

Law of Advertising

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LAW OF ADVERTISING by GEORGE ERIC ROSDEN and PETER E. ROSDEN. New York: Matthew Bender. 1974. Two Volumes. \$85.00.

*Jack R. Bierig**

Ironically, in choosing the title for their two-volume work, *The Law of Advertising*, George Eric and Peter Eric Rosden have come close to engaging in false advertising. The title suggests a comprehensive treatise on the legal considerations relating to the promotion of products, services, and perhaps ideas. The book, however, offers only an incomplete and inadequate treatment of that subject.

Many areas of the law of advertising are entirely omitted. For example, the treatise does not discuss how claims made for cosmetics may cause these products to be regulated as drugs. It ignores the unique advertising problems of products and services, such as liquor, prescription drugs, securities and banks, which are regulated by agencies other than the Federal Trade Commission. It does not take into account such problems as the use in advertising of flags, stamps and money.

Other important aspects of the law of advertising are not fully developed. Thus, although the existence of private regulatory bodies is recognized in chapters 41 and 42, the substantive rules of such bodies are completely ignored. The rules of the National Association of Broadcasters dominate the law of radio and television advertising in certain areas, such as toys, and have a major impact in several other areas. The policies of the television networks on such subjects as disclosure of warranty terms are similarly crucial. And yet these rules and policies are simply not discussed.

Likewise, while lotteries are briefly mentioned at §17.02, the complicated set of regulations governing these promotional devices is ignored. When is a promotion a skill contest, and when is it a game of chance? In which state should sweepstakes be voided? What is the effect of the statement "void where prohibited?" What filing, disclosure, and winners list requirements are imposed by various states in connection with sweepstakes? The authors leave their readers in the dark.

Very often, the authors set forth rules with almost no analysis. The paragraph on use of the word "new" (§26.01[51]) is illustrative. The

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entire discussion of the use of "new" to denote a recent product development is as follows:

In the term's use regarding a new principle, the question has arisen how long an advertiser can use the appellation "new". This depends in part upon the question how large a part of the population has been made acquainted with the new product, process, or principle.

This passage ignores the hard question of how much change in a product will justify description of the product as "new." Can, for example, a snack cake previously marketed under one brand name be legitimately called "new" if it is renamed and marketed in a frozen form which gives the product a change in taste and texture? The passage does not analyze the theoretical problems in a rule which forbids use of the word "new" in one geographical area when the product it describes has only been available in a distant location. It fails to examine what the rule should be with respect to a product which, having been test marketed for a year, is ready to be distributed nationally.

Often, the discussion of an issue is superficial or limited to easy cases. In discussing the legality of restraints on adjacent broadcast, for example, the authors state:

Doubtlessly, it is understandable, reasonable and not unfair, if a broadcasting advertiser precludes immediately adjacent competitive advertising. But if such an agreement goes as far as to forbid competitive advertising for the entire day, or even for an entire segment of a day, it may constitute an unfair method of competition (§ 2.03[5][c]).

This formulation succeeds only in avoiding the difficult questions. Suppose an advertiser who purchases time on two telecasts of the World Series seeks to prevent the advertising of competitive products on all other telecasts of the Series on the theory that he wants his product to be the only one of its kind to be associated with this sports event. The authors ingenuously tell their readers that section three of the Clayton Act, 15 U.S.C. §14, does not apply because it concerns "commodities" and broadcast time is not a commodity. But what of the Sherman Act's proscription of concerted refusals to deal? If the network agrees with the advertiser not to sell commercial time on any telecast of the World Series for the promotion of products competitive with those of the advertiser, is the arrangement illegal per se under §1 of the Sherman Act, or is it subject to the rule of reason? If it is to be judged by its reasonableness, what result should be reached? The authors don't offer a clue.

Of course, enactment of the Magnuson-Moss Warranty, Federal Trade Commission Improvement Act of 1975, has made much of the discussion of warranty law, FTC procedure, and consumer remedies outdated. The

authors cannot be blamed for this. More serious criticisms, however, can be made.

Even the most fundamental issues are treated in a superficial fashion. The requirement that the advertiser and the advertising agency have a reasonable basis for making a claim before such claim is made appears almost as an afterthought in a chapter entitled "Procedure Before Administrative Law Judges." The authors do not consider what constitutes a "reasonable basis" for different sorts of claims. They omit all mention of the interplay of such considerations as (1) the specificity of the claim, (2) the type of product advertised, (3) the possible consequences of a false claim, (4) the degree of consumer reliance, and (5) the availability of supporting evidence. They omit this analysis despite the fact that lawyers are called upon every day to undertake it in order to advise their clients on what sort of substantiation is required for a specific claim.

In short, the reader is left with the feeling that the portions of the book which deal with the law of advertising add little to what could be gleaned from a glance through the *CCH Trade Regulation Reporter* and the Better Business Bureau's *Do's and Don'ts In Advertising Copy*. To be sure, there are some exceptions. The chapters on the relations between advertiser, agency, and media, chapters 1-3, are helpful, even though they are somewhat redundant. Likewise, the examination of the standard of perception by which the Federal Trade Commission judges advertising (§18.02) is interesting. But these few worthwhile discussions are not enough to save the work as a whole. The reader who has been led by the title of the Rosden treatise to expect a comprehensive analysis of the law of advertising will be sorely disappointed.

In view of the superficiality and incompleteness of the work, it might be wondered how the authors fill two complete volumes of text. The answer lies in the fact that much of the book is a rambling and unhelpful discourse on the federal regulation of the communications media, coupled with a superficial examination of a variety of subjects only tenuously related to the law of advertising.

