

# CERTIFICATION MARKS AS PRIVATE EMPLOYMENT REGULATION

By

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## INTRODUCTION

This paper will address a mechanism through which private ordering occurs, such that intellectual property can be used to create private employment and labor regulation. Certification marks can be used as the bases for certification and labeling systems that require adopters/licensees to commit to particular processes, practices, and behaviors that are intended to redound to the benefit of workers. These can range from the prohibition of child labor to nondiscrimination commitments to wage and hour protections to health and safety standards, to name just a few. The paper first provides the background on what certification marks are and how they interact with certification systems, particularly those focused on social goals like the protection and ethical treatment of workers. It then provides a rough taxonomy of certification systems as they relate to employment and labor regulation, providing examples of five such approaches. Finally, the paper identifies four characteristics—embodied in four questions—that inform how likely it is for the use of certification marks to effect change for workers, the intended beneficiaries of these private regulatory systems.

## I. BACKGROUND

### A. The Legal Status of Certification Marks

McCarthy described certification marks as “special creatures” of trademark law.<sup>1</sup> They are used to indicate that the product or service that bears the mark has been certified as meeting a particular standard required by the licensor, the owner of the mark. In the U.S., the Lanham Act defines “certification mark” as follows:

any word, name, symbol or device, or any combination thereof (1) used by a person other than its owner, or (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this chapter, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person’s goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.<sup>2</sup>

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As such, certification marks serve a different purpose from traditional trademarks; in fact, the two are mutually exclusive to the extent that a mark used as a symbol of certification cannot be registered as a trademark.<sup>3</sup> A trademark identifies and distinguishes goods or services bearing the mark as coming from the owner of the mark. A certification mark, in contrast, provides an identifiable guarantee that the goods or services bearing the mark meet the standards set forth by the mark's owner, which has licensed the mark's use in relation to that good or service. Thus, unlike trademarks, which require the owner to be involved in the production of the product or the provision of the service bearing the mark—or risk loss of trademark rights as a result of abandonment<sup>4</sup>—certification mark owners are prohibited from using or displaying their marks on their own products or services.<sup>5</sup> “The owner of the mark is prohibited by law from practicing a self-produced mark, because self-certification is inherently self-interested.”<sup>6</sup>

Owners of certification marks are expected to adhere to high standards of conduct regarding their licensing and enforcement of the mark. Decisions to certify a product can be based only on the standards the owner has promulgated for use of the mark. For instance, a mark owner cannot base the certification decision on whether the user/licensee is willing to pay the owner for using the mark (with the exception of fees to cover the cost of administering the certification mark).<sup>7</sup> Failure to conform to the standards of conduct expected of a certification mark owner can ultimately undermine the registration process and/or the rights the owner has in the mark.<sup>8</sup>

Internationally, certification marks have long been recognized and resemble the approach outlined in the Lanham Act. In fact, the United States was somewhat tardy in providing official recognition to certification marks in 1946. A number of the states had already provided such recognition and protection, following the lead of foreign countries.<sup>9</sup> For example, Britain provided legislative recognition of certification marks in 1905.<sup>10</sup>

Today, certification marks are recognized throughout much of the world, though not always under the “certification mark” appellation, and protected due in part to the fact that the Paris Convention’s reference to collective marks is generally understood to include certification marks as well.<sup>11</sup> That reference thus has led to the protection of certification marks under the TRIPS Agreement, at least to the extent that a certification mark is an indication of geographical origin.<sup>12</sup>

In some instances and some jurisdictions, certification marks are registered by the government. “Actual control of the use of [certification] marks may be vested in private bodies, or public bodies, such as government agencies or departments.”<sup>13</sup>

## **B. The History of Certification Marks as Regulation**

Even before the Lanham Act provided formal recognition for certification marks, U.S. activists, union leaders, politicians, and bureaucrats recognized the potential power in certification labeling. The National Consumers’ League certified garments as “made under clean and healthful conditions” with its “White Label,” which was in use for roughly twenty years around the turn of the twentieth century.<sup>14</sup> The “White Label” was a progressive era response to deplorable working conditions in tenement sweatshops in the United States. Likewise throughout the late nineteenth century and well into the middle of the twentieth century, trade unions used labels to promote the fact that products had been made by unionized workforces. At the height of the “union label” movement, more than sixty unions in the United States used

labels to denote the source of a product's labor, and most of the states recognized the legal authority of unions to do so.<sup>15</sup> For instance, lumber mills used a stamp created by the Carpenter's Eight-Hour League of San Francisco to show that they ran on a more humanitarian eight-hour schedule than the otherwise prevailing ten-hour schedule.<sup>16</sup> Paul Duguid conjectures that courts' and Congress's antipathy to union activity at the turn of the twentieth century may explain why the United States was slow in recognizing certification marks in the federal law.<sup>17</sup>

In a fascinating attempt to capitalize on the power of symbols and labeling that was a precursor to today's regulation by certification, in 1933 the Roosevelt administration developed the "Blue Eagle" in conjunction with the National Industrial Recovery Act (NIRA) and the National Recovery Administration (NRA).<sup>18</sup> As part of the "First New Deal," the NIRA tried to empower the president to address the market instability that was seen as the cause of the Great Depression by authorizing the Administration, through the NRA, to develop codes of fair competition through public hearings and to negotiate voluntary agreements with industries to address work hours, rates of pay, and price fixing.<sup>19</sup> The first director of the NRA was Hugh Samuel Johnson, who called on every business in every industry to agree to a "blanket code," which included a minimum wage of between twenty and forty-five cents per hour, a maximum work week of 35 to 45 hours, and an end to child labor.<sup>20</sup> Johnson utilized the Blue Eagle symbol,<sup>21</sup> depicted in Figure 1, to indicate those businesses that voluntarily accepted the blanket code. In turn, consumers were encouraged to give preference only to those businesses displaying the Blue Eagle. Johnson said, "when every American housewife understands that the Blue Eagle on everything that she permits into her home is a symbol of its restoration to security, may God have mercy on the man or group of men who attempt to trifle with this bird."<sup>22</sup>

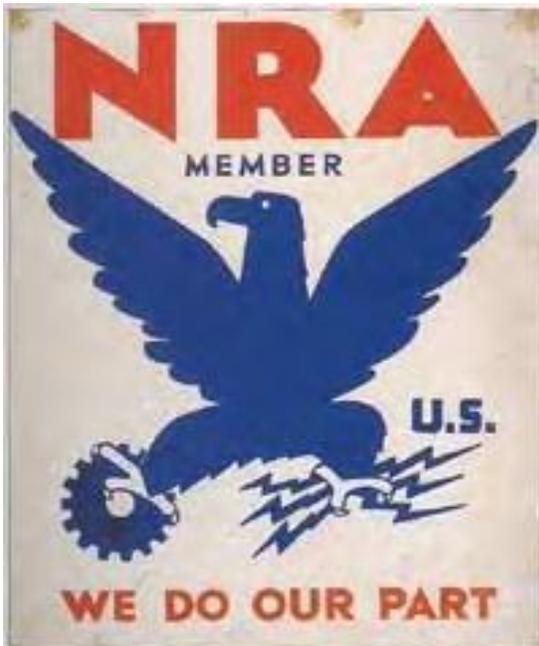


Figure 1: NRA "Blue Eagle" Poster.

