

# Likelihood of Eco-Friendly Confusion: Greenwashing and the FTC “Green Guides”

By Timothy C. Bradley

As the use of green trademarks and environmental marketing in general continues to expand, companies have come under fire for making dubious claims regarding the supposed environmental friendliness of their products. The Federal Trade Commission (FTC) created the “Green Guides” in 1992 to combat untruthful environmental marketing, and more recently has proposed revisions to strengthen the Green Guides. From reviewing these proposed revisions and recent enforcement actions by the FTC, insights can be gained regarding the future of the fight against greenwashing.

## Greenwashing

As consumers become increasingly aware of the environmental impact of their buying decisions, many concerned buyers are becoming more discerning in their buying decisions, and are seeking products that are organic, recycled, emissions-reducing, and more. Not surprisingly, savvy marketers are quick to capitalize on this increasing wave of concerned buying by touting the “green” aspects of their products.

Although environmental marketing has been on the rise since the 1980s, the increase seems to be particularly pronounced as of late. TerraChoice, an environmental marketing firm, performs an annual study of green marketing. TerraChoice found that between 2008 and 2009 there was an estimated 79% increase in green product offerings, and between 2009 and 2010 there was an additional 73% increase. In some stores visited by TerraChoice, there was an over 500% increase in green products offerings between 2009 and 2010.<sup>1</sup>

As green products abound, the use of green trademarks and the filing of registrations for eco-friendly marks has also increased. Between 2006 and 2007, for example, filing of eco-friendly marks at the United States Patent and Trademark Office (USPTO) more than doubled, from 1,100 to over 2,400 applications.<sup>2</sup> Many of these marks include the words “green,” “earth,” “eco,” or “organic.” The blog SustainableMarks.com tracks this trend, listing the various and numerous eco-friendly trademarks published for opposition by the USPTO each week—and they are numerous.

As green marketing has proliferated, so too have accusations of “greenwashing,” which refers to the inaccurate use of environmental claims to market products or services. TerraChoice has defined “Seven Sins of Greenwashing” (see Figure 1) to help consumers identify incidents of greenwashing in the marketplace.<sup>3</sup>

So how severe is the greenwashing problem? TerraChoice performs an annual greenwashing study, and in their most recent 2010 analysis found that over 95% of green products violate one or more of the seven sins.<sup>4</sup> The FTC, although not providing hard numbers, has also implicitly recognized the problem, recently bringing a set of claims for untruthful environmental marketing against a number of retailers

after a hiatus of more than 10 years during which actions were brought to enforce the “Green Guides,” and perhaps most significantly proposing revisions to strengthen the “Green Guides.”

## The “Green Guides”

The FTC, which monitors deceptive advertising, published the first “Guides for the Use of Environmental Marketing Claims,” also known as the “Green Guides,” in 1992. Part of the impetus behind the creation of the Green Guides was the recognition of the following trends: (1) consumers would avoid purchasing a product because they believed the product or package was environmentally harmful, (2) consumers would purchase a product specifically because of environmental advertising or labeling, and (3) consumers were willing to pay more for products perceived as environmentally preferable.<sup>5</sup>

Prior to introducing the Green Guides, the FTC had investigated individual cases of potentially false environmental advertising, looking into supposedly biodegradable plastic bags and diapers, and supposedly ozone-friendly aerosol sprays. The FTC determined that providing guidelines for environmental marketing would be a more effective approach, and the Green Guides were born.<sup>6</sup> The Green Guides, although not statutory law, are the FTC’s administrative interpretation of § 5 of the FTC Act, which prohibits unfair or deceptive acts or practices.<sup>7</sup> Thus, the Green Guides indicate how the FTC will apply § 5 and serve as guidelines for green marketers.<sup>8</sup> Current FTC chairman Jon Leibowitz has summarized the Green Guides as being “really about trying to cut through the confusion that consumers have when they are buying a product and that businesses have when they are selling a product.”<sup>9</sup>

The FTC sets forth four main principles in the Green Guides:

1. Any qualifications or disclosures should be sufficiently clear, prominent, and understandable to prevent deception;
2. Environmental claims should clearly indicate to what they refer (e.g., a product, the product’s packaging, a service or portion of a component of the product, etc.);
3. Environmental claims should not be presented in a manner to overstate their environmental attribute or benefit, expressly or by implication; and
4. Comparative statements should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception.<sup>10</sup>

