

McGraw-Hill Paperbacks

WHAT EVERY
MANAGER
NEEDS TO
KNOW ABOUT
MARKETING
AND THE LAW

ROBERT J.
POSCH

WHAT EVERY MANAGER NEEDS TO KNOW ABOUT MARKETING AND THE LAW_____

ROBERT J. POSCH, JR.

McGRAW-HILL BOOK COMPANY

**New York St. Louis San Francisco Auckland Bogotá
Hamburg Johannesburg London Madrid Mexico
Montreal New Delhi Panama Paris São Paulo
Singapore Sydney Tokyo Toronto**

Library of Congress Cataloging in Publication Data

Posch, Robert J.

What every manager needs to know about marketing and the law.

Includes index.

1. Marketing—Law and legislation—United States.

I. Title.

KF2005.P67 1984

343.73'088

83-17572

ISBN 0-07-050567-5

347.30388

Copyright © 1984 by McGraw-Hill, Inc. All rights reserved. Printed in the United States of America. Except as permitted under the United States Copyright Act of 1976, no part of this publication may be reproduced or distributed in any form or by any means, or stored in a data base or retrieval system, without the prior written permission of the publisher.

1234567890 BKP / BKP 89876543

ISBN 0-07-050567-5

The editors for this book were William A. Sabin and Susan B. West, the designer was Dennis Sharkey, and the production supervisor was Thomas G. Kowalczyk. It was set in Baskerville by Photo Data Inc.

Printed and bound by The Book Press.

This publication is designed to provide the author's opinion in regard to the subject matter covered. It is sold with the understanding that neither the publisher nor the author is engaged in rendering legal, tax, accounting, or similar professional services. While legal, tax, and accounting issues covered in this book have been checked with sources believed to be reliable, some material may be affected by changes in the laws or in the interpretations of such laws since the manuscript for this book was completed. For that reason the accuracy and completeness of such information and the opinions based thereon are not guaranteed. In addition, state or local tax laws or procedural rules may have a material impact on the general recommendations made by the author, and the strategies outlined in this book may not be suitable for every individual. If legal, accounting, tax, investment, or other expert advice is required, obtain the services of a competent practitioner. The publisher and author specifically disclaim any personal liability for loss or risk incurred as a consequence of the advice or information presented herein.

DEDICATION

To my wife, Mary Lou
For the past, the present, and the future

PREFACE

A good manager “manages” to overcome obstacles—“muddling through” is not the way to manage. Having as much information as you can get avoids much needless risk. This book reduces your risk while telling you in conversational style both how to get things done within the framework of government regulations and how to keep government regulations from impinging on your management discretion.

As all managers in the 1980s are aware, government legislation and government agencies create and destroy marketing objectives or opportunities at a rate not even considered 10 to 15 years ago. For example, permitting comparative advertising creates opportunities, and banning cigarette advertising on television destroys them. As knowledge increases so will government intrusion in the form of laws, taxes, mandated copy, and the like. Today's manager who wants to be tomorrow's manager must know the current law and trends and how he or she can anticipate (and possibly influence) the government *before* it jeopardizes a market, a trademark, or a pricing or distribution policy. Failure to anticipate and interact with government and other political environments can lead your firm down the path of the nuclear power industry or the automakers in the 1960s.

This book will assist today's broad-visioned, multidimensional manager to include government in the “marketing concept.” Traditionally, the marketing concept is the philosophy of focusing all the activities of the organization on satisfying customer needs through the use of integrated marketing to achieve maximum profits through customer satisfaction. However, all the positive publicity campaigns in the world won't overcome a government press release picked up by a wire service which alleges (but your buying public reads “states” or “confirms”) that you've cheated customers or sold them television sets with excess radiation. You and your firm must be aware of the government at every stage of your management

decision-making process—from obtaining a trademark for a new product idea through postsale warranty service.

The relatively low cost of this book may be deductible, yet it may help you interact with your counsel to avoid millions of dollars in fines which are *not* deductible. This book is written for *all* committed management professionals (because everyone in private enterprise is in marketing or assists marketing) who do not want to see the government feasting on their firms' profits or otherwise interfering in their business operations.