A review of the major portion of the first volume makes clear how the tome strays from its proclaimed subject. The authors devote all twenty-three pages of chapter 4, which includes an unnecessary history of the Commerce Clause, to reaching the conclusion that the federal government has the power to regulate advertising—as if there had been any question. They spend the following twenty-eight page chapter in a general discussion of the first amendment—apparently for those readers who never took a course in constitutional law. Other than the thought, put off for subsequent discussion, that certain forms of corrective advertising might be un-

constitutional, the chapter's only point relating to advertising is the suggestion that cease and desist orders of the Federal Trade Commission might be invalid as prior restraints on speech (§5.04[c]). Can the authors be serious?

Chapter 6 consists of a twenty-page diatribe against *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in which the Supreme Court indicated that first amendment protections do not extend to commercial advertising. While the soundness of this decision is open to serious question,¹ the case has remained the law for over three decades. It would seem, therefore, that a law review article or other form of monograph would be a more appropriate vehicle for a detailed discussion of the case's continuing validity than is a general treatise on the law of advertising. In any event, there is no justification for spending time on the straw arguments that commercial advertising is not constitutionally protected because the first amendment does not specifically mention advertising and because it is concerned only with political and religious speech (§6.03[1],[2]). Nor is there justification for the sort of alarmist melodrama contained in the following passage:

[I]t is a sordid fact that attacks upon the profit incentive eventually must destroy the free enterprise system, if they are sustained for a sufficiently long period. This attitude is thus aimed at self-destruction.

This same self-destructive attitude is glaringly obvious in the effects of the *Chrestensen* case (§ 6.03[4][a]).

Whatever one may think of the wisdom of *Valentine v. Chrestensen*, the experience of the past thirty-three years must demonstrate that the case has not led to the downfall of commercial advertising or the free enterprise system.

The next two chapters have virtually nothing to do with advertising. Chapter 7, entitled "Access to Media," devotes ninety pages in an attempt to refute the contention that individuals have a right of access to the media. It includes, *inter alia*, a discussion of the housing discrimination cases that originated with *Shelley v. Kraemer*, 334 U.S. 1 (1948) (§7.04[3]), consideration of the government function cases growing out of *Smith v. Allwright*, 321 U.S. 649 (1944) (§7.05), a discourse on anti-trust considerations in the newspaper business, including a history of American newspapers (§7.06), and the concession that the broadcasting media are "press" within the meaning of the first amendment. Inclusion of these matters could perhaps be condoned if they were mentioned in passing, but ninety pages of such irrelevance is just too much.

1. This is especially true after the decision in *Bigelow v. Virginia*, 43 U.S.L.W. 4734 (U.S. June 16, 1975).

Similarly, chapter 8 devotes forty-seven pages to a discussion of the fairness doctrine. It includes a long discussion of whether the licensing of broadcasters is constitutional (§8.04[1] [a]), a consideration of whether the standard of "public convenience, interest and necessity" is sufficiently detailed to support Congressional delegation of authority to the Federal Communications Commission (§8.04[1] [b]), and an argument that the unanimous opinion of the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) should be overruled (§8.04[2]). Lengthy discussions of matters long ago settled would be troublesome even if they were relevant to the purported subject of the treatise. They are inexcusable when such matters are beyond the scope of the book.

Chapters 10 through 15 do contain some material relevant to the law of advertising. Discussion of puffery (§10.06), commercial disparagement by advertising (§13.04), and the impact of advertising on products liability actions (§14.06) are useful. These sections, however, are surrounded by discussions of unfair competition, palming-off, and trademark and copyright law, which add nothing to the excellent and comprehensive treatments of the same subjects in *McCarthy on Trademarks* and *Nimmer on Copyright*. They are lost in generalized and unenlightening discussions of federal court jurisdiction, the Erie doctrine, conflicts of law, libel and slander, and products liability in general.

An account of the substance of the text is inadequate, however, to convey the feeling that one takes from this book that the authors are engaging in little more than an ideological ego trip. Two examples may convey the tone of the treatise more fully. Referring to the *Red Lion* case, the authors state:

Under normal circumstances, it would be an exercise in futility to take issue with a fairly recent and unanimous decision of the Court. However, the circumstances are not normal. Some of the holdings are merely dicta, others have subsequently been contradicted by an opinion for the Court or by some justices, and, finally, some of *Red Lion's* pronouncements constitute so dire a danger for the Freedom of the Press that detached analysis is a *sine qua non* in the national interest (§ 8.04[2]).

Whatever one may think of the *Red Lion* decision, it is hard to imagine a dispassionate student of the law seriously suggesting that the case constitutes so dire a threat to first amendment freedoms that the "national interest" requires its re-evaluation—even assuming, contrary to the fact here, that such re-evaluation would be "detached."

Later, in discussing whether it is deceptive advertising to give an impression that a product feature is unique when in fact the feature is not unique, the authors exclaim:

Actionability grounded on allegations of implied uniqueness constitutes a dangerous tool that could be used for the destruction of the entire advertising industry (§ 18.03[2]).

Many responsible advertising lawyers have long been counseling their clients to avoid claims which falsely imply uniqueness. A glance at most advertising material today will reveal that such claims are generally not made and in fact need not be made because of the diversity of product differences. In the case of products in which there is no advertisable difference or in the case of so-called standardized products, of which there are far fewer than the authors would have their readers believe, the emphasis has been on creating pleasant associations with the advertised product—a perfectly legitimate advertising technique.

These two passages reveal, perhaps more clearly than anything else in this review, that a more accurate title for *The Law of Advertising* would have been *A Polemic On Behalf Of Minimizing Federal Regulation Of The Communications Media In General And Of The Advertising Industry In Particular*. So styled, the book might attract a smaller audience, but at least one which will not be surprised by its contents. Regardless of title, however, the comprehensive treatise on the law of advertising in the mid-1970's remains to be written.