

THE HUMANE LABELING OF ANIMAL-BASED FOOD PRODUCTS: A WORKING OVERVIEW

By
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People who select animal-based food products with labels that refer to the welfare of animals are likely to believe that the labels on those products serve as a guarantee that the animals were treated humanely. For example, consumers may believe that animal-based food products sold under labels proclaiming “cage free” or “free range” conditions come from animals that were raised on the small family farms that have become iconic in American minds, or at least that those animals were not raised in cages. However, humane labels often lack adequate regulation or mechanisms of enforcement. As a result, many familiar labels essentially legitimize standard industry husbandry practices, and the unwitting consumer may be supporting the very husbandry methods that she hopes to avoid when she purchases products with humane labels. This overview introduces issues surrounding humane labeling, including issues with regulation and enforcement, and provides examples of attempts to improve the reliability and transparency of humane labels. This overview also explores ethical concerns about the efficacy of endorsing humane labeling as a method of improving farm animal welfare.

I. WHAT IS HUMANE LABELING?

In using the term “humane labeling,” this overview refers to labeling on animal-based food products that impacts, or appears to impact, current farm animal husbandry standards. Some labels that conceivably have an effect on animal husbandry standards, such as “organic” or “natural,” refer to other aspects of food production as well. Humane labels are overseen by government agencies, animal welfare groups, or even industry groups. For example, labels such as “free range” or “cage free” fall under the purview of the Food and Drug Administration, the Animal Welfare Institute oversees the label “Animal Welfare Approved,” and the National Pork Board administers the Swine Welfare Assurance Program.

The following are some examples of labels that refer to, or may conceivably refer to, animal husbandry standards:

- Natural (regulated by the Food and Drug Administration)

The definition of “natural” according to the FDA:

NATURAL:

A product containing no artificial ingredient or added color and is only minimally processed (a process which does not fundamentally alter the raw product) may be labeled natural. The label must explain the use of the term natural (such as - no added colorings or artificial ingredients; minimally processed.)¹

Perspectives on the regulation of the label “natural”:

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¹ United States Department of Agriculture: Food Safety and Inspection Service, *Meat and Poultry Labeling Terms* (Aug. 24, 2006), http://www.fsis.usda.gov/factsheets/Meat_&_Poultry_Labeling_Terms/index.asp.

Natural: Food labeled "natural," according to the USDA definition, does not contain artificial ingredients or preservatives and the ingredients are only minimally processed. However, they may contain antibiotics, growth hormones, and other similar chemicals. Regulations are fairly lenient for foods labeled "natural." Producers must submit a sort of application at the time of slaughter, detailing practices used throughout the life of the animal. Labels are evaluated to prevent mislabeling but no inspections are conducted and producers are not required to be certified.²

In 2007, the agency received two petitions for a clear definition of the term in order to avoid consumer confusion. One petition came from the Sugar Association, which wants FDA backing for claiming that sugar is a natural sweetener, while the second came from baked goods manufacturer Sara Lee. According to Sara Lee, a formal definition is needed to provide consistency for manufacturers and consumers.

This lack of consistency has led to a wide range of products being claimed as "natural," claims that have even sparked some lawsuits.

While the FDA has not responded to either petition yet, Geraldine June of the FDA Food Labeling and Standards department, says that the agency has not seen enough evidence that consumers are being misled by "natural" labels for the issue to become a priority. June said that the FDA has a limited budget and must prioritize issues that have an impact on health and safety, including health and nutrient claims, allergen declarations and irradiation labeling.

"Even if people interpret ["natural"] in different ways, it doesn't mean there is confusion out there," June said. "If there was, then we would definitely raise it as a priority".

In 1993, the FDA said that it would consider defining the term, "because of the widespread use of this term, and the evidence that consumers regard many uses of this term as noninformative." At that time, the agency also cited insufficient resource as a reason for the lack of a definition.³

- **Organic (regulated through the National Organic Program under the United States Department of Agriculture)**

Organic: Foods labeled "organic" must consist of at least 95% organically produced ingredients and the other 5% must be approved on the National List provided by the USDA. They cannot be produced with any antibiotics, growth hormones, pesticides, petroleum or sewage-sludge based fertilizers, bioengineering, or ionizing radiation. Each organic ingredient must be identified along with the name of the certifying agency.

The USDA regulates organic product labels much more thoroughly than they do other product labels and, hence, foods labeled "organic" are more likely to actually be organic. Producers of organic foods must submit an application for certification. This application must include the type of operation, substance history for the past three years of operation, organic products to be grown, raised, and produced, and their plan for practices and substance use. Furthermore, they must keep records for five years after certification and make all information and records available to the National Organic Program (NOP), the division of the USDA which deals with organic production. Before certification, an on-site inspection is conducted with continuing annual and unannounced inspections after certification. If it is found that a product has been knowingly mislabeled, there is a civil penalty of up to \$11,000.

100% Organic: Foods labeled "100% organic" must consist of only organic ingredients and processing aids. The same controls and regulations are put in place as those used for foods labeled "organic."

Made with Organic Ingredients: Foods with this labeling must consist of at least 70% organic ingredients and none of the ingredients can be produced with sewage-sludge based products or ionizing radiation. Labeling cannot include the USDA seal or the word "organic" in any principle displays. Three of the organic ingredients can be included on the label and all organic ingredients should be identified in the

² GreenCityBlueLake Institute, *What Do Food Labels Really Mean?* (July 29, 2009, 11:37 AM), <http://www.gcbl.org/forum/what-do-food-labels-really-mean>.

³ Natural News, *FDA Refuses to Regulate "Natural" Claim on Food Packaging* (Aug. 13, 2008), http://www.naturalnews.com/023850_natural_food_the_FDA.html

ingredients list. The same controls and regulations are put in place as those use for foods labeled "organic."⁴

- rBGH free (regulated by the Food and Drug Administration)
- United Egg Producers Certified (overseen by an egg industry trade group)
- Free range or cage free (regulated by the Food and Drug Administration)

The definition of “free range” or “free roaming” according to the FDA:

FREE RANGE or FREE ROAMING:

Producers must demonstrate to the Agency that the poultry has been allowed access to the outside.⁵

Perspectives on the regulation of the labels “free range” and “cage free”:

Free-range chickens are (according to voluntary regulations) supposed to have "access to the outdoors" -- however, by many reports, the care of many of these hens is structured so that they are very unlikely to go outside. The doors are not opened until the hens are of an age where they are likely to keep doing what they are used to doing, and when the (usually small) doors are opened, they usually don't go outside. Michael Pollan, in his best-selling book *The Omnivore's Dilemma*, describes one farm producing organic, free-range chickens for meat. He says that the chickens are "given outside access" at 5 weeks, then killed at 7 weeks. He never saw a chicken go outside during his visit.⁶

Free Range/Cage Free: For a product to be labeled "free range" or "cage free" the animals cannot be contained in any way and must be allowed to roam and forage freely over a large area of open land. This labeling is very minimally regulated. USDA food labeling regulation only requires that the producer be able to demonstrate that the animals are allowed access to the outside and not contained, but applications and certification are not required. This level of regulation has allowed producers to keep animals closely confined, but without cages, and still use the label "cage free."⁷

- Grass fed (regulated by the Food and Drug Administration)

A perspective on the regulation of the label “grass fed”:

Grass Fed: Food labeled "grass fed" usually includes the label "free range" or "cage free," however, they are not necessarily connected. By definition a "grass fed" animal is one that is raised primarily on ranges rather than in a feedlot, which means that they can be contained and still show this label, as long as they are allowed to graze. According to studies done by Northwestern Health Sciences University, grass fed products are usually preferred because the animals were probably not contained and the products are healthier than grain fed products. If an animal was "grain fed" it was most likely raised in a feedlot, contained for most of its life, and is of less nutritional value.

The USDA defines "grass fed" as it applies to labeling but does not regulate it in any way.⁸

- Certified Humane Raised and Handled (overseen by Humane Farm Animal Care, a nonprofit endorsed by HSUS and ASPCA)
- Animal Welfare Approved (a nonprofit, initiated by the Animal Welfare Institute)
- American Humane Certified (overseen by the American Humane Association)

⁴ GreenCityBlueLake Institute, *supra* note 2.

⁵ United States Department of Agriculture: Food Safety and Inspection Service, *supra* note 1.

⁶ About.com: Low Carb Diets, *What is a Cage-Free Egg?* (Mar. 27, 2009), <http://lowcarbdiets.about.com/od/lowcarbsuperfoods/a/cagefreeeggsdef.htm>

⁷ GreenCityBlueLake Institute, *supra* note 2.

