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Guest Column: Legal challenges loom as f&b industry weighs business as usual, pressure to change

Rise of false advertising litigation has f&b industry grappling with how best to embrace sustainability

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Sustainability initiatives have taken on increasing significance in the food and beverage industry in recent years. With an increased focus on branding through social media and consumer demand for environmentally conscious business practices, companies are under increased pressure to demonstrate a commitment to conservation.

This has led many companies to begin investing in developing alternative business practices, aimed at creating an overall positive environmental impact and staying current in a market that has experienced rapid changes in recent years.

Key Players

Leading the wave of sustainability are brands such as Ben and Jerry's, who is no stranger to incorporating social causes into its business model. Since its founding, the company has produced ice cream flavors centered around various philanthropic causes, such as supporting family dairy farms and non-profits. In January 2019, the company began eliminating single-use plastic in its stores, transitioning to wooden spoons and paper straws. It has also begun researching alternatives to the paper coating of its ice cream tubs, in order to make them biodegradable.¹

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The company claims it has a three pronged approach to business: its product mission, its economic mission, and its social mission. This approach is aimed at building brand loyalty, especially among younger and increasingly socially conscious consumers.² The company has recently partnered with the Sierra Club to organize events aimed at promoting clean energy in local communities and combating climate change. Free Ben and Jerry's ice cream will be served at many of these events, making sustainability a key pillar of the brand's consumer outreach.³

Another company that has taken a strong lead in sustainability reform is Barilla Group, who has focused on reforming its supply chain from the local level of agricultural production. Barilla Group has been working with around 5,000 farms in Italy in order to secure supply chain cultivation contracts, with the goal of establishing long-lasting changes at each step of its product production.

Additionally, in its 2019 sustainability report, Barilla Group highlighted the most recent sustainability milestone of the company—as part of a ten year endeavor, the company had reduced its water consumption by 21% and its carbon emissions by 30%, with one of its brands even going so far as to become the first to fully compensate its carbon dioxide emissions.⁴

In some instances, companies have decided to go outside of the food and beverage sphere in order to address certain environmental issues, which has led to unique partnerships for certain industry leaders. In January 2019, Tyson Foods announced a strategic partnership with the Environmental Defense Fund (E.D.F.), a non-profit advocacy group which works on issues such as restoring ecosystems, mitigating the effects of climate change and researching economic incentives to find solutions to ongoing environmental issues.⁵

The partnership was formed in order for the company to work with environmental experts in order to create efficient farming practices that both maximize the profit of certain products and have minimal negative environmental impact. The first project that the partnership has begun working on focuses on scaling 500,000 acres of land used for corn production in order to test out practices that can reduce greenhouse gas emissions, increase the profitability for farmers, and also focus on developing cloud based technology to gather data as different programs are piloted.⁶

Changing the Market

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While large companies have begun to implement new initiatives, the movement is not localized to only long-established firms. In fact, the desire for more sustainable business practices has also highlighted a need for sustainable food in the market, which newer and smaller players have been quick to take advantage of.

Several new companies are seeing impressive and rapid growth due to their innovative solutions to this emerging trend. The company Beyond Meat is one example. Beyond Meat was created in response to increased consumer demand for alternatives to meat or meat-based products. The company, founded in 2009, is known for releasing the first plant-based burger in grocery stores. In 2017, the company reported revenue of \$32.6 million. Just one year later, the company saw a 170% jump to net sales of \$87.9 million.

This year, Beyond Meat ended its third quarter with reported net sales of \$67.3 million, with its full year revenue outlook reaching \$240 million. The company has expanded beyond grocery stores and brought its products into chains such as Tim Hortons and Dunkin' Donuts.⁷

The need for sustainable food has also led to partnerships among smaller industry players and environmental researchers. In states such as California, which has experienced record droughts in the past few years, farmers and companies have needed to come up with creative solutions to improving water consumption.

