

LEGAL PROBLEM ARISING FROM ORGANIC COSMETIC*

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ABSTRACT

The rising of organic cosmetics products results in many cosmetic companies claiming that their products are “organic”. This is because the Cosmetic Act B.E. 2535 that regulates cosmetics products in Thailand does not control the use of “organic” in the label of cosmetics. As a result, many cosmetics companies do not have a clear idea of what organic cosmetics are. Subsequently, they would claim that their products are organic; even there are only 10 percent of organic ingredients in those products. And if they can use organic label freely, it can lead to false claim or misleading to the consumers. Unlike the products which are of agriculture products which are strictly controlled and monitored in regard of the use of the term “organic”. This is because there is no control measure in the use of the term “organic” for cosmetics in Thailand.

This thesis will study on the problem arising from the lack of control on the use of the term “organic” in cosmetics. Also, it will propose the measure regarding control of the use of the term “organic” in cosmetics.

Keywords: Organic cosmetics, misleading claims, consumer protection

บทคัดย่อ

ในปัจจุบัน กระแสเครื่องสำอางเกย์ตรองหรือเครื่องสำอางออแกนิค ได้รับความนิยมอย่างมากในประเทศไทย แต่ในขณะเดียวกัน ที่มีปัญหามากมายที่เกิดจากเครื่องสำอางออแกนิค โดยเฉพาะอย่างเช่นปัญหาการการโฆษณาเครื่องสำอางออแกนิค ทั้งนี้ เนื่องจากพระราชบัญญัติเครื่องสำอาง พ.ศ. 2535 ยังไม่ได้ควบคุมเครื่องสำอางออแกนิคและการโฆษณาเครื่องสำอางออแกนิค ทำให้ ผู้ประกอบการเครื่องสำอางสามารถอ้างว่าผลิตภัณฑ์เครื่องสำอางของตนเป็นเครื่องสำอางออแกนิคได้โดยปราศจากการควบคุม แม้ว่าในความ เป็นจริงผลิตภัณฑ์เครื่องสำอางดังกล่าวจะมีส่วนประกอบที่เป็นออแกนิกเพียง 10 เปอร์เซ็นต์ของผลิตภัณฑ์ เพราะในปัจจุบันยังไม่มีการ กำหนดความหมายของการโฆษณาเครื่องสำอางออแกนิค

วิทยานิพนธ์เล่มนี้ศึกษาปัญหาที่เกิดจากการขาดการควบคุมเครื่องสำอางออแกนิค และมุ่งเสนอแนวทางการควบคุมการ โฆษณาเครื่องสำอางออแกนิคในประเทศไทย

คำสำคัญ: เครื่องสำอางออแกนิค, misleading claims, คุ้มครองผู้บริโภค

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Introduction

In today world, organic cosmetics market has become one of emerging markets. It is predicted to have a value of more than 9 billion USD in 2009¹. This is due to the fact that consumers, especially women, become more aware of their appearance these days. As a result, they are becoming more conscious of the ingredients in the cosmetics and personal care products that they are putting on their body². And they opt to avoid the harmful ingredients that can cause them health issues such as cancer, tumors, allergies etc. Those harmful ingredients are such as Paraben, Benzophenone etc. Moreover, the organic trend is rising continuously in the recent year. They are much developed from the old day. As in the present, we can find are claimed to have the same quality as the conventional products in which some chemicals may be used.

The rising of organic cosmetics product leads to many cosmetic labels claiming that products are “organic” “natural,” “healthy,” and “safe”. So, this could cause confusion to a consumer who looks on a cosmetic label. The consumer could not know if the claim is true. With this topic more popular than ever, manufacturers are looking into getting certification for their cosmetics and personal care products. This is because consumers nowadays tend to think that an ingredient list is not enough as it is in a small letter and find it not accountable. Thus, they would prefer the one label that is recognizable and accountable for people when choosing organic cosmetics products. And this leads to certification system. This is to prevent the wrong use of the word “organic” in cosmetic. The organic certified cosmetics standard is firstly established by independent certifying agency called Ecocert in 2003. And the standard is a voluntary standard. This is resulted from the desire to counter with a false claim of “organic” in cosmetics and from the realizing that standards and logos are important to build consumer trust.

And the United States of America, in the past the US government does not define or investigate the use of these terms on personal care and cosmetic labels³. However, in 2011, the United States Department of Agriculture (USDA) implement organic cosmetics certification standard through the National Organic Program (NOP). That was the first time there was a governmental standard for organic cosmetics. The standard is purported to control the use of the word “organic” in cosmetics and personal care products.

