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# THE TRUTH IS ALWAYS IN STYLE: TARGETING GREENWASHED ADVERTISING IN THE FASHION INDUSTRY

by Sydney Helsel

H&M's 2019 "Conscious Collection" promotional images juxtapose lush green gardens with a hazy city skyline in the background.<sup>1</sup> The collection, which advertises itself as "[t]he short cut to sustainable choices,"<sup>2</sup> is just one example of many fashion brands' attempts to capitalize on the increased demand for sustainable products.<sup>3</sup> Each year, the fashion industry consumes approximately ninety-three billion cubic meters of water and produces an estimated ten percent of the world's carbon emissions.<sup>4</sup> The environmental effects of the fashion industry can be seen in images of the dried up Aral Sea in Uzbekistan<sup>5</sup> and in the dye and chemical filled black rivers of Dhaka, Bangladesh's garment manufacturing districts.<sup>6</sup>

Fashion brands should be encouraged to reduce their impact on the environment but there is little oversight over the environmental claims they advertise.<sup>7</sup> The burden of verifying the legitimacy of these environmental claims falls on the consumer.<sup>8</sup> Case in point: in 2019, Norway's Consumer Authority found that H&M's sustainability and environmental benefit claims were not sufficiently explained by the brand and were misleading.<sup>9</sup> In the United States, the Federal Trade Commission ("FTC") occupies an analogous role of taking action against brands that advertise false or misleading claims.<sup>10</sup> However, the closest the FTC has come to addressing greenwashing and unsubstantiated environmental benefit claims in the fashion industry was a series of actions against retailers for marketing rayon fiber products as bamboo.<sup>11</sup>

The term "greenwashing" wasn't coined until 1986,<sup>12</sup> but it did not describe a new phenomenon. For example, in her 1962 book, *Silent Spring*, Rachel Carson noted how pesticide companies advertised their DDT products as safe to use in agriculture.<sup>13</sup> Today, greenwashing continues to be prevalent.<sup>14</sup> In 2010, environmental marketing firm TerraChoice examined thousands of consumer products making environmental claims and found that ninety-five percent of them met one or more of the firm's indicators for greenwashing.<sup>15</sup> Some of the most frequent violations were product claims that could not be substantiated and product claims that were overly broad and potentially misleading.<sup>16</sup> Greenwashing is pervasive problem in the fashion industry, in part due to a lack of uniform enforcement against false and misleading advertising.<sup>17</sup>

The FTC was established in 1914 with the enactment of the Federal Trade Commission Act ("FTC Act"),<sup>18</sup> which grants the FTC the power and discretion to issue complaints and initiate proceedings against marketers that partake in "unfair or deceptive acts or practices in or affecting commerce".<sup>19</sup> The FTC has long recognized that unsubstantiated environmental claims risk

violating Section 5 of the FTC Act, and in 1992 published the Guides for the Use of Environmental Marketing Claims ("Green Guides").<sup>20</sup> Last updated in 2012, the Green Guides address specific categories of claims, such as recyclability, as well as claims of "general environmental benefit."<sup>21</sup> However, the Green Guides are not binding on the FTC, which can choose to bring an enforcement action at its discretion.<sup>22</sup>

Brands that market their clothing or practices as "sustainable" without qualification are partaking in misleading advertising in violation of Section 5 of the FTC Act.<sup>23</sup> Under the Green Guides, words such as "sustainable" or "green" would fall under the general environmental benefit category.<sup>24</sup> Fashion brands using such terms in their marketing must substantiate all reasonable inferences of environmental benefits; otherwise they would be violating Section 5 of the FTC Act.<sup>25</sup> Brands are also responsible for verifying claims made by their suppliers or manufacturers.<sup>26</sup> As illustrated by a string of bamboo fabric related cases brought against companies such as Amazon and Pure Bamboo, LLC, the FTC considers a company's advertising as a whole, including imagery, promotional material, and website text, including text not located on the individual product's page.<sup>27</sup> Even just the name of the brand or the product can lead to an inference of environmental benefit.<sup>28</sup> The Green Guides requires that reasonably-inferred claims are substantiated with proper, scientific proof.<sup>29</sup>

Puffery is not a defense available to marketers when facing an action brought under Section 5 of the FTC Act.<sup>30</sup> Circuit courts differ over what specifically constitutes puffery, but words of "relative connotation" or clearly denoting an opinion would be considered puffery.<sup>31</sup> Courts consider the context in which the word is used, thus terms such as "green" or "sustainable" in the context of fashion would denote more than just an expression of the advertiser's opinion.<sup>32</sup> Fashion, as an inherently visual medium, advertises in imagery just as much as through text, requiring the FTC and courts to analyze the claim in light of all relevant advertising associated with the item or brand.<sup>33</sup> For example, H&M's use of "conscious" alone could potentially be categorized as puffery, but when combined with environmentally-evocative advertising imagery, large green tags denoting the collection's products in stores, and references to the collection's "sustainable" nature throughout H&M's website, a consumer would infer that the collection is environmentally conscious or sustainable.<sup>34</sup>