⁸ GreenCityBlueLake Institute, *supra* note 2.

- Animal Compassionate Program (initiated by Whole Foods Market under the Animal Compassion Foundation)

Whole Foods Market's description of the Animal Compassionate Program:

“The mission of the Animal Compassion Foundation is to help develop techniques of animal husbandry that supersede even the best practices found today,” said Margaret Wittenberg, vice president of governmental and public affairs for Whole Foods Market and chair of the Animal Compassion Foundation. “Over time, we believe we can build an ever-increasing bank of knowledge which will enable compassionate methods to spread and ideally, producers will see the value in this endeavor and be inspired to follow this lead.”

The success of the Animal Compassion Foundation will be measured by feedback from livestock producers, the number of producers interested in compassionate production methods, and the success of those who raise their livestock humanely while remaining cost efficient and productive.

In December 2003, Whole Foods Market began a rigorous process of creating enhanced farm animal treatment standards above and beyond the strict animal welfare already required by the company. These enhanced standards are to be completed by 2008 for every species sold by the company and are being developed jointly by Whole Foods Market and animal welfare advocacy groups. Among these groups are: The Humane Society of the United States; People for the Ethical Treatment of Animals; Viva! USA; Animal Welfare Institute; Animal Rights International; animal welfare scientists including Dr. Ian Duncan of the University of Guelph and Dr. Renee Bergeron of Université Laval; and Steritech, an independent third-party animal welfare auditor.

“Whole Foods Market currently does more for animal welfare than any retailer in the industry and we currently require our producers to adhere to strict standards. However, our intentions are to step into a leadership role to raise these standards even higher and to do more to promote the well-being of farm animals,” added Wittenberg.⁹

- Animal Care Certified (initiated by egg industry groups)

Background on legal battles over the label “Animal Care Certified”:

From 2002 to 2005, the majority of U.S. egg producers labeled their egg cartons with a logo that read "Animal Care Certified." Despite the image conveyed by such a message, hens who were laying "Animal Care Certified" eggs were still subjected to abuses so terrible, they would lead to prosecution if forced on the dogs or cats with whom we share our homes.

In 2003, COK filed legal petitions with federal agencies and the Better Business Bureau, alleging that these producers were engaged in misleading advertising. But this was just the beginning of COK's campaign.

Over the next two years, COK conducted investigations inside so-called "Animal Care Certified" egg farms, argued its case two times before the Better Business Bureau, lobbied federal agencies, produced damning media exposés, conducted consumer polls and public outreach, and even filed a lawsuit.

The hard work paid off not only with nationwide media coverage of the abuses endured by so-called "Animal Care Certified" hens, but on September 30, 2005, the Federal Trade Commission (FTC) announced that the United Egg Producers' deceptive logo would no longer be stamped on egg cartons nationwide, as soon as April 1, 2006.

This landmark victory received national media attention, including articles printed in The New York Times, The Washington Post, The Baltimore Sun, USA Today, and Des Moines Register.

⁹ Whole Foods Market, *Whole Foods Market Establishes Foundation to Help Achieve More Compassionate Treatment of Farm Animals* (Dec. 14, 2004), <http://wholefoodsmarket.com/pressroom/blog/2004/12/14/whole-foods-market-establishes-foundation-to-help-achieve-more-compassionate-treatment-of-farm-animals/>.

Despite all of these steps, the "Animal Care Certified" is still being advertised. As recently as February 2008, COK documented this misleading logo on egg cartons being sold in stores in New Jersey. Read about the consumer fraud lawsuit COK filed in New Jersey in February 2008.¹⁰

- Swine Welfare Assurance Program (initiated by the National Pork Board, a pork industry group)

The National Pork Board's description of the Swine Welfare Assurance Program:

As a pork producer, your livelihood depends on the welfare and performance of your livestock. If an animal is mistreated or under stress, it will need to eat more feed to grow, will be more susceptible to disease and will generally not thrive. To do anything short of providing the best, humane care possible to help your animals realize their full productive potential is self-defeating. There is no scientific consensus about the 'ideal' tool to measure animal welfare. It is generally accepted that there are three indications of welfare that should be measured together. These are:

Performance and Health

Behavior

Physiology (for example, immune function and hormonal status or response).

For an accurate picture of welfare, all three indicators must be assessed. There is strong scientific consensus that using any one as a sole indication of welfare can be misleading. In addition, addressing animal welfare in isolation – without consideration of animal health, food safety and the environment – is unwise and most probably will lead to unintended consequences. Each of these other areas must be addressed simultaneously in a way that ensures an effective balance. As a pork producer, you have an Animal Welfare Committee that is charged with using producer Checkoff funds to review the science of animal welfare, to relate that science to production practices and to inform producers about the latest, scientifically sound swine husbandry practices that can be implemented on the farm.

...

SWAPSM has been designed as an educational and assessment tool for producers to track the welfare of their animals on farm. This program could also be used as the basis for a third-party audit if it is needed to show markets and consumers that you are raising pigs according to accepted welfare standards. Pork producers are fully supportive of adding to the scientific knowledge about animal welfare in all phases of pork production. In January 2002, the National Pork Board adopted a position statement on animal welfare guidelines for pork producers: "Animal welfare guidelines developed without a sound scientific basis puts the welfare of the animal and the sustainability of the producer's operation at risk. Therefore, the National Pork Board continues to support sound science as the only basis for animal welfare guideline decision-making."¹¹

The Swine Welfare Assurance Program did not offer significant changes for animal husbandry standards, despite appearing to improve farm animal welfare. Essentially, "sound science" advocates current farm animal husbandry.

II. WHO SETS FARM ANIMAL HUSBANDRY STANDARDS?

The federal government may set farm animal husbandry standards. However, other than slaughter, no aspect of animal husbandry is federally regulated; poultry, which accounts for 95% of all animals slaughtered for food in the United States, is exempted from the regulation of slaughter. State governments may have anti-cruelty statutes that could govern the treatment of farm animals, but claims

¹⁰ Compassion Over Killing, "Animal Care Certified"—A Case of Animal Abuse and Consumer Fraud, <http://www.cok.net/camp/acc/> (last accessed Sep. 25, 2010).

¹¹ National Pork Board, *Swine Welfare Assurance Program* (Sep. 2003), <http://www.thepigsite.com/articles/939/swine-welfare-assurance-program>.

for farm animal cruelty are rare and often unsuccessful. The United States Department of Agriculture regulates farm animal husbandry standards for organic products under the National Organic Program, but requirements for the animals' living conditions are vague and easily subject to many interpretations. In addition to government regulation, industry groups may voluntarily participate in programs promulgated either by other industry participants or by animal welfare groups.

- Federal government

The federal government has basically remained silent on the topic of farm animal husbandry by declining legislative action. The Animal Welfare Act (AWA) excludes animals raised for human consumption.¹² The Humane Methods of Livestock Slaughter Act (HMSLA) does apply to farm animals, but the Act excludes poultry, which account for 95% of animals slaughtered for food in the United States.¹³ Additionally, HMSLA only governs slaughter practices; the Act does not apply to farm animal husbandry prior to slaughter.¹⁴

- State governments

State anti-cruelty statutes may govern farm animal treatment. However, state anti-cruelty statutes are rarely enforced with regards to farm animals.¹⁵ In addition, prosecutors face high hurdles when alleging farm animal abuse: it is difficult to prove the requisite "intent" to behave cruelly, and state anti-cruelty statutes often exempt conduct that is seen as justifiable or necessary, thus condoning as justifiable the acts undertaken to produce food.¹⁶ Some states specifically exempt the "normal practices" of farm animal husbandry.¹⁷

- Industry groups (e.g., the Swine Welfare Assurance Program and "United Egg Producers Certified" were developed by industry groups)

Predictably, labels that are developed by industry groups often advocate current farm animal husbandry practices. Unfortunately, consumers may select products with these labels under the mistaken belief that the labels guarantee a level of concern for animal welfare that results in different husbandry practices.

- Interested groups who find producers of animal-based products that are willing to comply with the group's husbandry standards (e.g., the Animal Compassionate Program was promulgated by Whole Foods Market)

Labels developed by interested groups vary in their requirements for animal husbandry.

¹² David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable*, 5.

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.* at 7–10.

¹⁶ *Id.* at 8, 10–11.

¹⁷ *Id.* at 11–15.

