty-free" labeling in the European Union to meet consumer demand. Press Release, British Union for the Abolition of Vivisection, Beauty Without Cruelty Approved by Int'l Humane Cosmetics Standard (Nov. 25, 2004), *available at* http://www.buav.org/press/2004/11-25.html (noting that until ban goes into effect, it is up to consumers to identify genuinely "cruelty-free" products). The European Commission is accordingly formulating relevant guidelines. E-mail from Paul A. Shotton, European Parliamentary Officer, European Coal. to End Animal Experiments, to Delcianna J. Winders (Dec. 15, 2004) (on file with the *New York University Law Review*).

[7] RUDACILLE, *supra* note 3, at 303. Because the federal government tracks only the number of cats, dogs, primates, rabbits, guinea pigs, hamsters, and farm animals used in testing, ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., ANIMAL

to purchase products free of animal testing. For those concerned about animal testing, this state of affairs is unacceptable. Even those not particularly concerned about animal testing themselves can recognize the importance of a consumer's right to choose and to not be deceived.

This Note explains the problems presented by the lack of a legal definition of "cruelty-free" and demonstrates how a substantive standard can be implemented through a combination of false advertising law and reflexive law. Reflexive law encompasses a variety of regulatory approaches external to traditional command-and-control mechanisms. Reflexive law tools include warning labels, environmental impact statements, and, particularly relevant to this Note, third-party certification of labeling claims. These tools aim to influence market behavior by collecting and disseminating information. Through disclosure, reflexive law aims to promote the internalization of costs: When consumers become aware of the harmful effects—to themselves or to others—of a particular product (or some aspect of that product's development), they can express their concerns about those effects through their purchasing habits. Manufacturers, in turn, can respond to this expression by altering their practices.

Because reflexive law regulates largely outside of formal legal systems, parts of the analysis in this Note are somewhat nontraditional. However, reflexive law is an increasingly important field of legal scholarship, and analyses situating its emerging mechanisms within formal legal systems are crucial. Toward this end, this Note argues that at present a voluntary, third-party certification program that sets a labeling standard and then monitors labeling claims is ideal, and that this program should be buttressed by traditional false advertising law.

CARE REPORT 2 (2004), *available at* http://www.aphis.usda.gov/ac/awreports/awreport2004.pdf (listing data for only these nonhuman animals), and because rats, mice, and birds—the vast majority of nonhuman animals used in testing—are excluded from the federal Animal Welfare Act as it pertains to research, reliable data on the total number of animals used is unavailable. Animal Welfare Act, 7 U.S.C. § 2132(g) (2000) (listing nonhuman animals covered by Act); Animal Welfare, 9 C.F.R. § 1.1 (2005) (excluding rats, mice, and birds from definition of "animals" covered by Act). One author estimates that almost fourteen million nonhuman animals were used in laboratory testing in the United States in 1998. RUDACILLE, *supra* note 3, at 303. However, statistics are not kept based on the use of the nonhuman animals, so it is unclear how many nonhuman animals are used to test cosmetics. In 1995, the Massachusetts Society for the Prevention of Cruelty to Animals estimated the number of nonhuman animals used to test personal care products in the United States to be about 50,000. *"Cruelty-Free" Labeling: What Does it Mean?*, ISSUES & ANSWERS (Mass. Soc'y for the Prevention of Cruelty to Animals, Ctr. for Lab. Animal Welfare), May 1995, at 1, 2, *available at* http://www.mspca.org/site/pp.asp?c=gtIUK4OSG&b=127058.

Part I of this Note provides an overview of the problem, introducing animal testing of cosmetics and the current meaninglessness of "cruelty-free" labels. Part II examines the formal law mechanisms that might be used to standardize labeling claims, focusing on false advertising law, and concludes that these tools are helpful but currently insufficient. Finally, Part III discusses reflexive law as it relates to labeling programs, then focuses on a discussion of third-party certification of labeling claims. While a third-party certification program for "cruelty-free" labeling claims does exist—the Coalition for Consumer Information on Cosmetics's Leaping Bunny labeling program[8]—it is limited and must be expanded if it is to have a significant impact on the market. Accordingly, this Note closes with concrete proposals to develop this existing reflexive law program and strengthen it with support from traditional false advertising law, concluding that combining these two legal mechanisms is the best means of beginning to standardize "cruelty-free" labeling claims.

I
OVERVIEW OF THE PROBLEM: ANIMAL TESTING OF COSMETICS AND THE LACK OF A "CRUELTY-FREE" LABELING STANDARD

Although cosmetic manufacturers are responsible for ensuring their products are safe,[9] federal law does not mandate animal testing of cosmetics.[10] In fact, the Food and Drug Administration (FDA) promotes the development and use of alternatives to animal tests.[11]

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[8] *See infra* Part III.C. The Leaping Bunny label is utilized on products that have been certified as "cruelty-free" by the Coalition. Coalition for Consumer Info. on Cosmetics, http://www.leapingbunny.org (last visited Nov. 3, 2005). The Leaping Bunny Label is produced below:

[9] Alternatively, manufacturers can place the following label on their products: "WARNING—The safety of this product has not been determined." Food & Drug Admin., FDA Authority Over Cosmetics (Mar. 3, 2005), http://vm.cfsan.fda.gov/~dms/cos-206.html [hereinafter FDA Authority].

[10] *Id.* Indeed, the Food and Drug Administration (FDA) emphasizes this point, noting that "the [Food, Drug, and Cosmetic] Act does not specifically require the use of animals in testing cosmetics for safety, nor does the Act subject cosmetics to FDA premarket approval." Food & Drug Admin., Office of Cosmetics and Colors, Animal Testing (rev. June 9, 2005), http://vm.cfsan.fda.gov/~dms/cos-205.html [hereinafter FDA, Animal Testing].

[11] FDA, Animal Testing, *supra* note 10. The FDA is one of fifteen agencies participating in the Interagency Coordinating Committee on the Validation of Alternative

Indeed, such alternatives are already available,[12] as are many ingredients already known to be safe. Manufacturing cosmetics without the use of animal testing is entirely possible.

In addition, there is significant opposition to animal testing of cosmetics in the United States and attendant consumer demand for products free of such testing. For example, a poll on attitudes related to animal testing in the United States found that knowledge that a cosmetic company and its suppliers did not test on nonhuman animals would influence the purchasing decisions of sixty percent of all respondents between the ages of twenty-five and thirty-four.[13] The demand for products manufactured and marketed without the use of

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Methods (ICCVAM), whose "mission is to facilitate development, validation and regulatory acceptance of new and revised regulatory test methods that reduce, refine, and replace the use of animals in testing while maintaining and promoting scientific quality and the protection of human health, animal health, and the environment." Interagency Coordinating Comm. on the Validation of Alternative Methods, ICCVAM's Mission and Vision, http://iccvam.niehs.nih.gov/about/mission.htm (last visited Nov. 3, 2005) (citations omitted); *accord* ICCVAM Authorization Act, 42 U.S.C. § 2851-3 (2000). Indeed, every federal agency that recommends acute or chronic toxicological testing has a duty to "promote and encourage the development and use of alternatives to animal test methods . . . for the purposes of complying with Federal statutes, regulations, guidelines, or recommendations." 42 U.S.C. § 2851-4(b). For an overview of ICCVAM, see Gallagher, *supra* note 2, at 261–65, and Gillespie, *supra* note 2, at 467–68.

[12] FDA-recognized alternatives include tissue cultures and biochemical assays. FDA, Animal Testing, *supra* note 10. For an overview of available alternative methods, see Gallagher, *supra* note 2, at 265–72. The FDA has endorsed Corrositex, a protein membrane that uses no nonhuman animals and can replace the traditional Draize rabbit skin tests at a fraction of the cost. Kathi Keville, *Compassionate Cosmetics*, BETTER NUTRITION, June 2002, at 58; Press Release, Nat'l Inst. Envtl. Health Scis., ETA, OSHA and CPSC Accept Non-Animal System for Screening Chemicals – Skin Corrosiveness (Mar. 21, 2000), *available at* http://www.niehs.nih.gov/oc/news/corros2.htm; *see also* Ctr. for Alternatives to Animal Testing, Synthetic Skin System Can Replace Animals in Some Tests of Chemical Safety (Mar. 22, 2000), http://altweb.jhsph.edu/news/2000/20000322.htm (discussing federal approval of Corrositex).

[13] Coal. for Consumer Info. on Cosmetics, Identifying Attitudes Related to Animal Testing in the United States, http://www.leapingbunny.org/pollresults.htm (last visited Nov. 3, 2005). A 2002 national consumer survey also found that 23.6% of all adults state that they never buy products that are tested on animals. PACKAGED FACTS, THE U.S. YOUTH MARKET: DECIPHERING THE DIVERSE LIFE STAGES AND SUBCULTURES OF 15- TO 24-YEAR OLDS 65 (2003). Another 2002 market survey found that 28.3 million U.S. consumers claim that they never buy cosmetics that have been tested on animals. PACKAGED FACTS, THE U.S. MARKET FOR NATURAL PERSONAL CARE PRODUCTS: BEAUTY AND GROOMING FOR A NEW AGE 218 (2003). These individuals, moreover, span a wide demographic. *Id.* at 220, 222. Other studies corroborate a significant demand for cosmetics that have not been tested on nonhuman animals. A 1995 National Roper poll sponsored by the Associated Press, for example, found that 46% of respondents considered animal testing of cosmetics "never right." Tufts Ctr. for Animals & Pub. Policy, Cosmetics Testing, (unpublished report on file with the *New York University Law Review*) (detailing variety of surveys on consumer attitudes toward animal testing of cosmetics); *see also* Penn & Schoen Assocs., Report to the National Consumers League on Consumer Attitudes Toward and Awareness of Animal Testing Claims on Health and Beauty Aid Products 5 (unpublished

nonhuman animals demonstrates societal concern about cosmetic testing.

