



Encouraging Animal Advertisers to Pay for the Use of Animal Images: A Voluntary Certification Approach

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In this article, I suggest that “animal advertisers”—companies and organizations that use animal images or species names in their advertising, marketing, and branding—should, for self-interested reasons, make voluntary donations to wildlife-conservation organizations to “compensate” nature for this use. While a few animal advertisers already do so, most do not. I suggest that the U.S. Environmental Protection Agency (EPA) create a program to promote this voluntary compensation by certifying animal advertisers’ contributions to wildlife-conservation projects and organizations. The program would be similar in concept to EPA’s successful Energy Star program. Certified advertisers would be allowed to display the certification mark on their advertising and marketing materials, and so reliably signal the advertiser’s donation to consumers.

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Introduction

Advertisers often appropriate and use images of animals to sell products, promote services, and build their brands. Pacific Life Insurance features humpback whales in its advertising to associate the company with the “strength, performance, and protection” of those magnificent creatures.¹ Caribou Coffee has grown to be the second-largest coffee-shop chain in the United States partly on the strength of

¹ Pacific Life Insurance Company Advertising Information, <http://www.pacificlif.com/About+Pacific+Life/General+Information/advertising.htm> (last visited Jan. 3, 2010) (“The humpback whales featured in our advertising represent strength, performance, and protection—qualities that are core to Pacific Life’s business of helping people plan for a more financially secure future.”).

its distinctive caribou-themed décor.² Aflac Inc., the supplemental insurance company, is a household name thanks to its clever appropriation of the image of a lowly duck.³ These are examples of “animal advertisers”—companies or organizations that use animal images or animal names in their advertising, marketing, or branding.

Animal advertisers receive an apparent benefit from their intentional use of animal names and imagery. Meanwhile, many of the animals most commonly featured in ads—including tigers, gorillas, and whales—are trending towards extinction in the wild.⁴ Reversing this trend will require a major increase in funding for conservation of wildlife and wildlife habitat.⁵ If only animal species could share in the benefit that they provide to these advertisers.

A handful of animal advertisers do provide “compensation” to the animals whose images they use in the form of donations to wildlife-conservation organizations. But most do not. The Environmental Protection Agency (EPA) should create a program that will motivate animal advertisers in the latter group to join the former by giving donors the right to use a certification mark that would distinguish them in the eyes of the growing number of eco-conscious consumers.⁶ Such a

² See Caribou Coffee Company Overview, <http://phx.corporate-ir.net/phoenix.zhtml?c=192910&p=irol-irhome> (last visited Jan. 3, 2010).

³ Aflac’s chief marketing officer, Jeff Herbert, described the Aflac Duck, which had starred in over thirty TV commercials by 2007, as the company’s “greatest marketing asset.” Aaron Baar, *Aflac Enlists Zubi, Momentum*, Adweek, July 3, 2007, available at http://www.adweek.com/aw/esearch/article_display.jsp?vnu_content_id=1003606987 (quoting Jeff Herbert).

⁴ See W.M. ADAMS & S.J. JEANRENAUD, *TRANSITION TO SUSTAINABILITY: TOWARDS A HUMANE AND DIVERSE WORLD* 16 (IUCN 2008) (“Human activities have increased previous ‘background’ extinction rates by between 100 and 10,000 times. Between five and 20 percent of the estimated 14 million plant and animal species on earth are threatened with extinction.”). Population decline is also causing irreversible harm to the Earth’s terrestrial, freshwater, and marine ecosystems. See Press Release, WWF, WWF Update on Alarming State of the World (Oct. 21, 2004), available at http://www.panda.org/about_our_earth/about_forests/forest_news_resources/?15976/WWF-update-on-alarming-state-of-the-world.

⁵ EDWARD O. WILSON, *THE CREATION: AN APPEAL TO SAVE LIFE ON EARTH* 98 (2006) (discussing a 2000 Conservation International conference of biologists and economists, who concluded that it would “require one payment of about \$30 billion” to provide “substantial protection for 70 percent of Earth’s land-dwelling flora and fauna”). See also Overview of Conservation International’s Defying Nature’s End Forum, <http://www.nicholas.duke.edu/people/faculty/pimm/defying/> (last visited Jan. 3, 2010).

⁶ Some have proposed that the right of publicity be extended to the human owners of animals with publicity value. E.g., Sigrid Kun, *Race Horses and Intellectual*

program would be well aligned with EPA's aim of "arresting environmental deterioration."⁷

Third-party certification systems are well known and are used to designate environmentally preferable products in industries as distinct as forestry, fishing, mining, home appliances, electronics, coffee growing, and clothes manufacturing.⁸ Well-known "eco labels" include EPA's Energy Star and Green Power Partnership marks, and the privately initiated Forest Stewardship Council (FSC) mark.⁹ Since 1992, manufacturers have been able to apply the Energy Star mark to certain products that meet or exceed government-established standards for energy efficiency.¹⁰ Through its Green Power Partnership program, EPA also provides certification for organizations that purchase a given portion of their electricity from "green power" sources.¹¹ Finally, FSC is a non-profit, international non-governmental organization that monitors forestry practices and provides certification for forests and forest products that satisfy a set of minimum sustainability

Property Rights: Racing Towards Recognition?, 17 QUINNIPIAC L. REV. 207 (1997) (discussing extension of publicity rights to race horses); Melvin Nimmer, *The Right to Publicity*, 19 LAW & CONTEMP. PROBS. 203, 216 (1954) (proposing that, "since animals . . . may be endowed with publicity values, the human owners of these non-human entities should have a right of publicity"). *But cf.* *Lawrence v. Ylla*, 55 N.Y.S.2d 343, 345 (Sup. Ct. 1945) (refusing to extend a statutory right of publicity to plaintiff, the owner of a dog whose image was used in advertisements).

⁷ See Reorganization Plan No. 3 of 1970, 3 C.F.R. xx (1970), reprinted in 5 U.S.C. app. at 1551-56 (1994) (President Nixon established the United States Environmental Protection Agency in part "because arresting environmental deterioration is of great importance to the quality of life in our country and the world"); see also Endangered Species Act § 2, 35 U.S.C. 1531 (1973) ("Congress finds and declares that . . . the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [international treaties].").

⁸ See MICHAEL E. CONROY, *BRANDED! HOW THE CERTIFICATION REVOLUTION IS TRANSFORMING GLOBAL CORPORATIONS* 15 (2007).

⁹ *Id.*

¹⁰ About Energy Star, http://www.energystar.gov/index.cfm?c=about.ab_index (last visited Jan. 3, 2010). The voluntary Energy Star certification program has been a remarkable success. In 2008 alone, Americans saved "enough energy . . . to avoid greenhouse gas emissions equivalent to those from 29 million cars—all while saving \$19 billion on their utility bills." *Id.*

¹¹ Green Power Partnership Home Page, <http://www.epa.gov/grnpower> (last visited Jan. 3, 2010). Certified organizations are allowed to use the EPA Green Power Partnership mark on brochures, packages, annual reports, and their web sites. EPA Green Power Partner Mark Use & Display Guidelines, http://www.epa.gov/grnpower/pubs/gpp_mark.htm (last visited Jan. 3, 2010).

requirements.¹²

The idea of certifying animal advertisers' donations to conservation organizations was first proposed publicly by Canadian artist Gregory Colbert in 2006.¹³ (The idea was later seconded when a European non-profit group launched its "Save Your Logo" program in late 2009.¹⁴) It builds on environmental-certification schemes like Energy Star and FSC, but also owes a conceptual debt to cause-marketing campaigns organized by groups like Pink Ribbon International (which certifies donations to breast-cancer research) and 1% for the Planet (which certifies companies that donate one percent of their annual sales to environmental causes).¹⁵ Both of these organizations verify a company's donation and permit the company to display a certification mark on its advertising and marketing materials to attract socially-conscious consumers.