The Blue Eagle never had the opportunity to reach the level of dominance envisioned by Johnson, because relevant portions of the NIRA were declared unconstitutional by the U.S. Supreme Court on May 27, 1935. In *Schechter Poultry Corp. v. United States*,<sup>23</sup> the Court held that the mandatory codes sections of the NIRA were an unconstitutional delegation of power to

the executive and exceeded Congress's commerce clause power.<sup>24</sup> As a result, on September 5, 1935, the Blue Eagle emblem was discontinued and its use as a symbol prohibited by law.<sup>25</sup>

Following the enactment of the Lanham Act, certification marks were largely used for the balance of the twentieth century in the United States as indicators of product quality. The most famous certification marks included the Underwriters Laboratories (UL) label, which originally signified electrical safety for the U.S. market (and has since branched out to other areas of certification);<sup>26</sup> the Orthodox Union mark, which serves as a kosher certification;<sup>27</sup> and the Good Housekeeping Seal of Approval, which serves as an endorsement by the Good Housekeeping Research Institute that the product to which it is affixed will perform as intended and as a limited warranty by Good Housekeeping if a labeled product is defective.<sup>28</sup>

### **C. The Impetus and Goals of Modern Social Certification Systems**

A number of recent certification mark labeling initiatives have returned to the original focus on the conditions under which products are manufactured, including the employment and labor conditions in a business's facilities and along its supply chain. Due to globalization, consumers are confronted with products that are manufactured all over the world, particularly in countries and regions with underdeveloped labor and employment protections or limited capacity to enforce those protections.<sup>29</sup> Moreover, these organizations operate beyond the reach of any particular national legal system. John Ruggie, in his work as the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, identified these limitations on the regulation of the conduct of transnational businesses as "governance gaps."<sup>30</sup> While he was focused more broadly on businesses' responsibilities related to human rights, those concerns encompass the labor and employment conditions under which many products and services are manufactured and provided. Governance gaps result from inadequate national regulatory reach, a nonexistent international regulatory framework, and/or insufficiently organized and empowered non-state market and social actors. Governance gaps take several forms. Structurally, public governance is fragmented along national territorial lines, while the global economy transcends such territorial boundaries.<sup>31</sup> Even within and among those national jurisdictions, governments lack policy coherence on both vertical and horizontal axes.<sup>32</sup> Finally, states often lack the capacity or will to adopt or implement regulatory measures, because they fear either that they lack the means to enforce them or that they (or domestic firms) will suffer negative consequences in the global marketplace.<sup>33</sup> Thus, certification schemes have been rolled out as one way to bridge governance gaps.

As such, certification systems can serve as a form of private, market-based regulation. Generally certification systems work through an association that develops standards, accredits auditors, and provides some sort of certification for organizations that meet the standards as determined by the accredited auditors. One way, though not the only way,<sup>34</sup> of providing and communicating the certification is for the certifying organization to authorize the use of a certification mark. This process is regulatory in a couple of senses. First, though it is voluntary and thus does not have the full legitimacy and coercive power that accompanies state regulation, a certification system incorporates more aspects of a hard law system than some other soft law approaches, like corporate codes of conduct or international guidance instruments.<sup>35</sup> Certification systems usually involve "standards that are often precise and prescriptive, plus rationalized procedures for assessing compliance, and adjudicating disputes."<sup>36</sup> Nonetheless, the

“‘price’ of non-compliance is set by market forces, not by administrative authority.”<sup>37</sup> Whether the standards imposed by the certification system redound to the benefit of the populations the standards are promulgated to benefit depends on what that price is and how it is imposed. In public-private certification systems, that might be the cost of debarment or disqualification from selling products in a particular market. If the focus of the certification system is the granting of a license to use a certification mark in relation to a product, the price will be loss of the privilege to use the mark and any other damages that might come from violating the license.

Second, certification systems reflect notions of regulation by information disclosure. That information disclosure is available not only to consumers but also to other stakeholders such as suppliers and buyers, investors, employees, advocacy organizations, the general citizenry, and lawmakers.<sup>38</sup> Therefore, the regulatory nature of certification systems is not solely market-based, but it can also come about “through political and legal mobilization.”<sup>39</sup> Nonetheless, the amount and type of information that is produced through certification systems is often less extensive than other types of mandatory disclosures. Certification only provides positive information about businesses that voluntarily choose to submit to the certification and satisfy the certification standards.<sup>40</sup> Thus, the usefulness of the certification mark is dependent on the various stakeholders’ understanding of the contours and implications of those standards. In a system that focuses primarily on granting a license to use a certification mark, the access to what the mark means will depend largely on the fame and exposure of the mark and the standards it represents.

In the context of certification systems focused on labor and employment standards, there are several ways that certification marks have been used to accomplish these regulatory goals. The following section addresses five different approaches to the use of certification marks in certification systems. In discussing these approaches, I offer a taxonomy of sorts to describe a continuum of reliance on marks in various contexts.

## **II. APPROACHES TO THE USE OF CERTIFICATION MARKS FOR LABOR AND EMPLOYMENT REGULATION**

This section provides an overview of five types of uses of certification marks. [Fill out paragraph.]

### **A. Multi-Stakeholder Codes and Ancillary Use of Certification Marks**

Two major standard-setting organizations offer certifications that address workplace conditions to varying degrees. Each sets standards for processes and workplace conditions rather than for products and, thus, does not allow the use of the organization’s associated marks on individual products. In other words, these certifications say nothing about the quality of a product, so the standard-setting organizations refuse to allow labeling of products out of fear that marketing the products as certified would be false and misleading. The approach used by these groups most resembles the prototype of certification described in the previous section.<sup>41</sup> The two organizations will be discussed in turn: the International Organization for Standardization (ISO) and Social Accountability International (SAI).