In response to this demand, mainstream cosmetic manufacturers have begun to label their products with such claims as "cruelty-free" and "not tested on animals."[14] Indeed, a scan of cosmetic products reveals an array of such claims, whose meanings often seem simple and clear to consumers. Claims made include the following:

- "Not tested on animals"
- "Company X does not conduct or endorse animal testing"
- "Never tested on animals"
- "Cruelty-free"
- "Against animal testing"[15]

Many consumers mistakenly believe that all of these claims "mean the same thing."[16] In reality, however, these labels can denote a variety of things, or nothing at all. The Consumers Union notes in its Guide to Environmental Labels that "cruelty-free" labeling is "potentially misleading" and "not meaningful."[17] Indeed, the FDA, which has statutory authority to regulate such claims,[18] remarks that "[t]he unrestricted use of these phrases by cosmetic companies is possible because there are no legal definitions for these terms."[19] For example, a "cruelty-free" claim may indicate that while the final product was not tested on nonhuman animals, its ingredients were.[20] Alternatively, a "cruelty-free" claim might suggest that the product and/or its ingredients have not been animal tested within the past five years.[21] The claim could also mean that a manufacturer did not con-

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report on file with the *New York University Law Review*) (detailing another consistent study).

[14] *See* PACKAGED FACTS, THE U.S. BATH AND SHOWER CARE MARKET 220 (4th ed. 2002); PACKAGED FACTS, THE U.S. SKINCARE MARKET 14 (2001).

[15] Penn & Schoen Assocs., Inc., *supra* note 13, at 7.

[16] *Id.* (finding that 37% of U.S. women polled considered these claims identical).

[17] Consumers Union Guide to Environmental Labels, Cruelty Free Label Report Card, http://www.eco-labels.org/label.cfm?LabelID=265 (last visited Nov. 3, 2005). Absent a consistent definition of "cruelty-free," the Consumers Union observes, "the claim . . . can mean whatever the manufacturer wants it to mean." *Id.*

[18] Food, Drug, and Cosmetic Act, 21 U.S.C. § 321 (2000); *see also infra* Part II.A.1 (discussing federal authority to issue labeling requirement).

[19] Food & Drug Admin., Fact Sheet, Cruelty Free—Not Tested on Animals (rev. Feb. 24, 2000), http://vm.cfsan.fda.gov/~dms/cos-226.html [hereinafter FDA, Cruelty Free].

[20] Animal Protection Inst., Bluffer's Guide to Reading Cosmetic Labels & Claims (undated) (on file with the *New York University Law Review*). Indeed, the FDA recognizes this situation, noting that "[s]ome companies may apply such claims solely to their finished cosmetic products. . . . [while] rely[ing] on raw material suppliers or contract laboratories to perform any animal testing." FDA, Cruelty Free, *supra* note 19.

[21] *"Not Tested on Animals?,"* CAATALYST: A STUDENT NEWSLETTER, June 21, 2002, http://caat.jhsph.edu/pubs/caatalyst/cruelty_free.htm. This approach is referred to as the "rolling five year rule" and is "[a] policy followed by some cosmetic . . . companies in which

duct animal tests itself, but instead relied on a subcontractor or supplier to do so—perhaps in another country with weaker animal protection laws.[22] Given this wide range of possibilities, it is impossible to know what a freestanding "cruelty-free" claim actually signifies.

Efforts are underway to standardize "cruelty-free" labeling claims. The Coalition for Consumer Information's Leaping Bunny program, discussed in detail in Part III, certifies "cruelty-free" cosmetics manufacturers, assuring the veracity of their claims. There is, however, currently no external enforcement of the standard. No legal mechanisms have ever been brought to bear against manufacturers that mislead consumers about their testing practices. With virtually no threat of enforcement, making accurate "cruelty-free" claims is essentially voluntary. Moreover, the Leaping Bunny program's implementation has been limited.[23] Thus, while it is somewhat inaccurate to say that there is *no* "cruelty-free" standard, it is true that manufacturers making "cruelty-free" claims are not, for the most part, being held accountable to any standard. Given this situation, and its implications for both consumers and nonhuman animals, the focus here is on instituting a meaningful standard—that is, a standard that is popularly recognized and has teeth.

Without a meaningful standard, companies can mislead consumers through specious standards and, even worse, can lie outright about their testing practices. Indeed, because labeling a product "cruelty-free" can increase demand for the product, manufacturers have a financial incentive to "inflate, or even lie about, the . . . attributes of their products."[24] Consumer pressure for "cruelty-free" products can ironically incentivize lying on the part of the manufacturer in the absence of standardized labeling definitions. Furthermore, actually altering testing practices may require institutional changes and investment, creating disincentives for companies to actually *be* "cruelty-free," rather than merely representing themselves as such.[25] In light

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ingredients which have been tested may be purchased by 'cruelty-free' companies after five years have elapsed. . . . [with t]he deadline 'roll[ing]' from year to year." *Id.* This approach has been criticized by groups such as the British Union for the Abolition of Vivisection because a company could "'commission some animal testing now and, in five years' time, it would be 'cruelty-free.'" Roz Paterson, *Because the Lab Rats Are Worth It*, SUNDAY HERALD (Glasgow), Nov. 19, 2000, at 8.

[22] *"Cruelty-Free" Labeling: What Does it Mean?*, *supra* note 7, at 3.

[23] *See infra* note 146.

[24] *See* John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 MINN. L. REV. 245, 246 (1994).

[25] *See* Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151, 194 (2005) (noting that when consumers are unable to verify "cruelty-free" claims, "some manufacturers will be able to free ride on the efforts of

of consumer concern about the testing of cosmetics on nonhuman animals and the material impact that "cruelty-free" and similar claims have on purchasing practices, such claims should be standardized and rendered meaningful.[26] The remainder of this Part focuses on articulating such a standard.

Because virtually all cosmetic ingredients were tested on nonhuman animals at some point, there is essentially no product that can truly claim to have no involvement with animal testing.[27] A prohibition on using "cruelty-free" claims if any ingredient was *ever* tested on nonhuman animals would thus bar even those companies with a commitment to avoiding animal testing from benefiting from that commitment.[28] Effectively prohibiting "cruelty-free" claims in this way would reduce transparency and undermine incentives to alter practices.[29] Because consumers are concerned about subsidizing ongoing animal testing, a meaningful standard should indicate that the labeled product did not generate any new animal testing.

It is also important to consider testing of both finished products and ingredients. The European Commission was attentive to this issue, providing that "any reference to testing on animals must state clearly whether the tests carried out involve the finished product and/or its ingredients."[30] The Commission further strengthened this standard, amending it to allow a claim of no animal testing only when "the manufacturer and his suppliers have not carried out or commissioned any animal tests on the finished product, or its prototype, or any of the ingredients contained in it, or used any ingredients that have been tested on animals by others for the purpose of developing new cos-

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others, that is, they will be able to make the claim without incurring any of the costs that may be involved in ensuring the truth of the claims" and that "[u]ltimately, this will likely discourage manufacturers from incurring those costs or changing their practices").

26 Indeed, there is consumer support for such standardization—a vast majority of U.S. women polled want labels that resolve the ambiguities identified above. Eighty-five percent of U.S. women polled favored regulations to prohibit companies from claiming that a product was "not tested on animals" if its ingredients were tested on animals, while 91% favor barring companies that hire subcontractors to conduct animal testing from making animal testing claims. Penn & Schoen Assocs., *supra* note 13, at 9. In addition to supporting measures to prohibit the most blatantly misleading claims, 81% supported a system wherein animal testing related claims would be required to comply with specified requirements. *Id.* at 10.

27 As the FDA notes, "Many raw materials, used in cosmetics, were tested on animals years ago when they were first introduced." FDA, Cruelty Free, *supra* note 19.

28 ALIX FANO, LETHAL LAWS: ANIMAL TESTING, HUMAN HEALTH AND ENVIRONMENTAL POLICY 188–89 (1997).

29 *Id.*

30 Council Directive 93/35, art. 1(9), 1993 O.J. (L 151) 32, 35 (EEC) (amending Council Directive 76/768, art. 6(3), 1976 O.J. (L 262) 169 (EEC)). Note that this directive precedes the current European Union ban on cosmetic testing. *See supra* note 6.

metic products."[31] This approach serves as a useful model. Although virtually every cosmetic product will inevitably contain some ingredient that was, at some point, tested on nonhuman animals, a "cruelty-free" label signifying that no new testing was done can arm consumers with the information needed to make meaningful purchasing decisions which will, in turn, influence manufacturer practices.

This Part has shown that although there is significant consumer demand for cosmetics that are not tested on nonhuman animals, there is no standard definition of "cruelty-free." This lack of a standard leads to consumer confusion, deception, and market failure. A standard like the one currently employed in the European Union, which only allows "cruelty-free" claims when animal tests have not been commissioned for a finished product or its constituent ingredients, would address these problems. The next two Parts of this Note explore how to implement such standardization, considering traditional legal tools and reflexive law in turn.

II
USING FORMAL LAW TO STANDARDIZE "CRUELTY-FREE" CLAIMS

Several existing legal mechanisms might be employed to implement a meaningful "cruelty-free" labeling standard, including government enforcement of a standard and false advertising law. This Part analyzes these avenues in detail, concluding that while they both have potential, they also have weaknesses that render them unlikely to be sufficient to implement standardization at present.

A. Government Mandated Labeling

One possible way to ensure truth in "cruelty-free" labeling is through top-down government regulation. Under this approach, a

[31] Council Directive 2003/15, art. 1(5), 2003 O.J. (L 66) 26, 30 (EC) (amending Council Directive 76/768, art. 6(3), 1976 O.J. (L 262) 169 (EEC)). This requirement is only triggered when the manufacturer opts to make reference to animal testing. *See* Birgit Huber & Robert G. Pinco, *Cosmetic Regulation in the European Community*, *in* COSMETIC REGULATION IN A COMPETITIVE ENVIRONMENT 391, 401 (Norman F. Estrin & James M. Akerson eds., 2000). Such a label can rely on a cutoff date after which there is no new testing of either a product or an ingredient. Consider, for example, the European Trade Commission recommendation of a label "structured to read 'not tested on animals after . . .'" European Comm'n, Background Briefing, Testing of Cosmetics on Animals (Feb. 26, 2001), http://europa.eu.int/comm/trade/whats_new/cosm_ani.htm. The approach adopted by the European Commission through the Seventh Amendment to the Cosmetic Directive, while not a labeling scheme, utilizes a cut-off date by banning products tested after 2009. *See supra* note 6.

federal or state legislature or agency would articulate and enforce a standard for labeling claims.

1. *Federal Labeling Requirements*

Congress, the FDA, and the Federal Trade Commission (FTC) have the authority to issue standards regulating the use of "cruelty-free" claims.[32] The FTC has issued guidelines regulating the use of terms such as biodegradable, compostable, recyclable, and ozone-friendly on labels.[33] However, the FDA and FTC have declined to regulate "cruelty-free" claims. Despite citizen requests that they do so,[34] no agency has proposed guidelines or rules on this issue.[35]

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[32] The FDA is empowered to regulate labeling pursuant to the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 321 (2000), and the Federal Trade Commission (FTC) is empowered to do so under the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45 (2000).