To better target greenwashing in the fashion industry, the Green Guides should be codified and updated more frequently.<sup>35</sup> Expanding the Green Guides to include interpretations and

guidance for common environmental advertising terms such as “sustainable” and “green” will provide both fashion brands and consumers with clarity when making and interpreting claims.<sup>36</sup> Giving the “Green Guides” binding statutory authority provides certainty for brands and creates nationally-consistent expectations regarding “sustainability” and other environmentally focused claims. Relying solely on the discretion of the FTC, which has only brought actions sporadically, creates an unpredictable market for businesses and inconsistent protections for consumers.<sup>37</sup>

Codifying the “Green Guides” will provide national uniform standards for environmental marketing claims.<sup>38</sup> Addressing greenwashing will help ensure that fashion brands are doing the work to transition to environmentally friendly practices as the industry continues to target its products toward environmentally conscious consumers.<sup>39</sup>



## ENDNOTES

<sup>1</sup> Eliza Huber, *H&M Launched Their Conscious Exclusive Collection, Just in Time for Earth Day*, REFINERY29 (Apr. 11, 2019, 8:00 AM), <https://www.refinery29.com/en-us/2019/04/229508/hm-conscious-collection-spring-2019>.

<sup>2</sup> *Let's Be Conscious*, H&M, [https://www2.hm.com/en\\_us/hm-sustainability/lets-change.html/conscious](https://www2.hm.com/en_us/hm-sustainability/lets-change.html/conscious) (last visited Mar. 1, 2021).

<sup>3</sup> See Tensie Whelan & Randi Kronthal-Sacco, *Research: Actually, Consumers Do Buy Sustainable Products*, HARVARD BUS. REV. (June 19, 2019), <https://hbr.org/2019/06/research-actually-consumers-do-buy-sustainable-products> (citing statistics indicating the high rate of growth in demand for sustainability-marketed products); see generally *Good Wool*, THEORY, <https://www.theory.com/good-wool-by-theory.html> (last visited Mar. 23, 2021) (using “100% traceable and sustainable” wool); *Sustainability*, NIKE, <https://www.nike.com/sustainability> (last visited Mar. 23, 2021) (implementing a shoe recycling program); *Environmental Sustainability Commitments 2025*, ZARA, <https://www.zara.com/us/en/z-commitment-mkt1390.html?v1=1243180> (last visited Mar. 23, 2021) (listing numerous sustainability goals, including to be zero waste by 2023).

<sup>4</sup> THE WORLD BANK, *How Much do our Wardrobes Cost to the Environment?* (Sept. 23, 2019), <https://tiny.cc/kcxmsz>; see also Alden Wicker, *Fashion Has a Misinformation Problem*, VOX (Jan. 31, 2020, 2:40 PM), <https://www.vox.com/the-goods/2020/1/27/21080107/fashion-environment-facts-statistics-impact> (examining the lack of reliable scientific data evaluating the fashion industry’s true environmental impact).

<sup>5</sup> Tansy Hoskins, *Cotton Production Linked to Images of the Dried Up Aral Sea Basin*, THE GUARDIAN (Oct. 1, 2014, 1:34 PM), <https://www.theguardian.com/sustainable-business/sustainable-fashion-blog/2014/oct/01/cotton-production-linked-to-images-of-the-dried-up-aral-sea-basin> (highlighting that carcinogenic dust from the lake bed has caused disease and cancer in surrounding villages and that the cotton industry relies on forced labor).

<sup>6</sup> Helen Regan, *Asian Rivers are Turning Black and our Colorful Clothes are to Blame*, CNN STYLE (Sept. 28, 2020), <https://www.cnn.com/style/article/dyeing-pollution-fashion-intl-hnk-dst-sept/index.html> (working with dyeing chemicals or living near polluted water can expose an individual to toxic fumes and increased risks of illness).

<sup>7</sup> See Emily Chan, *6 Ways to be Greenwashing Vigilant*, VOGUE (Feb. 12, 2020), <https://www.vogue.co.uk/news/article/greenwashing-in-fashion>.

<sup>8</sup> See *id.* (highlighting several ways consumers can attempt to spot greenwashing).

<sup>9</sup> See Alden Wicker, *The Flawed Ways Brands Talk About Sustainability*, VOGUE (Apr. 16, 2020), <https://www.voguebusiness.com/sustainability/the-flawed-ways-brands-talk-about-sustainability-coronavirus>.

<sup>10</sup> See generally Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 96–97, (2003).