III. WHY HAVE HUMANE LABELING STANDARDS DEVELOPED?

First, “humane” standards arise in response to a perceived failure to enforce existing regulations; they provide consumers with more reliable information concerning animal-based food products.

For example, a letter issued by the Consumer Affairs Department of egg producer Foster Farms reassured a consumer troubled about animal welfare issues with the statement, “With regard to our poultry slaughtering practices, Foster Farms slaughters chickens and turkeys in accordance with all pertinent State and Federal Regulations.” Inasmuch as there are no federal regulations governing the welfare of chickens and turkeys during slaughter, and 47 states do not have any slaughter regulations that relate to chickens and turkeys, its compliance is presumably not overly burdensome.¹⁸

Second, “humane” standards arise because of the perception that industry regulation, self- or otherwise, is not sufficiently protective of animal welfare; they provide consumers with a preferred set of standards.

Legal scholarship has failed to recognize that only a tiny percentage of animals with whom humans interact are *not* raised for food, and that the legal status of farmed animals is dramatically different from that of other animals. While non-farmed animals do have certain protections, albeit inadequate and poorly enforced, upon which future legal developments can be based, it is not unfair to say that, as a practical matter, farmed animals have no legal protection at all. As far as the law is concerned, they simply do not exist. One reason for this reality is the obvious fact that people do not like to think about how farmed animals are raised and killed.

...

In the case of farmed animals, federal law is essentially irrelevant. The Animal Welfare Act, which is the primary piece of federal legislation relating to animal protection and which sets certain basic standards for their care, simply exempts farmed animals, thereby making something of a mockery of its title. No other federal law applies to the *raising* of farmed animals, and, consequently, the United States Department of Agriculture has no statutory authority to promulgate regulations relating to the welfare of farmed animals on farms.

...

In a rapidly growing trend, as farming practices have become more and more industrialized and possibly less and less acceptable to the average person, the farmed animal industry has persuaded the *majority* of state legislatures to actually amend their criminal anti-cruelty statutes to simply exempt all “accepted,” “common,” “customary,” or “normal” farming practices. Since 1990, 14 states have joined the growing majority of jurisdictions that have enacted such amendments. It is hard to imagine any reason for this aggressive legislative agenda on the part of industry other than a fear on its part that it is using farming methods that might be considered illegal under prior criminal law. Farmed animals within these states do not have even the illusion of legal protection from institutionalized cruelty.¹⁹

IV. REGULATION AND ENFORCEMENT OF HUMANE LABELING STANDARDS

A. *Who Enforces Compliance with Animal Husbandry Standards Under Humane Labels?*

False advertising laws may be enforced on either the state or federal level. As it is rare for government agencies to bring actions for false advertising, animal welfare groups often instigate these cases. Interested parties may enlist industry participants who are harmed by false advertising to gain legal standing.

¹⁸ David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable*, 16.

¹⁹ *Id.* at 3, 5–6, 12.

- Federal government
- State governments
- Interested parties, nonprofits, etc.
- Industry members may regulate each other to avoid unfair competition (e.g., a private suit under the Lanham Act for consumer protection)

B. What Happens If a Producer Is Not Conforming to Animal Husbandry Standards Under the Label It Has Assumed?

The Food and Drug Administration, United States Department of Agriculture, and Federal Trade Commission are each able to bring claims for false advertising; such government action is rare. Private plaintiffs may bring claims against producers under either state or federal law, depending on the circumstances of the case. On the federal level, a plaintiff may bring a private action under the Lanham Act. Examples of claims that plaintiffs may bring under state laws include intentional misrepresentation, breach of implied warranty, or unjust enrichment.

- Federal enforcement of false advertising law

The Food and Drug Administration, United States Department of Agriculture, and Federal Trade Commission are all able to bring allegations of false advertising.

In light of the fact that today's consumers often want their products to be created in the most environmentally-, globally-, and animal-friendly ways possible, unethical sellers sometimes succumb to the incentive to persuade consumers that goods were created more ethically than they actually were. False advertising law represents a rare, albeit roundabout, legal opening for animal advocates to deal with issues of animal mistreatment, regardless of legislative and executive branch disregard of the importance of animal protection.

...

False advertising laws exist to ensure that consumers receive the information they need to make the market choices they want. Ethical choices regarding how goods are produced are no less protected under the law than choices based on how a good functions or how long it will last, and are perhaps more important. In a world of expanding free markets, ethical consumption may be the most effective means for social change, but it is not possible if sellers get the benefit of being able to dupe the consumer. While it prevents deception, false advertising law is also 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. The law indirectly creates public forums where these issues must be dealt with dispositively.

...

The FDA, FTC, and USDA are all empowered to remedy false advertising. The FTC may bring an action pursuant to section 13 of the Federal Trade Commission Act (FTCA) to enjoin further distribution of the advertising and enforce such an injunction in district court, until it files a formal complaint under section 5 of the FTCA. Filing such a complaint begins a formal administrative procedure that can lead to cease and desist orders, monetary penalties, corrective advertising, and eventually court review. In short, the FTC has broad statutory authority to target false advertisers.

The FDA by comparison, acts as a more conventional regulatory agency, in essence making findings through its administrative procedure that can result in action by the Commissioner to prevent the advertising. As noted above, the USDA's enforcement authority is more specific to the particular product in question, rather than a broad authority over false advertising or improper labeling, but can be used to levy civil penalties and reject labeling.

Of the federal agencies charged with taking action against false advertisers, the FTC has primary responsibility for advertising in general, while the FDA takes primary responsibility over product labeling. Both are empowered to take action against false advertisers identified to them by members of the public, regardless of whether the complainant is a consumer, competitor, or animal advocacy organization. The FDA tends to have a much more formal set of procedures as part a "citizen petition filing" whereas the FTC

is able to receive simple complaints that it then investigates independently. The process for complaints to the USDA regarding specific instances of false advertising depends more on the particular product in question, and is based on section 4(d) of the Administrative Procedure Act. To the extent that a particular product (or service) falls within the jurisdiction of more than one agency, or jurisdiction is not clear, there is no prohibition in filing with multiple agencies. The complaint or petition should, of course, notify the agency that the complainant has filed with other agencies, and explain why.²⁰

- Private suits under the federal Lanham Act

Because the Lanham Act requires that plaintiffs show that the misrepresentation “actually deceives or has the tendency to deceive a substantial segment of its audience,” plaintiffs are likely to conduct detailed consumer surveys.²¹ The following excerpt is from a false advertising claim brought under the Lanham Act:

Sellers of chicken meat products sued competitor, alleging violations of the Lanham Act, specifically claiming that advertisements containing the claims “Raised Without Antibiotics” and “Raised Without Antibiotics that impact antibiotic resistance in humans” were false and misleading. Sellers moved for a preliminary injunction.²²

...

Elements of a false advertising claim under the Lanham Act are as follows: (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products. Lanham Act, § 43(a), 15 U.S.C.A. § 1125(a).²³

MEMORANDUM OPINION

RICHARD D. BENNETT, District Judge.

Plaintiffs Sanderson Farms, Inc. (“Sanderson”) and Perdue Farms, Inc. (“Perdue”) (collectively, “Plaintiffs”) bring this suit against their competitor, Tyson Foods, Inc. (“Tyson” or “Defendant”), alleging violations of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Plaintiffs' Amended Complaint alleges that Tyson's advertisements containing the claims “Raised Without Antibiotics” and “Raised Without Antibiotics that impact antibiotic resistance in humans” are false and misleading to the consumer. Plaintiffs specifically allege that Tyson uses ionophores in its chicken feed and that ionophores are antibiotics.

Pending before this Court is Plaintiffs' Supplemental Motion for a Preliminary Injunction. Plaintiffs' Motion seeks to require that Tyson immediately cease all non-label advertising using the unqualified “Raised Without Antibiotics” claim and the qualified “Raised Without Antibiotics that impact antibiotic resistance in humans” claim. Plaintiffs' Amended Complaint requests injunctive relief against “any claim, direct or indirect, qualified or unqualified, in words or in substance, that Tyson's chicken is raised without antibiotics.”

This Court held a hearing over four days, commencing on Monday, April 7, 2008 and concluding on Thursday, April 10, 2008, to allow the parties to present oral argument, testimony, and evidence.^{FN1} Having heard the testimony of numerous witnesses, including experts proffered by the parties, and having reviewed hundreds of exhibits, this Court finds that consumers are being misled by Tyson's advertisements

²⁰ Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 *Animal L.* 25, 25, 27, 30–32 (2004).