#### **1. ISO**

First, ISO is the world's largest organization dedicated to the development of voluntary international standards for products, services, and practices or processes.<sup>42</sup> ISO is a nongovernmental, independent organization headquartered in Geneva, Switzerland. It is a network of the national standards bodies of more than 160 countries.<sup>43</sup> ISO's goal in doing so is to help make industry more effective and efficient.<sup>44</sup> The standards developed by ISO are used in conformity assessments, which can take the form of certification, inspection, and testing. While testing is the most common, certification is the most well-known and relevant to this discussion.<sup>45</sup> ISO does not provide conformity assessment or certification on its own; rather certification bodies provide auditing and certification consistent with the ISO standards.<sup>46</sup> Thus, a company or organization cannot be certified *by* ISO; it can only be certified *to* an ISO standard and will receive a certificate from the certification body verifying that fact.<sup>47</sup>

Though most of ISO's wide-ranging standards have little or nothing to do with labor or employment conditions, the ISO 9000 Quality Management family of standards has some relevance to the workplace experience of employees. In particular, Principle 2 (Leadership) of the Quality Management Principles will lead to "[c]reating and sustaining shared values, fairness and ethical role models at all levels of the organization" and "providing people with the required resources, training and freedom to act with responsibility and accountability."<sup>48</sup> However, unlike the other standards and certifications discussed below, none of the ISO standards directly address issues like child labor, workplace health and safety, nondiscrimination, employees' freedom of association, or wage and hour requirements.

Once a company or organization obtains certification to an ISO standard by a certification body, ISO has strict rules about the usage of ISO marks and logos. Certified organizations are prohibited from using the ISO logo or adapting or modifying the logo for their own use.<sup>49</sup> Individual certification bodies sometimes provide their own certification marks, but ISO does not control, monitor, or regulate their use.<sup>50</sup> For example, BSI, a certification body in the United Kingdom, provides ISO 9001 conformity assessment and certification.<sup>51</sup> Once certified, BSI provides a certification mark that organizations can use in their advertising and informational materials. However, consistent with ISO mandate, Quality Management standards certify processes, not products, so certification marks may not be displayed on products, product labels, or product packaging.<sup>52</sup>

In general, consumers are not the target audience for ISO 9001 certification, because information about the standards has not sufficiently saturated the consciousness of the general public to provide much in the way of marketing leverage. Rather, other external audiences are more likely the targets, including suppliers, buyers, and contracting parties. Thus, the labeling of individual products would not likely be particularly meaningful regardless.

## **2. SAI**

SAI is a multi-stakeholder, nongovernmental organization that seeks to advance the human rights of workers around the world.<sup>53</sup> Thus, unlike ISO, SAI is uniquely focused on the experience of workers and the workplace. The centerpiece of SAI's work in this regard is the SA8000 Standard. The SA8000 is "one of the world's first auditable certification standards for decent workplaces, across all industrial sectors."<sup>54</sup> Companies that comply with SA8000 standards adopt policies and procedures that address the nine elements of the standard: child labor, forced and compulsory labor, health and safety, freedom of association and right to collective bargaining, discrimination, disciplinary practices, working hours, remuneration, and

management systems.<sup>55</sup> These elements are drawn from International Labor Organisation (ILO) conventions, United Nations declarations and conventions, and prevailing national laws.<sup>56</sup> SA8000 certification signifies that a company's codes of conduct and similar policies are sufficiently drafted and implemented to ensure the protection of the nine elements of workers' human rights. Whereas codes of conduct are voluntarily adopted and are not generally accompanied by any legal or regulatory compulsion,<sup>57</sup> the SA8000 provides some accountability for those codes and policies through auditing and complaint processes.<sup>58</sup>

Like the ISO, SAI is the standard-setting organization, while Social Accountability Accreditation Services (SAAS) evaluates and accredits auditing organizations that provide SA8000 certification.<sup>59</sup> For example, Bureau Veritas provides certification services worldwide, including SA8000 certification.<sup>60</sup> In addition to certification marks licensed by accredited certification bodies like Bureau Veritas,<sup>61</sup> SAI allows the use of the SA8000 logo<sup>62</sup> by certified companies or facilities "on promotional material, websites, and other print or online materials."<sup>63</sup> Moreover, SAI provides guidelines for the use of hangtags to advertise a consumer-level product as having been produced in an SA8000-certified facility.<sup>64</sup> However, a certified organization or retailer must do so in a way that does not suggest product certification, because "the marketing of a product as being 'SA8000-certified' is false and misleading."<sup>65</sup> While, like the ISO certification, SA8000 certification relates to the company's or facility's policies and processes, SAI apparently sees greater utility in allowing some consumer-oriented use of logos and hangtags to indicate products were manufactured in SA8000-certified facilities, even if the products themselves are not certified. As I suggest in the Part III below, the worker human rights that are the subject of SA8000 certification have more salience and are more easily valued and understood by consumers than the more abstract ISO 9001 Quality Management standards. Though a detailed appreciation of the nuances of the SA8000 standards is still likely beyond the average-informed consumer, the notion of a clear and unambiguous commitment to worker's rights can be communicated through the use of the logo in association with consumer-level products.

## **B. Product-Level Certification Mark with Ancillary Impact on Labor Standards**

Among the most famous social labels is the FAIRTRADE Mark, owned by Fairtrade International (FLO).<sup>66</sup> In stark contrast to the ISO and SAI approaches, which prohibit use of marks to signify product certification, the FAIRTRADE Mark is a "product label[] primarily intended for use on product packaging."<sup>67</sup> It is found on a range of products from foods and drinks to cotton, clothing, and jewelry. The use of the FAIRTRADE Mark signifies that all the ingredients or component parts of the labeled product are sourced from Fairtrade certified producers.

The Fairtrade certification system is administered by FLO-CERT, a separate entity from FLO. Like other certification systems, FLO-CERT engages in auditing and inspection to ensure that products bearing the FAIRTRADE Mark come from producers who meet Fairtrade Standards promulgated by FLO.<sup>68</sup> Although a long list of standards applies to specific products, there are generic standards, which include the Standard for Hired Labor.<sup>69</sup> The Standard for Hired Labor is based on principles related to the management of the Fairtrade Premium, which is a premium payment over and above the minimum Fairtrade Price and is reinvested to build long-term sustainability for the producers and the community;<sup>70</sup> freedom of association and collective bargaining; safe working conditions, including standards on child labor and health and safety;

nondiscrimination; and equitable pay.<sup>71</sup> Certification by FLO-CERT includes an initial audit and evaluation. If certification is reached following that, FLO-CERT will carry out at least two additional audits<sup>72</sup> during the ensuing three-year “certification cycle.” At the end of that cycle, FLO-CERT will issue a renewed certification if the interim audits are successfully completed.<sup>73</sup>