Although the FTC categorizes greenwashing offenses by

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Figure 1

## THE TERRACHOICE “SEVEN SINS OF GREENWASHING”

SIN	DESCRIPTION	EXAMPLE
I. SIN OF THE HIDDEN TRADE-OFF	Focusing on narrow set of attributes and not a product as a whole	Focusing on a product’s sustainable harvesting while ignoring its pollution
II. SIN OF NO PROOF	Making an environmental claim that cannot be substantiated	Claiming to have a percentage of post-consumer recycled content without any evidence
III. SIN OF VAGUENESS	Making a claim that is poorly defined or overly broad	Calling a product “all natural” while ignoring naturally occurring, yet toxic ingredients such as mercury
IV. SIN OF IRRELEVANCE	Making a claim that is truthful but unimportant	Calling a product “CFC-free” when CFCs are banned by law
V. SIN OF LESSER OF TWO EVILS	Making a claim that is true within one category, but distracts a consumer from other harmful aspects of the product	Organic cigarettes
VI. SIN OF FIBBING	Making completely false claims	Falsely claiming to be Energy Star certified
VII. SIN OF WORSHIPPING FALSE LABELS	Giving the impression of a third-party endorsement where no endorsement exists	Using fake certifications or endorsements

type of claimed environmental benefit rather than generically by type of offense, both the Green Guides and the Seven Sins of Greenwashing from TerraChoice incorporate many of the same principles. The Green Guides were introduced in 1992, were revised in 1996 and 1998, and now additional revisions have been proposed.<sup>11</sup> The following is a summary of the proposed changes:

- **Carbon Offset Claims:** This is a new section stating that if carbon offsets will not occur for two years or longer, a marketer cannot market the offsets as already having occurred or occurring in the immediate future. Also, marketers cannot claim that a carbon offset represents an emission reduction if the reduction or the activity causing the reduction was required by law.
- **Renewable Energy Claims:** This is a new section prohibiting unqualified renewable energy claims if power derived from fossil fuels is used to manufacture or power any part of the advertised item or service. This section also prevents marketers from representing an item or service as using renewable energy if the marketer generates renewable electricity but sells renewable energy certificates for all of that electricity.
- **Renewable Materials Claims:** This is a new section requiring marketers to qualify renewable materials claims with specific information about the renewable material in question, and to also qualify such claims if an item is not made entirely with renewable materials.
- **General Environmental Benefit Claims:** Under the previous Green Guides, marketers were entitled to make unqualified general claims (e.g., “green,” “eco-friendly”) if those claims were able to be substantiated. Under the proposed revisions, however, unqualified general claims are not permitted, and any general benefit claims must be accompanied by qualifications that are clear and prominent and that limit the claim to a specific benefit.
- **Degradable Claims:** Previously, items described as being degradable (biodegradable, photodegradable, etc.) had to decompose “within a reasonably short period of time” after customary disposal. The proposed revisions explicitly state that items must decompose within one year after customary disposal.
- **Compostable Claims:** Previously, items described as being compostable had to break down in a “timely manner.” Under the proposed revisions, an item marked as compostable must break down in approximately the same time as the materials from which it is composed.
- **Free-of and Non-Toxic Claims:** Previously, free-of and non-toxic claims were not permissible if an item had substances that posed the same or a similar environmental risk as the substance not present. However, under the proposed revisions, these claims also are prohibited if the substance in question has never been associated with the product category.
- **Recyclable Claims:** Previously, unqualified claims of recyclability for a product or package could be made if the entire product or package, excluding minor incidental components, was recyclable. Now, unqualified recyclable claims are acceptable only if a “substantial majority” of the population has access to the required recycling facilities, and qualification is required only if a “significant percentage” of the population or less have access to the required recycling facilities.
- **Certifications and Seals of Approval:** The FTC has clarified that unqualified certifications/seals should be accompanied by clear and prominent language explaining usage of the certification/seal, even if that certification is from a third party.