²¹ See also *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 547 F.Supp.2d 491, 498–502 (2008) (describing the consumer survey plaintiffs used to buttress the allegation that qualified language on “Raised Without Antibiotics” labels is not understood by a substantial percentage of consumers).

²² *Id.* at 491.

²³ *Id.*

proclaiming that its chicken is “Raised Without Antibiotics.” Based largely on Plaintiffs’ consumer survey, this Court also finds that the qualified language “Raised Without Antibiotics that impact antibiotic resistance in humans” is not likely to be understood by a significant portion of the consumer public. This Court further finds that there is a strong likelihood of success by Plaintiffs on the merits of this case when it proceeds to trial. Moreover, this Court finds that the public interest compels the issuance of a preliminary injunction during the pendency of this case. Accordingly, for the reasons set forth in the following findings of fact and conclusions of law, Plaintiffs’ Supplemental Motion for a Preliminary Injunction is GRANTED.²⁴

- Interested parties

Interested parties may bring allegations on behalf of consumers. For example, in *In re: Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation*, various plaintiffs brought class actions against Aurora, retailers, and an organic certifying agent, claiming that Aurora had failed to comply with the Organic Foods Production Act and the National Organic Program. Plaintiffs made more than four-dozen claims under the laws of several states, including claims for violations of consumer protection laws, negligence per se, breach of warranty, negligent misrepresentation, and unjust enrichment. The actions against Aurora were dismissed; on appeal, the Eighth Circuit upheld dismissal of plaintiffs’ claims against the organic certifying agent but remanded on plaintiffs’ other state law claims. The following quotation is an excerpt from *In re: Aurora Dairy*:

D. Remand is Appropriate as to Aurora and the Retailers

Except for QAI [the organic certifying agent], at least one claim against each defendant in the CCC could survive preemption. Many of the claims against Aurora seek to hold it accountable for representing its products as organic when in fact the products were not. As discussed above, all of these claims are preempted by the OFPA. However, claims against Aurora for other conduct, particularly other representations it made in marketing its High Meadow brand milk, fall outside the scope of preemption. For example, the class plaintiffs allege Aurora engaged in various deceptive trade practices in violation of the Colorado Consumer Protection Act (CCPA), Colo.Rev.Stat. § 6-1-105(1).

Among other things, the CCPA defines deceptive trade practices to include “advertis[ing] goods ... with the intent not to sell them as advertised” and “[f]ail[ing] to disclose material information concerning goods ... which information was known at the time of an advertisement or sale if such failure ... was intended to induce the consumer to enter into a transaction.” *Id.* at (i), (u). The class plaintiffs allege Aurora engaged in deceptive advertising practices by, among other things, “misrepresenting the manner in which its dairy cows were raised and fed,” and “suppressing or omitting material facts regarding the production of its ‘organic’ milk or milk products, specifically that ... the dairy cows were not raised at pasture.” This claim sufficiently states a cause of action at this stage of the proceedings. The district court’s dismissal of defendant Aurora from the lawsuit must be reversed.

The analysis of the deceptive advertising claims against Costco, Safeway, Target, and Wild Oats is identical to the analysis of the claims against Aurora. Each defendant is alleged to have misrepresented the manner in which the dairy cows were raised and fed in violation of various state deceptive trade practices laws and is alleged to have suppressed or omitted material facts regarding the production of its products. We hold at least one claim could have survived a motion to dismiss as to each of these defendants, again at this stage of the case.

The class plaintiffs accuse Wal-Mart of the same activity as the other retailers. Wal-Mart allegedly advertises that its milk is antibiotic and hormone free. The class plaintiffs also allege Wal-Mart made knowing false statements on its packaging about the humane treatment of cows. There is evidence some of the organic cows at Aurora were put in herds with ordinary cows, potentially subjecting them to injections of antibiotics and hormones. Our review of the allegations against Wal-Mart confirms the allegations are sufficient to state at least one plausible claim for relief, at this stage.

E. Instructions on Remand

On remand, the district court should first consider Aurora’s and the retailers’ motions to strike and the class plaintiffs’ motion to amend the CCC. Having determined which claims are properly before it, the

²⁴ *Id.* at 492–93.

court should next consider which of the class plaintiffs' claims survive preemption in accordance with this opinion.

III. CONCLUSION

For the foregoing reasons, we (1) affirm the dismissal of defendant QAI from this lawsuit, (2) affirm the dismissal of those claims challenging Aurora's certification and appellees' use of the OFPA Terms, (3) reverse the dismissal of all remaining claims against Aurora, Costco, Safeway, Target, Wild Oats, and Wal-Mart, and (4) remand for further proceedings consistent with this opinion. Although this task may be difficult in application, we are confident the district court and the parties will be able to apply these holdings.²⁵

- State laws against false advertising and misrepresentation

C. Can Members of the Public and Interested Groups Effectively Enforce Compliance with Animal Husbandry Standards Under Humane Labels?

There are a number of obstacles that limit the regulation of humane labeling. Government agencies have not been active in policing the welfare claims made on humane labels. In addition, interested parties may face difficulties when attempting to establish standing under some consumer protection legislation. Furthermore, many labels are understood subjectively (e.g., “happy”), and courts may be reluctant to determine the meaning of those terms.

Obstacles to enforcing consumer protection under the Lanham Act:

Rather than relying on a third party government agency to act, perhaps the preferred method of exposing a seller for deceiving consumers regarding an animal-related product or service is to bring them directly to court. However, as discussed below, this is difficult in any case and perhaps more so in the context of animal advocacy where litigants may lack traditional “injuries” or other grounds for standing. Consumer protection laws, while gracious in the authority they give to executive agencies to act, either expressly limit or have been interpreted to limit consumers' and non-governmental organizations' access to court. This limitation is predicated on many questionable theories discussed further below, but in the current state of the law it certainly makes challenging false advertisers in court less likely. Federal court, which can only be accessed by a few narrowly defined litigants, exemplifies this. For example, while the Federal Trade Commission Act appears to be Congress's attempt to create a broad consumer protection mechanism that might afford a private cause of action, it had been squarely held not to. In light of this authority it would also be hard to argue that anything under the USDA and FDA consumer protection laws afford a private cause of action for false advertising.

However, one avenue for calling false advertisers to account for their acts, in terms of original jurisdiction in federal court, is the Lanham Act. This act creates a federal cause of action for false advertising in interstate commerce with broad remedies ranging from injunctive relief and damages, to corrective advertising. The act effectively brings the force of federal courts to bear against false advertisers and it has become a major source of federal litigation that has created volumes of case precedent on issues regarding false advertising and the evidence needed to prove it.

Unfortunately, in the context of animal advocacy, the statute presents some initial pitfalls. While the statute allows for “any person who believes that he or she is or is likely to be damaged by” false advertising to bring a civil action, courts have almost universally rejected consumer actions, holding that a plaintiff must suffer some sort of commercial (and in some Circuits competitive) injury to have prudential standing and have consistently rejected consumer actions. While there may be questionable jurisprudential reasons for narrowing the statute (namely judicial economics), this has effectively limited Lanham actions to claims between competing sellers.²⁶

²⁵ *In re: Aurora Dairy Corp. Organic Milk Marketing and Sales Practices Litigation*, No. 09-2762, 2010 WL 3564849, at *12–13 (C.A.8 (Mo.) Sept. 15, 2010).

²⁶ Dillard, *supra* note 20 at 37–38.

An example of a consumer protection claim under state laws that was dismissed:

... For example, People for the Ethical Treatment of Animals (PETA) and John Robbins, former heir to the Baskin-Robbins fortune, filed a section 17200 lawsuit against the California Milk Advisory Board (CMAB) on December 11, 2002. The complaint alleged that the CMAB's "Happy Cows" campaign was deceptive advertising, which thus constituted a fraudulent business practice under section 17200. PETA sought to enjoin the ad campaign, which consisted of television ads with the slogan, "Great Cheese comes from Happy Cows. Happy Cows come from California." These ads portrayed dairy cows and calves in "spacious, grassy pastures on beautiful, rolling hills with a few cows grazing and wandering about and 'enjoying' the ease, luxury and contentment of life as a dairy cow in California." However, the harsh reality is that the life of a dairy cow or a calf is anything but happy--it is not even decent. PETA therefore sought to enjoin the CMAB's fraudulent advertising under section 17200. Unfortunately, the Superior Court of San Francisco dismissed the lawsuit, stating that governmental entities are exempt from false advertising laws. At the hearing, however, "[t]he judge did acknowledge that California cows probably aren't happy and that if the ads implying that they were happy had been made by a private individual, false-advertising laws might apply." PETA appealed the ruling, and the California Court of Appeal affirmed the dismissal.²⁷

Animal welfare groups may successfully use both the press and litigation to improve farm animal welfare. For example, Compassion Over Killing alleged that the "Animal Care Certified" label, which was overseen by United Egg Producers (UEP), was an example of false advertising. UEP settled with Compassion Over Killing out of court and agree to stop using the "Animal Care Certified" label.