The Nigiri Project, founded in Yolo County, California, is a project whereby researchers and farmers are using rice farms to encourage the growth of salmon, an endangered species in the area. Rice paddies, where grains are typically flooded, are being converted into flood plains that flow into the Sacramento River. Rather than having water immediately soak back into the earth, farmers have allowed the growth of algae near their rice plants, which has encouraged the emergence of water bugs, a food source for salmon in the Sacramento River. The project, if successful on a large enough scale, may fundamentally change the way companies conduct farming in areas where the necessary resources are becoming more finite.⁸

Legal Implications of the Changing Environment

Despite the rising popularity of alternative food and sustainability programs, they have not come without their fair share of backlash. The legal implications of

these initiatives has already begun to take effect.

In July 2019, Tyson Foods was sued by the non-profits Food & Water Watch and Organic Consumers Association (OCA), who allege that Tyson Food's marketing around its environmental stewardship and humane animal treatment constitutes false advertisement. The plaintiffs in these lawsuits also allege that undercover investigations have brought to light the fact that the company has had issues with various environmental violations and animal treatment in the past. The company has not commented on the litigation, but has made statements regarding the transparency of its business practices, pointing to its annual sustainability reports as evidence.⁹ The rise of false advertising litigation in a time where companies are under pressure to highlight their sustainability contributions leaves many in the industry with difficult decisions regarding how best to embrace the changing culture.

In some jurisdictions, the fight to preserve traditional spheres of the food and beverage market has been taken into the courts. On August 28, 2018, the Missouri Senate passed Senate Bill 627, which amended the Missouri meat advertising law and prohibited "misrepresenting a product as meat that is not derived from harvested production livestock."¹⁰

Proponents of Senate Bill 627 sought to provide protections for ranchers and cattle farmers in light of the rapid popularity of plant-based meat alternative brands such as Tofurkey.¹¹ Violations of the labeling law are considered a Class A misdemeanor, carrying fines up to \$2,000 and the possibility of one year in jail. The Missouri Department of Agriculture has published guidelines for complying with the law on its website.¹²

Turtle Island Foods, which owns the Tofurkey brand, along with the American Civil Liberties Union (ACLU) appealed the legislation on the grounds that the new laws were a violation of the company's First Amendment rights and sought a preliminary injunction against its enforcement. On October 4, 2019, a federal judge in Missouri declined to issue the preliminary injunction.¹³ Similar laws have been passed in Arkansas, Montana, South Dakota, Louisiana, and Wyoming and are currently being considered by the U.S. Department of Agriculture for application at the federal level.¹⁴

From supply chain reform, to efficient packaging, to alternative food, the industry has begun seeing an influx of ambitious plans that may dramatically change the

way business is conducted in the decades to come. The competition between longstanding practices and the pressure to change will continue to create unique legal challenges for companies, which will require equally unique solutions.

¹ <https://www.benjerry.com/values/how-we-do-business/responsibly-sourced-packaging>

² <https://www.fastcompany.com/90287777/this-key-metric-is-how-ben-jerrys-measures-success>

³ <https://www.sierraclub.org/press-releases/2019/10/ben-jerry-s-and-sierra-club-s-ready-for-100-campaign-find-sweet-spot-100>

⁴ <https://www.barillagroup.com/en/press-releases/2019-sustainability-report-barilla-focuses-recipes-inspired-mediterranean-diet-and>

⁵ <https://www.edf.org/>

⁶ <https://www.foodbusinessnews.net/articles/13169-tyson-foods-sizes-up-sustainability>

⁷ <https://www.forbes.com/sites/andriacheng/2019/07/29/beyond-meat-q2-sales-quadruples-but-replacing-meat-thats-a-different-story/#4e2e353b6f4f>

⁸ <https://caltrout.org/regions/central-california-region/the-nigiri-concept/>

⁹ <https://www.meatpoultry.com/articles/21617-non-profits-sue-tyson-foods-on-deceptive-advertising-claims>

¹⁰ <https://agriculture.mo.gov/animals/pdf/missouri-meat-advertising-guidance.pdf>

¹¹ <https://www.forbes.com/sites/tommytobin/2019/07/30/meat-alternative-label-restrictions-lead-to-lawsuits/#16f9d0247b82>

¹² <https://agriculture.mo.gov/animals/pdf/missouri-meat-advertising-guidance.pdf>

¹³ https://www.washingtonpost.com/business/judge-declines-to-block-fake-meat-law-appeal-is-filed/2019/10/04/830f66c2-e6d1-11e9-b0a6-3d03721b85ef_story.html

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