Manufacturers, producers, retailers, and other organizations can make use of the FAIRTRADE Mark on a product to signify that all ingredients or components in the product that can be sourced from a Fairtrade certified producer have been.<sup>74</sup> Use of the Mark requires execution of a license from Fairtrade International, a national Fairtrade organization,<sup>75</sup> or a Fairtrade marketing organization.<sup>76</sup>

In September 2011, Fair Trade USA, the leading third-party certifier of U.S. Fair Trade products, resigned its membership in the international Fairtrade system.<sup>77</sup> Fair Trade USA runs its own independent certification system and licenses the Fair Trade Certified label.<sup>78</sup> Similar to Fairtrade International, Fair Trade USA has a Farm Workers Standard as part of its certification standards, which closely resembles the principles and requirements under the International Hiring Labor Standard.<sup>79</sup>

As product-level certification marks the FAIRTRADE Mark and the Fair Trade Certified mark both put a premium on direct-to-consumer information sharing regarding the certification standards. Though the standards deal with trade, pricing, sourcing, and specific product attributes in addition to labor conditions, the latter are an important part of what the certification standards communicate to the consumers. And the marks have developed a general aura of social consciousness that likely aids in their effectiveness at encouraging adherence to those standards through market pressure.

### **C. Limited Product/Broad Labor Standard Certification**

In May 2008, the largest single-site immigration raid to that point occurred at the Agriprocessors plant in Postville, Iowa. U.S. Immigration and Customs Enforcement officials arrested and handcuffed nearly 400 immigrant workers who were unauthorized to work in the United States,<sup>80</sup> many of whom served jail time for identity theft before being deported.<sup>81</sup> The Agriprocessors plant workforce was devastated. As the nation’s largest supplier of kosher beef, the disruption at the Postville plant sent shockwaves through significant portions of the U.S. Jewish community.<sup>82</sup>

Certification marks play a central role in assisting consumers to identify kosher products. The Orthodox Union’s mark, a *U* inside of an *O*, appears on more than 400,000 products from Oreo cookies to Land O’ Lakes butter.<sup>83</sup> A number of other smaller, state- and local-level kosher certifying agencies also exist.<sup>84</sup> They are all focused, though, on the requirements of the kashrut, the Jewish dietary laws. Agriprocessors’ products were certified as kosher by the Orthodox Union and others; however, a constituency of Orthodox and Conservative Jewish leaders were concerned that no certification process looked at the social and ethical standards under which kosher products were produced. Thus, the Magen Tzedek was born.

Magen Tzedek means “star of justice” and was founded to ensure that the “Jewish commitment to ethics and social justice directly into the marketplace...and the home.”<sup>85</sup> The Magen Tzedek Commission has created a certification mark that it will license to kosher product producers that meet a series of standards related to labor practices, animal welfare, consumer protection, corporate integrity, environmental impacts, and traceability, which the Commission developed in consultation with SAAS.<sup>86</sup> The labor standards deal with living wages and benefits

(including maternity and parent care leave, bereavement leave, child care, and other benefits), freedom of association and the right to collective bargaining, health and safety, antidiscrimination, and child and forced labor.<sup>87</sup> SAAS will accredit auditing and certification bodies that will, in turn, certify kosher products that are produced in accordance with the Magen Tzedek standards.

Only otherwise certified kosher products are eligible for Magen Tzedek certification.<sup>88</sup> Thus, the audience for the Magen Tzedek mark is an already well-informed consumer (i.e., the kosher buyer). As a result, it may be more likely that this specialized consumer will be primed to be moved by the addition of the Magen Tzedek mark to a kosher product (or lack thereof). Thus, the price of noncompliance may be greater than in the foregoing examples of certification. Nonetheless, Magen Tzedek has been met with some resistance, because it supplements what some Jewish leaders see as sufficient existing legal requirements. Rabbi Avi Shafran, who is the spokesperson for one of the leading fundamentalist Orthodox religious, educational, and advocacy organizations, Agudath Israel of America, stated: “I think that many consumers have no reason to distrust the government agencies and law enforcement agencies as adequate safeguards for all those areas . . . . I know of no *halachic* [Jewish law] opinion requiring a kosher consumer to try to ensure that companies go beyond what governmental rules require of them.”<sup>89</sup> So the supplemental character of the certification regulatory scheme represented by Magen Tzedek may or may not work in its favor.

#### **D. Limited Product/Limited Standard Certification Filling a Traditional Governance Gap**

In response to reports of widespread use of child labor in the hand-knotted rug producing industry, particularly in India, a demand for a certification standard to eradicate child labor from it arose. Originally entitled “Rugmark,” the Goodweave certification system and certification mark is intended to prohibit the export of rugs made with child labor, and it is guided by ILO Conventions 138, regarding minimum age for work, and 182, regarding the eradication of the worst forms of child labor.<sup>90</sup> Goodweave inspectors and auditors not only look for compliance, but if they find noncompliant employment of child labor, they are empowered by the standards to remediate the situation by removing the child from the workplace, returning him or her home, and ensuring his or her enrollment in school.<sup>91</sup> The Goodweave mark seeks to fill a governance gap created by states that lack the capacity or will to monitor, enforce, and remedy child labor violations.

The Goodweave International Generic International Standard for Rug Producers is administered by the Goodweave International Certification Division. The standard requires compliance with the following commitments:

- A ban on the use of labor by children younger than 14;
- Cooperation with Goodweave remediation efforts;
- Recordkeeping on wage and benefits paid;
- Disclosure and traceability of supply chain and production processes; and
- Providing Goodweave inspectors and auditors access to production facilities.<sup>92</sup>

Noncompliance with these requirements, if not corrected, will result in revocation of the license to use the Goodweave label.<sup>93</sup>

Because the Goodweave mark represents a specific and limited labor standard within a circumscribed industry, its salience to consumers will likely be high. Moreover, because it seeks

to regulate an area in which states have traditionally failed to sufficiently fulfill their responsibilities, consumer demand, as well as consumer and producer efficacy, are likely to be high. Because producers understand that they are under an international human rights obligation not to use child labor, even if state efforts are lax, producers are unlikely to seek to avoid private regulation efforts.