Timeline for the battle over the "Animal Care Certified" label:

May 2003: COK investigators documented disturbing, yet standard, cruelty at an "Animal Care Certified" egg factory farm in Cecilton, Md.

June 2003: COK filed a petition before the Better Business Bureau asserting that the United Egg Producers (UEP) was engaging in false advertising by allowing its member producers to use an "Animal Care Certified" logo on their cartons. COK launched EggScam.com, which is now EggIndustry.com.

November 2003: After weeks of filings submitted by both the UEP and COK, the Better Business Bureau's National Advertising Division ruled in COK's favor, stating that the ACC logo is misleading and should be discontinued. The Associated Press ran a story on its national wire about the ruling.

November 2003: The UEP appealed the case to the Better Business Bureau's National Advertising Review Board

May 2004: The consumer protection organization affirmed its earlier ruling and stated the ACC logo should be discontinued or modified. Again, the Associated Press ran a story on its national wire about the ruling.

May 2004: COK investigators gathered evidence at another "Animal Care Certified" egg factory farm, this time in Millington, Md. Standard egg industry abuses were once again documented in video and photos.

July 15, 2004: Washington, D.C.'s ABC affiliate, WJLA, ran an exclusive I-Team report on the "Animal Care Certified" issue entitled, "Egg Fraud." The following day, WJLA's affiliate, News Channel 8, did a 20-minute live interview with COK's Paul Shapiro about the issue.

July 28 and August 4, 2004: New Jersey's Twin-Boro News ran a two-part series on the "Animal Care Certified" controversy.

August 25, 2004: After determining that the UEP was not in compliance with the latest National Advertising Review Board's ruling, the Better Business Bureau officially referred the case to the Federal Trade Commission for potential law enforcement action.

February 15, 2005: COK and four egg consumers filed a lawsuit against two retailers and an egg producer alleging that the "Animal Care Certified" (ACC) logo stamped on egg cartons deceives shoppers by conveying a false message of humane animal care. (This case was settled.)

February 2005: COK investigators documented conditions inside Maryland's three largest egg farms, two of which are "Animal Care Certified." Conditions for hens on all three farms are strikingly similar.

²⁷ Donna Mo, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. Rev. 1313, 1321-22, (2005).

May 24, 2005: Representative Jan Schakowsky (D-IL), who is a ranking member of the House Subcommittee on Commerce, Trade, and Consumer Protection which oversees the Federal Trade Commission (FTC), sent a letter on May 24, 2005, to FTC Chairman Deborah Majoras urging the Commission to take action on a consumer protection matter involving the United Egg Producers' (UEP's) "Animal Care Certified" (ACC) logo.

September 2005: COK and Giant settle false advertising claims out of court. Giant agrees to remove the "Animal Care Certified" logo from its store brand egg cartons.

October 2005: The Federal Trade Commission announced that the United Egg Producers will discontinue its use of the misleading "Animal Care Certified" logo.

March 31, 2006: This marks the last day the egg industry could use its deceptive "Animal Care Certified" logo per the agreement with the Federal Trade Commission.

September 21, 2006: The United Egg Producers paid \$100,000 to settle the claims of 16 state attorneys general offices and the District of Columbia attorney general that it engaged in false advertising relating to the use of its "Animal Care Certified" logo.

February 20, 2008: COK and a New Jersey egg consumer file a lawsuit against the UEP and ISE America, an egg factory farm in New Jersey, for the continued use of the misleading "Animal Care Certified" logo.²⁸

News articles on the "Animal Care Certified" battle:

The egg industry should stop advertising its products as humane as long as it continues such practices as clipping hens' beaks and depriving birds of food and water, according to a ruling issued Monday by the Better Business Bureau.

The ruling comes from the bureau's New York-based National Advertising Review Board, its highest authority on advertising issues. The board recommended that the United Egg Producers either discontinue labeling eggs as "animal care certified," or significantly alter it to stop misleading consumers. "It is unimaginable that consumers would consider treatment they find 'unacceptable' to be humane treatment," the ruling stated.

The ruling upheld a November finding by a lower panel of the Better Business Bureau. Compliance with the recommendations are voluntary, but groups that refuse to do so are referred to federal agencies like the Federal Trade Commission or the Food and Drug Administration for further investigation. "It happens so infrequently that if it does go to the FDA or the FTC, they will scrutinize the case because it raises their red flags," said Bruce Hopewell, director of the National Advertising Review Board.²⁹

The label *Animal Care Certified* on egg cartons was supposed to assure egg buyers that hens were getting enough food, water and cage space to flap their wings. But after complaints by an animal welfare group that the labels were misleading consumers into thinking that hens were receiving indisputably humane care, the Federal Trade Commission approved a labeling change in late September.

The new logos, which will instead say *United Egg Producers Certified*, will affect about 180 egg producers in the United States, or about 80 percent of the 220 egg producers in the country.

This is an important victory for animals and consumers, said Erica Meier, executive director of Compassion Over Killing, an animal welfare group in Washington that filed complaints two years ago with the trade commission and the Council of Better Business Bureaus over the old labels. *This allows consumers to make more informed buying choices*, Ms. Meier said. *It is a step in the right direction for the egg industry*.

The trade commission, while not making a formal decision on the dispute, encouraged the United Egg Producers, the trade group representing the \$5.3 billion American egg industry, to alter the labels after the Better Business Bureaus recommended changes last year, said Mary K. Engle, associate director of the commission's division of advertising practices.

Ms. Meier said that the old label *implied that the animals were treated humanely, when they are not*.

²⁸ Compassion Over Killing, *supra* note 10.

²⁹ Associated Press, *Business Group Shells Egg-Industry Ads: Better Business Bureau Disputes Humane Claim* (May 11, 2004), available at <http://www.msnbc.msn.com/id/4951194/>.

Egg-laying hens, she said, are the most abused animals in modern agriculture. They spend up to two years crowded together in cages with little room to move or spread their wings. To prevent the hens from pecking each other, parts of their beaks are sliced off, *without pain relief*, she said.

And unlike household pets like dogs and cats, or other agricultural animals like hogs and cows, *pretty much from birth to death, egg-laying hens, as well as chickens raised for slaughter, have virtually no legal protection*, Ms. Meier said.

Mitch Head, a spokesman for United Egg Producers, said he disagreed that the old labeling was misleading but said the association decided to make the change because the trade commission's review had become *a purgatory* for the egg producers and was hurting business.

United Egg Producers has consistently disputed that hens are mistreated. Mr. Head said a national consumer survey done by the producers showed that consumers did not think the label was misleading.

The issue of the Animal Care Certified labeling began in 2002, when the United Egg Producers established a panel of independent scientists to study the conditions under which egg-laying hens were raised. The scientists looked at cage space, food, water and how the hens were transported, among other factors.

The panel, headed by Jeffrey Armstrong, dean of agriculture and natural resources at Michigan State University, came up that year with a set of guidelines. Producers who followed the guidelines could place the Animal Care Certified seal on their egg cartons. Producers submit monthly compliance reports and are audited annually, usually by staff members of the United States Agriculture Department.

Mr. Head said the animal welfare groups' battle against egg producers could cost consumers money. The groups are pushing for eggs to be produced in a cage-free or free-roaming environment. Eggs produced under those conditions cost about \$3 a dozen, about three times what eggs produced by conventionally caged chickens cost. Some 98 percent of the eggs that are sold in the United States are cage-produced, Mr. Head said.

Right now consumers are voting with their pocketbooks, Mr. Head said. *If Americans are forced to pay three times as much for eggs, many of them will be forced out of having that cheap source of protein and vitamins.*

The label change could affect retailers as well. Animal welfare groups have been pushing for retailers to stop selling eggs produced from birds confined to so-called battery cages, which severely restrict hens' movement.

Compassion Over Killing and the Humane Society of the United States recently singled out the Trader Joe's food stores, accusing the company of hiding behind the Animal Care Certified program. The company says it does not include that seal on its private-label packaging but has defended its use of eggs produced by battery-caged chickens by saying it buys eggs only from Animal Care Certified companies.