This article proposes that an EPA certification program of this sort would further the important governmental goal of preserving endangered wildlife (and nature in general), while also furthering the interests of animal advertisers. Part I evaluates the scope of animal advertising and of advertisers' current payment of "compensation" to nature for their use of animal names and images. Part II describes the proposed market-based EPA certification approach to encouraging animal advertisers to voluntarily compensate animals in the form of donations to wildlife-conservation organizations. Finally, Part III offers suggestions on the design, implementation, and promotion of the proposed EPA certification program.

¹² Timothy Synnott, *Some Notes on the Early Years of the FSC* 14 (Nov. 19, 2005), http://www.fsc.org/fileadmin/webdata/public/document_center/publications/Notes_on_the_early_years_of_FSC_by_Tim_Synnott.pdf; see also About the Forest Stewardship Council, <http://www.fsc.org/about-fsc.html?&L=518%DE%88%3F1%3D1> (last visited Jan. 3, 2010).

¹³ Gregory Colbert co-founded a non-profit certification organization, the Animal Copyright Foundation, with the goal of convincing animal advertisers to voluntarily "support conservation through responsible advertising." However, the organization was slow to gain participants, and its website at <http://www.animalcopyright.org> has now (literally) gone black, apparently indicating the end of the Foundation.

¹⁴ About Save Your Logo, <http://www.saveyourlogo.org/en> (last visited Apr. 28, 2010). The non-profit group, Fonds de dotation pour la biodiversité, counts Lacoste, MAAF, and Olympique Lyonnais among the program's participants.

¹⁵ Pink Ribbon International Home Page, <http://www.pinkribbon.org> (last visited Jan. 3, 2010); 1% for the Planet Home Page, <http://www.onepercentfortheplanet.org/en> (last visited Jan. 3, 2010).

I. Background

A. *The Scope of Animal Advertising*

Worldwide, advertisers spend over \$450 billion each year on branding and advertising. Most of that amount goes for “ad buys,” the industry term for purchases of advertising space and airtime.¹⁶ While no one has published solid numbers on the frequency or manner in which animals are used in these advertisements, there seem to be at least five broad categories.

First, there are companies with animal-related names, such as Caribou Coffee,¹⁷ Food Lion, Gorilla Glue Co., Panda Restaurant Group (owner of Panda Express, the largest Chinese “quick-serve” restaurant chain in the U.S.),¹⁸ Oy Panda Ab (Finnish maker of Panda brand licorice), Penguin Group (one of the largest book publishers in the world and owner of various Penguin brands), and Puma AG (the German sportswear company). There are also numerous animal-named professional sports teams, including the Bears, the Bengals, the Bobcats, the Broncos, the Cardinals, the Colts, the Cubs, the Dolphins, the Ducks, the Eagles, the Falcons, the Grizzlies, the Hawks, the Hornets, the Jaguars, the Lions, the Lynx, the Panthers, the Penguins, the Rams, the Ravens, the Seahawks, the Tigers, and the Timberwolves.

Second, there are animal-named brands, including Camel cigarettes, Blue Rhino (a retail propane-tank-exchange brand of Ferrellgas),¹⁹ Duck Tape brand duct tape (represented by its mascot,

¹⁶ *Business: Animal Copyright*, THE ECONOMIST, March 9, 2006, at 97.

¹⁷ Caribou Coffee has leveraged its use of animal imagery to an impressive extent, with in-store photographs and posters of wild caribou and stylized caribou imagery on the store’s furniture, walls, cups, napkins, and merchandise.

¹⁸ See 2009 QSR 50 by Segment, QSR Magazine.com, <http://www.qsr-magazine.com/reports/qsr50/2009/charts/segment.phtml> (last visited Jan. 3, 2010).

¹⁹ Blue Rhino Home Page, <http://www.bluerhino.com/BRWEB/> (last visited Jan. 3, 2010). The name Blue Rhino was chosen to invoke the “tough, sturdy, and [tank-like]” nature of the rhinoceroses that the company’s founder admired on a safari trip to Africa. About Our Name, <http://www.bluerhino.com/BRWEB/Company-Info/About-Our-Name.aspx> (last visited Jan. 3, 2010). “Blue” refers to the color of propane flames, but it could also describe the outlook for the White Rhinoceros; at last count, less than 17,500 remained in the wild. *Ceratotherium simum*, International Union for the Conservation of Nature Red List of Threatened Species

Trust E. Duck),²⁰ and Original Penguin clothing. Brand names for chewing tobacco include Grizzly, Kodiak, Cougar, Red Seal, and Timber Wolf, with each tin featuring a naturalistic image of its namesake. Animal names are also appropriated for car models, including the Chevy Impala, Dodge Viper, and Dodge Ram. Ford is especially fond of animal names, with a brand stable that has included the Bronco, Cougar, Falcon, Mustang, Puma, and Taurus (Latin for "bull"). Starbucks Coffee sells a Komodo Dragon blend, a "spicy, herbal and earthy [blend] that evokes the lushness of Indonesia."²¹

Third, many companies use animals as a logo or mark. Well-known examples include the Pacific Life Insurance humpback whale, the ExxonMobile tiger, the BEHR bear, the Hartford elk and the Glenfiddich elk,²² the Harris Bank lion, the ING Group lion, the Royal Bank of Canada (or RBC) lion,²³ the Piggly Wiggly pig, and numerous clothing label logos, including the LaCoste alligator and the Ecko Unlimited rhino. Pharmaceutical company Sepracor uses a Luna Moth in its Lunesta logo and commercials.²⁴

Closely related are corporate mascots like StarKist's Charlie the Tuna, the Ad Council's Smokey Bear, Frito-Lay's Chester Cheetah, Kellogg's Tony the Tiger, General Mills' Honey Nut Cheerios bee ("Buzz"), the Aflac Duck,²⁵ the Geico gecko, the Budweiser frogs (and

Version 2009.2., <http://www.iucnredlist.org> (last visited Jan. 3, 2010) (hereinafter IUCN Red List).

²⁰ About the Duck Brand, <http://www.duckbrand.com/Info/About.aspx> (last visited Jan. 3, 2010).

²¹ Starbucks Store.com, <http://www.starbucksstore.com/products/shprodde.asp?SKU=411991> (last visited Jan. 3, 2010).

²² Both elk are based on "The Monarch of the Glen," an 1851 oil painting by Sir Edwin Landseer. See Richard Barlow, *The Monarch of the Glen*, SUPERNATURALE, <http://www.supernaturale.com/articles.html?id=163> (last visited Jan. 3, 2010).

²³ Measured by revenue, the Royal Bank of Canada is Canada's largest company. Duncan Marvin, *The FP500 Has a New Ruler*, FINANCIAL POST, June 5, 2007, available at www.financialpost.com/story.html?id=26c44d47-defa-4927-b446-87fd3c7b9452&k=62180.

²⁴ Stephen Heuser, *Tiny Rival Sues Sepracor Over Lunesta Moth*, BOSTON GLOBE, Dec. 4, 2006, available at http://www.boston.com/business/technology/biotechnology/articles/2006/12/04/tiny_rival_sues_sepracor_over_lunesta_moth/.