As for Thailand, the rising of organic cosmetics has emerged in the recent years⁴. This is because Thai people focus more on a healthy life style. They would consume more on organic things such as food, cosmetics, body care etc. As seen from many well-known department stores importing various lines of organic cosmetics from abroad, it is also available everywhere in social network through the rising of e-commerce. This trend is called

¹ **Marketwatch**, Rodman Publishing(2009)

²**Understanding Natural & Organic Cosmetic Labels**, available at <http://www.quicklabel.com/blog/2010/11/natural-certification-for-cosmetic-labels-usa/> (last visited Oct. 3, 2014)

³*Id.*

⁴Cuyvers L. et al., **Market profile: potentials for make-up cosmetics exports of Thailand to Japan** , ASEAN Business Case Studies No 32 (August, 2013)

as the organic trend which is still considered a niche market in Thailand. Nonetheless, the organic cosmetics trend especially continues growing in Thai market following the global trend that organic market has become an emerging market instead of niche market. In another word, Thailand's cosmetic industry is moving towards organic products with lots of indigenous plants and herbs for extraction for production.

However, Thailand does not have any law to control on the use of the word "organic" labeling in the cosmetics in the present. The Cosmetics Act B.E. 2535 that regulates cosmetics products does not control the use of "organic" in the label of cosmetics. Also, Agricultural Standard Act B.E.2551 that regulates the use of the word "organic" in agricultural products such as food, but it does not extend to cosmetics.

1. Problem Arising from the Uncontrolled Use of the Word "Organic" on Cosmetics in Thailand

Presently, Thai Food and Drug Administration (FDA) is only responsible for regulating conventional cosmetics and label in Thailand but they do not regulate organic cosmetics. In addition, we only have an organic certification in agriculture products such as foods, agricultural products. Furthermore, Thailand's cosmetic industry is also moving towards organic products with lots of indigenous plants and herbs for extraction for production. This is mainly due to the fact that under Cosmetic Act B.E. 2535 which governs all cosmetics sold in Thailand has not the definition of the word " organic" for cosmetics. And this can lead to a problem as the manufacturers can use the word "organic" freely without any control on their products. The problem from the lack thereof is a false claim or a misleading of the word "organic" to the consumers. Such problem is the same as other countries who also have no control of the word "organic" in cosmetics products. Hence, that is the reason why we need to set a regulation to control the use of the word "organic" in cosmetics. And such regulation should establish a standard that provides minimum requirements for the organic cosmetic manufacturers to meet when wishing to use the word "organic" on their products' labels. Moreover, having a governmental standard concerning organic cosmetics certification in Thailand would help reduce the cost for the manufacturers who want to have an organic certified seal. This is because they can send their products for an inspection in Thai laboratory which is cheaper than sending their product abroad for an inspection.

2. Legal Problem Arising from Organic Cosmetics in Thailand

The lack of law controlling the use of "organic" on cosmetics' label encourages the cosmetics companies to use organic label freely, this can lead to false claim or misleading to the consumer. Although, concerning false claim or misleading of organic cosmetics, Cosmetic Act B.E. 2535 has a provision for such claim in cosmetics. That provision is Section 37. However, it is not directly stated in the provision but it refers to the Consumer Protection Act B.E. 2522 for the false claim or misleading advertising instead. The Consumer Protection Act B.E. 2522 that can apply to cosmetics through Section 37 of Cosmetic Act B.E. 2535; has a provision of law in Section 22 preventing the false claim or misleading advertising. However, as there is no definition or a standard to provide a guideline of what organic

cosmetics are. This can lead to a loophole of law of which cosmetics companies can take advantage. Moreover, regarding Section 22, the false claim or misleading advertising is proven to be difficult for the consumers to find an evidence to prove otherwise from the cosmetics companies. Thus, we can say that the lack of efficiency of Section 22 in the Consumer Protection Act B.E. 2522 together with the lack of any control measure on the use of the word “organic” on cosmetics products see many cosmetics companies in Thailand still use the word “organic” on cosmetics’ label without having to prove the claim. And if this continues without any measure to encounter the problem, it can cause many harm to organic cosmetics market. For example, the consumers would lose trust and not continue to buy organic cosmetics. This could have a negative effect on organic cosmetics industry whether domestic market, import sector or export sector. Thus, Thailand as a potential important export and market of organic cosmetics needs to establish a measure on organic cosmetics. This is to build creditability to our organic cosmetics products. It is because consumers nowadays are rich with information about products from traditional media and online media. As a consequence, they can be educated on product ingredients, manufacturing process and product packaging. These factors can place an importance on buying decision. Hence, having something to ensure the consumer for the authenticity of the organic claims such as organic cosmetics standard is highly recommended.