### **E. Product Labeling/Certification in an Area of Otherwise Absent Regulation**

The Employment Nondiscrimination Act (ENDA) has been introduced in Congress every term since 1993, yet it has never been enacted.<sup>94</sup> Nonetheless, public opinion is strongly in favor of protecting LGBT employees from discrimination in employment.<sup>95</sup> Given that these facts exist in some tension, law professors Ian Ayres and Jennifer Gerada Brown conceived of a certification scheme to allow employers to commit to nondiscrimination on the basis of sexual orientation and gender identity. Ayres and Brown registered the Fair Employment Mark with the U.S. Patent and Trademark Office as a certification mark.<sup>96</sup> They offered to license the Fair Employment Mark free of charge to any employer who will make two promises:

1. Not to discriminate in employment on the basis of sexual orientation or gender identity; and
2. To grant all of its employees and applicants the right to sue the employer directly for a remedy of any breach of the nondiscrimination promise.<sup>97</sup>

The first promise is represented in the Fair Employment Mark license agreement by the licensee agreeing to adhere to the dictates of ENDA as though it were duly enacted by Congress. The second promise is included in the license agreement through an express grant to the licensee's employees and applicants of third-party beneficiary status under the agreement.<sup>98</sup>

Because of the nature of these commitments, Ayres and Brown, as owners of the Fair Employment Mark, do not face the daunting task of developing standards, accrediting certifying agencies, and/or engaging in extensive and repeated auditing and certification reviews. Rather, the signing the license agreement is coextensive with the required promises from the owners' standpoint.<sup>99</sup> The provision of third-party beneficiary status to employees and applicants supplies the enforcement mechanism, in contrast to other certification marks that require the owner to police compliance through complaint procedures and repeated inspections.<sup>100</sup> From the perspective of the owners, the process is nearly costless.

Ayres and Brown explain that signing the license agreement allows, but does not require, a licensee to affix the Fair Employment Mark to its marketing materials, product packaging, and any other medium it desires to signal its commitment to nondiscrimination on the basis sexual orientation and gender identity.<sup>101</sup> However, in signing the license, the employer takes on contractual liability under a legal standard (i.e., ENDA) that it would not otherwise face. Presumably, a licensee would do so to win market share from LGBT consumers and allies, to recruit and retain LGBT and ally employees, and to simply signal an ethical commitment to equality.<sup>102</sup>

In reality, though, there has been little to no uptake of the Fair Employment Mark. This could be due to the lack of general knowledge of the consuming public about the details of ENDA, despite the support for LGBT nondiscrimination in employment. Moreover, unlike the foregoing schemes, where the mark supplements or reinforces existing legal and regulatory duties of the licensee, the Fair Employment Mark would require the licensee to adopt a legally binding obligation to third parties where one otherwise does not exist. That likely appears to be

a substantial cost in the cost-benefit analysis any potential licensee would go through, especially when some of the assumed signaling benefit—to consumers, employees, and the general public—of the Fair Employment Mark could be captured by voluntary policies and codes of conduct that profess a commitment to equal treatment and nondiscrimination on the basis of sexual orientation and gender identity.

### **III. IMPLICATIONS AND REFLECTIONS**

Certification systems have become a not insubstantial mechanism with which to impose private ordering in a number of institutions, particularly the workplace. These are often focused on issues of importance to the human rights of employees. Yet, as the examples above indicate, not all certification systems have equal likelihood of success in bringing about the hoped-for changes in workplace conditions. This part identifies four characteristics—embodied in four questions—that inform how likely it is for the use of certification marks to effect change for workers, the intended beneficiaries of these private regulatory systems.

#### **A. Does It Focus on Standards That Are Otherwise Obligatory on the Licensee?**

Whether a regulatory system based on certification is likely to make a difference in the labor and employment environment of the average worker for an organization subject to it depends at least in part on whether the standards and commitments under the system or license actually imposes upon the adopting organization an obligation to which it is not otherwise subject via domestic law or regulatory system. The more the obligation fills a governance gap the more likely it is to have a true effect on the workplace. The Goodweave and Fair Employment marks fit the bill best in this regard. And yet, the more the certification system impose on the adopter or licensee an obligation that is unique and that opens it to a new or expanded risk of liability, the greater the disincentive for potential participants to commit to it. The Fair Employment Mark suffers from this drawback. Thus, we might expect to see the greatest impact under this consideration when the standards of conduct or commitments under the certification system supplements an existing and highly valued—but under-enforced—obligation, like the Goodweave system dealing with child labor or Magen Tzedek’s commitment to ethical labor standards (like the above-minimum-wage living-wage requirement).

#### **B. Does It Incorporate an Effective Complaint and Enforcement Mechanism?**

Each of the examples described in Part II above incorporates some sort of complaint and enforcement system. How much that system empowers the stakeholders who the intended beneficiaries of the system will determine whether it has an impact on them. Clearly, the Fair Employment Mark’s full empowerment of employees and applicants by making them express third-party beneficiaries of the licensee’s promises empowers them to the greatest degree. Most certification systems do not go that far. For the more typical system, the access the intended beneficiaries have to file simple complaints and the certifier’s mechanism to respond will have a significant impact on its effectiveness. Probably the least likely to effect change in the lives of the intended beneficiaries (all else being equal) are those systems where in the only hammer is the revocation of the use of a certification mark only after the lapse of a certification cycle. This approach most resembles the FAIRTRADE Mark. Goodweave International, in contrast,

explicitly reserves the right to revoke the license to use the Goodweave mark whenever a licensee is noncompliant.

### **C. Does It Focus on Issues of Salience to External Markets?**

To the extent that a certification system, particularly one that relies on product labeling with a certification mark, relies on market pressure to effect change for the benefit of workers, it is more likely to be successful in doing so if it focuses on issues that are of high regard and salience to those external markets. To create sufficient market response and pressure, the information disclosure nature of a certification has to get the attention of the external audiences with enough strength to affect their behaviors as a result of the information it provides. [Note here behavioral research on how fickle we are, despite self-reported strongly held commitments to, for instance, social justice issues.] Magen Tzedek may be more effective here because the audience for the Magen Tzedek mark is an already well-informed consumer (i.e., the kosher buyer) who is more likely primed to be sensitive to the addition of the Magen Tzedek mark to a kosher product (or lack thereof).

### **D. Does It Provide a Signal that Is Clear and Simple Enough for External Audiences to Make an Informed Associative Choice as a Result?**

Related to the prior question, the information disclosed by a certification must be clear and simple enough for the target external audience(s) to understand and make informed choices about whether to associate with the certified (or noncertified) organization as a result. This is particularly true when the associative choice involves consumption, as with product labeling. Consumers will not be moved to purchase labeled products or avoid non-labeled products unless they understand the information the label is intended to convey. The more a mark focuses on a single issue, the greater the likelihood that external audiences will exert a market reward or price for having or not having the label. The Goodweave Mark is probably the best example of this. The Fair Employment Mark likely falls short. Though a commitment to nondiscrimination may be compelling to some consumers, it is unclear that the specific commitment to follow the dictates of an unenacted statute provides sufficiently greater clarity and simplicity of information to mobilize the intended audience to push for the greater commitment of the Fair Employment Mark. Similarly, the more complex the certification standards and the more diverse the subjects of the standards, like the ISO standards, the less likely it will result in clear associative choices by consumers or other stakeholders, unless and until the mark itself develops an aura of quality or importance despite that complexity. The FAIRTRADE Mark and Fair Trade Certified Mark likely approach that famous status.