²⁵ Aflac's annual ad buy is about \$75 million in the U.S., with most of that going to television. Kathleen Sampey, *Aflac Realigns Marketing*, ADWEEK, Feb 13, 2007, available at http://www.adweek.com/aw/eseach/article_display.jsp?vnu_content_id=1003545018. Comedian Gilbert Gottfried, who provides the temperamental duck's voice, is surely well paid. But ducks, whose ungainly locomotion and distinctive calls provide the comedic elements key to making the ads so memorable,

clydesdales and chameleons and penguins), and the Coca-Cola-drinking polar bears that frolic in the arctic darkness on television each Christmas season. A marketing campaign for Air Wick pitches home air fresheners using not one but four animal mascots: Mrs. Elephant, Mrs. Chameleon, Mrs. Octopus, and Mrs. Giraffe.²⁶

Fourth, some companies earn revenue by mediating interactions between their customers and their animals. Examples include Sea World, Disney World (with its Animal Kingdom theme park), and numerous circuses and zoos, all of which use images of animals in their ads. Animal-centric tourism companies might also fall into this category. The same holds for film companies that make animal-themed movies; not only do they use animals in their ads, but the movies themselves are often advertisements for related merchandise. This past decade alone saw the high-grossing documentaries *March of the Penguins* and *Winged Migration* (migratory birds); animated features such as *Ice Age* (prehistoric mammals), *Finding Nemo* (tropical fish), *Shark Tale*, *Madagascar* (various endangered species endemic to the titular island), *Happy Feet* (penguins), and *Kung Fu Panda*; and live-action movies like *Whale Rider* (southern right whales), *Hidalgo* (horses), and *Golden Compass* (computer-generated, armor-wearing polar bears).

Finally, there are one-off animal-themed ad campaigns, like Quiznos' short-lived "spongemonkey" TV spots,²⁷ and single-ad examples that often feature trained chimpanzees or orangutans, both of which are endangered.²⁸ One randomly selected issue of *The New York Times Style Magazine* contained over a dozen examples of animal advertising, including three ads with penguins, three with horses, and one each with an elephant, orca, sea turtle, iguana, and lion.²⁹

B. *The Allure of Animal Advertising*

It is perhaps not surprising that so many companies use animal names and images to help sell their products and build their brands.

are paid nothing. Aflac, whose revenues topped \$15.3 billion in 2007, has also featured orangutans and goats in its television ads.

²⁶ See, e.g., Air Wick's Mrs. Elephant, <http://airwick.us/access/html/elephant.html> (last visited Jan. 3, 2010).

²⁷ The big-eyed creatures were based on the western tarsier, a tree-dwelling prosimian of south-east Asia. See ANIMAL: THE DEFINITIVE VISUAL GUIDE TO THE WORLD'S WILDLIFE 121 (David Burnie & Don E. Wilson eds., 2005).

²⁸ See IUCN Red List, *supra* note 19.

²⁹ N.Y. TIMES STYLE MAG., Travel Issue, Fall 2008.

Effective brands are intrinsically striking, carry an underlying appeal, and create a lasting impression.³⁰ A company can satisfy all three of these criteria by associating itself with an animal.

First, the image of an animal is often more striking and charismatic than a corporate name or an abstract logo. Compare the irascible Aflac duck to the hard-to-love name of the company itself. Or consider Serengeti Law, the maker of law-firm management software. When it was deciding on a name for itself, it did not choose a technical-sounding but soulless neologism. Instead, it selected a name that reflected the “vibrant and inter-connected” ecosystem of the Serengeti plains, with its “diverse array of wildlife.”³¹ Serengeti Law’s eye-catching print ads incongruously place African megafauna in a cubicle-filled law office, and are a refreshing change from the typical print advertisement for legal services: besuited bipeds seated around a conference table or shaking hands.

Second, because many people find animals inherently appealing, branding based on them has an underlying appeal. As Serengeti Law has discovered, a side benefit of its choice of name—and, one presumes, its use of animal advertising—is that “everyone is fascinated by the Serengeti and its animals.”³² There are, of course, other ways to grab potential customers’ attention. But compared to, say, crude jokes or sexual imagery, charismatic animals have a broader, more wholesome appeal.

Third, the use of an animal creates a lasting brand impression by suggesting an association between the company and the well-known characteristics of the animal. You know from its name alone that Gorilla Glue is especially strong. (If the company’s name doesn’t do the trick, its logo of a hairy, muscle-bound gorilla will.) White Swan is a popular name for dry cleaning companies because white swans are the living embodiment of whiteness: no ring around the collar.³³ An inordinate number of security and car alarm companies brand themselves with the cobra, a normally passive animal that will strike with deadly speed if approached too close.

The conclusion is that companies benefit from the frequent use

³⁰ CONROY, *supra* note 8, at 7.

³¹ Serengeti Law Company Name and Background, <http://www.serengetilaw.com/Serengeti/default.htm> (last visited Jan. 3, 2010).

³² *Id.*

³³ A September 12, 2008 web search revealed unrelated dry cleaning companies using white-swan related names and logos in Atlanta, Georgia; Akron, Ohio; Memphis, Tennessee; and Florence, South Carolina.

of animals in their advertisements; they would not use them otherwise. Worldwide, the benefit received from the use of animals in advertising is likely in the billions of dollars. (Assuming that the fraction of the annual \$450 billion in worldwide marketing expenditures that features animals is only one percent—which seems quite conservative—yields a low estimate of \$4.5 billion per year in animal advertising.³⁴ It is fair to assume that most advertisers receive a benefit equal to or greater than their marketing expenditures.) Given this sizable benefit, it is reasonable to expect these advertisers to help guarantee the continued existence of wildlife.

C. *The Current Scope of Animal Compensation*

While most of the animal advertisers listed above do not yet provide compensation for their use of animal images, it is important to acknowledge those that do. The Pacific Life Foundation claims that it has given over \$3.9 million towards marine life conservation.³⁵ Ecco Unlimited, the rhino-emblazoned urban clothing label, donated \$75,000 to rhino conservation in 2005.³⁶ Carivintas Winery, a California wine-maker, has announced a line of boutique red wines whose labels will feature the images of dogs rescued from Michael Vick's infamous dog-fighting operation. Ten percent of each sale will be donated to Best Friends Animal Sanctuary in southern Utah, which has been helping care for and rehabilitate the rescued animals.³⁷ Less directly, Blue Rhino (the propane brand) currently sponsors "Bowling for Rhinos," an annual fundraiser organized by the American Association of Zookeepers that has raised over \$3.2 million for rhino conservation since 1990.³⁸

Why do these for-profit companies give money to wildlife conservation? It may be due to a magnanimous love for animals. But the more likely reasons have to do with their bottom line. First, it may

³⁴ See *Business: Animal Copyright*, *supra* note 16.

³⁵ Pacific Life Marine Mammal Grants, <http://www.pacificlife.com/NR/exeres/6B5B2F0A-6E8D-44FF-ACB5-7C038EBCA39E.htm> (last visited Jan. 3, 2010).

³⁶ SAVE THE RHINO INTERNATIONAL, ANNUAL REPORT APRIL 2005—MARCH 2006, at 6, http://www.savetherhino.org/etargetsrinm/Portals/_target/Documents/SRI%20Annual%20Report_web.pdf.

³⁷ Mike Stark, *Classy Canines: Vick Dogs Featured on Wine Labels*, USA TODAY, Nov. 13, 2008, available at http://www.usatoday.com/sports/football/2008-11-13-3409735832_x.htm.

³⁸ Bowling for Rhinos Overview, <http://aazkbfr.org> (last visited Jan. 3, 2010).

serve as a signal to their current and potential employees, improving morale and loyalty while also helping them compete for the best graduates and executives.

Second, donating to wildlife may help these companies protect their brand value by averting what I term “the dodo effect”: no self-respecting advertiser wants to see its animal namesake or logo become, like the dodo bird, a caricature of terminal failure.³⁹

The clearest example of the dodo effect may be ExxonMobil’s efforts to conserve the wild populations of its animal icon, the tiger. The Exxon tiger first sprang to life shortly after World War II, when Exxon used a tiger in its ads to vividly distinguish its gasoline from the lower-quality fuels that were common during the war.⁴⁰ Since that time, the company has spent countless millions marketing the Exxon tiger worldwide, imploring customers to “Put a Tiger in Your Tank” and “Rely on the Tiger.”

