

*“But the
People in
Legal Said...”*

*A Guide to Current
Legal Issues in
Advertising*

Dean Keith Fueroghne

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*To my wife, Lynn.
And to my dad—I think he would have been proud.*

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PREFACE

A number of years ago, I took an advertising law class at UCLA. The class was attended mostly by lawyers and professionals in advertising. The professor began by announcing that there would not be a text for the course because none existed.

That experience—combined with the naivete about the implications of law that I've seen in the advertising business—led to the creation of this book. Although advertising is a creative business, I have seen many agencies create more liability for themselves and their clients than awards for their ads. Most advertisers feel that advertising laws (the few that they are aware of) restrict the power of their message. Nonetheless, they need to understand these laws and their consequences.

The law has built a wall around itself with unfamiliar words and uncommon reasoning—a wall that most cannot break through. Until now there was simply no one source to provide the advertiser with ready access to information about advertising law. This book attempts to provide one source a person can use to learn about such areas of law as agency, contract, copyright, trademark, privacy and publicity rights, FTC regulations, and others.

This book is addressed to all who produce, distribute, and prosper from advertising—the account executive, the art director, the copywriter, the creative director, the advertising manager—whether in the agency business or an in-house advertising department. I have tried to explain the legal principles as clearly as possible, using cases as examples to illustrate each of the points.

Because of the impact of legislation, court decisions, and consumerism on the advertising field, the law should be well understood by anyone who creates and implements advertising. While I have tried to assure that the examples used in this book are current, the case law, statutes, and legislation should not be used as authoritative unless the user researches same at the time of use to determine their validity or the changes or modification since the date of publication. This book is intended to provide insight into the areas of law that affect advertising and to allow the reader to know when to seek specific legal advice. It is not intended to be construed as offering legal advice in any way. As with any legal problem, when in doubt, consult an attorney who specializes in that area.

So many people have added to this book that I must acknowledge their help. I wish to thank my contributing editor, Lee Lefton, for his guidance, help, and encouragement in this project, and for the endless hours he spent editing, refining, and helping me see the trees for the forest.

I also wish to acknowledge the following people who reviewed various portions of this book as it was written and who provided valuable insights and stories: Laurel Federick, attorney for Ogilvy & Mather, L.A.; Dan Katz, associate creative director for Orenstein & Savage Advertising; Erin Foley, advertising manager for the Samuel Goldwyn Company; Don Barshinger, associate creative director for The Good Guise Advertising; and Pete Bleyer, commercial photographer in Los Angeles.

Special thanks to Susan Glinert, senior editor at Dow Jones-Irwin, for her enthusiasm, advice, and help throughout this project. I hope it is justified by the result.

To all the people I've worked with over the years in this business, who have provided the stories—sometimes humorous, sometimes sad—that have helped to illustrate the book, I extend my thanks. Many I have learned from; some I have walked away from shaking my head. But all have contributed to this book—some more than they would have liked.

Finally, my gratitude goes to my wife, Lynn, who read and reread every page, provided invaluable assistance, and put up with the seemingly endless hours that went into the research and writing of this book.

Dean Keith Fueroghne

INTRODUCTION

Here are some interesting trivial tidbits.

Did you know that advertising expenditures in the United States exceeded \$109 billion* in 1987? This is more than is spent on all of public education in this country in a year. And it's a third of what the United States spends yearly on national defense. The combined expenditure on advertising for the 10 largest companies in the country is greater than most nations' gross national product!

Did you know that a major national television commercial will be viewed by more people than the total number of people who have seen *Gone with the Wind*? The average American watches about 20,000 television commercials each year. Major manufacturers will spend a quarter of a million dollars to produce a 30-second television commercial that is designed to promote a 30-cent item.

What this trivia illustrates is that advertising is a very expensive, very pervasive, very specialized, and very institutionalized segment of our social and economic environment. But did you ever stop to ask yourself, how does advertising interact with the restrictions of society? This is one of the primary questions this book will explore.

It is generally accepted that advertising is a part of the business process. Advertising goes hand-in-hand with moving products and services from the rawest of materials to the ultimate consumer. Although it is difficult to precisely define

*Source: *The Wall Street Journal*, June 8, 1987, p. 10, col. 1.

advertising, in essence it is the catalyst that keeps a free-enterprise market operating. Countries that don't have a free-enterprise system don't have advertising in the commercial sense because they don't need it. A prime example of this situation is Red China. Before trade was opened up with the West, consumerism was controlled by the government. Afterwards, Western products were introduced into the Chinese culture along with something new—"advertising."

Most textbooks teach that modern advertising began in the early 1900s. Greats like William Benton, George Batton, Albert Lasker, Chester Bowles, Bruce Barton, Ernest Elmo Calkins, Leo Burnett, David Ogilvy, and others whose names you may recognize did not create the process of advertising. What we consider to be advertising in its purest sense has been around for thousands, perhaps millions, of years before the time of these industry giants.

Because it is such a powerful marketing tool, advertising draws more than its share of criticism, despite an ever-increasing awareness and emphasis on social responsibility. Those advertisers who have taken a naive attitude and ignored their responsibilities have learned the pitfalls of viewing the consumer as simply a passive and unquestioning viewer of commercial messages.

The consuming public's skeptical impression of advertising will continue to increase. Because of this, a major challenge for the advertising community is to restore the credibility of its product and to check the public's skepticism lest it turn to cynicism.

The demands of advertising professionals require that they keep current on all aspects of their profession. Law is one of those areas that has a powerful effect on advertising. Therefore, the new policies dictated by regulatory agencies and the interpretations of court decisions must be well understood by advertising professionals.