Alison Mochizuki, a spokeswoman for Trader Joe's, declined to comment.³⁰

In re: Aurora Dairy, which was discussed above at pp. 8–9, was remanded to a district court on September 15, 2010 on state law claims alleging that milk was falsely advertised as organic. This case may offer an avenue for interested parties to enforce compliance with humane labeling.

In addition, some groups have been successful in improving farm animal welfare through other means. Proposition 2 in California is an example of a highly effective campaign to improve farm animal welfare.

Proposition 2 in California:

This essay explores the events and circumstances leading up to the enactment of Proposition 2, the Prevention of Farm Animal Cruelty Act, which was principally sponsored by The Humane Society of the United States (HSUS) and Farm Sanctuary, and overwhelmingly enacted by California voters on November 4, 2008. The measure, although not without its critics, can fairly be described as the most important animal law reform in the last decade. Indeed, one of the largest agribusiness newspapers in the country, *Feedstuffs*, described it as “an initiative that will affect all of livestock and poultry production across the entire U.S., if not North America. All segments of production, including packer/processors, grain producers, suppliers and those in the business of selling food, must recognize this . . .”

³⁰ Alexei Barrionuevo, *Egg Producers Relent on Industry Seal*, N.Y. Times, Oct. 4, 2005, at C18.

...

Proposition 2 represents a new and historic benchmark for these efforts. It ends the practice of confining certain animals raised for food in crates and cages so small the animals can barely move. It is historic because it addresses battery cages for the first time and does so in one of the nation's largest agriculture states. Proposition 2 requires that factory farms provide enough space for animals, including laying hens, to stand up, turn around, and extend their limbs. The measure's operative provision is as simple as it is unassailable, providing that "[a] person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely."

The measure applies to breeding pigs, egg laying hens, and veal calves, and goes into effect in January of 2015, giving factory farms six years to shift to different housing systems. Part of the measure's strength lies in its modest but powerful goals. Proposition 2 does not eliminate all animal cruelty, nor does it require idyllic living conditions. It simply moves factory farms away from some of their worst abuses.

...

The Proposition 2 coalition may have been the most diverse and broad-based of any ballot measure coalition in California. Proposition 2 was backed by HSUS, the Center for Food Safety, the California Veterinary Medical Association, the United Farm Workers, the Cesar Chavez Foundation, the National Black Farmers Association, the Sierra Club, the California Council of Churches, the California Democratic Party, and the Consumer Federation of America. Hundreds of other prominent individuals and organizations spanning the political and economic spectrum also supported the initiative.³¹

D. First Amendment Issues with Mandatory Disclosure of Animal Husbandry Standards

Forced disclosure of farm animal husbandry standards may run afoul of the First Amendment. For example, in *International Dairy Foods Ass'n v. Amestoy*, the Second Circuit decided that a Vermont statute requiring dairy producers to identify products derived from dairy cows treated with synthetic growth hormones violated the First Amendment.

An excerpt from *International Dairy Foods Ass'n v. Amestoy*:

Plaintiffs-appellants International Dairy Foods Association, Milk Industry Foundation (MIF), International Ice Cream Association, National Cheese Institute, Grocery Manufacturers of America, Inc. and National Food Processors Association (collectively "appellants" or "dairy manufacturers") appeal from a decision of the district court (Murtha, *C.J.*), denying their motion for a preliminary injunction. 898 F.Supp. 246 (D.Vt.1995). The dairy manufacturers challenged the constitutionality of Vt. Stat. Ann. tit. 6, § 2754(c) which requires dairy manufacturers to identify products which were, or might have been, derived from dairy cows treated with a synthetic growth hormone used to increase milk production. The dairy manufacturers alleged that the statute violated the United States Constitution's First Amendment and Commerce Clause.

Because we find that the district court abused its discretion in failing to grant preliminary injunctive relief to the dairy manufacturers on First Amendment grounds, we reverse and remand.³²

E. Obstacles to Publicly Demonstrating a Need for Greater Regulation of Humane Labeling

Attempts to publicly expose farm animal husbandry standards and thereby demonstrate a need for regulation of humane labeling may result in legal ramifications. For example, a number of states have enacted "veggie libel" laws protecting food producers from "disparagement." In addition, the Animal Enterprise Terrorism Act criminalizes videotaping and other documentation methods that have typically been used to bring public attention to conditions in CAFOs.

³¹ Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 Animal L. 149, 150, 156, 160–61 (2009).

³² *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69 (1996).

As one example, a veggie libel law in Texas:

According to Texas's false disparagement statute, a person is liable if: “(1) the person disseminates in any manner information relating to a perishable food product to the public; (2) the person knows the information is false; and (3) the information states or implies that the perishable food product is not safe for consumption by the public.” In deciding whether the disseminated information was false, “the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data.” Unlike the prior statutes, Texas's false disparagement section merely provides for “damages” and makes no mention of punitive damages. However, Texas's statute is significant because it utilizes a high standard of culpability regarding the dissemination. To be liable, the individual must have had actual knowledge or stated or implied that the product was unsafe. Moreover, no burden of proof is assigned according to the statute. Interestingly, the statute precludes a cause of action for statements regarding organic methods of production, yet makes no mention of the reasoning behind this distinction.

Aspects of the Texas statute were first addressed when Paul Engler, a Texas cattlerancher, filed a lawsuit against Oprah Winfrey. Mr. Engler filed his lawsuit after watching a show that Ms. Winfrey broadcast about “mad cow” disease. Mr. Engler and twelve other ranchers alleged that they lost millions when a guest's statement that feeding ground up animal parts to cattle could spread mad cow to humans in the United States caused Ms. Winfrey to exclaim, “It has just stopped me from eating another burger!” The ranchers claim that the comments on Ms. Winfrey's show were not based “on reasonable or reliable scientific data” and, therefore, caused cattle prices to drop ten percent, \$.62 a pound to \$.55 a pound, by the end of the month following the broadcast.

Generally, about 80% of agricultural disparagement cases are dismissed; thus it was not surprising that Judge Mary Lou Robinson barred the cattlemen from trying the case under the Texas law because the plaintiffs failed to prove their allegations as required by the statute. This decision restricted the cattlemen to basing their claim upon common law business disparagement. Under this standard, the cattlemen had to prove that Ms. Winfrey intended her statement about hamburgers to result in harm to the cattleranchers. As noted previously, this standard is notoriously difficult to prove and, consequently, the cattlemen lost their suit. As such, no actual challenge to the agricultural disparagement statutes has been waged, and for now, the lobbyists and agricultural groups can breathe a sigh of relief.

...

While agricultural statutes aim to protect a worthy group, they violate the First Amendment by proscribing protected speech. The First Amendment presupposes that the freedom to state one's mind is integral to personal liberty, and essential to the vitality and growth of society. Moreover, under the United States Constitution, “there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” Nevertheless, “there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.” These categories include: libelous speech, fighting words, incitement to riot, obscenity, and child pornography. Each of these categories have been carefully examined and deemed to be outside the realm of protected speech because they “are no essential part of any exposition of ideas...”

...

The agricultural disparagement statutes are constitutionally infirm because they do not adhere to the requirement that the speech be false. To be guilty, common-law disparagement actions required that the defendant published a knowingly false statement harmful to the interests of the other. While a defamation action requires that when the statement is regarding an issue of public concern and a private individual, the statement must be measured according to the “actual malice” standard set forth in *New York Times*. According to the standards articulated in the agricultural disparagement statutes, a statement is false if it is not based upon a reasonable or reliable scientific data or information. Although the Georgia statute requires that the dissemination be “willful or malicious,” there is not a guarantee that this will rise to the level of the standard in *New York Times*. Therefore, these standards create a per se falsity based upon a lack of hard scientific proof and are far below the constitutional requirements. Proponents of the statutes might argue that the requirement of reliable scientific proof serves to prevent exaggeration or mischaracterization and, in fact, ensures truthful speech. However, it is unlikely that a court would hold a defendant liable under this standard because to require a defendant to perform a scientific study before making a public statement would be unduly burdensome, chill debate and inhibit speech.

...

According to the product disparagement statutes, it would be permissible to disseminate false, positive statements (e.g., “Eating apples will make you live to the age of 100.”), but impermissible to disseminate true statements that were harmful to agriculture. By the very terms of the statutes, only

comments with a positive viewpoint toward agriculture will survive. Viewpoint and content based laws are prohibited on the basis that they inhibit freedom of speech, and therefore, the disparagement statutes would be invalid.