The writing has been kept simple, so you'll find no gratuitous legalese. Further, you'll find many checklists for easy review and overview—a feature that does not exist in current literature in the field.

A primary goal of this book is to help managers to spot issues or situations which may become legal issues. Any professional knows that in our complex world it is hard to fight all the fires. When you've seen a legal issue or anticipate that one may develop, review the matter with your counsel. Prompt consultation with your counsel in these circumstances could be the best career move you ever make.

ROBERT J. POSCH, JR.

Acknowledgments _____

This book bears the imprint of many persons. Although it goes without saying that it is impossible to list acknowledgments to all those who influenced this book, I'm going to try. I'd like to note special thanks to those individuals who, since I left Hofstra Law School, contributed decisively to my integration of law and marketing.

On April 23, 1975, I met Gerard H. Toner (now general counsel of Doubleday & Company, Inc.). Since then, he has been incontestably the single most important influence on my professional life. As a friend, he has always had time and as a professional, he has always set an example of disciplined excellence. He is the type of professional who excels in everything he does and imparts the leadership which motivates those around him to make their own commitment to professional excellence.

At Doubleday over the past eight years I've received much hands-on knowledge from a host of individuals who have assisted me in integrating law and business. If you, the manager, find this book lucid yet cogent, you can thank Peter Andresakis, Andy Danek, Bruce Degerdon, Doug Deptuch, Gary Edwards, Rick Engle, Walter Freese, Bob Galway, Tony Garramone, Joe Grabowski, Jim Guastavino, Craig Havemeyer, Alex Hoffman, L. C. Jacox, Heather Kilpatrick, Jeff Kunion, George Larie, Dick Malina, Barry Mark, Jon Mulford, Clarence O'Connor, John O'Neill, Ilene Skeen, Howard Weill, Bob Woods, and the late James T. McGrath.

Other professionals who've had a direct impact include John Beach, Anne Darr, Ron Docksai, Henry Hoke, Ted Krebsbach, Ed Markowitz, Terry McGoldrick, Ed Nash, Bill Newton, J. Gardiner Pieper (who operates New York State's best bar review course), Howard Phillips, Howard Weber, and three outstanding professors in the Hofstra MBA program: Dr. Dorothy Cohen, Dr. Joel Evans, and Dr. Saul Sands.

Specific editorial input came from many sources. Of particular note were the incisive legal comments by George Shively, Esq. Eileen De Milt

was particularly helpful in offering insights into Section 2, one area of her current expertise.

My overriding debt is to my wife Mary Lou, who has been a star to steer by in helping to shape the contents of this book. The tone is hers as well as mine, and I hope that the reader will appreciate that the relative absence of legalese results from her efforts. Her patience and that of my children, Judith and Robert III, were greatly appreciated. To extol the merits of Mary Lou is to say the same about her parents, Vernon and Mary Collins. Finally, I thank my parents, Robert and Maryrose Posch, and my sister Eileen, who always encouraged me to write; now that I'm prolific, I trust that they feel vindicated.

CONTENTS_____

Preface	xi
Acknowledgments	xiii

SECTION 1	HOW TO READ THIS BOOK	1
------------------	------------------------------	----------

SECTION 2	ESTABLISHING YOUR PROFIT PRESERVATION CENTER	5
------------------	---	----------

SECTION 3	THE LAW YOU SHOULD KNOW AFFECTING PRODUCT DECISIONS	19
------------------	--	-----------

Chapter 1	YOUR PRODUCT LIABILITY EXPOSURE	22
Chapter 2	WHAT YOU NEED TO KNOW ABOUT THE FAIR PACKAGING AND LABELING ACT	39
Chapter 3	WARRANTY COMPLIANCE	46
Chapter 4	YOUR TRADEMARK AS PART OF YOUR PACKAGE	65