[33] Fed. Trade Comm'n, Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.7 (2005). Although the guidelines do not themselves "have the force and effect of law," "[c]onduct inconsistent" with them "may result in corrective action by the [FTC] . . . if, after investigation, [it] has reason to believe that the behavior falls within the scope of conduct declared unlawful by the [FTCA]." 16 C.F.R. §§ 260.1–260.2. The dissonance between the FTC's responsiveness to environmental concerns and its failure to address "cruelty-free" labeling is likely due to the greater political influence of the environmental movement, which is more established and well-funded than the animal protection movement. For a comparison of the two movements, see generally Megan A. Senatori, *The Second Revolution: The Diverging Paths of Animal Activism and Environmental Law*, 8 WIS. ENVTL. L.J. 31 (2002).

[34] In 1995, for example, the National Consumers League (NCL), after surveying consumer perceptions of "cruelty-free" labeling claims and meeting with the FDA about the results, petitioned both the FDA and FTC "to adopt clear and consistent voluntary guidelines for 'not tested on animals' claims." Letter from Linda F. Golodner, President, NCL, to David A. Kessler, FDA Commissioner (Nov. 15, 1995) (on file with the *New York University Law Review*); *see also* Memorandum of Meeting, FDA, "Not Tested on Animals" and Similar Claims: Consumer Perception Study/Survey (Nov. 9, 1995) (on file with the *New York University Law Review*) (noting content of meeting between NCL and FDA representative). This petition was strongly supported by the Animal Protection Institute (API). Letter from Karen E. Purves, Animal Advocate, API, to David A. Kessler, FDA Commissioner (Dec. 5, 1995) (on file with the *New York University Law Review*). Although the FDA acknowledged the petitions, claimed to "share and appreciate [the] concern for the truthful labeling of cosmetic products," and affirmed that it would "not hesitate to take appropriate steps" after evaluating the petition, it never issued guidelines or addressed the issue again. Letter from John E. Bailey, Acting Director, Office of Cosmetics and Colors, FDA, to Karen E. Purves, API (Feb. 6, 1996) (on file with the *New York University Law Review*); *accord* Letter from John E. Bailey, Director, Office of Cosmetics and Colors, FDA, to Linda F. Golodner, President, NCL (May 15, 1996) (on file with the *New York University Law Review*). A Freedom of Information Act request conducted by this author revealed that the May 15, 1996 letter cited above is the final FDA response to this matter.

[35] This inaction is substantiated by a comprehensive search of the Federal Register and the Freedom of Information Act response discussed above. *See supra* note 34. Indeed, the FDA has tended to focus solely on the physical safety of cosmetics in recent history, neglecting other concerns such as questionable claims as to effectiveness. Bryan A. Liang

Whatever the reason,[36] it appears unlikely that viable "cruelty-free" labeling standards will be issued by the federal government in the near future. Although federal labeling requirements may eventually become a viable solution, the stage is not yet set for such a development and other solutions must be considered until it is.[37] Indeed, tools that can help develop "cruelty-free" standards now can raise the awareness needed to ultimately achieve government standards. Accordingly, we should look to other mechanisms to standardize "cruelty-free" labeling.

2. *State Labeling Requirements*

Absent federal labeling requirements, individual states might act pursuant to their "little FTC" acts, which are modeled after the Federal Trade Commission Act and empower state agencies to prevent false advertising.[38] However, the difficulties inherent in multiple, varying labeling requirements make this solution problematic. Part of the current problem with "cruelty-free" labeling is the use of multiple confusing claims, an issue that would not be fully addressed by, and

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& Kurt M. Hartman, *It's Only Skin Deep: FDA Regulation of Skin Care Cosmetic Claims*, 8 CORNELL J.L. & PUB. POL'Y 249, 250–52 (1998).

[36] One possible explanation for the failure is the strong cosmetic industry antiregulatory lobby, which opposes standardization. The U.S. cosmetic industry is very well-organized through the Cosmetics, Toiletry and Fragrance Association (CTFA). About CTFA, CTFA Membership Listing, http://www.ctfa.org/Content/NavigationMenu/About_CTFA/Member_Company_List/Member_Company_List.htm (last visited Nov. 3, 2005). Although the CTFA supports national uniformity, see *infra* note 45, the group has a considerable history of enacting self-regulation measures that enabled the industry to successfully avoid government regulation. *See generally* Peter Barton Hutt, *A History of Government Regulation of Adulteration and Misbranding of Cosmetics*, *in* COSMETIC REGULATION IN A COMPETITIVE ENVIRONMENT, *supra* note 31, at 1, 23 (describing history of CTFA's self-regulation); Gerald N. McEwen, Jr. et al., *Voluntary Self-Regulation: A Case Study*, *in* COSMETIC REGULATION IN A COMPETITIVE ENVIRONMENT, *supra* note 31, at 185, 185–94 (same).

[37] If federal labeling standards do become viable, there may still be some concerns with relying upon them. For example, some worry that the result will be an excessively weak standard. *See, e.g.*, E-mail from Ann Marie Giunti, Coordinator, Caring Consumer Project, People for the Ethical Treatment of Animals, to Delcianna J. Winders (Dec. 21, 2004) (on file with the *New York University Law Review*) ("Efforts to enact such legislation could actually be detrimental as regulatory agencies and industry pressure groups would be given the opportunity to lobby for labeling that is a greater disservice to cruelty-free companies and caring consumers."). Given the limited federal protections for nonhuman animals and the underenforcement of what protections do exist, these assertions may be correct. *See infra* note 58. The merits of these contentions should be addressed if and when federal labeling requirements become politically feasible; such an assessment, however, is outside the scope of this Note, given its focus on what can be done at present to ensure truth in "cruelty-free" labeling.

[38] Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 35 (2004).

might actually be exacerbated by, state-by-state regulation. Because virtually all cosmetics are sold nationwide,[39] varying state laws would introduce the need for multiple labeling claims. In the face of multiple labeling regimes, manufacturers would have to respond by producing many different labels for the same product,[40] which would be burdensome to them. Alternatively, manufacturers could place many claims on the same label, reducing this burden, but also making the label less helpful to consumers. While a single package might conceivably accommodate the requirements for each state, overly detailed labels increase the likelihood of consumer confusion and information overload, thereby undermining the very purpose of the labeling.[41] There is a third possibility: Manufacturers may choose to comply with the most stringent state labeling requirement, effectively resulting in a "race to the top."[42] No states, however, have regulated "cruelty-free" labeling to date.

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[39] *See infra* note 153 and accompanying text (noting that U.S. cosmetic industry is heavily concentrated into few national companies).

[40] The proliferation of organic food labels prior to the federal Organic Foods Production Act of 1990 exemplifies this problem. Prior to the Act:

> private organizations and state agencies had the authority to certify organic practices in their jurisdiction. Not surprisingly, there was no uniformity in standards and therefore no guarantee that "organic" meant the same thing from state to state. By 1990, twenty-two states had adopted organic food statutes that all varied in one way or another. . . . [leaving consumers] to decipher a confusing array of private and State labels.

Lauren Zeichner, Student Article, *Product vs. Process: Two Labeling Regimes for Genetically Engineered Foods and How They Relate to Consumer Preference*, 27 ENVIRONS ENVTL. L. & POL'Y J. 467, 471–72 (2004).

[41] Successful labeling requires that information be effectively "digest[ed], simplif[ied], and summarize[d]" so that it is readily accessible to consumers. Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 141 (2001). Professor Menell suggests:

> [t]he usability of information can be judged by three criteria: (1) comprehensibility—whether the information is understandable and easy to apply in making decisions; (2) universality—whether the information enables consumers to compare a broad range of choices in a comparative perspective; and (3) prioritization—whether the information enables consumers to make judgments about the importance of choosing one option relative to others.

Peter S. Menell, *Structuring a Market-Oriented Federal Eco-Information Policy*, 54 MD. L. REV. 1435, 1446 (1995).

[42] *See* Kyle W. Lathrop, Note, *Pre-Empting Apples with Oranges: Federal Regulation of Organic Food Labeling*, 16 J. CORP. L. 885, 926 (1991) ("Some argue that a state with sufficient political and market influence can serve the entire nation by enacting stricter regulations than those mandated by the federal government."). For example, many national manufacturers have reformulated their products in order to avoid having to place warning labels on their products under California's Proposition 65. *Id.* at 926–27; ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 478 (4th ed. 2003).

State standards are also likely to face a preemption challenge.[43] The strongest form of federal preemption is express preemption, where a federal statute explicitly specifies that states are preempted from regulating a certain area. The FDA Modernization Act of 1997,[44] supported by the cosmetic industry,[45] added a preemption provision for cosmetic labeling to the Food, Drug, and Cosmetic Act (FDCA).[46] The FDCA now bars states from "establish[ing] or continu[ing] in effect any requirement for labeling or packaging of a cosmetic that is different from or in addition to, or that is otherwise not identical with, a [federal] requirement specifically applicable to a particular cosmetic or class of cosmetics."[47] This provision is further defined to cover "any specific requirement relating to the same aspect of such cosmetic as a requirement specifically applicable to that particular cosmetic or class of cosmetics under [the FDCA] for packaging or labeling, including any State requirement relating to public information or any other form of public communication."[48]

Unfortunately, there is virtually no case law guiding the interpretation or application of this preemption provision.[49] Given the provision's limited scope—it purports to pertain only to specific requirements already addressed by the FDCA requirements—state law pertaining to "cruelty-free" labeling may not be preempted because no specific federal requirement addresses this issue. Although the FDCA discusses misbranding in general, it does not specifically address "cruelty-free" labeling. However, the immediately succeeding statement, "including any State requirement relating to public information," seems to broaden the scope of preemption considerably, generating some uncertainty. While federal law does not expressly address "cruelty-free" labeling, state regulation of such labeling would be "a requirement relating to public information" and thus may be preempted by federal law. Were the states to regulate

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[43] Although state false advertising suits based on misleading "cruelty-free" claims are likely to survive a preemption challenge, see *infra* notes 80–87 and accompanying text, such a successful challenge to a statutory or regulatory labeling regime is somewhat more viable.