## **CONCLUSION**

Approaches to regulating the workplace through certification schemes and the prominence of certification marks in those schemes vary widely. This paper has provided examples of five different approaches, which varied on whether processes or products were the subject of the certification and labeling, how broad the focus of the regulation is, and the extent to which the certification is a supplement to existing state-based regulation or fills a gap the states have failed to address. Having identified the important role certification marks sometimes

play in this private ordering, this paper identifies four characteristics—embodied in four questions—that inform how likely it is for the use of certification marks to effect change for workers, the intended beneficiaries of these private regulatory systems.

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<sup>1</sup> 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §19:91 (4<sup>th</sup> ed. 2005).

<sup>2</sup> Lanham Act § 45, 15 U.S.C. § 1127 (2006).

<sup>3</sup> See MCCARTHY, *supra* note 1, §19:94.

<sup>4</sup> See 15 U.S.C. §1064.

<sup>5</sup> See *id.* § 1054.

<sup>6</sup> Ian Ayres & Jennifer Gerada Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639, 1643 (2006).

<sup>7</sup> See *id.* (“In effect, the certifying entity must operate as a nonprofit.”).

<sup>8</sup> See Mark R. Barron, Comment, *Creating Consumer Confidence or Confusion? The Role of Product Certification marks in the Market Today*, 11 MARQ. INTELL. PROP. L. REV. 413, 416 (2007) (citing Terry E. Holtzman, *Tips from the Trademark Examining Operation*, 81 TRADEMARK REP. 180 (1991)).

<sup>9</sup> See Paul Duguid, *A Case of Prejudice? The Uncertain Development of Collective and Certification Marks*, 86 BUS. HIST. REV. 311, 312 (2012) (“These [collective and certification] marks had been widely protected, not only outside the United States, but also within individual U.S. states, for more than fifty years.”).

<sup>10</sup> *Id.* (noting that a revision to U.S. trademark law in that same year ignored collective and certification marks).

<sup>11</sup> Daphne Zografos Johnson, *International Intellectual Property Scholars series: Using Intellectual Property Rights to Create Value in the Coffee Industry*, 16 MARQ. INTELL. PROP. L. REV. 283, 305 (2012) (citing NORMA DAWSON, CERTIFICATION TRADE MARKS, LAW AND PRACTICE 13 (1988)).

<sup>12</sup> *Id.*

<sup>13</sup> JEFFREY BELSON, CERTIFICATION MARKS 26 (2002).

<sup>14</sup> Katheryn Kish Sklar, *The Consumers’ White Label Campaign of the National Consumers’ League, 1898-1918*, in GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY 17, 18 (Susan Strasser et al., eds., 1998).

<sup>15</sup> See Duguid, *supra* note 9, at 317-18 (noting that, “in 1900, the Cigar Makers’ International Union (CMIU) gave out more than one billion [labels] and spend over thirty million dollars on ‘label agitation,’” making it the most widespread and well supported of the union labels).

<sup>16</sup> See Ayres & Brown, *supra* note 6, at 1643 (citing ERNEST R. SPEDDEN, THE TRADE-UNION LABEL 10 n.2 (1910)).

<sup>17</sup> See Duguid, *supra* note 9, at 313. See *supra* text accompanying notes 9-10 for a discussion of the United States’ tardiness in recognizing certification marks until the passage of the Lanham Act in 1946.

<sup>18</sup> *National Industrial Recovery Act*, U.S. HIST., <http://www.u-s-history.com/pages/h1663.html> (last visited May 29, 2014).

<sup>19</sup> *Id.*

<sup>20</sup> *The New Deal*, AM. HIST. SCRAPBOOK, <http://mfaewillard.weebly.com/the-new-deal.html> (last visited May 29, 2014).

<sup>21</sup> Many sources credit Charles T. Coiner, a noted advertising art director, with the design of the Blue Eagle logo. See, e.g., *Charles T. Coiner, 91, Ex-Art Chief at Ayer*, N.Y. TIMES, Aug. 16, 1989; *Charles Coiner Papers: An Inventory of His Papers at Syracuse University*, SYRACUSE UNIV. LIBR., [http://library.syr.edu/digital/guides/c/coiner\\_c.htm](http://library.syr.edu/digital/guides/c/coiner_c.htm) (last visited Apr. 4, 2014). Others credit Johnson with conceiving and initially sketching it. See ROBERT HIMMELBERG, THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION (2d ed., 1993).

<sup>22</sup> ALONZO L. HAMBY, FOR THE SURVIVAL OF DEMOCRACY 164 (1994).

<sup>23</sup> 295 U.S. 495 (1935).

<sup>24</sup> *Id.* Note that this decision preceded the “switch in time that saved nine,” in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which headed off President Roosevelt’s court-packing plan and heralded the end of the Lochner Era.

<sup>25</sup> Jennifer Bair et al., *To Label or Not to Label, Is That the Question?*, in WORKER’S RIGHTS AND LABOR COMPLIANCE IN GLOBAL SUPPLY CHAINS: IS A SOCIAL LABEL THE ANSWER?, at 3, 9 (Jennifer Bair et al. 2013).

<sup>26</sup> See *Welcome to UL Certification Marks and UL Badges*, UNDERWRITERS LAB., <http://www.ul.com/global/eng/pages/corporate/aboutul/ulmarks/> (last visited Apr. 18, 2014) (“UL is a global leader in testing, inspection, certification, auditing and validation. The UL Mark is the single most accepted Certification Mark in the United States, appearing on 22 billion products annually.”)