<sup>11</sup> See *FTC Warns 78 Retailers, Including Wal-Mart, Target, and Kmart to Stop Labeling and Advertising Rayon Textile Products as ‘Bamboo’*, FED. TRADE COMM’N, (Feb. 3, 2010) <https://www.ftc.gov/news-events/press-releases/2010/02/ftc-warns-78-retailers-including-wal-mart-target-kmart-stop>; see generally Kristin Gruver, Nikki Waxman, & Stacey Halliday, *Textile Industry Faces Increasing Global Pressures Regarding Climate Disclosures, Green Marketing, and Human Rights in 2021*, BEVERIDGE & DIAMOND, (Jan. 14, 2021), <https://www.bdlaw.com/publications/textile-industry-faces-increasing-global-pressures-regarding-climate-disclosures-green-marketing-and-human-rights-in-2021/>; *Green Guides*, FEDERAL TRADE COMM’N, <https://www.ftc.gov/>

[news-events/media-resources/truth-advertising/green-guides](https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides) (last visited Mar. 1, 2021).

<sup>12</sup> See Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L. J. 281, 284 (2014).

<sup>13</sup> See Rachel Carson, *Silent Spring*, 31 (1962); see also *id.* (discussing early awareness of greenwashing).

<sup>14</sup> See Marc McAree & Giselle Davidian, *Greenbiz and Getting to Market: What it Takes to Go Green and Limit Liability*, 45 ABA: THE BRIEF, Winter 2016, at 4, 10–11 (suggesting that market advantages have encouraged greenwashing practices).

<sup>15</sup> See TERRACHOICE, *THE SINS OF GREENWASHING: HOME AND FAMILY EDITION*, 15–16 (2010), <http://faculty.wvu.edu/dunnc3/rprnts.TheSinsOfGreenwashing2010.pdf> (organizing greenwashing tactics into seven categories, called “sins,” a play on the biblical seven deadly sins).

<sup>16</sup> See *id.* at 10, 16 (using seven different indicators and applying tests based on environmental marketing guidance from the FTC and the Canadian Competition Bureau).

<sup>17</sup> See Wicker, *supra* note 10.

<sup>18</sup> See Winerman, *supra* note 8, at 96–97.

<sup>19</sup> 15 U.S.C. § 45(a)(1) (2021).

<sup>20</sup> *Guides for the Use of Environmental Marketing Claims*, 57 Fed. Reg. 36363 (Aug. 13, 1992) (to be codified at 16 C.F.R. pt. 260).

<sup>21</sup> 16 C.F.R. § 260.4 (2012).

<sup>22</sup> 16 C.F.R. §§ 260.1–260.4.

<sup>23</sup> See 15 U.S.C. § 45 (1914); 16 C.F.R. §§ 260.1–260.4 (2012) (marketing claims must be “truthful, not misleading, and supported by a reasonable basis”).

<sup>24</sup> See 16 C.F.R. §260.4 (2012).

<sup>25</sup> See *id.*

<sup>26</sup> See *Complaint at 3*, Fed. Trade Comm’n v. Amazon.com, Inc., No.1:13-cv-00002 (D.D.C. 2013) (holding Amazon liable for failing to verify the textile claims of its suppliers).

<sup>27</sup> See *id.*; *Complaint at 2–3*, Pure Bamboo, LLC, et al., F.T.C. No. 082-3193, (Dec. 18, 2009) (highlighting various environmental claims found throughout the website, on the product itself, and in promotional materials).

<sup>28</sup> See 16 C.F.R. § 260.4 (using a brand name such as “eco-friendly” would imply “that the product has no negative environmental impact” and thus marketers should refrain from using green language in product names).

<sup>29</sup> See *id.*

<sup>30</sup> See *Carlay Co. v. Fed. Trade Comm’n*, 153 F.2d 493, 496 (7th Cir. 1946) (marketing an “easy” and “simple” dieting plan where a consumer ate vitamin enriched candies before a meal was not misleading because relative terms such as “easy” amounts to dealer’s talk).

<sup>31</sup> See *id.* at 496 (holding that “words such as ‘easy,’ ‘perfect,’ ‘amazing,’ ‘prime,’ ‘wonderful,’ [and] ‘excellent’ are regarded in law as mere puffing . . . upon which no charge of misrepresentation can be based.”).

<sup>32</sup> See *Fed. Trade Comm’n v. Trudeau*, 579 F.3d 754, 765–67 (7th Cir. 2009) (defining puffery as “empty superlatives on which no reasonable person would rely,” and determining that *Carlay* did not permit puffery to be an absolute defense for the use of relative words such as “easy”).

<sup>33</sup> See 16 C.F.R. § 260.4 (emphasizing visual aspects of advertising); see also *Fed. Trade Comm’n v. Trudeau*, 579 F.3d 754, 766–67 (finding that the book’s contents were misconstrued by the selected excerpts provided by the author).

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