Unfortunately, tigers are no longer strong as a species. While their natural range once extended across most of Asia, tigers now survive only in scattered pockets, with no subpopulation containing more than 250 mature breeding individuals.⁴¹ The current total effective population of tigers is estimated to be less than 2,500 and shrinking.⁴²

ExxonMobile is well aware of these grim facts. In 1995, to help prevent the extinction of the animal avatar in which it had invested so much, Exxon committed to donate over \$10 million to tiger conservation through a partnership with the National Fish and Wildlife Foundation.⁴³ ExxonMobile satisfied this commitment and later went

³⁹ See DAVID QUAMMEN, *THE SONG OF THE DODO: ISLAND BIOGEOGRAPHY IN AN AGE OF EXTINCTIONS* 266-67 (1996) (chronicling the “invidious adjectives” heaped upon the dodo after its extinction in the late seventeenth century); Steve Miller, *First The Dodo, Now Full-Size SUVs*, BRAND WEEK, September 25, 2006, available at <http://www.allbusiness.com/marketing-advertising/branding-brand-development/4698144-1.html>. I distinguish the term “dodo effect” from the twin phrases “dodo bird effect” and “dodo bird verdict,” which relate to the asserted equivalence of different schools of psychotherapy. See Lester Luborsky et al., *The Dodo Bird Verdict is Alive and Well—Mostly*, 9 CLINICAL PSYCHOL.: SCI. & PRAC. 1 (2002), available at http://www.disfinzione.com/congressi/Lester_Luborsky.pdf.

⁴⁰ See Tony’s Exxon, <http://www.tonysexxon.com/Exxon%20Tiger%20History.htm> (last visited Jan. 3, 2010).

⁴¹ IUCN Red List, <http://www.iucnredlist.org/search/details.php/15955/summ> (last visited Jan. 3, 2010) (2002 estimate).

⁴² *Id.*

⁴³ Press Release, National Fish and Wildlife Foundation (Mar. 16, 2001), available at http://findarticles.com/p/articles/mi_m0EIN/is_2001_March_16/ai_71756538.

further, donating millions more to tiger conservation. The Save the Tiger Fund has called this “the largest corporate commitment to saving a species.”⁴⁴

Third, donating to wildlife conservation may serve as a signal to current and potential customers; a signal these companies may amplify or, just as likely, dampen through self-serving marketing or public-relations. It is this final motivation that suggests how a third party like EPA could help convince other animal advertisers to join the ranks of those that are already donating to wildlife conservation.

II. A Voluntary Certification Approach to Animal Compensation

As the above examples show, it is not unreasonable to expect animal advertisers to pay for their use of animal images by donating to the ongoing survival of animals in the wild. But the indirect economic benefits of improving employee morale and avoiding the dodo effect are apparently not strong enough to convince most animal advertisers to provide voluntary compensation.⁴⁵ EPA certification would give them another, stronger reason to donate: competitive advantage in the battle for consumers.⁴⁶

It is safe to assume that the reason most animal advertisers use animal imagery is to attract nature-loving consumers and to distinguish themselves from competitors (the latter being the general goal of most advertising). And judging from advertisers’ frequent use of animals,

⁴⁴ See Save the Tiger Fund, http://www.savethetigerfund.org/AM/Template.cfm?Section=Who_We_Are1 (last visited Jan. 3, 2010). The millions of dollars that ExxonMobil has donated to help fund think tanks that deny global-warming have been less helpful to wildlife species that are on the brink. See Greenpeace, *ExxonMobil’s Continued Funding of Global Warming Denial Industry* (2007), <http://www.greenpeace.org/usa/assets/binaries/exxon-secrets-analysis-of-fun.pdf> (last visited Jan. 3, 2010).

⁴⁵ For example, while the tiger is also mascot for Kellogg’s Frosted Flakes and for numerous professional sports teams and universities (including well-endowed Princeton University), I have found no donation announcements from any of them.

⁴⁶ Many of these same advertisers are already competing to appear environmentally friendly in the eyes of investors. See Tobias Buck, *More Companies Reveal Social Policies*, FINANCIAL TIMES (London), June 15, 2005, at 8 (reporting that “[m]ore than half of the world’s biggest companies reveal details of their environmental and social performance”).

they must believe that it works. Indeed, there are now cable channels (for example, Animal Planet, Discover, and Natural Geographic) that specifically cater to nature-loving consumers—and to the advertisers that seek to target them. But these consumers also base their purchasing decisions in part on advertisers' environmental reputations, as evidenced by the many companies now seeking to cultivate their green credentials.⁴⁷ There is even a term, "green-washing," for corporate efforts to secure environmentally friendly marketing benefits without making real environmental improvement.

EPA certification for animal advertisers that donate to wildlife conservation would give those advertisers a relatively credible and inexpensive way to signal their commitment to animals and the environment. The certification would be relatively inexpensive because the advertisers already spend, by definition, one-hundred times more than the cost of a one-percent donation in order to buy ad time to associate themselves with animals. Spending an additional one percent to clinch it with empathetic, nature-loving consumers should thus be seen as a good deal.

A. *EPA Should Merely Certify, Not Direct Funds*

EPA could collect advertisers' donations itself and direct the funds toward the most effective wildlife conservation use. But a better approach would be to simply certify that a given advertiser has donated to a qualified conservation group. This would allow donors to choose and directly support their preferred wildlife-conservation organizations or projects, which would increase the number of willing donors. It would also help keep EPA's administrative costs low, as EPA would merely verify advertisers' donation receipts rather than taking on the task of collecting and distributing donation funds itself.

B. *Third-Party EPA Certification is Superior to Alternatives*

Currently, animal advertisers' donations are typically announced by the advertiser itself. This is first-party certification.⁴⁸ If the donee is sophisticated enough, it may also announce the donation

⁴⁷ See DANIEL C. ESTY & ANDREW S. WINSTON, GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE 127-132 (2006).

⁴⁸ See CONROY, *supra* note 8, at 14.

itself, for example in a press release. This is second-party certification.⁴⁹ A well-designed third-party (e.g., EPA) certification program would have advantages over both of these approaches.

First, an EPA certification program would allow for the creation and use of a widely recognizable certification mark. Most press releases are never seen by consumers. An EPA certification mark, however, could be displayed directly on advertising, public relations materials, or even product packaging. It could speak to customers at the time of the actual purchasing decision, and unlike a one-time press release, a mark would continuously announce the advertiser's donation.

A second-party certification mark could achieve some of these same benefits, and conservation organizations might license their own marks for this use. Most, however, would see the task of licensing and policing donors' use of their mark as a distraction from their core mission. An exception is the World Wide Fund for Nature (WWF), which offers its well-know panda bear logo for use by corporate donors that meet certain qualifications.⁵⁰ But WWF is one of the largest non-governmental conservation organizations in the world.⁵¹ Smaller conservation organizations, with fewer resources than WWF, might welcome the chance to "outsource" this task to an EPA certification program. Further, by certifying donations across all wildlife-conservation organizations, EPA (or another third party) will be able to leverage scale to reduce the transaction costs associated with certification and thus promote a larger number of certified donations.

Second, an EPA certification program would enable standardized certification of animal advertisers' donations. Standardization is key because it helps provide certainty and reliability to customers who are looking for information about animal advertisers' donations.⁵² The alternative first- and second-party approaches would

⁴⁹ See *id.* at 14-15.