3. Foreign Control Measures on Organic Cosmetics

3.1 The United State of America (USA).

USDA NOP Standard

In 2011, the United States Department of Agriculture (USDA) through the National Organic Program (NOP) firstly established the organic regulation concerning the implementation of organic cosmetics certification standard. This is the first time that a governmental body got involved in regulating the use of organic in cosmetics.⁵ The USDA National Organic Program (NOP) standard is introduced as the first legislative standard concerning organic cosmetics in this world.⁶ Prior to USADA NOP standard, the word "organic" is not properly regulated on personal care products (such as toothpaste, shampoo, lotion, etc.)⁷. The products that underwent USDA NOP standard’s process is eligible to adhere the USDA label on its products.

However, the USDA has no authority over the production and labeling of cosmetics, body care products, and personal care products that are not made up of agricultural ingredients, or do not make any claims to meeting USDA organic standards.

3.2 Europe

COSMOS Standard

⁵ Program, United States Department of Agriculture Agricultural Marketing Service, **the National Organic Program** , available at <http://www.ams.usda.gov/NOP>(last visited Nov. 7, 2014)

⁶ *Id.*

⁷ *Id.*

COSMOS is a standard created in early 2010 by a group of six European certification bodies: Ecocert along with other 5 certification bodies: Bioforum in Belgium, BDIH in Germany, COSMEBIO in France, ICEA in Italy and SOIL ASSOCIATION in UK.⁸ The purpose is to the establishment of a new cosmetic certification in order to create one standard that is internationally recognized for natural and organic cosmetics and harmonizing the sector through defining minimum requirements and common definitions for organic and natural cosmetics.⁹ The COSMOS standard will identify criteria regarding the products' origin, processing, composition (ingredients), packaging, labeling and disposal. At the present a COSMOS logo is not yet available.

3.3 South Korea

The Regulation on Organic Cosmetics Standard

The Korean Ministry of Food and Drug Safety (MFDS) passed Regulation 2014-20, the Regulation on Organic Cosmetics Standard, which will go into effect on June 24, 2015.¹⁰ This is in an attempt to encounter the problem from the lack of detailed criteria for the organic cosmetics causing misrepresentation and exaggerated advertising.¹¹

4. Comparison of the Foreign Measures on Organic Cosmetics

4.1 The Composition of organic cosmetic product

It is found that the composition part of the 3 measures is similar; the requirement of at least 95% of organic origin ingredient.

4.2 Calculation rules for organic percentage

It is found that the USDA NOP standard has the calculation that covers call kind of product's form whether in solid, liquid or mix of both. COSMOS standard does not have a clear calculation method of the mixture of liquid and solid products. And the South Korea's organic cosmetics standard calculates based only on weight ratio. Thus, the calculation method of USDA NOP standard is the most complete one. And the USDA NOP standard can be a guideline of percentage calculation for Thailand.

4.3 Label

It is found that USDA NOP standard seems to be the only standard that provides logo unlike COSMOS standard and organic cosmetics standard that do not have a logo. The logo can be beneficial to the consumers. This is because the organic cosmetics companies can have a right to use the agency organic certified logo labeled on their products when their products meet with the requirements set by the standard.

4.4 The Authorized person

⁸Maurizio Canavari, Rungsaran Wongprawmas et al, **The Perception of European operators towards Thai natural skin care products**, 1 (2011)

⁹*Id.*

¹⁰*Id.*

¹¹ Karen Yarussi-King , Asia-Pacific Update on Korean Organic Standards (2015)

The South Korea's Organic Cosmetics standard only has a governmental body involved. While the USDA NOP standard and COSMOS standard can have accredited certifying agencies which are of private agencies. The difference between USDA NOP standard and COSMOS standard is that the accreditation of USDA NOP standard must be done by the governmental body. Meaning, there is a governmental body under USDA NOP to monitor if the accredited certifying agency follows the requirements of the standard. Hence, the USDA NOP standard seems to have a better provision to be a guideline for Thailand concerning the authorized person.

4.5 The Imported Product

It can be seen that the equivalent arrangement in USDA NOP standard is of a national treatment principle. Meaning, it is between states. Hence, private certifying agency such as COSMOS cannot have the equivalent arrangement with other countries. The equivalency arrangement allows two differing standards, regulations or procedures to remain as is, but treats them as if they are the same as long as they meet the same results and policy objectives even if through different means.¹² The benefit of the equivalent arrangement is that imported organic products certified in compliance with an equivalent foreign regulatory regime would not require re-certification to the domestic standards by a domestically accredited certifying agency. This helps to reduce the time of importation process.¹³

5. Measure concerning Organic Cosmetics Standard in Thailand

The measure using in the USDA NOP standard and COSMOS standard to assure the standard being followed is a certification system. When compared the 3 measures using in the USA, EU and South Korea, we can see that USDA NOP standard is a certification provided by government whereas COSMOS standard is a certification provided by a private certifying agency. In contrast, the South Korea's organic cosmetics standard does not offer a certification. The organic cosmetics standard also does not provide any logo signified that the cosmetic products met the requirements of the standard. Leading, the consumer in South Korea cannot know whether the organic cosmetic products are met with the standard.