**SECTION 4 THE LAW YOU SHOULD KNOW
AFFECTING CHANNEL POLICY 79**

Chapter 5	ANTITRUST ISSUES IN CHANNEL DISTRIBUTION	81
Chapter 6	HOW TO AVOID GETTING TIED UP WITH TIE-INS	93
Chapter 7	WHAT YOU NEED TO KNOW ABOUT PHYSICAL-HANDLING RELATIONSHIPS	101
Chapter 8	SALIENT ISSUES IN SALES LAW	107
Chapter 9	YOUR GUIDE TO DIRECT-MARKETING LEGAL COMPLIANCE	126

**SECTION 5 THE LAW YOU SHOULD KNOW
AFFECTING PRICING POLICY 141**

Chapter 10	ANTITRUST ISSUES AFFECTING PRICE- FIXING	142
Chapter 11	TRADE ASSOCIATION MEMBERS— COMPETITORS OR CONSPIRATORS?	150
Chapter 12	PRICE DISCRIMINATION AND THE ROBINSON-PATMAN ACT	159
Chapter 13	HOW TO AVOID DECEPTIVE PRICING	171

**SECTION 6 IMPLICATIONS OF THE
CREDIT DISCLOSURE LAWS 177**

Chapter 14	TRUTH-IN-LENDING ACT—REGULATION Z	179
Chapter 15	FAIR CREDIT BILLING ACT	191
Chapter 16	FAIR CREDIT REPORTING ACT	197
Chapter 17	EQUAL CREDIT OPPORTUNITY ACT	208

SECTION 7	YOUR COMPLETE GUIDE TO DUNNING COMPLIANCE	221
SECTION 8	THE LAW AFFECTING YOUR PROMOTIONAL POLICY	241
Chapter 18	TRADITIONAL ADVERTISING	243
Chapter 19	PERSONAL PROMOTIONS	286
Chapter 20	NONPERSONAL PROMOTIONS	297
SECTION 9	CONCLUSION	311
GLOSSARY		312
INDEX		319

SECTION

ONE

HOW TO READ THIS BOOK_____

The sections and chapters in this book are not arranged in order of importance but rather are designed to follow one form of traditional decision analysis. Obviously, managers do not make their marketing decisions in "chapter-by-chapter" isolation, but some sequence was needed. Today's manager must interact with the organization's total marketing program, goals, and political environment. Because of the overall impact of the political environment, we begin with it.

Government legislation and government agencies create and destroy management opportunities in marketing a product or service. Both the creation and the destruction of these opportunities result from savvy input or lack of same by management into the public arena. The problem with prior books on this point is that they merely state this principle with not much more than a mention of the background of the various agencies and what they can do to you. There is a premium on passivity.

This book touches on the traditional approach and suggests tactics for staying abreast of current and future developments in your relationship with government bodies that can affect your business. Therefore, we begin with the need for the managers of your firm (no matter how small) to develop a profit preservation center. To prosper in this decade, management must constantly monitor changes in the business environment—not just as to action pending, but also as to which way the legislatures are going to act "down the road." Management at all levels of responsibility must plan for government change the same way it does for technological

change, tax change, or competitive changes. The failure to do so will hurt your firm's future as well as your career advancement.

Section 2 is written particularly for the small concern that cannot afford to retain ongoing in-house counsel, since the monitoring function can be done by any manager who wants to avoid adverse visibility to government. More importantly, this monitoring is fun—it's "newspaper law" or current events. Staying atop these areas will assist your professional career as well as make you a better citizen.

After you've reviewed this section, pick out the section you're most involved with professionally, that is, product development, channel design, pricing, or promotional policy. If you encounter "legalese," it will usually be explained in English, but the Glossary is a handy reference tool when you need a quick definition of a term. Also, give the references a chance; they have a lot of information useful to you without further follow-up.

Finally, no book can replace decent gut reaction to a questionable practice. Posch's rule of regulatory compliance is simple: If you would not like to be treated this way (unfair pricing, deceptive advertising, bait and switch, etc.), then someone else wouldn't either, and one of those "someone elses" probably has a law or regulation on point.¹

If you encounter a questionable area of importance, never consult a book such as this as your sole source of information. You must consult your attorney. If you don't have an attorney who specializes in your field, contact the local bar association for a referral.