[44] Pub. L. No. 105-115, 111 Stat. 2296 (amending scattered sections of 21 U.S.C.).

[45] Hutt, *supra* note 36, at 40 n.290. The Cosmetics, Toiletry and Fragrance Association (CTFA) has sought national uniformity in cosmetic regulation. *Id.*

[46] Pub. L. No. 105-115, 111 Stat. 2296, 2376 (codified at 21 U.S.C. § 379s (2000)).

[47] 21 U.S.C. § 379s(a) (2000).

[48] *Id.* § 379s(c).

[49] I have only found one case mentioning 21 U.S.C. § 379s, and it is not officially published. Am. Int'l Indus. v. Super. Ct., 85 Cal. Rptr. 2d 815 (Cal. Ct. App. 1999). Moreover, this case only holds, with respect to § 379s, that a product liability claim and a claim under a state initiative measure approved in 1986 are not barred. *Id.* at 828.

"cruelty-free" labeling of cosmetics, the industry would likely bring a challenge, which would need to be litigated.[50]

Any attempt at creating state labeling requirements should be attentive to the possibilities of judicial challenge and increased consumer confusion. Like federal labeling requirements, state requirements may become a viable solution and merit further consideration. Given the current limitations of government mandated regulations, however, it is worthwhile to assess legal tools that might affect standardization more immediately. Accordingly, the remainder of this Part considers the use of false advertising law to standardize "cruelty-free" claims.

B. False Advertising Law and Labeling Claims

Various groups have recently employed false advertising law to challenge claims made about the treatment of nonhuman animals.[51] As Carter Dillard notes, "false advertising law is . . . one of the few avenues that animal advocates can use to have courts and public agencies review the actual treatment of animals as well as consumers' perception of that treatment."[52] In this vein, false advertising suits may be brought against cosmetic manufacturers who mislead consumers with "cruelty-free" claims. In fact, the deployment of false advertising law could be particularly illuminating in the field of cosmetic labeling, as most consumers are unaware of the problems with "cruelty-free" labeling. Suits about misleading claims have the potential to raise awareness about the lack of a standard and spur concerned consumers to demand more meaningful labeling claims. There are a variety of avenues available for false advertising challenges—federal, state, and extra-governmental—each of which is examined in turn below.

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[50] Indeed, even before the addition of the preemption provision, CTFA successfully argued in court that a state law governing the display of warning labels on containers using chlorofluorocarbons was preempted by the FDCA. Cosmetic, Toiletry & Fragrance Ass'n v. Minnesota, 575 F.2d 1256, 1257 (8th Cir. 1978). Even though the substantive warning required by state and federal law was identical, state law required the label to be placed on the front panel of the product whereas federal law allowed placement on the back panel. *Id.*

[51] *See generally* Dillard, *supra* note 38 (discussing use of false advertising law to advance animal protection). One example is the suit brought by People for the Ethical Treatment of Animals (PETA) against Kentucky Fried Chicken (KFC) for allegedly false representations about its treatment of chickens. *Id.* at 26 n.1. This suit was dropped after KFC agreed to make changes to claims about chickens made on its website and in its customer-service script. Donna Mo, Comment, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313, 1322 (2005).

[52] Dillard, *supra* note 38, at 27.

1. *Federal Enforcement of False Advertising Law*

The federal government is empowered to bring suit against manufacturers for misleading consumers through the use of "cruelty-free" claims. The FTC and FDA share jurisdiction over cosmetic marketing,[53] and have agreed to allocate primary responsibility over cosmetic labeling to the FDA.[54] The Food, Drug, and Cosmetic Act provides:

> If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining whether the labeling or advertising is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertising relates under the conditions of use prescribed in the labeling or advertising thereof or under such conditions of use as are customary or usual.[55]

The Act prohibits such misbranding of any "cosmetic in interstate commerce."[56] A representation that a product is "cruelty-free," combined with a failure to disclose that either the ingredients or the finished product is tested on nonhuman animals, is misleading under this definition.

However, while federal agencies have broad authority to regulate false advertising, they also have absolute enforcement discretion[57] and, in fact, there has never been a proceeding about misleading "cruelty-free" claims.[58] Federal enforcement against misleading "cruelty-

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53 Federal Trade Commission Act, 15 U.S.C. § 45(a)(2) (2000) ("The [Federal Trade] Commission is hereby empowered to prevent . . . corporations . . . from using . . . unfair or deceptive acts or practices in or affecting commerce."); Food, Drug, and Cosmetic Act, 21 U.S.C. § 331(b) (2000) (prohibiting "[t]he adulteration or misbranding of any . . . cosmetic in interstate commerce"); *see also* Lesley Anne Fair, *Regulation of Marketing Claims by the Federal Trade Commission and States*, *in* COSMETIC REGULATION IN A COMPETITIVE ENVIRONMENT, *supra* note 31, at 153–54 (describing coordination between FTC and FDA).

54 Memorandum of Understanding Between Federal Trade Commission and the Food and Drug Administration, 36 Fed. Reg. 18539 (Sept. 16, 1971).

55 21 U.S.C. § 321(n) (2000).

56 *Id.* § 331(b).

57 *See* Heckler v. Chaney, 470 U.S. 821, 831–32, 837 (1985) (holding that agency decisions to not enforce are presumptively unreviewable and that presumption is not overcome by enforcement provisions of Food, Drug, and Cosmetic Act).

58 In light of the notably persistent underenforcement of the two main federal laws pertaining to nonhuman animals, the Humane Slaughter Act, 7 U.S.C. §§ 1901–1906 (2000), and the Animal Welfare Act, 7 U.S.C. §§ 2131–2156, federal enforcement appears even more unlikely. *See* David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, *in* ANIMAL RIGHTS: CUR-

free" claims, while a potentially useful tool, appears relatively unlikely at present, particularly given that the government cannot be compelled to exercise its enforcement discretion in a particular way. It is thus worthwhile to examine other types of false advertising claims that allow consumers more of a voice and might set the groundwork for subsequent government actions.

2. *Private Suits under the Lanham Act*

The Federal Lanham Act provides a cause of action to "any person who believes that he or she is or is likely to be damaged" by a misrepresentation "in commercial advertising or promotion," of the "nature, characteristics, [or] qualities . . . of his or her or another person's goods, services, or commercial activities."[59] Despite this expansive language, consumer actions under the Lanham Act have been consistently rejected, with courts requiring a competitive injury[60] for prudential standing.[61] Though significantly cabined by the judiciary, the Lanham Act provides a potential forum for a truly "cruelty-free" manufacturer to bring suit against a competitor employing misleading "cruelty-free" claims. For example, a manufacturer that has verified that its "cruelty-free" claims are accurate might bring suit against a company that claims its products are "cruelty-free" while continuing to hire subcontractors to perform animal-based ingredient testing.

RENT DEBATES AND NEW DIRECTIONS 205, 207–08 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (noting extraordinary underenforcement of federal animal protection laws). *See generally* GAIL A. EISNITZ, SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY (1997) (detailing systematic underenforcement problems with Humane Slaughter Act); Katharine M. Swanson, Note, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. REFORM 937 (2002) (discussing administrative and judicial underenforcement of Animal Welfare Act as it applies to laboratory animals).

[59] 15 U.S.C. § 1125(a)(1) (2000).

[60] A competitive injury is a commercial injury caused by a competitor's act.

[61] *See, e.g.*, Made in the USA Found. v. Phillips Foods, Inc., 365 F.3d 278, 281 (4th Cir. 2004) (holding that consumers lack standing to bring Lanham Act claims); Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 n.5 (5th Cir. 1996) (same); Stanfield v. Osborne Indus., 52 F.3d 867, 873 (10th Cir. 1995) (same); *see also* Dillard, *supra* note 38, at 38 (finding "almost no jurisdiction in which a typical consumer . . . can bring a Lanham Act claim"); Courtland L. Reichman & M. Melissa Cannady, *False Advertising under the Lanham Act*, 21 FRANCHISE L.J. 187, 192 (2002) (noting "courts have consistently rejected consumer standing to sue for false advertising under the Lanham Act"). This issue, however, has not been definitively addressed by the U.S. Supreme Court. *See* Reichman & Cannady, *supra*, at 192.

The elements required to satisfy a Lanham Act false advertising claim are:

> (1) a false or misleading statement of fact; (2) that is used in a commercial advertisement or promotion; (3) that is material, in that it deceives or is likely to deceive; (4) that is used in interstate commerce; and (5) that causes, or is likely to cause, the claimant competitive or commercial injury.[62]

A "cruelty-free" claim by a manufacturer who commissions animal testing meets these criteria: The claim is false; it constitutes commercial promotion;[63] it is, in light of the survey results discussed, likely to deceive consumers;[64] it is used in interstate commerce; and it is likely to cause a competitive injury by extracting business from a truly "cruelty-free" manufacturer.

Such a suit is attractive for a number of reasons. The Lanham Act provides for monetary awards for damages sustained by the plaintiff,[65] defendant's profits, costs, and, in exceptional cases, attorney's fees, as well as injunctions and corrective advertising.[66] Another benefit of a Lanham Act suit is that a defendant's testing and labeling practices can be thoroughly scrutinized through discovery,[67] affording a forum for exploring what "cruelty-free" might appropriately signify. Such a suit could bring public attention to animal testing issues and to the lack of a "cruelty-free" labeling standard, perhaps garnering support for the promulgation of government labeling requirements. A Lanham Act suit could thus encourage the development of a more meaningful standard, while also deterring the use of misleading labels.

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62 Reichman & Cannady, *supra* note 61, at 188.

63 The Lanham Act provides that "a mark shall be deemed to be in use in commerce" when "it is placed in any manner on the goods or their containers or the displays associated therewith or on the . . . labels affixed thereto" and "the goods are sold or transported in commerce." 15 U.S.C. § 1127 (2000); *cf.* Gillette Co. v. Norelco Consumer Prods. Co., 946 F. Supp. 115, 133–35 (D. Mass. 1996) (holding that claims in package insert do not constitute advertising or promotion because they are inside package and thus do not impact purchasing decision).

64 *See supra* notes 16–17 and accompanying text.

65 Marketplace damages (the amount of profit lost by plaintiff due to defendant's false advertising) and unjust enrichment (the defendant's profits earned from false advertising) are two forms of monetary relief available under the Lanham Act. Reichman & Cannady, *supra* note 61, at 194. The award of defendant's profits is typically predicated on intentional misconduct. *Id.* at 194–95.