Disappointingly, the proposed revisions still do not address

the use of the terms “organic,” “sustainable,” or “natural.” This stance is understandable from the vantage point of the FTC, as a definition for “natural” or “sustainable” is hard to pin down, and the USDA already regulates the use of the term “organic” for all agricultural products.<sup>12</sup> However, these terms are used extensively and loosely in the marketplace, and by leaving these terms outside the scope of the Green Guides it seems likely that they will continue to cause confusion. (For a detailed discussion on this topic, see the article entitled “It’s Not Easy Being Green: Use of the Terms ‘ORGANIC,’ ‘SUSTAINABLE,’ and ‘NATURAL’ in Trademarks and Advertising” in this issue of *Landslide*.)

### **Enforcement of the “Green Guides”**

In the 1990s, the FTC brought over 20 actions to enforce the Green Guides. These actions addressed a variety of environmental claims, including claims of being “recycled,” “recyclable,” “ozone friendly,” “degradable,” and “environmentally safe.” The products in question in these cases included plastic trash bags, disposable diapers, paper and plastic grocery store bags, a snow-melting chemical, and various aerosol sprays.<sup>13</sup>

In 2009, after a hiatus of over 10 years during which no claims were brought to enforce the Green Guides, the FTC initiated two sets of actions to enforce the Green Guides, the first of which was brought against retailers making biodegradable claims, and the second set of which was brought against retailers marketing rayon products as bamboo. As will be described below, all of these actions have since settled, with the defendants agreeing to comply with the FTC’s demands.

### **“Biodegradable” Actions**

The defendants in the “biodegradable” actions were Kmart, Tender Corp., and Dyna-E International. Kmart was marketing disposable plates using the mark “American Fare,” Tender Corp. was marketing disposable disinfectant wipes using the mark “Fresh Bath,” and Dyna-E International was marketing beach towels using the mark “LIGHTLOAD.” All three defendants had included the phrase “biodegradable” on their product packaging.

The FTC alleged that each of these defendants was inaccurately calling its product biodegradable in violation of § 5 of the FTC Act. More specifically, the FTC alleged that each party had neglected to define or quantify the “biodegradability” of its product, and that over 91% of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities, where the items in question would not completely break down “within a reasonably short period of time” (as required by the Green Guides). Additionally, for Tender Corp.’s wipes, the FTC alleged that it was unclear whether the “biodegradable” indication on the product packaging referred to “the product, its packaging, or a portion or component of the product or packaging.”<sup>14</sup>

All three parties have since settled, agreeing to refrain from making misleading biodegradability product claims in the future, and also agreeing to maintain copies of and let the FTC inspect their future advertising materials having any indication of biodegradability.

### **“Bamboo” Actions**

Shortly after initiating the “biodegradable” actions described above, the FTC initiated actions against four companies that were marketing rayon textile products as bamboo. The defendants in the bamboo actions were Sami Designs, CSE, The M Group (doing business as Bamboosa), and Pure Bamboo. To market their rayon textile products, Sami Designs was using the marks “ecoKashmere” and “Eco Scrubs,” CSE was using the mark “Bamboo Comfort,” The M Group was using the mark “Bamboosa,” and Pure Bamboo was using its company name as a mark.

As the FTC explained in its complaints, rayon is a fiber manufactured by taking purified cellulose from a plant source (such as bamboo), converting it to a viscous solution by dissolving it in one or more chemicals, such as sodium hydroxide, and then forcing the chemical solution through spinnerets and into an acidic bath where it solidifies into fibers. Regardless of the plant source used, the FTC explained, “the manufacturing process involves the use of hazardous chemicals, and the resulting fiber was rayon and not cotton, wood, or bamboo fiber.”<sup>15</sup>

The FTC alleged that the defendants: (1) had priced their textile products at a premium compared to similar products in the marketplace; (2) had made various claims concerning the fiber content, biodegradability, and anti-microbial characteristics of their allegedly bamboo textile products; and (3) were marketing their rayon products to lead customers to believe that the textiles included actual bamboo fibers.

As with the biodegradable claims, all four defendants have since settled. Each of the four defendants agreed to refrain from representing its product as being made of bamboo or bamboo fiber, and as retaining the anti-microbial properties of any material from which they are made. Each party also agreed to maintain and let the FTC inspect its future marketing materials.