REFERENCES

¹ Throughout this book much reference will be made to Federal Trade Commission (FTC) decisions as well as to codified law and case law. Because of their precedent value, you should review these FTC decisions carefully.

Under Section 5(m) of the FTC act, you and your firm are bound by any cease and desist order, regardless of your firm's lack of involvement, if you or your firm had actual knowledge that such act or practice was unfair or deceptive and unlawful under Section 5(a) (1). Specifically, the FTC can commence a civil action in federal district court against any person, partner, and/or corporation which engages in an act or practice which the commission has determined in a cease and desist proceeding to be unfair or deceptive and prohibited by the FTC's decision. A violation of any such order may result in a civil penalty of up to \$10,000 as well as in monitoring by the FTC, who will have access to internal records in matters pertaining to the order. The practical effect is that cease and desist orders are elevated to the level of trade regulation rules once you have actual knowledge. To

establish such actual knowledge, the FTC will send copies of the order to industry members who may be engaging in the prohibited practice.

This may not afford you or your firm sufficient time to change policy. A more efficient way to do this is to routinely monitor all orders through an internal profit preservation center (see Section 2). This will keep you up to date as to compliance as well as assist you in planning for future trends.

At a minimum, get on the FTC's mailing list. Request that your name be added by writing to the Federal Trade Commission's Press Office, Washington, D.C. 20580.

SECTION TWO ESTABLISHING YOUR PROFIT PRESERVATION CENTER

Japanese management techniques and philosophies have recently attracted much attention, but managers can learn little from the Japanese until their companies establish profit preservation centers which interact effectively with all levels of government. The attitude that "this is not my job" is the reason so many jobs are being exported to Japan and elsewhere.

The Japanese manager is no creative genius. Japan did not prosper until business in the United States de facto ceased to compete in the mid-sixties. If you gave Japanese managers excessive affirmative action policies, regulations, and paperwork; "big is bad" antitrust enforcement; a president who believes profits are obscene; and counterproductive capital gains taxes and then made the Japanese defend themselves militarily, you would see how good they are. But, of course, the Japanese wouldn't tolerate this.

Nor should you. All managers must take an interest in government relations. Any manager can design a profit preservation center at a minimal cost. Depending on your resources, this center will anticipate, monitor, report, track, assess, and, where necessary, lobby for or against all state and federal legislation and regulation impacting your business.

If your business is large, you may be involved with as much as 5 to 10 percent of all state bills (and 150,000 to 200,000 are being introduced each biennium) in addition to those at the federal level. However, as a large industry you have the ability and the resources to develop an effective profit preservation center.

If your business is small, you may want to have input but may feel overwhelmed. Don't. You can stay abreast of and affect many issues without exorbitant cost. Our regulatory survival course can be self-taught.

WHO WILL RUN YOUR SYSTEM?

You should have a broad, up-to-date data base covering the social, political, technological, and economic trends affecting your business. The manager you select for this function must be able to learn how to learn, since government affairs are a lifetime education. This person must know your business to isolate the key laws and rules which may affect your business. The manager must understand the government process—who is a key sponsor, what committees really count in a given state and how receptive a sponsor's staff is to your input. Knowledge of computers also will help as more government bodies expand their electronic data transmission systems.

If you're running a small business and must do this yourself and the previous description doesn't sound like you, don't despair. Much of the law involved is newspaper law. It's easy to be familiar with the vernacular—you read about civil rights, age discrimination, and the like every day. Add this to your expertise in your own product line, and you're ready to go—on a limited basis. However, your exposure is probably more limited also.

HOW TO STAY ABREAST OF RULES AND LEGISLATION

You must monitor the government activity which affects your business. Monitoring requires an understanding of what signals precede an event (or have done so in the past). This is important not only because you wish to stay within the law but also because knowledge of future trends enables