66 15 U.S.C. §§ 1116–17 (2000). Injunctive relief, however, is much more commonly sought than monetary damages, in part because the burden of proof is lower. *See* Reichman & Cannady, *supra* note 61, at 193 (noting that plaintiff seeking injunctive relief need only "satisfy the materiality element of the cause of action," while plaintiff seeking damages "must prove actual confusion or deception arising from the violation").

67 *See* Dillard, *supra* note 38, at 39. These procedures are significantly different from those of a Better Business Bureau challenge. *See infra* Part II.B.4.

Despite the advantages of a Lanham Act suit, finding a viable plaintiff may pose challenges. Even a manufacturer that has endeavored to ensure that its products are truly "cruelty-free" may be wary of opening itself up to scrutiny in the courtroom, particularly in light of the absence of a "cruelty-free" standard. As discussed, the primary concern of "cruelty-free" labeling is to deter *new* animal tests;[68] however, given the focus of the Lanham Act on literal veracity and falsity,[69] the fact that a seemingly "cruelty-free" company uses ingredients that were historically tested on nonhuman animals might deter it from bringing suit.[70] Moreover, because there is a higher burden of proof for monetary damages,[71] it may not be cost-effective for truly "cruelty-free" manufacturers to bring Lanham Act claims. Nonetheless, with the support of a well-funded animal protection group interested in "cruelty-free" labeling, and the possibility of recovering attorney's fees, a suit may be viable. A "cruelty-free" company certified by a third-party would probably be the most likely to withstand scrutiny of its "cruelty-free" claims. Moreover, it may be worthwhile for a third-party "cruelty-free" certifier to support such a suit in the future, as it would likely enhance the vitality of a certification program.[72] Should Lanham Act claims prove too difficult or insufficient, however, state courts and the Better Business Bureau provide alternative avenues for challenging false advertising.

3. *False Advertising Suits in State Court*

While the Lanham Act has exceedingly strict standing requirements,[73] some states allow private parties to challenge false advertising more easily.[74] The District of Columbia, for example, provides

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[68] *See supra* Part I.

[69] *See, e.g.*, S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 238 (2d Cir. 2001) (noting that falsity under Lanham Act can be shown by demonstrating that statement was literally false, or literally true but likely to mislead or confuse); United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998) (same); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (same).

[70] *See supra* note 27 and accompanying text.

[71] *See supra* note 66.

[72] For more on third-party certification, see *infra* Part III.

[73] *See supra* notes 60–61 and accompanying text.

[74] Until recently, California's unfair competition law, CAL. BUS. & PROF. CODE §§ 17200–17209 (West 1997), afforded a private cause of action to "any person acting for the interests of itself, its members or the general public," and was particularly useful for consumers. *Id.* § 17204; *see, e.g.*, Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1091 (Cal. 1998) (noting that provision "conferred upon private plaintiffs 'specific power' to prosecute unfair competition claims" (citation omitted)). These provisions, however, were significantly weakened through a successful ballot initiative in the 2004 election, which required that plaintiffs suffer a loss of money or property to have standing. *California Proposition 64: Limits on Private Enforcement of Unfair Business Competition*

that any "person . . . may bring an action . . . seeking relief from the use by any person of a trade practice in violation of a law."[75] Similarly, some states' "little FTC" acts, such as the Florida false advertising and deceptive business practices statutes[76] and the Pennsylvania Unfair Trade Practices and Consumer Protection Law,[77] provide a private cause of action for consumers harmed by false advertising.[78] Under such provisions, consumers misled by "cruelty-free" claims can bring suit for declaratory and injunctive relief and, in some states, punitive or noneconomic damages.[79]

Preemption challenges might be brought against state false advertising claims, but they are unlikely to succeed given the Supreme Court's recent decision in *Bates v. Dow Agrosciences LLC*.[80] In *Bates*, the Court considered a pesticide labeling preemption provision with language closely parallel to that of the cosmetic labeling preemption provision.[81] Dow challenged a common law fraud claim as preempted.[82] The Court held, however, that as long as the requirements under state law were equivalent to federal misbranding standards, there was no preemption.[83] The Court did not require that the state

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Laws, *in* OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION 38–41 (2004), *available at* http://vote2004.ss.ca.gov/voterguide/english.pdf; *see also* O'Melveny & Myers LLP, Californians Vote to Amend Infamous 'Private Attorney General' Statute (Nov. 4, 2004), http://www.omm.com/webdata/content/publications/client_alert_class_action_2004_11_04.htm (describing Proposition 64). *See generally* Mo, *supra* note 51 (discussing implications of this change for animal advocates and ways in which statute might still be used to protect nonhuman animals). Nonetheless, other states' private attorney general provisions still provide an opportunity for consumers to confront manufacturers making false "cruelty-free" claims. Though some are described in this Note, a full survey of such provisions is outside its scope.

75 D.C. CODE ANN. § 28-3905(k)(1) (LexisNexis 2001). This provision has been cabined by recent case law and may come under more attack, given that private attorney general provisions are often criticized as transferring enforcement duties to the courts that should remain with the executive and legislative branches. *See* Dillard, *supra* note 38, at 43–45. Dillard suggests, however, that D.C. law "should . . . be read to allow animal advocacy organizations and concerned citizens, as well as consumers and commercial competitors, to target false advertisers." *Id.* at 43.

76 FLA. STAT. ANN. § 501.211 (West 2002); FLA. STAT. ANN. § 817.44 (West 2000).

77 73 PA. STAT. § 201-9.2 (West 2005).

78 *See* Dillard, *supra* note 38, at 39–42.

79 *Id.* at 39–40 (citing Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 FORDHAM L. REV. 1305, 1350 (2001)).

80 125 S.Ct. 1788 (2005).

81 The preemption provision at issue in *Bates*, part of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136–136y (2000), provides that states cannot impose "addition[al]" or "different" labeling "requirements" for pesticides. *Id.* § 136v(b). The language of this provision is markedly similar to that covering cosmetics labeling, which also preempts state requirements that are additional to or different from those imposed by federal law. *See supra* note 47 and accompanying text.

82 *Bates*, 125 S.Ct. at 1793.

83 *Id.* at 1800.

and federal provisions be identical.[84] Thus state and federal law can provide "parallel requirements," even when such requirements give each state authority to interpret misbranding provisions independently, without raising preemption problems.[85]

At least until the federal government actively regulates "cruelty-free" labeling claims, state false advertising suits are unlikely to be preempted. The Court noted that where a state requirement is inconsistent with a federal regulatory requirement, it is preempted.[86] Where, however, federal regulations are silent on an issue—as they currently are on "cruelty-free" claims—the scope of preemption is more narrow.[87] Because the Court held that where state requirements are "equivalent to" and "consistent with" federal requirements they are not preempted,[88] states are authorized to provide a remedy for misbranding through false advertising suits so long as they do not impose requirements that exceed those of federal law.[89]

Consumer suits in some state courts thus offer a practical alternative to litigation in federal courts, which have effectively barred consumer claims through strict prudential standing requirements.[90] State suits provide an important forum, drawing public attention to animal testing issues and the current problems with "cruelty-free" labeling. Given the accessibility of these fora, they can be important in initiating dialogue about "cruelty-free" labeling. However, they also suffer from limitations. Most significantly, they are inefficient for consumers in terms of both money and time. State-by-state litigation may also result in the same problem as state-by-state regulation—piecemeal requirements with disparities that ultimately confuse rather than

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[84] *Id.* at 1804.

[85] *Id.* at 1800. Indeed, the Court noted that despite Dow's fear that the "parallel requirements" holding would "'give juries in 50 states the authority to give content to [the federal] misbranding prohibition, establishing a crazy-quilt of anti-misbranding requirements,'" *id.* at 1801 (quoting Brief for Respondent at 16, *Bates*, 125 S.Ct. 1788 (No. 03-388)), the parallel requirements reading was compelled by the statutory language—the same language that is present in the FDCA. *See supra* note 81.

[86] *Bates*, 125 S.Ct. at 1803–04.

[87] *Cf. id.* 1804 n.28 ("At present, there appear to be relatively few regulations that refine or elaborate upon FIFRA's broadly phrased misbranding standards. To the extent that EPA promulgates such regulations in the future, they will necessarily affect the scope of pre-emption.").

[88] *Id.* at 1800.

[89] *See id.* at 1798. With regard to what constitutes an additional requirement, the Court underscored that an "occurrence that merely motivates an optional decision does not qualify as a requirement." *Id.*

[90] *See supra* notes 60–61 and accompanying text.

clarify.[91] For these reasons, although state false advertising suits can serve an important supplementary function, they should be combined with external mechanisms to create a "cruelty-free" labeling standard.

4. Better Business Bureau Challenges

The Better Business Bureau's (BBB) tools can also ensure that "cruelty-free" labeling claims are used responsibly. BBB mechanisms have been used to challenge claims made about the treatment of non-human animals. Most notably, the BBB recently referred a case to the FTC involving the use of a "humane care certified" label on eggs produced by hens who are routinely debeaked[92] and deprived of food and water, recommending that the label be dropped or altered.[93] The FTC encouraged the certifiers to alter the label, approved a labeling change, and dropped its consideration of a false advertising complaint after the change was implemented.[94] A similar complaint could be brought for misleading "cruelty-free" labels.[95]

The BBB's well-developed advertising self-regulation mechanisms are an alternative to judicial enforcement of false advertising

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[91] *See supra* text accompanying notes 39–42. Alternatively, however, manufacturers may choose to comply with the highest state standard. *See supra* note 42 and accompanying text.

[92] Egg producers debeak baby chicks without anesthesia using a hot knife. Their beaks are cut off so that they do not peck or cannibalize one another when intensively confined. *See* Amy Mosel, Comment, *What about Wilbur? Proposing a Federal Statute to Provide Minimum Humane Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 147 n.69 (2001) ("Researchers have compared the sensation of being debeaked to that of having a limb amputated . . . . The blade cuts through horn, bone, and sensitive tissue, with pain continuing after the operation is completed.").

[93] Patrick Condon, *Egg Industry Warned About "Humane" Label*, HOUSTON CHRONICLE, May 11, 2004, at 5.

[94] Alexei Barrionuevo, *Egg Producers Relent on Industry Seal*, N.Y. TIMES, Oct. 4, 2005, at C18; Nelson Hernandez, *Egg Label Changed after Md. Group Complains*, WASH. POST, Oct. 4, 2005, at B3. The logo was altered from stating "Animal Care Certified," which was deemed misleading, to state "United Egg Producers Certified." Hernandez, *supra*.