### **“Greenwash”**

- The inaccurate use of environmental claims to market products or services.
- A superficial or insincere display of concern for the environment that is shown by an organization.<sup>16</sup>
- An environmental claim that is unsubstantiated (a fib) or irrelevant (a distraction).<sup>17</sup>

### **“Greenwashing”**

- Expressions of environmentalist concerns especially as a cover for products, policies, or activities.<sup>18</sup>
- When companies come out with green claims, such as manufacturing eco-friendly, biodegradable, recyclable products even if their core businesses may be detrimental to the environment.<sup>19</sup>
- What corporations do when they try to make themselves look more environmentally friendly than they really are.<sup>20</sup>

Subsequently, in early 2010, the FTC warned 78 additional retailers to stop labeling rayon products as bamboo.<sup>21</sup> Those on the warning list included both large and small retailers, such as Target, Wal-Mart, Amazon.com, Zappos.com, Sears, Nordstrom, JC Penney, and Costco Wholesale. Thus, it appears that additional bamboo enforcement actions may be on the horizon.

### What Now?

Now that proposed revisions to the Green Guides have been released and the FTC has brought a series of recent claims to enforce the Green Guides, what effect will this have on the fight against greenwashing?

From a trademark perspective, the USPTO is likely to keep issuing green trademarks that may ultimately be used for greenwashing. Marks used for greenwashing are not always deceptive on their face, but rather may be either deceptive in application or used in connection with deceptive packaging. The “Bamboosa” mark, for example, was registered for the goods and services of “[c]lothing, namely, shirts, shorts, pants, socks, undergarments, sashes, wrap.”<sup>22</sup> However, it is only when the mark is used in connection with marketing materials extolling the virtues of bamboo that greenwashing really seems to occur. Thus, if an examiner is presented with a vaguely “green” mark, unless a submitted specimen or the goods and services for that mark make a clearly misleading environmental claim, it may simply not be possible for the examiner to make a rejection based on the mark being deceptively misdescriptive.

Environmental marketing firms such as TerraChoice and EnviroMedia have been active in bringing attention to the issue of greenwashing, and their actions seem to be helping. EnviroMedia is partially responsible for the Greenwashing Index, where consumers can report and rate the relative truthfulness of perceived greenwashing of various print and video ads.<sup>23</sup> TerraChoice, as discussed above, produces the annual Sins of Greenwashing report, and although it does not identify offenders by name, it does help consumers identify trends in untruthful environmental marketing. By keeping advertisers accountable, and by helping concerned buyers make informed decisions, these groups seem to be making a difference. TerraChoice, for example, reports that while it identified less than 1% of green products as being sin free in 2007, it identified 4.5% of green products as being sin free in 2010, with big box retailers having the largest percentage of legitimately green claims.

The recent wave of Green Guides enforcement actions and the recent FTC warnings to retailers, coupled with the proposed revisions to the Green Guides, are encouraging signs that the FTC is getting more serious about addressing greenwashing. However, although the proposed revisions do seem to offer some improvements, enforcement of the Green Guides is what really matters. As demonstrated by the lack of any claims being brought for over 10 years preceding 2009, enforcement of claims can vary greatly depending on who is in control in Washington, and although the recent push to revise and enforce the Green Guides is encouraging, enforcement may simply not be a priority for future administrations.

### Conclusion

It is certainly wise to make clients aware of the Green Guides and the recent proposed revisions to the Green Guides.

Although greenwashing is something more likely to be encountered in the marketing and advertising realm, for intellectual property practitioners involved with trademark prosecution or green technology patent prosecution, it would be beneficial to at least make your clients aware of the Green Guides. Particular attention should be paid to the “Sin of Vagueness” because that appears to be of particular concern to the FTC, as seen in the biodegradable and bamboo actions described above. Deceiving customers should always be avoided, and following the Green Guides is a great step towards achieving that goal. ■