The certification can serve as an extra guarantee for products. Moreover, the certified organic cosmetics are different from organic cosmetics. This is because without certification, a product can contain just one or two organic ingredients and the rest might be chemicals or synthetically derived compounds. This is the reason why many consumers will not only be drawn to products that are certified to be organic; they want the security of knowing the label's claims are genuine. Thus, now, the best and easiest way to establish whether a cosmetic product is organic for consumers is to look for a certified label.

Thailand can adopt these three foreign measures on the organic cosmetics as a guideline to establish our own measure to solve the problem arising from organic cosmetics.

¹² **Canada - US Organic Equivalence Arrangement – Overview**, available at <http://www.inspection.gc.ca/food/organic-products/equivalence-arrangements/us-overview/eng/1328068925158/1328069012553> (last visited Aug. 6,2015)

¹³ *Id.*

Conclusion

Presently, Thailand has not regulated the labeling of “organic” in cosmetics product. This is as Cosmetic Act B.E.2535 only regulates conventional cosmetics but not organic cosmetics. Moreover, the consumer protection on advertising of cosmetics products under Cosmetic Act which refers to Consumer Protection Act B.E. 2522, Section 22 cannot also effectively prevent the misuse of the term “organic” in cosmetics products. This is as there is no definition organic cosmetic. The cosmetics companies then have no idea of what organic cosmetics are. This leads to the problem that the cosmetics companies can claim the word “organic” freely in their products. This is why Thailand should establish its own measure concerning organic cosmetics. The measure needs to be of pre-market control measures to achieve effectiveness in controlling the using of the term “organic” in cosmetics.

Recommendations

Solutions based on these three foreign measures on the organic cosmetics are as follows;

The issue of Organic Cosmetic Standard

Minister of Public Health under the Cosmetic Act B.E. 2535 cannot exercise an authority for other reasons but for public health protection as per Section 5. And Cosmetic Committee can only submit opinion to the Minister concerning cosmetics; the Committee cannot provide any measurement on cosmetics. For these reasons, we should amend Section 5 of the Cosmetic Act B.E.2535 to grant authority to the Minister to provide measurement for other reasons deemed necessary concerning cosmetics not only for public health protection. This is by means of establishing the organic cosmetics standard.

The Enforcement of Standard

The Thai FDA has responsibility concerning organic cosmetics standard as a competent authority. This is as the standard is of a pre-market control of cosmetics. And the Thai FDA has duty to monitor and enforce the pre-market control of cosmetics in Thailand. Subsequently, the Thai FDA must assure the requirements of the standard are conformed to.

Standard concerning Organic Cosmetics

For this matter, before the establishing of any measure concerning organic cosmetics, there should set the standard for organic cosmetics. This is as the term “organic” using in other products such as food is different from cosmetics products. In addition, cosmetics products require much more complex process of production. Leading, we should set a specific standard for organic cosmetics. The standard should set more requirements as guideline for the cosmetics companies concerning organic cosmetics. For example, to be eligible for organic claimed, a cosmetic product must contain at least 95 percent organic ingredients. A label with a percentage indicating how much of the product qualifies as organic. In contrast, any product containing less than 95 percent organic ingredients cannot claim to be organic. Also, the organic cosmetics products must also be attach the certified logo to demonstrate compliance with the standard.

The standard would serve as a pre-market control measures applied to organic cosmetics that proved to be the most effective in a long term. For a pre-market control

measure, this can be achieved by pre-market activities before introducing products into the market.

Establishment of Certification System

In addition to this, it must be mentioned that standard will set pre-market obligations which, as explained previous, are very significant in controlling what may be used in cosmetics. Thus, we can say that the consumers are better protected by the exercise of pre-market controls. Also, we need to establish a certification system to serve as a measure to ensure that product is in compliance with the standard. It is crucial for ensuring the legitimacy of the claim.¹⁴ Thus, the standard on organic cosmetic products requires a measure to ensure the standard is complied with.

Also, the most suitable certification system for organic cosmetics for Thailand is a government standard. This is because it offers a single standard. On contrary, the standard from independent agency could cause confusion and mistrust to the consumers.

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