[95] Although the FTC defers to FDA decisions on labeling, the National Advertising Division (NAD) deems labels to be "'national advertising' within its jurisdiction." David H. Bernstein, *How to "Litigate" False Advertising Cases Before the NAD*, *in* STRATEGIES FOR LITIGATING COPYRIGHT, TRADEMARK & UNFAIR COMPETITION CASES 255, 267 (2002). NAD procedures provide that:

> advertising' shall include any paid commercial message, in any medium (including labeling), if it has the purpose of inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service; if it is disseminated nationally or to a substantial portion of the United States . . . ; and if the content is controlled by the advertiser.

National Advertising Review Council, The Advertising Industry's Process of Voluntary Self-Regulation § 1.1(A) (2005), *available at* http://www.nadreview.org/Procedures.asp?SessionID=637376 [hereinafter NARC, Advertising Self-Regulation].

law. One of the BBB's core services is the review and voluntary correction of advertising.[96] Filing a false advertising challenge with the BBB's National Advertising Division (NAD) is seen as a "powerful alternative" to suing under state or federal law, one "that often results in a quicker, cheaper, easier and more professional decision,"[97] and as "perhaps the most effective means of taking an advertiser to task."[98] Indeed, the FTC itself has repeatedly "praised the NAD as 'the model of self-regulation.'"[99]

As a self-regulating body that relies on voluntary compliance, the NAD cannot require participation or enforce its decisions.[100] However, advertisers who refuse participation or compliance are reported to the appropriate governmental enforcement agency,[101] and the FTC has indicated that when advertisers fail to comply with NAD decisions it is "prepared to take action."[102] Indeed, it has taken such action in the past, resulting in consent decrees, fines, and compulsory compliance reports.[103] Consequently, the NAD compliance rate exceeds ninety-five percent.[104]

The NAD is also preferable to public enforcement insofar as it places the burden on the advertiser to substantiate its claims.[105] Under the Lanham Act,[106] the burden is on the challenger to prove that the advertising is false,[107] a difficult task in the case of "cruelty-free" labeling, where proprietary testing information is often tightly guarded. Despite this advantage, there are some drawbacks to proceeding via the NAD; most importantly, it cannot offer monetary relief and, unlike enforcement by the FTC, the process is confidential.[108] If publicizing the issues around "cruelty-free" cosmetics and

96 Better Business Bureau, Advertising Self Regulation, http://www.bbb.org/advertising.asp (last visited Nov. 3, 2005).

97 Bernstein, *supra* note 95, at 260; *see also* Fair, *supra* note 53, at 179–80 (discussing effectiveness of NAD); Paul M. Hyman & Samia N. Rodriguez, *Regulation of Labeling and Advertising Claims*, *in* COSMETIC REGULATION IN A COMPETITIVE ENVIRONMENT, *supra* note 31, at 43, 50–51 (same).

98 Dillard, *supra* note 38, at 33.

99 Bernstein, *supra* note 95, at 260.

100 *Id.* at 261.

101 NARC, Advertising Self-Regulation, *supra* note 95, § 2.1(F).

102 *See* Bernstein, *supra* note 95, at 264 (quoting Press Release, FTC, Dietary Supplement Advertiser Settles FTC Charges of Deceptive Health Claims (May 12, 1998), *available at* http://www.ftc.gov/opa/1998/05/bogdana.htm).

103 *See id.*

104 *Id.*

105 *Id.* at 261.

106 *See supra* Part II.B.2.

107 Bernstein, *supra* note 95, at 261.

108 *Id.* at 268.

labeling is a primary purpose in challenging an advertisement, then the NAD is not the ideal forum.

This Part has analyzed the contributions that traditional legal mechanisms—particularly, command-and-control labeling requirements and false advertising law—can offer to standardize "cruelty-free" labeling. The federal and state governments appear unlikely to promulgate labeling requirements at present. False advertising claims brought in federal and state courts and through the BBB provide a forum for addressing and penalizing the misuse of "cruelty-free" claims. By combining these backward-looking tools with a forward-looking certification system, a widespread and enforceable "cruelty-free" standard can be established. Part III thus turns to the contribution that reflexive law, particularly third-party certification, can presently make to the standardization of "cruelty-free" claims.

III
USING REFLEXIVE LAW TO STANDARDIZE "CRUELTY-FREE" CLAIMS

This final Part presents an overview of reflexive law theory generally, and labeling specifically, as well as a case study of one particularly instructive reflexive law program. It then argues that an expansive labeling and certification program can create a meaningful "cruelty-free" labeling standard. The Part concludes with a discussion of the interaction between reflexive law and false advertising law, contending that a reflexive law program can provide the infrastructure and positive incentives for manufacturers to use truthful "cruelty-free" labeling claims, while false advertising law can act as an outside check on this program, penalizing abuse of the standard and ensuring its integrity.

A. Reflexive Law Theory and Labeling

Distinct from traditional command-and-control regulation, which operates by directly controlling conduct, reflexive law operates through the collection and dissemination of information, which in turn encourages companies to internalize social norms.[109] The role of the state in a reflexive law framework is generally limited to providing mechanisms for information disclosure, which in turn encourage and

[109] *See* Stewart, *supra* note 41, at 127. *See generally id.* at 127–51 (defining reflexive law and reviewing its instruments); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41, 48–51 (1999) (explaining theory and development of reflexive law); Eric W. Orts, *Reflexive Environmental Law*, 89 Nw. U. L. REV. 1227 (1995) (developing and applying theory of reflexive law in environmental field).

enable companies and other entities to self-regulate.[110] Warning labels, environmental impact statements, and third-party certified labeling claims are some examples of reflexive law approaches.[111] External transparency is central to reflexive law, as complete information allows stakeholders to fully understand the impact of their actions and then articulate their preferences in the market.[112] This expression of preferences in the market is then expected to result in positive behavioral changes by firms and other organizational actors.[113] Reliable information disclosure through labeling can thus incentivize practices valued by consumers and provide compliant manufacturers with a competitive advantage.[114]

Eco-labels are an example of a positive information scheme;[115] they aim to facilitate product evaluation through a simple, identifiable, and credible sign.[116] The voluntary nature of a positive information scheme—and its demonstrable success in several cases—make it a promising approach. The Forest Stewardship Council's (FSC) eco-labeling program provides a successful example of reflexive law at work.[117] The next section provides an overview of the FSC program to guide the discussion of third-party certification of "cruelty-free" labeling.

B. Labeling Case Study: Forest Certification

The FSC program emerged from circumstances akin to those addressed in this Note—a lack of labeling standards resulting in ques-

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110 *See* Stewart, *supra* note 41, at 131 ("Government's role, in a reflexive perspective, is to ensure that appropriate information is generated, conveyed and exchanged.").

111 *See id.* at 136–41.

112 *See id.* at 134.

113 *See id.* at 134–36 (describing theory that consumers' demand for environmentally-friendly products will lead producers to make more such products to increase their market share).

114 *Id.* at 132.

115 *Id.* at 136–37. Information schemes are classified as positive, negative, or neutral depending on the type of information they disclose. *Id.* at 136–41.

116 *Id.* at 136–39.

117 While this Note focuses on the lessons to be learned from Forest Stewardship Council's (FSC) successes, its weaknesses are also instructive for "cruelty-free" labeling. Forest certification programs, for example, have struggled with market acceptance. *See generally* Misty L. Archambault, Note, *Using Brand Management Concepts to Encourage Market Acceptance of Forestry Certification Regimes in the United States* 17–25 (unpublished manuscript, on file with the *New York University Law Review*) (arguing that demand-related obstacles and low supply hamper market acceptance of forest certification programs). While outside the scope of this Note, using brand management concepts to promote third party certified "cruelty-free" labels could enhance their efficacy.

tionable industry claims and consumer confusion.[118] In response to increased consumer concern about the environmental impact of private timber harvesting,[119] the failure of traditional legal tools to address the problem,[120] and the plethora of unsubstantiated environmental claims made by manufacturers,[121] the FSC, a multi-stakeholder organization, developed an international certification and labeling scheme for timber products.[122] The FSC label combines a green tree icon with a checkmark.[123] In order for a company to use the logo, it must comply with ten nondiscretionary principles that encompass environmental and social considerations,[124] and fifty related criteria of forest stewardship.[125] To ensure compliance with these principles, the FSC accredits independent, third-party certifying organizations who must themselves meet rigorous administrative requirements.[126] The certifying bodies conduct strict inspections and periodically monitor

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118 Teresa Hock, Note, *The Role of Eco-Labels in International Trade: Can Timber Certification Be Implemented As a Means to Slowing Deforestation?*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 347, 359 (2001).

119 BENJAMIN CASHORE ET AL., GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY 11 (2004).

120 *See id.* (discussing failure of global forest convention); *id.* at 96–97 (noting industry-friendly state regulation of private forestland).

121 Hock, *supra* note 118, at 359. One study, for example, found that only three out of six hundred claims of sustainable production in the United Kingdom were substantiated. *Id.*

122 FSC competes with another certification program run by the Sustainable Forestry Initiative (SFI). For a detailed description and analysis of the relationship between the two programs see CASHORE ET AL., *supra* note 119, at 88–126. SFI guidelines are less aspirational than those of the FSC. J.R. Geraghty, *From the Trees to the Tables—How Big Timber Got Green*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 97, 100. With the increased popularity of FSC certification, however, SFI was compelled to raise its standards to maintain credibility, demonstrating that "consumers and NGOs can quickly delegitimize weak standards and inadequate enforcement mechanisms, and . . . mobilize effectively for more stringent codes of conduct and more reliable monitoring." Gary Gereffi et al., *The NGO-Industrial Complex*, FOREIGN POL'Y, July/Aug. 2001, at 56, 64.

123 *See* Forest Stewardship Council, http://www.fsc.org/en (last visited Nov. 3, 2005).

124 Forest Stewardship Council, Policy & Standards, http://www.fsc.org/en/about/policy_standards/princ_criteria (last visited Nov. 3, 2005); *see also* Kristen M. Kloven, *Eco-Labeling of Sustainably Harvested Wood Under the Forest Stewardship Council: Seeing the Forest for the Trees*, 1998 COLO. J. INT'L ENVTL. L. & POL'Y 48, 49–50.