As our economic system has grown over the years, it has by necessity become more complex. This complexity has forced the legislature and courts to create an equally complex system to maintain the delicate balance that exists between free enterprise and consumer protection.

On one side stand the advertiser and his agency trying to display their product as favorably as possible. On the other side stands the consumer, guarded behind a protective legal barrier in which he can feel a sense of security in making purchasing decisions. The legislature has seen to that. Between these two constants lies a fine line. As you will see throughout the book, it is one beyond which neither side would be prudent to extend.

Throughout history, as promoters of products and advertising services have become more sophisticated and indeed clever, the legal system has had to keep pace. This book was written to discuss the relationship between advertiser and legislator, what brought it about, and its practical applications.

Many years ago, Calvin Coolidge said that "advertising ministers to the spiritual side of trade." While some consumers have expressed a fear of—and others have indicated a hope for—the demise of advertising, it is still integral to our market environment. Advertising provides a valuable service to the seller, the buyer, and the public and indeed serves the spirit of trade only so long as it remains truthful and honest.

As you read this book there are a few things I feel that you should keep in mind. Advertising is affected by many areas of law. In fact, each chapter of this book covers a separate area of law. One point that the reader must remember is that the law tends to be compartmentalized. As a result, one area of law differs from another. And, therefore, the subject of each chapter differs. The regulation of each area of law varies—copyright has no effect on publicity rights, comparative advertising regulation has no effect on products liability.

As you read, you may see inconsistencies in logic from chapter to chapter. What you're actually noticing is the variations in the different areas of law. Always consider the subject of the chapter, and you'll see the law in the proper light. Also, read each chapter carefully and completely—do not skim. The subject matter is far too complex for that. I would strongly recommend reading the book straight through the first time. Many of the topics build on each other, and there is a reason that the chapters are in the order that they are. When questions arise about specific subjects, you can then go back to the appropriate chapter for reference.

Another important point to consider is that you will find many examples of ads that were produced that don't follow the laws illustrated in this book. Citing such examples will not protect you if you are caught in similar violations. The fact that 20 people get away with robbery doesn't make it legal!

Finally, as you read, you will undoubtedly have questions that will be brought up by the book. That's the idea—that's your clue that your question might best be answered by an attorney who specializes in that area. This book cannot answer every question that arises; although it should answer many. What it can do is teach you the basics and give you the wisdom to know when it's time to consult an attorney.

NOTES ON CITES

In this book you will notice that each case has a citation (cite) following the name of the case. For those who have a background in law, these cites are all too familiar. But for those who do not, they represent some unknown code. Here is how to decipher the code.

The citations indicate where the specific court opinions can be found. A typical cite may look like this: *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir. 1959).

The name of the case appears first: *Dawn Donut Co. v. Hart's Food Stores, Inc.* The first number following, indicates the volume of the reporter: 267. The next series indicates the name of the reporter: F.2d (in this instance; Federal Reporter, second series). The next set of numbers shows the page where the case begins: 358. In parentheses is the circuit court where the case was decided and the date it was decided.

The various sources are cited by abbreviations as we saw above. The following is a list of the most common sources used in this book.

U.S.	United States Supreme Court Reports
F.	Federal Reporter (decisions by the Circuit Court of Appeals)
F.2d	Federal Reporter, second series

F. Supp.	Federal Supplement. (decisions of the United States District Courts)
F.C.C.	Federal Communications Commission Reports
F.T.C.	Federal Trade Commission Reports
U.S.L.W.	United States Law Weekly
U.S.P.Q.	United States Patent Quarterly
A.	Atlantic Reporter
A.2d	Atlantic Reporter, second series
N.E.	North Eastern Reporter
N.E.2d	North Eastern Reporter, second series
N.W.	North Western Reporter
N.W.2d	North Western Reporter, second series
P.	Pacific Reporter
P.2d	Pacific Reporter, second series
S.E.	South Eastern Reporter
S.E.2d	South Eastern Reporter, second series
S.W.	South Western Reporter
S.W.2d	South Western Reporter, second series
S.	Southern Reporter
S.2d	Southern Reporter, second series

In addition, each state court system has its own reporters and digests where cases are recorded. While there are far too many to list here, I will give a few examples of the basic California sources. A complete list of abbreviations for all states can be found at any law library.

Cal.	California Reports (series one through three)
Cal.App.	California Appellate Reports (series one through three)
Cal.Dec.	California Decisions
Cal.Rptr.	California Reporter

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CHAPTER 1

THE DEVELOPMENT OF CONTROL OVER ADVERTISING

There's a sucker born every minute.

—P. T. Barnum

W. C. Crosby was an astute businessman. He understood all too well the power of advertising. Crosby had a knack for practicing the subtle art of persuasion. He knew how to pique a person's interest by using the right words: how to light a fire in the prospect, how to promote, how to sell—abilities that any great ad man must possess. He lived during the early 1900s, when he eloquently described his profession as “a business, like all business,” which “takes rise from the conditions of life about it and adapts itself as does social life. And . . . plays an invariable chord in the human make-up . . . according to the times and circumstances.”

His was not a name that would go down in the history books as one of the great advertising giants of the past. He would, however, be remembered as a craftsman of the art of persuasion. W. C. Crosby was a con man, and one of the best. He kept company at the turn-of-the-century with such notables as Willie “The Sleepy Kid” Loftus, Jimmy McVicar, Charley (changed to Henry in the movie *The Sting*) Gondorf, “The Crying Kid,” “Hungry Joe” Lewis, George Pole, and Big Joe Turley.

The con man's migration to America was a natural occurrence. One frontier opened itself up to another. Long before the Civil War, the con man could be found in the Gold Rush shanty towns of California, riding the paddle wheelers down the Mississippi to New Orleans, drifting through high society in the East and riding the first rails to the West.