⁵⁰ See, e.g., Pure & Natural Mission Statement, <http://www.pure-natural.com/ourcommitments.html> (last visited Jan. 22, 2010) (displaying WWF logo and noting that the company makes annual donations of at least \$100,000 to WWF); see also WWF Shop to Support, <http://www.worldwildlife.org/how/goodstuff/item8160.html> (last visited Jan. 22, 2010). As these examples show, WWF certification is not restricted to animal advertisers—for example, Dial Corporation markets Pure & Natural as eco-friendly but does not use animal images.

⁵¹ See WWF in Brief, http://www.panda.org/wwf_quick_facts.cfm (last visited Jan. 22, 2010).

⁵² See Abhijit Banerjee & Barry D. Solomon, *Eco-Labeling for Energy Efficiency and Sustainability: A Meta-Evaluation of US Programs*, 31 ENERGY POL'Y 109 (2003)

lead to a marketplace full of various donor claims and donee certification marks. But certification systems flounder when there are many certification schemes, each with its own standard, attempting to provide the same type of information to the market. This can lead to consumer confusion, decreasing the informational value of each mark and perhaps leading consumers to ignore all of the marks.⁵³

Third, an EPA certification program has the potential to provide more trustworthy information to the consumer, increasing consumers' confidence in their ability to rely on conservation donations as a basis for their purchasing decisions. Customers have reason to be wary of advertisers' first-party environmental claims. For example, while Bowling for Rhinos has raised millions of dollars since 1990,⁵⁴ Blue Rhino can't rightly take full credit for those donations because it merely sponsors the event—Blue Rhino itself does not appear to have directly donated any money to conservation.⁵⁵ Consumers may also want to know whether the size of a donation is significant, or merely nominal, relative to the size of the company and the extent of its use of animal images. For example, while Ecko Unlimited's one-time donation of \$75,000 to rhino conservation seems substantial, it might be pocket change compared to the total amount the company spends using rhino images to market itself.

So much for the benefits of EPA creating a program to certify animal advertisers' donations to wildlife conservation—what should the EPA program look like?

III. Designing an Effective Animal-Advertising Certification System

EPA does not need to devise the proposed certification system from whole cloth. It already has an excellent template: its Energy Star program, which has been quite successful.⁵⁶ The two programs are

(finding that government-backed labeling programs such as Energy Star excel over private programs in their ability to affect the market and capture consumers).

⁵³ See, e.g., CONROY, *supra* note 8, at 20.

⁵⁴ See *supra* text accompanying note 38.

⁵⁵ See Blue Rhino: Save the Rhinos by Bowling For Rhinos, <http://www.bluerhino.com/BRWEB/Company-Info/Save-the-Rhinos.aspx> (last visited Jan. 22, 2010).

⁵⁶ See U.S. EPA OFFICE OF AIR AND RADIATION, CLIMATE PROTECTION PARTNERSHIPS DIVISION, NATIONAL AWARENESS OF ENERGY STAR FOR 2008: ANALYSIS

somewhat different – while Energy Star tells potential customers about products’ energy-use characteristics, animal-advertising certification would tell potential customers about advertisers’ environmental contributions, regardless of the environmental profile of the product or service being advertised. But at least four aspects of Energy Star, and of successful product certification schemes generally, do appear to translate well into the advertising context.

First, as with Energy Star, the animal-advertising certification program should be voluntary. As discussed below, this will allow the program to avoid issues that might stymie it, while still allowing the program to achieve its intended benefits. Second, the program must set tough but achievable certification standards.⁵⁷ Third, the program must build a recognizable and trusted brand or mark. And fourth, the program must convince companies of the benefits of earning certification and using the mark.

What follows, then, is only a rough outline of the proposed certification system, intended to spark further discussion. Many relevant questions remain to be asked, and the ultimate contours of the program should be based on input from many sources, including EPA, animal advertisers, conservation groups, advertising agencies, and other potential partners.

A. *Voluntary Nature of the Certification System*

Most certification systems are voluntary; potential participants can opt in but are not legally required to do so. In most instances, this is probably a second-best story – the certification body would prefer to make its standard mandatory, but lacks the political power to secure the necessary state or federal legislation. But in the case of promoting animal advertisers’ donations, there is good reason to believe that a voluntary approach is the best, not merely second-best, approach.

To see why, we should ask which advertisers would be compelled to donate to conservation under a mandatory approach. Would it be only those that depict actual animals realistically using photographs or videos? Or the broader set that depict stylized animals using icons (like LaCoste’s alligator or NBC’s peacock), animation

OF 2008 CEE HOUSEHOLD SURVEY ES-2 (2009) (reporting that of the forty percent of households that knowingly purchased an Energy Star-labeled product in the past twelve months, most were influenced “somewhat” or “very much” by the label); see also Banerjee & Solomon, *supra* note 52.

⁵⁷ See CONROY, *supra* note 8, at 17-18.

(Kellogg's tiger, General Mills' bee), or computer graphics (Geico's gecko)? Only those that use images of "wild" animals, or also those that use domesticated, trained, or companion animals (or tame members of an otherwise wild species?) Only those that use images of threatened or endangered species, or also those that use non-threatened species (or species that are already extinct, like dinosaurs?) If the former, what process would be used to determine which species are sufficiently rare to merit inclusion? What would be the affect of tying such a mandatory program to the already contentious process of listing and delisting species under the Endangered Species Act? At a more basic level, would the program only cover advertisers, or would it also cover non-advertising uses of animal imagery (*e.g.*, nature documentaries, animated children's movies, theme parks)?

In addition to triggering these thorny questions, the creation of a mandatory requirement also implies a system of enforcement. But effective enforcement would be hindered by issues of standing (if a private cause of action were created) or of institutional competency and political sustainability (if enforcement were by an agency), to say nothing of the political hurdles alluded to earlier; legislation requiring advertisers to compensate animals (or nature generally) for the use of animal images is not likely to pass Congress any time soon.⁵⁸

Indeed, even if it were politically possible to impose a mandatory compensation requirement on animal advertisers, it would likely lead to a perverse outcome, as reluctant advertisers substitute away from their use of animal imagery. That would reduce the prevalence of animals in advertising, marketing, and brand building, which is not a goal of this proposal.

The suggested voluntary certification approach avoids all these concerns.⁵⁹ What is more, by offering a marketing and public-relations benefit to animal advertisers, a voluntary certification program will

⁵⁸ Cf. Dane E. Johnson, *Statute of Anne-imals: Should Copyright Protect Sentient Nonhuman Creators?*, 15 ANIMAL L. 15 (2008) (questioning whether the policy justification for copyright and right of publicity applies to non-human animals); Cass R. Sunstein, *Enforcing Existing Rights*, 8 ANIMAL L. 1, 62-63 (2002) ("[T]he notion of a citizen suit provision for animals has not been accepted by Congress [despite heavy lobbying]." (quoting David S. Favre)).

⁵⁹ I thus do not attempt to resolve the questions about the scope of a mandatory program here, apart from noting that they are moot under the proposed voluntary system. These issues would have to be addressed under a mandatory system, however, and may be worthy of further research and discussion in that context.

increase conservation funding without alienating potential corporate partners.

B. *Setting a Tough but Achievable Standard*

The first hurdle for any would-be certification scheme is to establish certification criteria. EPA's certification requirements should be tough enough that most companies will need to change their behavior to qualify—otherwise the program would have little effect. For example, when EPA initiated its Energy Star certification program, it had to set tough but achievable efficiency thresholds for personal computers, monitors, printers, fax machines, and the like.⁶⁰ Likewise, before the Forest Stewardship Council announced its certification program, it had to first scientifically determine whether and how various types of forests could be logged sustainably.⁶¹

But the requirements cannot ask companies to do something that is economically impossible.⁶² If companies feel that EPA requirements are too stringent, then they will either ignore its certification program, or perhaps establish less-stringent industry-led certification scheme to compete against it.⁶³

To make certification as attractive as possible, EPA must also work to minimize the costs associated with certification, such as auditing costs. The requirements for use of the EPA certification mark must also be flexible enough to be used in a wide variety of advertising and marketing contexts, with minimal disruption to the processes already in place. For these reasons, EPA should involve animal advertisers and representatives from other parts of the advertising industry, such as ad agencies, in the process of designing certification requirements.