125 Forest Stewardship Council, Policy and Standards, http://www.fsc.org/en/about/policy_standards/princ_criteria (follow "Principle 1" through "Principle 10" hyperlinks) (last visited Nov. 3, 2005); *see also* Errol E. Meidinger, *The New Environmental Law: Forest Certification*, 10 BUFF. ENVTL. L.J. 211, 219–20 (2002–03).

126 Kloven, *supra* note 124, at 50–51; *see also* Errol E. Meidinger, *"Private" Environmental Regulation, Human Rights, and Community*, 7 BUFF. ENVTL. L.J. 123, 150–54 (1999–2000) (detailing FSC certification process).

requirements.[127] This system was expressly designed to function without government intervention.[128]

Forest certification became an important device only after targeted activist campaigns.[129] Forest certification supporters sought to indirectly influence timber harvesters to certify by targeting The Home Depot and other large lumber retailers, demanding that they carry FSC-certified products.[130] This tactic proved successful: In addition to becoming the top retailer of certified wood in the United States, The Home Depot has induced more suppliers to shift to certified wood products than any other U.S. retailer.[131] Furthermore, The Home Depot's commitment to purchase certified wood prompted other large retailers to do the same.[132] The substance and implementation of the largely successful FSC program can serve as a valuable model for "cruelty-free" labeling.

C. *Third-Party Certification of "Cruelty-Free" Labels*

The major eco-labeling programs, including FSC, share several attributes: voluntary participation, independent standards, and regular re-certification.[133] These attributes are also shared by the Corporate Standard of Compassion for Animals program, an effort to establish a meaningful "cruelty-free" label launched in 1996 by the Coalition for Consumer Information on Cosmetics (CCIC).[134] CCIC is a coalition of six national animal protection groups[135] operating in

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127 Kloven, *supra* note 124, at 52. Certifying bodies also conduct chain-of-custody inspections to account for the amount of certified wood in a final product made from multiple sources when it reaches consumers. *See* Gereffi et al., *supra* note 122, at 60.

128 Meidinger, *supra* note 125, at 237.

129 CASHORE ET AL., *supra* note 119, at 88.

130 Jim Carlton, *Against the Grain: How Home Depot and Activists Joined to Cut Logging Abuse*, WALL STREET J., Sept. 26, 2000, at A1.

131 The Home Depot, Inc., Wood Purchasing Policy, http://www.homedepot.com/HDUS/EN_US/corporate/corp_respon/wood_purchasing_policy.shtml (last visited Nov. 3, 2005).

132 CASHORE ET AL., *supra* note 119, at 112; Geraghty, *supra* note 122, at 101.

133 Stewart, *supra* note 41, at 137.

134 *See* Telephone Interview with Rachel Menge, Consumer Affairs Coordinator, Coal. for Consumer Info. on Cosmetics (CCIC) (Jan. 5, 2005). The standard is known in Europe as the "Humane Cosmetics Standard." European Coal. to End Animal Experiments, Humane Cosmetics Standard, http://www.eceae.org/english/hcs.html (last visited Nov. 3, 2005).

135 The organizations are: American Anti-Vivisection Society, American Humane Association, Animal Protection Institute, Doris Day Animal League, The Humane Society of the United States, and New England Anti-Vivisection Society. Coal. for Consumer Info. on Cosmetics, About Us, http://www.leapingbunny.org/about_us.htm (last visited Nov. 3, 2005). One company, Beauty Without Cruelty, is also part of the CCIC. *Id.*

the United States with sister organizations in Canada and the European Union.[136]

CCIC aims to dispel confusion about "cruelty-free" labeling by "promot[ing] a single comprehensive standard and an internationally recognized . . . logo."[137] CCIC's standard involves a voluntary pledge signed by a manufacturer committing to not conduct or commission animal testing.[138] The commitment also assures that the company will not purchase any products or ingredients that have been tested on nonhuman animals by suppliers.[139] In addition to signing the commitment themselves, participating companies must obtain Statements of Assurance from all suppliers and intermediaries to ensure full compliance with the standard.[140] Participants in the program are entitled to use CCIC's Leaping Bunny logo on their product labels.[141] To enforce the standard, participants are subject to random "spot checks" conducted by independent auditing firms to determine compliance.[142]

The Consumers Union Guide to Environmental Labels,[143] which analyzes a vast array of labeling programs, has deemed CCIC's

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136 Coal. for Consumer Info. on Cosmetics, Support Around the World, http://www.leapingbunny.org/industry_intl.htm (last visited Nov. 7, 2005); Coal. for Consumer Info. on Cosmetics, Leaping Bunny Logo Conditions of Use & Application 3 (on file with the *New York University Law Review*).

137 Coal. for Consumer Info. on Cosmetics, About Us, http://www.leapingbunny.org/about_us.htm (last visited Nov. 7, 2005).

138 Coal. for Consumer Info. on Cosmetics, Manufacturer Statement of Assurance (on file with the *New York University Law Review*) [hereinafter CCIC, Manufacturer Statement].

139 *Id.*

140 *Id.*; Coal. for Consumer Info. on Cosmetics, Supplier Statement of Assurance (on file with the *New York University Law Review*). To facilitate the process, manufacturers can request supplier commitments automatically through the CCIC website. Telephone Interview with Michelle Thew, Chair of CCIC (Nov. 2, 2004). Alternatively, the manufacturer can include the following language on all of its purchase orders to suppliers: "The supplier affirms by fulfilling this order that it does not conduct or commission animal testing of any cosmetics and/or household products, including without limitation, ingredients or formulations" supplied to the manufacturer after its compliance date. CCIC, Manufacturer Statement, *supra* note 138.

141 A nominal licensing fee must be paid to use the logo, although it can be waived for smaller companies. Telephone Interview with Michelle Thew, *supra* note 140.

142 CCIC does not currently conduct spot checks on suppliers. Telephone Interview with Rachel Menge, *supra* note 134. Expanding the scope of spot checks is a potential area of improvement for the program.

143 Consumers Union Guide to Environmental Labels, http://www.eco-labels.org (last visited Nov. 3, 2005). The criteria considered by the Consumers Union in determining what makes a good eco-label include verifiability by an independent organization, consistency, clarity, transparency, protection from conflict of interest, and opportunities for public comment. The Guide rates labels as "not meaningful," "somewhat meaningful," or "highly meaningful" based on fixed criteria. Consumers Union Guide to Environmental Labels, What Makes a Good Label?, http://www.eco-labels.org/good_ecolabel.cfm (last visited Nov. 3, 2005).

Leaping Bunny label "highly meaningful."[144] The Consumer's Union lauds CCIC's program for its verifiability, verification, consistency, and freedom from conflicts of interest.[145] Despite the strengths and successes of the CCIC program, however, limited manufacturer participation and consumer awareness constrain its effectiveness.[146] In order to reach more consumers and have a significant impact on cosmetic industry practices, CCIC should attract more companies to its certification program. Because the CCIC framework is roughly analogous to that of the FSC, FSC developments can serve as a useful model. The remainder of this section proposes some strategies to increase participation in the CCIC program.

To be effective, it is important to consider certification participation by all levels of the supply chain, from ingredient suppliers to retailers.[147] However, CCIC has to date focused exclusively on cosmetic manufacturers. By expanding certification to other points in the supply chain, CCIC can dramatically increase the effectiveness and scope of its program. Typically, certification programs emphasize the first stage of the supply chain,[148] which, in the case of cosmetics, consists of ingredient suppliers. One potential approach to increase effectiveness of the CCIC program is to encourage certification of ingredient suppliers directly. However, since ingredient suppliers are somewhat insulated from individual consumer demands—and therefore the benefits of positive labeling—incentives for joining the program may be somewhat attenuated. This market structure likely explains why CCIC has focused on manufacturers—the intermediaries between consumers and ingredients suppliers—to influence industry practices. Nonetheless, by successfully pressuring large manufacturers through the individual consumers with whom they interface, CCIC can indirectly push suppliers to participate. Activism can be central here.

144 Consumer Union Guide to Environmental Labels, Leaping Bunny Label Report Card, http://www.eco-labels.org/label.cfm?LabelID=239 (last visited Nov. 3, 2005).

145 *Id.*

146 The Leaping Bunny website currently lists 181 participants in the program. Coal. for Consumer Info. on Cosmetics, Shopping Guide, http://www.leapingbunny.org/shop_company.htm (last visited Nov. 3, 2005). None of the five major color cosmetic companies participate. *Compare id.*, *with* EUROMONITOR, COLOUR COSMETICS IN THE USA 3 (2005) (noting five companies that dominate U.S. color cosmetic market).

147 *See* CASHORE ET AL., *supra* note 119, at 23 (discussing how economic actors and governance systems support compliance at various stages of supply chain).

148 *See id.* (noting that most non-state market-driven governance systems focus compliance efforts on first stage of supply chain).

Grassroots activism has played a key role in the growth of reflexive law mechanisms.[149] The traditional carrot and stick activist strategy—threatening a boycott campaign, for example, while offering a stamp of approval through the certification process—has proven successful in other arenas, such as forest certification.[150] Consumers concerned about the treatment of nonhuman animals, moreover, have demonstrated that they are willing and able to engage in successful grassroots campaigns time and time again.[151]

By selecting a strategic target—a large company that can successfully be encouraged to participate in certification[152]—CCIC may have tremendous influence over the market, encouraging other manufacturers to certify in order to stay competitive. Large cosmetic companies are readily identifiable and easy targets of a consumer boycott aimed at inducing certification. Moreover, because five companies alone occupy over sixty-five percent of the U.S. color cosmetic industry,[153] persuading them to become certified could have a dramatic effect. Changing the demands that large cosmetic manufac-

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[149] *See id.* at 25 (detailing Starbucks's commitment to offer fair trade certified coffee and Whole Foods Market's commitment to promote certified sustainable fisheries after targeted citizen activism). Indeed, such tactics have already been successfully used by the animal protection movement in the realm of animal testing. In 1981, for example, Revlon, the largest cosmetic manufacturer in the world, awarded over $750,000 to fund research into alternatives to animal tests in response to "an uncommonly well-organized campaign, involving more than 400 separate animal welfare-related organizations . . . . [t]hrough meetings with representatives of Revlon, through the media, through petitions to . . . Congress, through letter-writing campaigns, and through protest marches and rallies." Dale Jamieson with Tom Regan, *On the Ethics of the Use of Animals in Science*, *in* Dale Jamieson, Morality's Progress: Essays on Humans, Other Animals, and the Rest of Nature 103, 110 n.6 (2002). Further, Revlon claims to not have participated in any animal testing since June of 1989. E-mail from Rachel Evans, Senior Consumer Services Representative, Revlon, to Delcianna J. Winders (Dec. 16, 2004) (on file with the *New York University Law Review*).