### Endnotes

1. *TerraChoice 2010 Sins of Greenwashing Study Finds Misleading Green Claims on 95 Per Cent of Home and Family Products*, TERRACHOICE 11 (Oct. 26, 2010), <http://www.terrachoice.com/files/TerraChoice%202010%20Sins%20of%20Greenwashing%20Release%20-%20Oct%2026%202010%20-%20ENG.pdf> (last visited August 1, 2011).
2. *In Booming 2007, Trademarks Were Colored Green*, DECHERT LLP, 2 (May 1, 2008), [http://www.dechert.com/library/Trends\\_in\\_Trademarks\\_2008.pdf](http://www.dechert.com/library/Trends_in_Trademarks_2008.pdf).
3. *The Seven Sins*, TERRACHOICE, <http://sinsofgreenwashing.org/findings/the-seven-sins/> (last visited June 16, 2011).
4. TERRACHOICE GRP. INC., *THE SINS OF GREENWASHING: HOME AND FAMILY EDITION 2010*, 6, 16, available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2010/> (follow “Greenwashing Report 2010” hyperlink).
5. Roscoe B. Starek, III, Comm’r, Fed. Trade Comm’n, *A Brief Review of the FTC’s Environmental and Food Advertising Enforcement Programs* (Oct. 13, 1995), available at <http://www.ftc.gov/speeches/starek/rbsgre.shtm>.
6. *Id.*
7. 15 U.S.C. § 45 (2006).
8. *Complying with the Environmental Marketing Guides*, BUREAU OF CONSUMER PROTECTION BUS. CENTER (May 2000), <http://business.ftc.gov/documents/bus42-complying-environmental-marketing-guides>.
9. Tanzina Vega, *Agency Seeks to Tighten Rules for “Green” Labeling*, N.Y. TIMES (Oct. 6, 2010), available at <http://www.nytimes.com/2010/10/07/business/energy-environment/07green.html>.
10. 16 C.F.R. § 260.6 (2010).
11. *Green Guides: Summary of Proposal*, FED. TRADE COMMISSION, <http://www.ftc.gov/bcp/edu/microsites/energy/documents/Green-Guides-Summary-of-Proposal.pdf> (last visited June 16, 2011); *Proposed Revisions to the Green Guides*, FED. TRADE COMMISSION (Oct. 2010), <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>.
12. *Proposed Revisions to the Green Guides*, *supra* note 11, at 138.
13. Roscoe B. Starek, III, *supra* note 5.
14. *In re Kmart Corp.*, FTC File No. 082 3186, Docket No. C-4263 (FTC 2009); *In re Tender Corp.*, FTC File No. 082 3188, Docket No. C-4261 (FTC 2009); *In re Dyna-E Int’l, Inc.*, FTC File No. 082 3187, Docket No. 9336 (FTC 2009).
15. *In re Sami Designs, LLC*, FTC File No. 082 31984, Docket No. C-427 (FTC 2009); *In re CSE, Inc.*, FTC File No. 082 3181, Docket No. C-4280 (FTC 2009); *In re Pure Bamboo, LLC*, FTC File No. 082 3193 Docket No. C-4278 (FTC 2009); *In re The M Group, Inc.*, FTC File No. 082 3184, Docket No. 9340 (FTC 2009).
16. *Collins English Dictionary—Complete and Unabridged*, 10th ed. (HaperCollins Publishers 2009), available at <http://dictionary.reference.com/browse/greenwash>.
17. *Futerra Sustainability Communications: The Greenwash Guide*, [http://www.futerra.co.uk/downloads/Greenwash\\_Guide.pdf](http://www.futerra.co.uk/downloads/Greenwash_Guide.pdf) at 1 (last visited June 13, 2011).
18. *Merriam-Webster’s Collegiate Dictionary*, 11th ed. (2011), available at <http://www.merriam-webster.com/dictionary/>

greenwashing.

19. Purple Romero, *Beware of Green Marketing, Warns Greenpeace Exec*, ABS-CBN NEWS, Sept. 17, 2008, <http://www.abs-cbnnews.com/special-report/09/16/08/beware-green-marketing-warns-greenpeace-exec>.

20. Shireen Deen, *Don't Be Fooled: America's Ten Worst Greenwashers*, GREENWASHING.NET, Aug. 29, 2002, <http://greenwashing.net/>.

21. *FTC Warns 78 Retailers, Including Wal-Mart, Target, and Kmart, to Stop Labeling and Advertising Rayon Textile Products as "Bamboo,"* FED. TRADE COMMISSION (Feb. 3, 2010), <http://www.ftc.gov/opa/2010/02/bamboo.shtm>.

22. BAMBOOSA, U.S. Trademark Registration No. 3,285,001.

23. GREENWASHING INDEX, <http://www.greenwashingindex.com>.