



## TRADEMARK VALUATION AND MARKET ANALYSIS

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### 1. INTRODUCTION

As an economic expert active in the area of intellectual property, I was asked recently for a valuation of the trademark of a line of green food supplement products bearing the brand label **New Health** (name is fictitious). The valuation of the trademark was part of an asset transfer to another rights owner. I developed for the analysis a hybrid approach that combined the examination of competitive prices in the market and an estimated royalty rate that was based on license rates from market

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competitors. I believe that this approach can at times be used in place of, but preferably in combination with, other techniques now commonly used in trademark analysis.

## **2. THE COMPETITIVE MARKET FOR GREEN FOOD SUPPLEMENTS**

The **New Health** product line featured green-food supplements that the seller made available to some 2500 different buyers at retail and online stores. Green food supplements are derived from a number of herbal sources known in the public domain; no recipe is protected by a patent. Consequently, price competition among producers of green supplements is vigorous, especially at online sites.

Even in competition, prices of differentiated goods nonetheless may differ from one another due to, *inter alia*, brand reputation and the associated worth of their respective trademarks. A skillful expert may use price data from the competitive market to determine the worth of a particular trademark.

To value the New Health mark, I then examined online prices of **New Health** and several other green competitors – **Miracle Greens**, **Kyo-Green**, **Nutra Greens**, **Green Vibrance**, **Magma Plus**, and **Greens Plus** – that appear on the same websites. Product prices noticeably varied depending on container size and purchase brand. For example, the average price per ounce (PPO) of a 15.9 oz. bottle at **New Health** averages \$1.72; the

respective PPO of an 18.0 bottle is \$1.67. By contrast, the PPO of a 9.4 oz. bottle from **Greens Plus** is \$4.25, while the PPO of a 5.3 oz. bottle at **Kyo-Green** is \$3.66.

*Of all brands examined, **New Health** had the lowest prices per ounce. This is initial evidence that the value of its trademark is zero.*

### 3. IDENTIFYING A LOW PRICE COMPETITOR

To examine this possibility more closely, I compared prices at **New Health** with those of its nearest low-price competitor, **Green Vibrance**, which offered online products of similar quality. Based on online price data, Table 1 displays the average container price and the related price per ounce (PPO) of bottles of different product weights produced by **New Health** and **Green Vibrance**.

**Table 1: Comparison of Prices for New Health and Green Vibrance**

	Container Prices			
	11.5	15.9	18.0	23
<b>New Health</b>	NA	<b>\$27.51</b>	<b>\$30.06</b>	NA
<b>Green Vibrance</b>	<b>\$28.18</b>	NA	NA	<b>\$50.60</b>

	Price per Ounce			
	11.5	15.9	18.0	23
<b>New Health</b>	NA	<b>\$1.73</b>	<b>\$1.67</b>	NA
<b>Green Vibrance</b>	<b>\$2.45</b>	\$2.35	<i>\$2.31</i>	<b>\$2.20</b>

The bold number entries for **New Health** and **Green Vibrance** are based on actual price data for the identified producer. Due to the practice of volume discounting, larger bottles for both producers evidently have lower PPOs. The italicized entries in the lower table for **Green Vibrance** – i.e., \$2.31 and \$2.35 -- are linear interpolations of the two endpoints of the row -- i.e., \$2.20 and \$2.45 – based on differences in container weight. I did this interpolation of **Green Vibrance** prices in order to standardize the container weights in order to compare prices at **New Health** and **Green Vibrance**.

*Comparing bottle weights at 15.9 and 18.0 ounces, it is clear that **New Health** offers the lowest price product. This is continuing evidence that supports the hypothesis that **New Health** has a trademark value of zero.*

#### 4. MEASURING THE TRADEMARK PREMIUM

While **Green Vibrance** and **New Health** have the lowest prices of all sellers that I sampled, it is still possible that both trademarks have a positive value that would be implicated in an asset transfer.

To discern whether the trademark for **New Health** has any value, we can compare prices at **New Health** with net prices at **Green Vibrance** *after deducting for the royalty associated with the Green Vibrance mark*. A net price for **Green Vibrance** would presumably be the value of an *unbranded product without a trademark premium – i.e., a generic*. If **New Health** prices are at or below these generic prices, we have some further indication that the **New Health** mark is worth zero.

We can best discern the value of the **Green Vibrance** premium that would be deducted by learning of any percentage licensing royalty involving the use of the **Green Vibrance** mark. The percent royalty could then be subtracted from the present **Green Vibrance** price to obtain the price of the residual element without any brand premium. However, no such public information on licensing rates for **Green Vibrance** was available.

In the absence of a direct benchmark from **Green Vibrance**, I did learn that **ProGreens**, a premium producer of green supplements, had been able to license its name

in 2000 to **Allergy Research Group** for a maximal royalty payment of 8.0%.<sup>1</sup> This 8.0% royalty for **ProGreens** would expectedly exceed the appropriate royalty value of its low-price competitor, **Green Vibrance**. If the maximal royalty value of 8.0% is deducted from any **Green Vibrance** prices, the remaining net price for **Green Vibrance** is a *minimal estimate of the price of an unbranded competitor or generic*. If **New Health** prices are yet below this generic price, we may reasonably conclude that brand name of **New Health** and its associated trademark are zero.