[150] CASHORE ET AL., *supra* note 119, at 23–26; *see also supra* Part III.B (discussing FSC successes).

[151] *See, e.g.*, *supra* note 149 (discussing campaign resulting in Revlon funding research into alternatives to animal tests); *infra* note 163 (discussing campaign resulting in Whole Foods Market's "Animal Compassionate" label); Andrew Martin, *PETA Ruffles Feathers*, CHICAGO TRIB., Aug. 6, 2005, at 1 (detailing McDonald's, Wendy's, and Burger King's "wholesale changes" to farm animal welfare practices after targeted campaigns organized by People for the Ethical Treatment of Animals).

[152] Some possibilities include Estée Lauder, which has at least two subsidiaries and fourteen distinct brands, and already claims not to test finished products or ingredients on animals, and Revlon, which owns Almay and a variety of other product lines and also claims not to participate in animal testing. NAT'L ANTI-VIVISECTION SOC'Y, PERSONAL CARE FOR PEOPLE WHO CARE 162, 165 (11th ed. 2002). For more on Revlon see *supra* note 149. Revlon occupied 9.7% of the U.S. color cosmetic market in 2004 while Estée Lauder occupied 13.6%. EUROMONITOR, *supra* note 146, at 2.

[153] EUROMONITOR, *supra* note 146, at 3. Color cosmetics include facial make-up, eye make-up, lip products, and nail products. *Id.* at 8.

turers place on their ingredient suppliers, which often provide to many different companies, is likely to systematically alter industry testing practices.

Retailers are another potential certification participant not actively pursued by CCIC. Just as FSC approached major retailers,[154] CCIC might approach major chains, such as drug stores, supermarkets, and department stores, which together constitute fifty-six percent of the retail color cosmetic market.[155] Indeed, insofar as retailers often have prominent physical locations outside of which demonstrations may be held, they provide an easy target for an activist campaign. Consumers could simply request that a retailer commit to providing some certified "cruelty-free" products consistently, thereby calling attention to animal testing.[156]

A company like Whole Foods Market, which has demonstrated concern for the treatment of nonhuman animals and earnestly marketed this concern, may be motivated to commit to providing exclusively certified "cruelty-free" cosmetics. In fact, Whole Foods Market already purports to sell only body care products made without animal testing,[157] and to have a companywide policy against animal testing.[158] However, there is no formal auditing to ensure compliance with this commitment. Whole Foods Market also claims to "educate [its] customers about the cruelty of animal testing of body-care products, helping to influence the marketplace by taking a clear stance that those types of products will not be tolerated."[159] These declarations make Whole Foods Market an ideal target for a campaign seeking a retailer commitment to market only *certified* "cruelty-free" products, thereby increasing the efficacy of the CCIC program.[160] Indeed, Whole Foods Market has a history of active involvement in labeling

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154 *See supra* notes 130–132 and accompanying text.

155 Department stores are the leading distribution channel for color cosmetics, with 34.2% of the market in 2004, while pharmacies, drugstores, and supermarkets together had 21.9% of the market. EUROMONITOR, *supra* note 146, at 6. Supermarkets across the nation are also intensifying their cosmetic marketing. Faye Brookman, *Critical Mass: Food Stores Plan for Makeup Sales Gains*, WOMEN'S WEAR DAILY, Apr. 1, 2005, at 9.

156 This is akin to Starbucks's commitment to serve some fair trade organic coffee without replacing all of its coffee with this product. *See* CASHORE ET AL., *supra* note 119, at 25.

157 Whole Foods Market, What Does Natural Mean?, http://www.wholefoodsmarket.com/products/wholebody/natural.html (last visited Nov. 3, 2005).

158 E-mail from Lourdes Zarate, National Marketing and Communications, Whole Foods Market, to Delcianna J. Winders (Dec. 15, 2004) (on file with the *New York University Law Review*).

159 Whole Foods Market, Sustainability and Our Future, http://www.wholefoods.com/company/sustainablefuture.html (last visited Nov. 3, 2005).

160 A false advertising suit could also buttress such an effort. Somewhat analogously, a retailer in Maryland agreed to drop a misleading logo from eggs that it sold after an animal

programs,[161] and has been responsive to similar strategies, committing to promote fish from certified fisheries[162] and to impose humane standards on its meat suppliers.[163] The CCIC certification program could be expanded to certify stores such as Whole Foods Market as "cruelty-free," rather than only the products they sell, and then perform audits or spot checks to ensure compliance.

In short, by diversifying its strategies and attending to all levels of the supply chain, from ingredient suppliers to retailers, CCIC can increase consumer awareness about animal testing and the efficacy of its labeling scheme. The market alone, however, is not sufficient to ensure a robust "cruelty-free" labeling standard. Like most reflexive law mechanisms, the program will flourish with external support from some of the formal law systems discussed earlier.

D. Buttressing Certification with False Advertising Law

Both formal law and reflexive law tools have flaws when it comes to standardizing "cruelty-free" labeling. In the current political and economic environment, the government appears to lack the will to promulgate "cruelty-free" labeling standards.[164] False advertising claims, while a valuable enforcement tool, are inadequate to create a substantive standard. While false advertising rulings offer guidance as to what labeling claims are acceptable, they do not offer positive content for a standard. Moreover, given their ex post, case-by-case nature, false advertising actions are not likely to regularize claims so much as they are likely to deter blatant misrepresentations. In addi-

protection group brought a false advertising suit against the store. *See* Nelson Hernandez, *Advocates Challenge Humane-Care Label on Md. Eggs*, WASH. POST, Sept. 19, 2005, at B2.

161 Whole Foods Market began to advocate for mandatory labeling of genetically modified foods in 1992 and is the only retail representative on the National Organic Standards Board. Whole Foods Market, Sustainability and Our Future, http://www.wholefoods.com/company/sustainablefuture.html (last visited Nov. 3, 2005).

162 CASHORE ET AL., *supra* note 119, at 25. Whole Foods Market was the first U.S. retailer to market Marine Stewardship Council (MSC) certified Alaska salmon and has funded a MSC initiative to increase the number of certified fisheries in the United States. Press Release, Whole Foods Market, Whole Foods Market Helping to Solve Overfishing Problem (May 19, 2003), *available at* http://www.wholefoods.com/company/pr_05-19-03.html.

163 In response to a two-year campaign by the group Viva!USA, Whole Foods Market's CEO John Mackey pledged to create an "Animal Compassionate" label imposing objective animal welfare standards and third-party audits on facilities from which it obtains meat and poultry. Press Release, Viva!USA, Whole Foods Market to Create Humane Farming Standards (Oct. 21, 2003), *available at* http://www.vivausa.org/newsreleases/10-02.htm; Press Release, Whole Foods Market, Whole Foods Market® Pledges to Create Gold Standard for Humane Farm Animal Treatment with "Animal Compassionate" Label (Oct. 21, 2003), *available at* http://www.wholefoods.com/company/pr_10-21-03.html.

164 *See supra* Part II.A (discussing government failure to develop standards regulating use of "cruelty-free" claims).

tion, the increasing difficulty of getting into court to bring such claims, due to strict standing requirements[165] and foreclosed causes of action, reduces the overall utility of false advertising suits.[166] Reflexive law systems, on the other hand, are able to provide positive substance to a standard and to verify compliance, but lack the authority to actively enforce the standard.

Because of their antipodal strengths and weaknesses, third-party certification and false advertising law are ideally suited to work in tandem. Professor Meidinger notes that "triangulation of social accountability structures is important to regulatory efficacy. The key idea is to empower third parties to monitor the performance of both regulators and regulatees."[167] External enforcement helps maintain the integrity of a standard. In the context of the "cruelty-free" labeling framework outlined in this Note, this triangulation occurs when the independent third-party certification group's monitoring is supplemented by false advertising law, an additional level of external monitoring. Strategic false advertising actions can help institutionalize a standard and then ensure its continued vitality by acting as a check on compliance.

The various false advertising mechanisms discussed in Part II should be pursued in coordination with the expansion of the third-party certification system discussed in this Part. CCIC-certified manufacturers can bring Lanham Act, BBB, and state false advertising claims against competitors profiting from misleading "cruelty-free" claims. Such suits can serve a variety of functions, most importantly that of giving teeth to the standards set out by the reflexive law program, thereby deterring the use of deceptive "cruelty-free" claims. CCIC might even bring a suit itself alleging a competitive injury, given the resources it has invested in its certification and labeling program. Likewise, consumers who rely on misleading "cruelty-free" claims can bring suits in state courts where available, and false advertising challenges with the BBB.

In short, the most viable means of implementing a meaningful "cruelty-free" labeling standard for cosmetics will draw on both reflexive law and traditional false advertising law. The former will create and promote a substantive standard, while the latter will ensure its vitality. As a well-defined "cruelty-free" standard emerges and a body of false advertising case law on the issue evolves in various fora, government standards and false advertising enforcement may become

165 *See supra* notes 60–61 and accompanying text.

166 *See supra* note 61 and accompanying text; *supra* notes 74–75.

167 Meidinger, *supra* note 125, at 285.

more viable. Even if they do not, however, reflexive law and false advertising law together can fill this regulatory gap and address the market failure problems associated with misleading "cruelty-free" claims, benefiting both human consumers and nonhuman animals.

CONCLUSION

Building on scholarship in reflexive law, this Note has outlined a strategy for remedying the proliferation of misleading "cruelty-free" claims through standardization. "Cruelty-free" claims are presently unregulated, resulting in market failure. Consumers make purchasing decisions with incomplete and misleading information and are therefore unable to encourage manufacturers to follow consumer preferences. It appears unlikely at present that the federal or state governments will issue regulations to standardize "cruelty-free" claims. However, a voluntary third-party certification system can create the needed standard. Supplementary enforcement of false advertising law can help ensure the integrity of a "cruelty-free" standard. Enhancing the existing third-party certification system through increased participation and providing external legal support can correct the current market failure problems by enabling consumers to make informed and meaningful decisions about their purchases. These decisions in turn can influence the testing practices of cosmetic manufacturers and ultimately reduce the number of nonhuman animals who are forced to suffer needlessly in painful experiments before meeting an untimely death.