

Insights and Commentary from Dentons

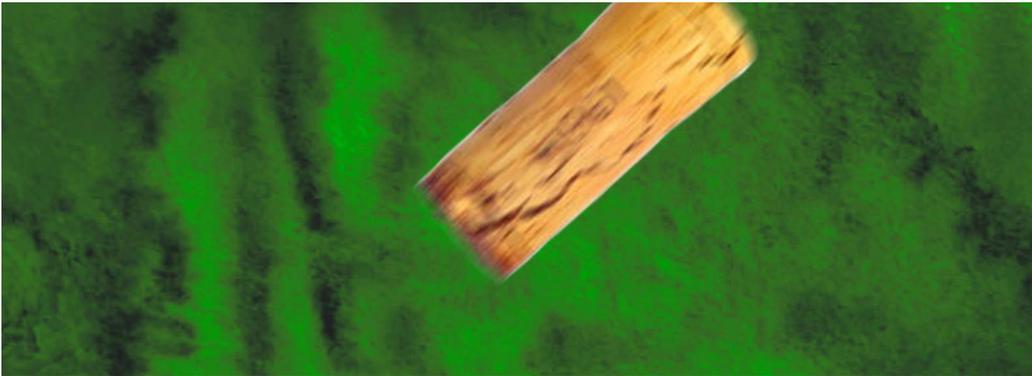
The combination of Dentons and Kensington Swan offers our clients access to 10,000+ lawyers in 182 locations and 74 countries around the world.

This document was authored by representatives of Kensington Swan prior to our combination's launch and continues to be offered to provide clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

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**INTELLECTUAL
PROPERTY**

Greenwashing uncorked

Consumers are becoming increasingly eco-conscious when shopping, and many prefer to choose products that are environmentally friendly. The wine they drink is no exception. This opens an exciting new marketing avenue for savvy vineyards to distinguish their wines on crowded shelves, and appeal to a new demographic of consumers. However, it is important to stay on the right side of the law to avoid being accused of 'greenwashing'.

What is 'greenwashing'?

Greenwashing is the process of creating a false or misleading impression about the environmentally friendly nature of a product. Green claims in relation to wine could include statements about environmental sustainability and terms like natural, organic, carbon neutral, or biodynamically grown. When making environmental claims of this type, they must be true and able to be substantiated with cold hard facts at the time when they are made (rather than later).

Businesses involved in greenwashing typically exaggerate their claims or don't have evidence to back them up. Such businesses also forget that regardless of eco-certifications achieved, the ultimate test is would the average consumer be misled by a claim (not a sommelier or oenologist). It's also possible for a single claim to be strictly correct, but for a label or bottle as a whole to produce an overall misleading impression.

What does the law say?

Under the Fair Trading Act 1986, it is illegal to mislead consumers, give false information, or make misrepresentations. As well as specific claims or statements about your product, the overall impression of a product, created by words, pictures and advertisements is important, particularly if relevant information is left out. It is possible to mislead through silence, or telling only half the story. Any comparative claims (such as 'environmentally friendlier') must be based on a meaningful and measurable benefit over competitor wines.

The Advertising Standards Code provides that environmental claims must be accurate and able to be substantiated by evidence that reflects scientific and technological developments. An 'environmental claim' means any statement, symbol or graphic that indicates an environmental aspect of a product, component or packaging, and includes references to sustainability, recycling, carbon neutrality, energy efficiency, or use of natural products. As always, there is a blurred line between claims and advertising 'puffery'.

The Advertising Standards Authority has considered several beer advertisements containing green claims. In 2016 a complaint about a DB Breweries advertisement saying 'Save the entire world... purchase...DB Export Brewtroleum' was considered. The Authority refused the complaint because consumers would appreciate the statement was hyperbole, and DB Breweries had evidence to show that production of its Brewtroleum product had environmental benefits. In a similar decision,

DB Breweries was again able to substantiate the environmental claims it was making. The message – do your homework.

In New Zealand, there are a number of eco-certifications available to wine growers, including for organic and biodynamic certification. Certifications are a good way to show that a wine meets independent external standards relevant to a claim. However, certification is not mandatory from a Fair Trading Act perspective, provided claims can be proven in other ways.

Things to be wary of:

- Vague claims (e.g. 'environmentally friendly', 'green', or 'earth safe') that are too general and subjective to be understood, and can mislead. Claims need to be backed up with supporting evidence.
- Imagery that is inconsistent with reality and creates an overall impression that a wine has more environmental brownie points than it actually does.
- Unsubstantiated claims – each claim should be capable of being substantiated at the time when it is made. If the wine is '100% natural', the producer should have written evidence to back this up which can be easily shared if ever challenged. It's too late to carry out testing after claims have been made.
- Claims based on the absence of particular substances or damaging effects – these sorts of claims are not acceptable if no other wine includes the chemical or causes the effect. While it may be true to say that a wine is 'soy-free', if all other wine is also naturally soy free, this sort of claim may mislead.
- Misplaced reliance on certifications when the average consumer has a different understanding of what a green claim or term means – this is why consumer education by the wine industry is valuable.

There is growing focus and understanding of the entire life cycle approach to how our food and wine production and consumption affects the environment. For example, glass bottles are not necessarily a lower impact form of packaging merely because glass is recyclable. The environmental effects of manufacturing, transporting and recycling glass are all factors that go to the overall impact of glass. As we all learn more, the imperative to be honest with consumers will grow. In addition, green claims are on the Commerce Commission's radar and are a 2019/2020 [priority](#).

If in doubt, seek legal advice from IP experts – don't just rely on the assurances of an advertising agency or designer.

TOP TIPS



BE SPECIFIC

Make sure a claim is direct and objective.



BACK IT UP

Have written evidence to show that a claim is accurate and able to be substantiated.



CERTIFICATION

If possible and relevant, look into achieving certification.

One thing is for sure – green is the new black (or in our case, red, white or rosé), and is certainly here to stay. Any questions contact jenni.rutter@kensingtonswan.com



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