Compared to the Energy Star and FSC certification schemes, the proposed EPA certification program is relatively simple to design. There are three requirements that must be defined: (1) who qualifies as an animal advertiser; (2) what is a sufficient donation size; and (3) who qualifies as a wildlife-conservation donee.

⁶⁰ See ENERGY STAR Major Milestones, http://www.energystar.gov/index.cfm?c=about.ab_milestones (last visited Jan. 22, 2010).

⁶¹ See CONROY, *supra* note 8, at 64-66.

⁶² *Id.* at 18.

⁶³ See *id.* at 244-45 (describing the Sustainable Forestry Initiative (SFI), an industry-created alternative to FSC certification).

1. *Animal Advertisers Defined*

Clearing this first hurdle should be relatively easy for EPA, because making the program voluntary obviates the need for EPA to draw a clear line between what is and is not animal advertising. Instead, each advertiser—with the help of its customers and critics—can decide for itself whether it is an “animal advertiser” for purposes of participating in the voluntary certification program. Since categorizing advertisers in this way is somewhat novel, EPA may need to provide some guidance. But it need not provide a more detailed definition of “animal advertiser” that this article provides above: animal advertisers are “companies or organizations that use animal images or animal names in their advertising, marketing, or branding.”⁶⁴

2. *Required Donation Size*

To be helpful to wildlife, the minimum donation amount must be more than the proverbial peanuts. Ideally, the donation would be proportional to the extent of the advertiser’s use, as is standard for the compensation of human actors. The required donation, divided by a size-related denominator, could be set at, say, one or two percent.

The most obvious denominator would be the company’s budget for an individual animal-related ad campaign or set of campaigns. This is because the relevant fraction of the advertising budget may vary across advertisers, based on the extent of their use of the animal imagery.⁶⁵ For example, the Minnesota Timberwolves (a professional basketball team) use the timber wolf name or imagery in virtually all of their ads (including radio ads, print ads, billboards, merchandizing, and other promotional materials). But Starbucks uses the Komodo dragon name and imagery in only a small fraction of its advertising; specifically, the ads for its Komodo Dragon blend. Middle cases include ExxonMobil and Coca-Cola. ExxonMobil uses tiger imagery in some but not all of its ads. Coca-Cola runs its polar bear campaign in the winter only, not year-round.

For companies that do not or cannot track their budget related to animal-related ad campaigns, the required donation might be set at a proportionally lower percentage based on annual advertising budget or annual revenue.

⁶⁴ See *supra* p. 1.

⁶⁵ This is the same approach often used for the license of celebrities or famous characters for use in advertising services. See GREGORY J. BATTERSBY & CHARLES W. GRIMES, LICENSING ROYALTY RATES 2006 EDITION § 1.03[C][4] (2006).

Setting the required donation rate at one or two percent seems appropriate because the advertising license rates for celebrities or famous characters typically range between two and fifteen percent, depending on the popularity of the character.⁶⁶ At the upper end of that range, think Michael Jordan or Snoopy, the “spokesman” for Metropolitan Life Insurance Company.⁶⁷ One or two percent thus seems reasonable for non-famous animals. One percent in particular seems appropriate because it is stereotypically considered negligible – the least that we might expect a person (or in this case, an advertiser) to do.

At the same time, some animal advertisers might want to give more than one percent, perhaps to distinguish themselves as providing more than minimal compensation for their use of animal imagery. The EPA certification program should accommodate this, perhaps by offering to also certify advertisers at the two percent level. Providing certification for multiple donation levels would encourage a higher level of giving. On the other hand, it would also require designing a second certification mark. (Why would Advertiser B pay twice as much to use the exact same certification mark as Advertiser A?) This would increase costs slightly, and might also lead to consumer confusion that would make it harder to establish the certification mark as a well-known brand.

3. *Qualified Wildlife-Conservation Donees*

The EPA program will also have to determine, at a basic level, what qualifies a wildlife-conservation organization as suitable for donation.⁶⁸ The ideal donee would be an established conservation organization whose mission (and day-to-day objective) is to conserve, protect, or restore threatened wildlife species and the habitats in which those species live. Money spent in support of particular wildlife-conservation projects should also qualify, even if the money is not donated to a conservation organization.

Certification should not be granted, however, for donations not

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ The task is similar to the one faced by 1% for the Planet, which only certifies donations made to pre-qualified 501(c)(3) or international equivalent organizations that are environmentally focused. 1% for the Planet: Get Approved, http://www.onepercentfortheplanet.org/en/nonprofits/get_approved.php (last visited Jan. 22, 2010). Donors can recommend a donee organization for pre-qualification, and donee organizations can themselves apply online.

directed specifically towards wildlife conservation. For example, money spent educating the public about the need for conservation would not count. Neither would donations to animal shelters or pet welfare organizations. While these organizations are certainly laudable and worthy of donations, their efforts are not directed towards EPA's charge of "arresting environmental deterioration."⁶⁹

To be sure, some animal advertisers (as I have defined the term above) do rely on images of domesticated or companion animals. Would it not be better to allow those advertisers, at least, to receive certification for donations to animal shelters or animal-welfare groups? Perhaps, but that would necessitate drawing a line between the hazy, overlapping domains of "domesticated" and "wild" animal species.⁷⁰ Without such a line, "wild" animal advertisers might choose to donate to "domesticated" animal donees (for example, to maximize their public-relation benefits), which would frustrate the primary goal of increasing funding for conservation of wildlife and wildlife habitat. In addition, the administrative costs of distinguishing between two subcategories of animal advertisers (and donees) might outweigh the benefit of attracting donors who would otherwise abstain.

Sponsorship of fundraising intermediaries that aggregate contributions and pass them along to actual wildlife-conservation organizations is a closer call. How should the EPA program treat, for example, Blue Rhino's sponsorship of Bowling for Rhinos?⁷¹ On the one hand, donations to Bowling for Rhinos should probably qualify, since it appears to be a fundraising intermediary that aggregates donations and passes them along to wildlife-conservation organizations or projects.⁷² On the other hand, the mere sponsorship or funding of a fundraising intermediary itself would probably not qualify for certification, since the donation is not directed specifically towards conservation. So Blue Rhino's sponsorship of Bowling for Rhinos would not qualify for certification.

A related question is whether the EPA certification program should attempt to steer donations toward the most effective

⁶⁹ See *supra* note 7.

⁷⁰ See also *supra* Part III.A (discussing definitional problems).

⁷¹ See *supra* text accompanying notes 38 and 55.

⁷² This is not to suggest that EPA should audit fundraising intermediaries to verify that donations made to them are, in fact, passed along to actual wildlife-conservation organizations. Absent any explicit indication that an advertiser is somehow trying to game the certification system, EPA should leave it to advertisers to police the use of their own donations.

conservation organizations and projects. Not all conservation projects are equally worthy. For example, some conservation professionals believe that resources and efforts should be focused on the so-called “biodiversity hot spots.”⁷³ Thirty-four of the “hottest” spots shelter the vast majority of the animal species classified as “endangered” or “critically endangered” by the International Union for Conservation of Nature.⁷⁴ So conservation efforts targeting these hot spots will likely do the most good in terms of preserving biodiversity.