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- <sup>27</sup> *Kosher Certification Policy*, OU KOSHER, <http://oukosher.org/kosher-certification-policy/> (last visited Apr. 18, 2014).
- <sup>28</sup> *About the Good Housekeeping Seal of Approval*, GOOD HOUSEKEEPING, <http://www.goodhousekeeping.com/product-reviews/history/about-good-housekeeping-seal> (last visited Apr. 18, 2014).
- <sup>29</sup> Ayres & Brown, *supra* note 6, at 1441.
- <sup>30</sup> See Jamie Darin Prekert, *Conflict Minerals and Polycentric Governance of Business and Human Rights*, in LAW, BUSINESS AND HUMAN RIGHTS: BRIDGING THE GAP 203, 207 (Bird et al., eds., forthcoming 2014) (describing governance gaps).
- <sup>31</sup> Report of the Special Representative of the Secretary-General on Human Rights, Transnational Corporations, and Other Business Enterprises, Protect, Respect and Remedy: A Framework for Business and Human Rights, Hum. Rts. Council, U.N. Doc. A/HRC/8/5 (April 7, 2008), available at <http://198.170.85.29/Ruggie-report-7-Apr-2008.pdf>.
- <sup>32</sup> *Id.* Vertical incoherence occurs when a state adopts an obligation—for instance through legislation—but fails to give sufficient regard or effort to its implementation. Horizontal incoherence occurs when states regulate in one area in isolation (e.g., child labor in a particular industry) with little regard for how that interacts with or affects regulatory efforts elsewhere in the government. John Gerard Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Keynote Address at the 3rd Annual Responsible Investment Forum, New York, NY (Jan. 12, 2009), available at <http://198.170.85.29/ruggie-address-to-responsible-invest-forum-12-jan-2009.pdf>
- <sup>33</sup> Ruggie, *supra* note 32.
- <sup>34</sup> Some certification systems do not utilize certification marks, but will allow certified organizations to make limited use of the certifying organization’s trademark in their own marketing materials on or their Web sites to indicate the certification, but not to affix it to any particular product.
- <sup>35</sup> Tim Bartley, *Certification as a Mode of Social Regulation*, in HANDBOOK ON THE POLITICS OF REGULATION 441, 444 (David Levi-Faur ed., 2011).
- <sup>36</sup> *Id.* at 442.
- <sup>37</sup> *Id.*
- <sup>38</sup> Cf. Stephen Kim Park, *Human Rights Reporting as Self-Interest: The Integrative and Expressive Dimensions of Corporate Disclosure*, in LAW, BUSINESS AND HUMAN RIGHTS: BRIDGING THE GAP, *supra* note 30, at 48 (arguing that disclosure serves an internal educative and expressive purpose, as well as an external informational purpose).
- <sup>39</sup> Bartley, *supra* note 36, at 443.
- <sup>40</sup> *Id.*
- <sup>41</sup> See *supra* text preceding note 34.
- <sup>42</sup> *About ISO*, ISO, <http://www.iso.org/iso/home/about.htm> (last visited Apr. 20, 2014).
- <sup>43</sup> *Id.*
- <sup>44</sup> *Id.*
- <sup>45</sup> *What Is Conformity Assessment?*, ISO, <http://www.iso.org/iso/home/about/conformity-assessment.htm> (last visited Apr. 20, 2014).
- <sup>46</sup> *Certification*, ISO, <http://www.iso.org/iso/home/standards/certification.htm> (last visited Apr. 20, 2014).
- <sup>47</sup> *Id.*
- <sup>48</sup> ISO, QUALITY MANAGEMENT PRINCIPLES (2012), available at [http://www.iso.org/iso/qmp\\_2012.pdf](http://www.iso.org/iso/qmp_2012.pdf).
- <sup>49</sup> ISO, PUBLICIZING YOUR ISO 9001:2008 OR ISO 14001:2004 CERTIFICATION 2 (2010), available at [http://www.iso.org/iso/publicizing\\_iso9001\\_iso14001\\_certification\\_2010.pdf](http://www.iso.org/iso/publicizing_iso9001_iso14001_certification_2010.pdf).
- <sup>50</sup> *Id.*
- <sup>51</sup> *Certification to ISO 9001 Quality Management*, BSI, <http://www.bsigroup.com/en-GB/iso-9001-quality-management/Certification-for-ISO-9001/> (last visited Apr. 20, 2014).
- <sup>52</sup> See ISO, *supra* note
- <sup>53</sup> *About SAI*, SOC. ACCOUNTABILITY INT’L, <http://www.sai-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=472> (last visited Apr. 20, 2014) (“SAI works to protect the integrity of workers around the world by building local capacity and developing systems of accountability through socially responsible standards.”).
- <sup>54</sup> SA8000® Standard, SOC. ACCOUNTABILITY INT’L, [HTTP://WWW.SAI-INTL.ORG/INDEX.CFM?FUSEACTION=PAGE.VIEWPAGE&PAGEID=937](http://www.sai-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=937) (last visited Apr. 20, 2014).
- <sup>55</sup> *Id.*
- <sup>56</sup> *Id.*

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<sup>57</sup> See Michael Urminsky, *Self-Regulation in the Workplace: Codes of Conduct, Social Labeling and Socially Responsible Investment* 13 (ILO, MCC Working Paper No. 1) (“The International Organization of Employers (IOE) estimates that 80 per cent of codes of conduct fall into the category of general business ethics with no implementation methods.”).

<sup>58</sup> For a description of the complaint resolution program related to SA8000 and administered by SAAS complaint management system, see *Complaint Resolution Program*, SOC. ACCOUNTABILITY INT’L, <http://www.sa-infl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1460> (last visited Apr. 20, 2014).

<sup>59</sup> SOC. ACCOUNTABILITY ACCREDITATION SERVS., <http://www.saasaccreditation.org/> (last visited Apr. 20, 2014).

<sup>60</sup> Bureau Veritas Certification Servs., *SA8000 Certification*, BUREAU VERITAS, <http://www.bureauveritas.com/wps/wcm/connect/3494830047e94ad7af7aafafdcad0d0a3/SA8000.pdf?MOD=AJPERES&CACHEID=3494830047e94ad7af7aafafdcad0d0a3> (last visited Apr. 20, 2014).

<sup>61</sup> See *id.* for a representation of the Bureau Veritas Certification Mark, modified for SA8000 certification purposes. “The Bureau Veritas Certification Mark is a globally recognized symbol of your organization’s ongoing commitment to excellence, sustainability and reliability.” *Id.*

<sup>62</sup> For a representation of the SA8000 logo, see SOC. ACCOUNTABILITY INT’L, GUIDELINES FOR CORPORATE COMMUNICATION AND GRAPHIC STANDARDS 9 (2012).

<sup>63</sup> *Id.* at 6.

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.* at 6.

<sup>66</sup> There are actually a series of FAIRTRADE Marks, including the FAIRTRADE Mark and FAIRTRADE Program Marks, which deal with sourcing certification for cocoa, sugar, and cotton. See *The FAIRTRADE Program Marks*, FAIRTRADE INT’L, <http://www.fairtrade.net/fairtrade-program-mark.html>. For ease of reference and because the labor standards are more specifically implicated under the FAIRTRADE Mark, I refer only to it here.

<sup>67</sup> *The Fairtrade Marks*, FAIRTRADE INT’L, <http://www.fairtrade.net/the-fairtrade-marks.html> (last visited Apr. 20, 2014).