## 5. COMPARING NEW HEALTH WITH THE GENERIC

If adjusted for an imputed trademark royalty at **Green Vibrance** of 8.0%, Table 1 is amended as follows:

**Table 2: Price per Ounce for New Health and an Estimated Generic**

	11.5	15.9	18.0	23
<b>New Health</b>	NA	<b>\$1.73</b>	<b>\$1.67</b>	NA

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<sup>1</sup>The basis for this is a March, 2000 license agreement entered between **Allergy Research Group/Nutricology** and the original trademark owner, Jim Cassidy, which concerned the rights to use his **ProGreens** mark. (<http://www.secinfo.com/dV3p8.227x.htm#12fd>). Under the terms, Nutricology agreed to pay Cassidy a variable percent royalty based on the net sales of products sold bearing his trademark. Percent royalty amounts were designed on a sliding scale based on percent of net sales. Amounts due escalated at threshold levels -- 4.5 % for first \$170 thousand, 6.75% for next \$170 thousand, and 8.0% for amounts above \$340 thousand.

**Generic**                      **\$2.25**              \$2.16              \$2.13              **\$2.02**

The first row in Table 2 presents the same PPO for **New Health** as Table 1. The second price in Table 2 represents a putative generic; i.e., the PPO of **Green Vibrance** from Table 1, *less an 8% trademark royalty*.

Comparing the **New Health** prices with the adjusted prices for **Green Vibrance**, it is clear that **New Health** prices are still the lower of the two. Based on this comparison in Table 2, we have reasonable evidence that prices at **New Health** are no higher than estimated prices of an unbranded generic. This is strong evidence that the value of the **New Health** trademark is zero.

## **6. CONCLUSION**

The proffered hybrid valuation that would compare and adjust market prices and royalty rates should be compared with other techniques that experts commonly use to estimate the worth of a trademark. As an alternative procedure, a valuation expert may attempt to discern the total value of a company's intangible assets, and so apportion this total to each of its contributing components. The composite for intangible assets is generally measured by subtracting the book or replacement value of tangible assets from

the net value of the company. This procedure assumes that book value accurately reflects current market value of these assets, an assumption that is often incorrect.

Once deduced, the remaining intangible assets -- defined by the *Financial Accounting Standards Board* as “non-financial fixed assets that do not have physical substance but are identifiable and are controlled by the entity through custody or legal rights” -- may constitute a wide range of contributing elements -- trademarks, patents, copyrights domain names, trade dress, trade secrets, professional and managerial abilities, mineral rights, customer bases, inter alia,. Since the values of each of these components are intangible themselves, the resulting decomposition itself could be quite inexact or even arbitrary.

As an alternative, an expert may determine a market benchmark by comparing percent licensing royalties drawn from other comparable products in the market. The comparison of market royalties can be quite advantageous if a similar product can be found. However, useful public information regarding licensing royalties is often unavailable. It is certainly not appropriate to assign directly to a trademark royalty a value based on a dissimilar product, or collect royalty data on a wide range of products and simply strike the average or medium as the reliable measure of the trademark in question; a reasonable royalty award “cannot stand solely on evidence which amounts to

little more than a recitation of royalty numbers, one of which is arguably in the ballpark of the jury's award."<sup>2</sup>

If possible, the approaches identified above should be used to complement one another. At other times, an astute expert must select the appropriate technique as it applies to the context of the particular case, the nature of market competition, the data available for the analysis, and its congruence with any ruling in common law.

#### ABOUT THE AUTHOR

**Michael A. Einhorn** ([mae@mediatechcopy.com](mailto:mae@mediatechcopy.com), <http://www.mediatechcopy.com>) is an economic consultant and expert witness active in the areas of intellectual property, media, entertainment, damage valuation, licensing, antitrust, personal injury, and commercial losses. He received a Ph. D. in economics from Yale University. He is the author of the book *Media, Technology, and Copyright: Integrating Law and Economics* ([Edward Elgar Publishers](#)), a Senior Research Fellow at the [Columbia Institute for Tele-Information](#), and a former professor of economics and law at Rutgers University. He has published over seventy professional and academic articles and lectured in Great Britain, France, Holland, Germany, Italy, Sri Lanka, China, and Japan.

In the technology sector, Dr. Einhorn worked at Bell Laboratories and the U.S. Department of Justice (Antitrust Division) and consulted to General Electric, AT&T, Argonne Labs, Telcordia, Pacific Gas and Electric, and the Federal Energy Regulatory Commission. He has advised parties and supported litigation in matters involving [patent damages](#) and related valuations in semiconductors, medical technologies, search engines, e-commerce, wireless systems, and proprietary and open source [software](#).

Litigation support involving media economics and [copyright damages](#) has involved [music](#), movies, television, advertising, branding, apparel, architecture, fine arts, video games, and photography. Matters have involved Universal Music, BMG, Sony Music

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<sup>2</sup> *Lucent Techs, Inc. v. Gateway, Inc.* 580 F. 3d 1301 (Fed. Cir. 2009)

Holdings, Disney Music, NBCUniversal, Paramount Pictures, DreamWorks, Burnett Productions, Rascal Flatts, P. Diddy, Nelly Furtado, Usher, 50 Cent, Madonna, and U2.

Matters involving trademark damages have included the Kardashians/BOLDFACE Licensing, Oprah Winfrey/Harpo Productions, Madonna/Material Girl, CompUSA, Steve Madden Shoes, Kohl's Department Stores, *The New York Observer*, and Avon Cosmetics. Matters in publicity right damages have involved Zooey Deschanel, Arnold Schwarzenegger, Rosa Parks, Diane Keaton, Michelle Pfeiffer, Yogi Berra, Melina Kanakaredes, Woody Allen, and Sandra Bullock.

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## **ADDITIONAL ARTICLES**

See also [http://mediatechcopy.com/?page\\_id=71](http://mediatechcopy.com/?page_id=71)

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