Most of the biodiversity hot spots are located outside of North America.⁷⁵ But many domestic advertisers will probably prefer to donate to conservation projects in the United States in order to maximize their public-relations benefit. So the programs’ means (using certification to improve consumer response to participants’ advertisements) is somewhat in tension with its ends (increasing wildlife conservation to the greatest possible extent). This problem—if indeed it does turn out to be a problem—is probably not one that can be solved in advance. (The obvious solution, disqualifying donees operating outside of recognized biodiversity hot spots, would depress overall certification rates and slow the growth of the program as a whole.) Instead, this issue should be addressed once the certification scheme has been successfully established. Data on participating donees should be collected by EPA to enable analysis of the certification program’s conservation effectiveness and, if necessary, to support future modifications to the donee qualification guidelines.

Here’s another question: Should qualified donations be restricted to conservation groups and projects that work to preserve the animal species used by a given advertiser? Or should Gorilla Glue Co., for example, be allowed to make certified donations to the preservation of ocean life? Many animal advertisers probably will choose to make donations to “their” animals because of the dodo effect, or for other public relations reasons. A company like General Mills, which makes Honey Nut Cheerios, would presumably generate more publicity by donating to research on colony collapse disorder (which affects honey bees) than by donating to research on white-nose syndrome (which affects bat colonies).⁷⁶

⁷³ WILSON, *supra* note 5, at 94-96.

⁷⁴ *Id.* at 96.

⁷⁵ *Id.* at 95.

⁷⁶ U.S. Fish & Wildlife Service, Northeast Region: White-Nose Syndrome: Something is Killing Our Bats, http://www.fws.gov/northeast/white_nose.html (last visited Jan. 22, 2010).

There is also a fairness argument. If an advertiser is using and benefiting from the use of rhinoceroses (or African megafauna in general), shouldn't the compensation for that use be directed toward the conservation of that species? After all, this is how it works for humans. The right of publicity requires that an advertiser obtain the consent of the person whose image is to be used – an advertiser cannot merely decide to obtain consent from someone else.

But there would be downsides to imposing this requirement, too, and they outweigh the fairness argument. First, from an objective conservation perspective, the goal should be to achieve the most conservation benefit from each donation, regardless of the type of animal used in a given advertising campaign. Second, requiring the donation to go to a single species or animal type runs contrary to ecological science: the species in a given biome are interrelated and it may be impossible to preserve one without preserving the entire biome. Third, such a requirement would make the program more costly to administer and police, and would risk discouraging advertisers who might otherwise participate. Finally, as noted, many advertisers will align their donation with the animals used in their advertisements even without an explicit requirement.

C. *Building a Recognizable and Trusted Mark*

A major selling point of the EPA certification scheme is that it will communicate an advertiser's environmental contributions to their target consumers. But the ability of a mark to effectively communicate a message depends on consumers' familiarity with the mark. The mark will be of little value to most advertisers unless it first means something to consumers. (The exception, discussed below, is that some advertisers may have an interest in the certification mark becoming more recognizable.) Two main factors that help a certification mark gain recognition are (1) market demand for the information provided by the mark, and (2) strategic partnerships.⁷⁷

1. *Demand for the Information Provided by the Mark*

The certification mark would provide useful information to consumers who want to patronize companies that support wildlife. But are there any such consumers? Certification of animal advertisers depends partly on a novel fairness argument that may not initially be

⁷⁷ See CONROY, *supra* note 8, at 290-94.

intuitive to consumers: advertisers that profit from using animal imagery should share a portion of that profit with the natural world that enabled the advertisements in the first place. If customers are attracted to, say, Pacific Life Insurance because its whale ads remind them of their goal of a carefree retirement in warm tropical waters, the whales—or at least nature generally—should get a portion of the company's benefit.

Stated differently, there does not appear to be a pre-existing norm or commonly held belief that it is wrong to use animals without compensation. Indeed, current norms probably point in the opposite direction. Clear-cutting old-growth forests and needlessly destroying fisheries probably strikes most people as inherently distasteful. But while most consumers understand that animals are not compensated for use of their image, few seem outraged by this fact.

The challenge of building demand for information about advertisers' donations is thus similar to the challenge faced by groups seeking to certify fair trade coffee or sustainable tourism. Those groups have achieved modest success, but not because they were able to tap into a deep pool of pre-existing consumer concern.⁷⁸ Instead, the groups had to generate demand for their new products by educating consumers that the status quo in those industries, while not terribly destructive (in relative terms), could nonetheless stand for some improving. The EPA certification program would thus do best to focus on environmentally conscious consumers who already see a benefit in buying from companies that share their environmental values.

2. *Building Partnerships*

As noted, it is important that EPA work with industry partners in developing certification requirements—here, that would mean working with animal advertisers to determine, for example, what is a sufficient donation size and who should qualify as a wildlife-conservation donee, as described above. It is also important to work with partners in launching and promoting the certification scheme itself. There would appear to be at least two groups of willing potential partners for the EPA certification program: environmental organizations and advertising intermediaries.

Environmental organizations, especially those that focus on wildlife conservation, should be willing to support the EPA program

⁷⁸ See *id.* at 109-10.

because they—or at least their conservation goals—stand to benefit from an overall increase in donations. Once it is established, the certification system may even be able to charge administrative fees to cover the cost of promoting and policing its mark and auditing donations. Until that time, however, the EPA program costs would probably need to be covered by taxpayer funding. Alternatively, in the case of a private third-party certification body, initial funding would probably be secured through foundation grants or corporate partnerships.

Partnering with environmental and conservation groups would also help EPA identify animal advertisers that have worked with or donated to those groups in the past. As discussed below, these advertisers should be approached early about becoming certified.

Conservation organizations can also support the EPA program by displaying the certification mark themselves. For this reason, certification should be extended to those organizations that use animal images in their marketing and membership materials. Examples of such groups include Defenders of Wildlife (which uses a wolf in its logo), World Wide Fund for Nature (WWF) (panda), National Audubon Society (great egret), Sea Shepherd Conservation Society (humpback whale), Rainforest Action Network (black panther), National Resources Defense Council (spirit bear, a black bear subspecies),⁷⁹ International Rhino Foundation, and dozens of others.

Convincing these organizations to place the certification mark on their materials would help build recognition quickly by encouraging, say, the 5 million WWF supporters or the 1.3 million members of National Resources Defense Council to associate the mark with wildlife conservation.⁸⁰ These organizations have an interest in the successful launch of an EPA program for certifying wildlife-conservation donations, so they should be willing to display the EPA certification mark even before it achieves public recognition—in effect subsidizing the mark's growth.

These certified conservation organizations should not be required to donate a portion of their ad budget to some *other* conservation group. That would be silly; the money would be better

⁷⁹ See Natural Resources Defense Council Switchboard, <http://www.switchboard.nrdc.org/blogs/lizbb/about> (last visited Jan. 22, 2010).

⁸⁰ See WWF Frequently Asked Questions, <http://www.panda.org/faq/response.cfm?hdnQuestionId=2392002171269> (last visited Jan. 22, 2010); About NRDC: Who We Are, http://www.nrdc.org/about/who_we_are.asp (last visited Jan. 22, 2010).

put toward conservation efforts by the organization itself. Instead, as long as these groups spend the required donation amount on their own wildlife-conservation programs, they would simply have to meet the definition of a qualified conservation organization. (If this causes confusion, the EPA program could use a different but related mark to indicate groups that merely meet the requirements to receive certified donations.)

Zoos are another category of potential partners, since they frequently use their animals in advertisements to encourage visitors and donations. Many would qualify as donors based on their past or present donations or in-kind support to partner conservation organizations.⁸¹ A few other zoos might qualify as conservation organizations in their own right, if (as discussed above) their primary mission is to conserve threatened wildlife species and their habitats.