<sup>68</sup> *FAQs: Frequently Asked Questions*, FAIRTRADE INT’L, <http://www.fairtrade.net/faqs.html> (last visited Apr. 20, 2014) (“For a product to display the FAIRTRADE Certification Mark it must meet international Fairtrade Standards. These standards are established by Fairtrade International and . . . are the result of broad consultations of different stakeholders and external experts.”).

<sup>69</sup> *List of Fairtrade International Standards Available on Website*, FAIRTRADE INT’L, [http://www.fairtrade.net/fileadmin/user\\_upload/content/2009/standards/documents/2012-08-03\\_LIST\\_OF\\_FLO\\_Standards.pdf](http://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/2012-08-03_LIST_OF_FLO_Standards.pdf) (last visited Apr. 20, 2014).

<sup>70</sup> Caspar van Vark, *Q&A: Fair Trade for All*, THE GUARDIAN (Feb. 27, 2008, 8:13 AM), <http://www.theguardian.com/environment/2008/feb/27/qa.fairtrade>.

<sup>71</sup> FAIRTRADE INT’L, FAIRTRADE STD. FOR HIRED LABOUR (Jan. 1, 2014), *available at* [http://www.fairtrade.net/fileadmin/user\\_upload/content/2009/standards/documents/generic-standards/2014-03-14\\_HL\\_EN.pdf](http://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/generic-standards/2014-03-14_HL_EN.pdf).

<sup>72</sup> *How It Works*, FLOCERT, <http://www.flo-cert.net/fairtrade-services/fairtrade-certification/how-it-works/> (last visited Apr. 21, 2014) (“If we classify an organization as ‘high risk’—perhaps because of the complexity of its trade chains or high volume of trade—more audits may be needed. We also widely carry out unannounced audits.”).

<sup>73</sup> *Id.*

<sup>74</sup> *Using the FAIRTRADE Marks*, FAIRTRADE INT’L, <http://www.fairtrade.net/using-the-fairtrade-mark.html> (last visited Apr. 20, 2014).

<sup>75</sup> In the United States, the national Fairtrade organization is Fairtrade America. See FAIRTRADE AMERICA, <http://fairtradeamerica.org/> (last visited Apr. 21, 2014).

<sup>76</sup> *Using FAIRTRADE Marks*, *supra* note 74.

<sup>77</sup> *Q&A on Fairtrade International and Fair Trade USA*, FAIRTRADE INT’L, <http://www.fairtrade.net/897.html> (last visited Apr. 21, 2014).

<sup>78</sup> *Certification Mark: Frequently Asked Questions*, FAIR TRADE USA, <http://fairtradeusa.org/sites/all/files/wysiwyg/filemanager/label/Fair-Trade-USA-FAQ-newcertificationmark.pdf> (last visited Apr. 21, 2014).

<sup>79</sup> See FAIR TRADE USA, FAIR TRADE USA COMPLIANCE CRITERIA FOR THE FARM WORKERS STANDARD 1.1 (2014), *available at* [http://fairtradeusa.org/sites/all/files/wysiwyg/filemanager/FTUSA\\_FWS\\_CC\\_1.1v3\\_EN\\_040214.pdf](http://fairtradeusa.org/sites/all/files/wysiwyg/filemanager/FTUSA_FWS_CC_1.1v3_EN_040214.pdf).

<sup>80</sup> Spencer S. Hsu, *Immigration Raid Jars Small Town*, WASH. POST (May 18, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/17/AR2008051702474.html>.

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- <sup>81</sup> Harvey Popolaw, *Recalling the Postville Tragedy: Impetus for Comprehensive Immigration Reform Bill*, JEWISH SOC. JUST. ROUNDTABLE (May 10, 2013, 10:44 AM), <http://jewishsocialjustice.org/blog/recalling-postville-tragedy-impetus-comprehensive-immigration-reform-bill>.
- <sup>82</sup> See Hsu, *supra* note 80.
- <sup>83</sup> Louis Nayman, *Kosher Gets Ethical*, IN THESE TIMES (Jan. 7, 2011), [http://inthesetimes.com/article/6743/kosher\\_gets\\_ethical](http://inthesetimes.com/article/6743/kosher_gets_ethical).
- <sup>84</sup> *Directory of Kosher Certifying Agencies*, CHICAGO RABBINICAL COUNCIL, [http://www.crcweb.org/agency\\_list.php](http://www.crcweb.org/agency_list.php) (last updated Feb. 19, 2014).
- <sup>85</sup> *Mission Statement*, MAGEN TZEDEK, <http://www.magentzedek.org/about-us/mission-statement/> (last visited Apr. 21, 2014).
- <sup>86</sup> See MAGEN TZEDEK COMMISSION, CERTIFICATION STANDARDS FOR THE MAGEN TZEDEK SERVICE MARK (2012).
- <sup>87</sup> *Id.* at 8-13.
- <sup>88</sup> *Id.* at 5.
- <sup>89</sup> Nayman, *supra* note 83.
- <sup>90</sup> GOODWEAVE INT'L, GENERIC INTERNATIONAL STANDARD FOR RUG PRODUCERS 2 (2012), *available at* <https://www.goodweave.org/uploads/GWI-Generic-Intl-Standard-v2-3.pdf>.
- <sup>91</sup> *Id.* at 5.
- <sup>92</sup> *Id.* at 3-4.
- <sup>93</sup> *Id.* at 2. For a visual representation of the Goodweave label, see GOODWEAVE INT'L, GOODWEAVE INTERNATIONAL (GWI) TRADEMARK POLICY 2 (2013).
- <sup>94</sup> Examples of failed versions of ENDA are S. 2056, 104th Cong. (1996); H.R. 1863, 104th Cong. (1995); and H.R. 4636, 103d Cong. (1994).
- <sup>95</sup> See Ian Ayres & Jennifer Gerada Brown, *Privatizing Employment Protections*, 49 ARIZ. L. REV. 587, 587 (2007).
- <sup>96</sup> See Ayres & Brown, *supra* note 6, at 1641 & n.6.
- <sup>97</sup> *Id.* at 1644; see also Ayres & Brown, *supra* note 95, at 596-97 (describing a revision to the original license agreement for the Fair Employment Mark to include a prohibition against gender identity discrimination, in line with the evolution of ENDA).
- <sup>98</sup> Ayres & Brown, *supra* note 6, at 1644.
- <sup>99</sup> *Id.* at 1644 (“Because the licensing agreement expressly includes both of these elements [i.e., the promises], we can truthfully certify these matters merely by certifying that the licensee has signed the license.”).
- <sup>100</sup> *Id.* at 1641.
- <sup>101</sup> *Id.*
- <sup>102</sup> *Id.* at 1679-88.