...

Information and speech that reports on the status and safety of agricultural practices is clearly speech that is of public concern. These new breeds of disparagement statutes disregard common law product disparagement statutes, as well as constitutional principles set forth under the First Amendment. Based upon the difficulties inherent in recovering under both causes of action, it is not surprising that agribusiness pushed for these statutes to protect their livelihoods. However, while the statutes are intended to protect producers' businesses and their families, they in actuality insulate agriculture from any type of criticism. In this respect, they serve to chill debate and limit discussion on the foods we eat. Justice Holmes believed "that the best test of truth is the power of the thought to get itself accepted into the competition of the market ... [t]hat at any rate is the theory of our Constitution." Therefore, although certain statements and publications may be detrimental to agriculture, it is contrary to the very tenets of our society to prohibit speech merely because it is unpopular. Consequently, the product disparagement statutes are dangerous and unconstitutional.³³

F. What Should We Do to Improve Farm Animal Husbandry Standards?

Improving farm animal husbandry standards will take some creativity. Groups and individuals may pursue legislation at both the state and federal levels. Farm animal advocates may also work to increase public awareness of farm animal treatment, moving us towards legislative improvements. Advocates may also pursue legal action under the federal Lanham Act and state laws against false advertising. A combination of these and other approaches is likely to be most effective.

- Legislation and policy at the federal level, working to improve baseline animal welfare standards in food production
- Legislation and policy at the state level, working to ban gestation crates, cages for laying hens, etc. on a state-by-state basis

As a consequence of the receptiveness of certain state populations, a relative lack of agribusiness influence in such states, and the relatively low cost of pursuing legislation at the state level, nearly all progressive legislation directed at farm animals that has passed in recent years occurred at the state level. Due to the relative strength of agribusiness in certain states, progressive farm animal legislation is far more successful in some states than in others. But the prospect of state-by-state reform remains attractive because it is less expensive for farm animal advocacy organizations to pursue, and it allows advocacy groups to focus their limited resources on states that may be ready to embrace reform.³⁴

- General public policy, work to decrease the market for animal products raised via baseline industry standards by encouraging consumption of animal products with improved, "humane" standards as an alternative

Changes in policies and production practices by food producers have been increasingly consumer-demand driven rather than governed by changing regulations. The growth in "politics by other means - politics practiced through the market" has allowed interest groups to pursue political objectives through the market system rather than through more traditional legislative channels. Recent changes in production systems for dairy and meat products (among other food products) can be attributed to market pressures, rather than changes in legislation. The recent movement away from rBST use in milk production in various

³³ Colleen K. Lynch, *Disregarding the Marketplace of Ideas: A Constitutional Analysis of Agricultural Disparagement Statutes*, 18 J.L. & Com. 167, 182–83, 183, 186, 188, 189 (1998).

³⁴ Colin Kreuziger, *Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals*, 23 Law & Ineq. 363, 399 (2005).

regions of the U.S. is an example of changes in production systems initiated via the market rather than through changes in regulations.

...

Retailers are able to respond to “politics practiced through the market” relatively quickly (in comparison to legislative changes) and alter the production systems used for the products they sell, thereby effecting change in animal welfare standards in the industry. In the U.S., the largest reforms for animal welfare standards for food production animals were initiated by restaurants.

...

Several well-established and growing consumer advocate groups exist as proponents of animal welfare. Recent changes in production practices have been increasingly driven by consumer demand rather than by changes in regulations. This trend toward changes in practices, in response to consumer groups rather than solely in response to changes in regulation affected by more traditional means, provides support for the expectation of continued change in practices in response to animal welfare advocate groups. Additionally, this trend means that there are interested and committed groups who are “policing” producers to make sure that claims made regarding processes in livestock for food production are verifiable and not misleading to consumers.³⁵

- Reflexive law (encouraging the disclosure of information)

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. The role of the state in a reflexive law framework is generally limited to providing mechanisms for information disclosure, which in turn encourage and enable companies and other entities to self-regulate. Warning labels, environmental impact statements, and third-party certified labeling claims are some examples of reflexive law approaches. 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. This expression of preferences in the market is then expected to result in positive behavioral changes by firms and other organizational actors. Reliable information disclosure through labeling can thus incentivize practices valued by consumers and provide compliant manufacturers with a competitive advantage.

Eco-labels are an example of a positive information scheme; they aim to facilitate product evaluation through a simple, identifiable, and credible sign. The voluntary nature of a positive information scheme--and its demonstrable success in several cases--make it a promising approach.

...

Grassroots activism has played a key role in the growth of reflexive law mechanisms. 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. 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.

....

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.” 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

³⁵ Nicole J. Olynk, Christopher A. Wolf & Glynn T. Tonsor, *Labeling of Credence Attributes in Livestock Production: Verifying Attributes which are More Than Meet the Eye*, 5 J. Food L. & Pol'y 181, 185-86, 187, 192 (2009).

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.³⁶

- Legal challenges to labeling under consumer protection laws

Consumer Protection Under the Lanham Act:

Moreover, the plaintiff, who is in a sense the protagonist, is likely to be a small business owner attempting to honestly appeal to a growing market niche for humane products, but prohibited and injured by a relatively inhumane and deceptive competitor. Again, to the extent animal activists and organizations are marginalized in the law, the small business owner is the preferred litigant.

The range of remedies also makes this type of action attractive. Unlike many animal advocacy actions, there are broad remedies available under the Lanham Act including injunctions, corrective advertising, damages for lost profits or defendant's profits, costs, and attorney's fees. This creates a financial incentive that rarely exists in animal advocacy. For all of these reasons, the Lanham Act should not be ignored but rather embraced as a favorable means of addressing animals in the market and consumers' perception about them.³⁷

Consumer Protection Under the Federal Trade Commission:

The Commission will find an advertisement deceptive if it contains a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material. A representation may be made by express or implied claims. An express claim might be an actual statement of fact on the product label, while an implied claim would typically be the message that a consumer infers from that ad. To determine what claims an ad implies, the FTC will consider the entire context of the ad, including the nature of the claim and transaction.

Thus, an advertiser that sells a product with the term "free range" on the label would presumably be making an express claim that the animal was in fact free-ranging, while an advertiser that sells meat with a design of an animal in a pasture on the packaging could also be said to be making an implied claim that the animal was in fact free-ranging.

In addition to the deception arising from claims, the omission of material information can be deceptive under certain circumstances. Deception can occur through "omission of information that is necessary to prevent an affirmative representation from being misleading," as well as through silence which itself implies a claim.

For example, if there is a reasonable understanding among consumers that free range does not mean free range of a small pen, the seller of the meat labeled "free-range" should include this fact on the label if this is in fact the case. Likewise, the seller with the design of an animal in the pasture would be expected to do the same.

The Commission will next consider the representation from the perspective of a person acting as a reasonable or average consumer would under the circumstances. Importantly, this "reasonable consumer" standard can change. If the representation is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.

To illustrate, assume that the animal in question had spent part of its life in a pasture and part in a feedlot. Presumably the Commission would ask whether a reasonable consumer seeing meat labeled with a design of an animal in a pasture would assume that the animal had in fact spent its entire life in a pasture. If, however, there was evidence to show that the seller was marketing specifically to an urban population that had no experience with how animals are raised, the Commission would presumably be more likely to find such an assumption reasonable--as opposed to marketing directed at a rural populace where feedlot use is common.³⁸

³⁶ Delcianna J. Winters, *Combining Reflexive Law and False Advertising Law to Standardize "Cruelty-Free" Labeling of Cosmetics*, 81 N.Y.U. L. Rev. 454, 476-77, 482, 485 (2006).

³⁷ Dillard, *supra* note 20 at 39.

³⁸ Dillard, *supra* note 20 at 46-47.

- Use of the media

The front lines of a high-stakes food fight moved recently to a sidewalk in front of a Kentucky Fried Chicken restaurant, where young volunteers from People for the Ethical Treatment of Animals tried to shock and disgust lunch-hour patrons.

There was a PETA intern dressed in a bloodied chicken costume, a 22-year-old with shocking pink hair and the word "VEGAN" tattooed across her chest in gothic lettering, and campaign coordinator Ben Goldsmith with a flat-screen television strapped to his chest.

"That bird is having its thigh sliced open while fully conscious," Goldsmith said, narrating a grisly video as KFC customer Tiffany Mueller looked on, gnawing on a piece of chicken.