Another group of potential partners are the advertising intermediaries that aggregate animal-loving consumers for the purpose of delivering ads. For example, EPA might partner with animal or travel-related magazines, or with Animal Planet or another animal-themed cable channel. Suppose Animal Planet convinced its advertisers (all of which, even if they don't use animals in their ads, are presumably seeking to turn the channel's animal-loving viewers into paying customers) to donate one percent of their ad buy to conservation. A rough calculation shows that this could amount to as much \$470,000 a year.⁸² This would amount to more than one quarter of the charitable income of International Rhino Foundation, one of the world's largest rhino conservation organization.⁸³ Animal advertisers who first donate enough to only cover their ads on Animal Planet

⁸¹ For example, the International Rhino Foundation lists over a dozen zoos among its supporters. International Rhino Foundation 2008-2009 Donors, <http://www.rhinos-irf.org/donors> (last visited Jan. 22, 2010).

⁸² According to the SEC 10-K for Discovery Holdings Company, Discovery Communications Holding, LLC, which owned 85% of Animal Planet, earned \$1,345,033,000 in global ad revenue in 2007. Discovery Holding Co., Annual Report (Form 10-K), at II-18 (Feb. 15, 2008). About 35% of this revenue was generated by channels other than its flagship Discovery and TLC channels: Animal Planet, Discovery Kids, and others. *Id.* at II-11. Assuming that Animal Planet is responsible for 20% of the remainder and that half of these ads feature animals, that works out to approximately \$47 million worth of animal ads. One percent of these ad buys on Animal Planet would thus equal about \$470,000.

⁸³ International Rhino Foundation's charitable income for 2007 was approximately \$1.6 million. International Rhino Foundation 2007 Annual Report, available at <http://www.rhinos-irf.org/attachments/files/144/Annual%202007.pdf>.

might later decide to seek certification for all of their animal advertising.

D. Convincing Advertisers to Make Certified Donations and Use the Mark

I have described above how animal advertisers in general would benefit from an EPA certification program that verifies donations to wildlife conservation: it will help them distinguish themselves from competitors in the eyes of the growing number of eco-conscious consumers. Making certified donations may also improve advertisers' employee morale and help them avoid the dodo effect. But not all advertisers will be ready to voluntarily participate in such a program at first. The EPA certification program system should initially focus on the advertisers that are most likely (or in the best position) to participate. In particular, attention should be focused on the following four categories of potential participants.

1. Advertisers that have Already Made Qualified Donations

The easiest sort of animal advertisers to convince to use the mark will be those that have already donated to wildlife conservation, even without the incentive of EPA certification. These "white hat" animal advertisers should be allowed and encouraged to apply past qualifying donations to future ad campaigns. (These advertisers should also be approached early on to seek their input in developing the certification process.) For example, at a required donation ratio of one percent, Ecko Unlimited's 2005 donation of \$75,000 to rhino conservation (discussed above) would entitle it to certification of \$7.5 million in ad buys going forward.

There is nothing wrong with rewarding past donations today—companies that have already donated to conservation should be rewarded—as long as donations are only counted once. (Allowing double counting, on the other hand, would reduce the incentive that certification would otherwise provide for continuing donations.) Providing this certification without requiring an additional donation may even create momentum within the certified company to make continued donations, because otherwise they will have to forfeit use of the certification mark once past donations have been exhausted. Certifying these white hat advertisers will also provide early exposure for the certification mark, allowing it to build consumer recognition.

2. *Small Private Companies*

Some publicly owned companies might have difficulty convincing their shareholders of the value of making a certified donation to wildlife conservation. Private companies, on the other hand, are relatively freer to voluntarily raise their costs—especially if it helps them stand out in a crowded market. For example, Shark Trust Wines, a California company, donates ten percent of the profits from its wine sales towards shark conservation.⁸⁴ That fact helped not only put Shark Trust Wines on the wine list at one of President Barak Obama’s Inaugural Balls in Washington D.C., it also earned the company a mention in media coverage of the event.⁸⁵

Since its founding in 2002, 1% for the Planet (discussed earlier) has certified over 700 companies, mostly by focusing on small, privately held companies.⁸⁶ Indeed, all animal advertisers that are already certified by 1% for the Planet might automatically qualify for certification if their 1% donations are to wildlife conservation, because a company’s annual revenue will almost always be larger than its annual advertising budget.

3. *Reputable Conservation Organizations*

As described above, EPA should also encourage qualifying conservation organizations to use the certification mark in their advertisements—no donation required—to build consumer recognition of the mark and to identify that the organization is eligible to benefit from certified donations.

4. *Friendly Non-Animal Advertisers*

Certification could also be made open to any advertiser willing to donate the requisite amount to wildlife conservation, regardless of whether they use animals for advertising, marketing, or brand building. For example, companies that advertise on Animal Planet but that do not use animal imagery might want a credible way to demonstrate their commitment to wildlife conservation, too. More

⁸⁴ Shark Trust Wines Mission, <http://www.sharktrustwines.com/mission.php> (last visited Jan. 22, 2010).

⁸⁵ See Leslie Kaufman, *Torn Between Green Galas? At Least They’re a Walk Apart*, N.Y. TIMES, Jan. 16, 2009, available at <http://www.nytimes.com/2009/01/18/fashion/18ball.html?ref=earth> (last visited Jan. 22, 2010).

⁸⁶ See 1% for the Planet: History, <http://www.onepercentfortheplanet.org/en/aboutus/history.php> (last visited Jan. 22, 2010).

broadly, any company that currently donates to conservation might be interested in certification. This would expand the potential market for the certification beyond the advertisers that use animal names and images, which in turn would mean more money for conservation and a faster path to widespread recognition of the certification mark.

On the other hand, extending certification in this way would weaken the connection between the use of animal images in ads and the idea of compensating nature for that use. It might also bring the certification scheme into competition with other environmental-donation-certification programs, such as 1% for the Planet.

Conclusion

Wild animal species contribute substantial value to humanity. In particular, they contribute directly to companies who use their images for advertising, marketing, and brand-building. But such “animal advertisers” are currently neither required nor encouraged to compensate nature for this use. That is a shame. The natural world is today experiencing an extinction crisis that threatens to extinguish countless species and cause irreversible harm to our planet’s life-sustaining ecosystems. Hundreds of wildlife-conservation organizations are working to halt, or at least slow, this dangerous loss of biodiversity. But the current funding for this effort is manifestly inadequate; the wave of extinction continues to accelerate.

The United States Environmental Protection Agency is the governmental agency tasked with arresting environmental deterioration. As such, it should establish a certification program to reward (and thus encourage) animal advertisers that donate money to wildlife conservation. Unlike Gregory Colbert’s Animal Copyright Foundation or another single-issue non-profit group, EPA has the necessary resources, credibility, and name recognition. EPA has also successfully launched other eco-certification programs, including its Energy Star and Green Power Partnership programs. And there is reason to think that many animal advertisers would participate in a well-designed and promoted donation-certification program. They are obviously trying, at least in part, to appeal to environmentally concerned and animal-loving consumers. EPA certification of their donations to wildlife conservation would be a reliable and cost-effective way to further distinguish themselves in the eyes of those consumers.

The proposed EPA certification program would be simple and relatively inexpensive to implement. Any verifiable donation to a qualified wildlife-conservation organization or project would earn EPA certification, as long as the donation value exceeded a minimum threshold—say, one or two percent of the company’s animal-related ad buy. The donor would then be allowed to place a special EPA certification mark on its related advertising and public relations materials, much as companies certified under EPA’s Energy Star and Green Power Partnership programs are allowed to display those programs’ marks. With the early cooperation of a few big-name partners, such as those advertisers who have already made qualified donations, EPA could create a new and sustainable source of funding for conserving humankind’s collective natural (and commercial) heritage.