

# Buffalo Law Review

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Volume 58  
Number 4 *Symposium: Advertising and the Law*

Article 2

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7-1-2010

## Foreword: Advertising and the Law

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### Recommended Citation

Mark Bartholomew, *Foreword: Advertising and the Law*, 58 Buff. L. Rev. 717 (2010).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol58/iss4/2>

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VOLUME 58

JULY 2010

NUMBER 4

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## Foreword: Advertising and the Law

MARK BARTHOLOMEW<sup>†</sup>

In an episode of the popular television drama *Mad Men*, Bert Cooper, the head of a mid-sized New York City advertising agency in the 1960s, instructs a lowly junior executive on how things get sold in the United States. The junior executive, intimidated by the large Mark Rothko painting hanging in Cooper's office, shyly asks Cooper what he thinks the painting means. Cooper responds gruffly: "People buy things to realize their aspirations. It's the foundation of our business." He then tells the junior executive that he bought the painting merely for its resale value.<sup>1</sup>

Although Cooper states that he only bought the painting as an investment, his description of advertising reveals that there is more to the profession than providing raw information about a product's objective qualities and characteristics. Cooper may believe that he is personally immune to the charms of advertising, but he also realizes that a truly effective advertisement taps into something deeper than our physical needs. As sociologists have been telling us for a while now, consumption of material goods has a symbolic value, not just an economic one.<sup>2</sup> The interesting question is how dynamic this process of developing symbolic values in the marketplace is. There may be widespread faith in the general ability of capitalist

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1. *Mad Men: The Gold Violin* (AMC television broadcast Sept. 7, 2008).

2. See generally, e.g., JEAN BAUDRILLARD, *SIMULATIONS* (1983); STUART EWEN, *ALL CONSUMING IMAGES* (1988).

market structures to set economic values in a fair and efficient way, but capitalism's role in creating symbolic meaning is less well-understood. Advertising both responds to and creates wants and needs in consumers. Cooper's description only hints at the level of influence commercial actors have in shaping our symbolic preferences.

It is hard enough to assess the dynamism of the relationship between advertiser and consumer. There has been a great deal of scholarly debate over just this topic.<sup>3</sup> But the issue becomes more complex when the relationship is overlaid with a set of legal regulations. The law prohibits some types of commercial representations and encourages others. It also privileges some entities to act on behalf of the consumer in her struggle for symbolic meaning with the advertiser, instead of letting the consumer into court to do this herself. For example, in the United States, the federal law regulating false advertising only permits suits by an advertiser's competitors, not by individual wronged consumers.<sup>4</sup> Thus, it becomes even more difficult to assess the consumer's agency in these matters when, in the legal arena, her battles are being fought by proxy.

But the stakes here are very high. When consumers are confused by advertising messages, inefficiencies sabotage the marketplace and incentives for investment in quality products decline. An audience that passively consumes the symbolic messages offered by advertisers will lack the ability to make optimal choices, and will instead purchase the same brands over and over despite inferior product characteristics. Even though the advertiser may try to link its message to our personal aspirations, if we do not have some role in shaping that message, our only aspiration will be to consume. This presents problems as social science offers evidence that materialist values lead to less social well-being.<sup>5</sup>

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3. See Mark Gottdiener, *Approaches to Consumption: Classical and Contemporary Perspectives*, in *NEW FORMS OF CONSUMPTION: CONSUMERS, CULTURE, AND COMMODIFICATION* 3, 15-18 (Mark Gottdiener ed., 2000).

4. *Barrus v. Sylvania*, 55 F.3d 468 (9th Cir. 1995); see also 15 U.S.C. § 1125(a) (2006).

5. *E.g.*, HELGA DITTMAR, *CONSUMER CULTURE, IDENTITY AND WELL-BEING: THE SEARCH FOR THE 'GOOD LIFE' AND THE 'BODY PERFECT'* 73, 188 (2008); Richard M. Ryan & Edward L. Deci, *On Assimilating Identities to the Self: A Self-Determination Theory Perspective on Internalization and Integrity Within*

To understand this struggle between advertiser and consumer and the role of the law in this struggle, advertising needs to be investigated on many fronts. The participants in this Symposium address a number of issues relating to advertising with a variety of analytical and legal frameworks. What groups them together, besides the general subject matter of advertising, is an interest in how legal rules influence the relationship between producer and consumer.

Two main themes run through these articles. One theme that emerges is the quest to intellectually or empirically arrive at an accurate assessment of the relationship between advertisers and consumers. Historian Daniel Horowitz argues that contrary to the dominant scholarly view, famed sociologist David Riesman believed in advertising's potential to triumph over modern society's conformist impulses and unleash self-expression and individual agency. Rather than decrying all aspects of the commercial environment, Riesman championed advertising's ability to introduce and refine tastes while at the same time responding to the preferences of individuals and social groups. Alberto Salazar describes a Canadian legal regime that stifles consumers attempting to shape corporate activity through counter-advertising. In my own work, using the example of marketing targeted to the gay community, I argue that the trend in advertising towards less universal and more group-based appeals expands commercial influence on our sense of self and reduces our ability to find non-commercial avenues for self-exploration.

Another theme is the need to recalibrate advertising regulations in light of technological change. The relationship between the advertiser, the consumer, and the law is a moving target. Laws crafted for advertising on billboards and magazines may not be suitable for commercial appeals in cyberspace. Sonia Katyal reveals a new landscape of non-traditional marketing channels where antibranding activists and stealth marketers are competing for consumer attention. Lisa Ramsey explains that

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*Cultures*, in HANDBOOK OF SELF-IDENTITY 253, 268-69 (Mark R. Leary & June Price Tangney eds., 2003); see also Nestor Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 794-801 (2009) (discussing normative consequences of property's status-signaling function).

traditional trademark infringement law may apply to the practice of “brandjacking” on social media networks, yet also contends that there should be a deeper sensitivity to the First Amendment rights of users of Facebook, Twitter, and other social network sites. Rebecca Tushnet examines how third-party bloggers have become the newest spokespersons for corporate America and makes a strong case for using existing laws to police the testimonials and endorsements of these bloggers for false and misleading claims.

There are many messages to be taken from these Articles. But one thing this Symposium issue proves is that there is a lot of information that needs to be teased out of the marketplace before we can have an accurate assessment of how advertising works. And maybe, in a way, that is a good thing. Articles like these demonstrate the need for consumers to be conditioned to understand the advertisement as a text deserving of scrutiny just like the words in a poem or an abstract painting hanging in someone’s office. It wouldn’t hurt for all of us to think a little more critically about commercial messages, just like the folks who work in an advertising agency.