"It all tastes the same to me," Mueller said.

As unorthodox as it may sound, the protest against KFC represents what has been a highly successful formula for PETA, an organization founded in 1980 that is perhaps best known for tactics such as throwing red paint on fur coats and comparing the slaughter of livestock to the Holocaust.

In addition to such clever gimmicks as dressing vegan models in lettuce bikinis, PETA has used media savvy, a stable of celebrity advocates and a sophisticated Internet operation to try to change the behavior of consumers and some of America's largest corporations, including fast-food chains. McDonald's, for one, made wholesale changes in the way it treats farm animals after animal-welfare activists, including PETA, highlighted abuses. Burger King and Wendy's did the same after PETA launched campaigns called "Murder King" and "Wicked Wendy's."

Taking a stand

What makes the KFC campaign unique is that the chicken chain has refused to submit to PETA's demands, which include stopping the use of growth-enhancing antibiotics and using gas, rather than electric shocks and sharp knives, to kill chickens. As a result, company executives have been doused with fake blood, criticized by the likes of Pamela Anderson, Al Sharpton and the Dalai Lama, and continually subjected to the circuslike atmosphere of PETA protests at its restaurants.

In Ft. Wayne, Ind., for example, a PETA intern dressed in a chicken suit spent an hour-long protest in a wheelchair, going back and forth through a busy intersection. The "stunt boy" from local radio station "Wild 96.3" trailed the intern, holding out a bucket of chicken and asking, "Is this your brother or your aunt?"

Asked to respond to PETA's "Kentucky Fried Cruelty" campaign, which began in January 2003, spokeswoman Virginia Ferguson said, "KFC is committed to the well-being and humane treatment of chickens.... We are proud of our responsible, industry-leading animal-welfare guidelines."

Company officials declined further comment, other than to refer to the animal-welfare guidelines available on the company's Web site. They highlight KFC's audits of slaughterhouses and farms, and the site states that, working with its Animal Welfare Advisory Council, KFC has devised quantifiable standards for the treatment of chickens.

The Web site does not mention that several members of the advisory council, formed in late 2000, quit in frustration because of the lack of progress and because they had to sign a strict confidentiality agreement.

Animal-welfare groups, which started in England in the 1820s, did not focus on fast-food restaurants until the 1990s, when two London activists distributed leaflets titled "What's Wrong with McDonald's?"

In a libel suit filed against the protesters, the judge ruled in favor of McDonald's on most counts, though he did conclude that McDonald's suppliers mistreated animals. Because of the judge's findings, PETA launched a "McCruelty" campaign in which protesters passed out an "Unhappy Meal" that contained plastic animals covered in fake blood.

McDonald's agreed to major animal-welfare changes in 2000, including audits of slaughterhouses to ensure that animals were treated humanely and refusing to buy from suppliers that cut off chickens' beaks. PETA called a moratorium to its campaign 11 months later, though McDonald's officials insist the protests did not trigger the changes.

Regardless, in the years since, McDonald's has emerged as an industry leader in animal welfare. Its decision to conduct slaughterhouse audits prompted more positive changes in that industry "than I'd seen in a 25-year career," said Temple Grandin, an animal-welfare expert who consulted for McDonald's and other fast-food chains.

After the McDonald's campaign ended, PETA wrote other major fast-food chains requesting that they implement similar animal-welfare protocols.

"Our expectation after the McDonald's campaign was that the corporations would trip over themselves to make similar changes," said Bruce Friedrich, PETA's director of vegan campaigns. "Instead, the corporations took a wait-and-see attitude."

PETA responded with the "Murder King" campaign against Burger King and "Wicked Wendy's" protests against Wendy's hamburgers. Both chains eventually followed the lead of McDonald's.³⁹

- State ballot initiatives

The use of citizen initiatives will continue to play a major role in these reforms, as they have been perhaps the most successful tool in animal advocates' toolbox throughout the last two decades to achieve humane reforms. Since 1990, animal advocates have enacted twenty-eight ballot initiatives, including measures to outlaw cockfighting in Arizona, Missouri, and Oklahoma; to stop hound-hunting and baiting of bears in Colorado, Massachusetts, Oregon, and Washington; to halt mountain lion hunting in California; to re-strict the use of steel-jawed leghold traps and other body-gripping traps in Arizona, California, Colorado, Massachusetts, and Washington; and to halt the use of gestation crates in Florida and Arizona.

This solid record of success is in contrast to the slower-moving reforms from state legislatures and Congress. Traditional legislative bodies are particularly vulnerable to influence by industries with resources and political power. Animals are exploited for financial gain in immeasurable ways, and any interference with their unfettered use can be easily blocked by the longstanding political influences of the hunting lobby, agriculture lobby, and other animal-use industries. Legislative bodies, governed by committee chairs who are frequently beholden to those interests they oversee, do not offer the same opportunities for animal advocates found in the twenty-four states with some form of citizen initiatives.

If a proposed reform is simple, moderate, and resonates with the average citizen, adoption through the ballot measure allows animal protection measures to escape the vice-like grip opponents of reform often have on regular legislative bodies. The people become the decision-makers. The airwaves-- whether television, radio, or Internet--become the means by which citizens learn about and see for themselves which practices should be forbidden, and why. If undertaken with adequate resources and proper polling, animal protection measures are predictably met with success when they are brought to the public directly.⁴⁰

- Work with, or look to, other movements such as the labor and environmental movements

V. ETHICAL ISSUES: CAN HUMANE LABELING STANDARDS IMPROVE FARM ANIMAL WELFARE?

Is supporting incremental improvements in humane standards the appropriate approach to farm animal welfare?

Yes:

- Incremental improvements affect millions of animals who are alive and suffering now
- America won't go vegan, so we'll have to compromise

Conversely, there appears to be little popular support for the animal rights perspective. However, awareness of animal rights issues appears to be increasing, as younger generations increasingly adopt vegetarian or vegan lifestyles or eat increasing amounts of vegetarian or vegan food. It is equally clear that the general public does not support the abolition of meat consumption or production at any time in the near future.⁴¹

³⁹ Andrew Martin, *PETA Ruffles Feathers*, Chicago Trib., Aug. 6, 2005, at 1.

⁴⁰ Lovvorn & Perry, *supra* note 31 at 154-55.

⁴¹ Kreuziger, *supra* note 34 at 382.

- Public awareness of issues with the treatment of farm animals will encourage a trend of improved husbandry standards, a snow-ball effect

In fact, there are likely to be dynamic interactions between the market-perfecting and democracy-improving functions of disclosure. With respect to animal welfare, most people's values are not firm and fixed. Their moral commitments, and even their behavior, are endogenous to what they know and to what they learn from others. Many of those who think that they do not care about animal welfare might well change their minds and their behavior if they are exposed to certain kinds of mistreatment. Those who are relatively indifferent to the topic might be less indifferent once they hear what other citizens have to say. In the domain of race and sex equality, an emphasis on concrete practices helped to activate general public concern. The same is likely to be true here. For advocates of animal welfare, the hope would be for a kind of virtuous spiral, in which disclosure helped to heighten discussion and debate in a way that did not merely activate, but instead transformed and deepened, existing moral commitments.⁴²

- Public awareness of farm animal treatment (e.g., that gestation crates are permitted at all) will result in a greater number of vegans and vegetarians, thus decreasing the demand for animal-based food products altogether

No:

- Humane labeling standards give the public the feeling that animal agriculture is, or can ever be, “humane,” so support for these standards will hinder attempts to eradicate CAFOs
- Humane labeling will stall both state and federal legislative improvements, member of the general public will feel that improved law aren't necessary because they are already afforded the option of choosing products that are raised “humanely”
- Support for humane labeling is ethically incompatible with the goals of animal welfare advocates, and we shouldn't compromise our goals

Many animal welfare advocates would see a step in this direction as distressingly cautious and even problematic. What if consumers are not, in fact, willing to sacrifice much for animal welfare? Should animal welfare really be bought and sold, or does this create a kind of market in suffering in a way that would be self-evidently unacceptable in the domain of human beings? Should we not be able to agree that the welfare of animals counts, independently of how much consumers are willing to pay to improve it? Why should the suffering of animals depend on how much people are willing to pay to reduce it?⁴³

- Even though some incremental approaches might be effective at improving animal welfare, humane labeling is fraught with regulation failures that render humane labels ineffective at improving farm animal well-being

⁴² Jeff Neslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 *Law & Contemp. Probs.* 117, 130–31 (2007).

⁴³ *Id.* at 124–25.