

MARK BARTHOLOMEW, *ADCREEP: THE CASE AGAINST MODERN MARKETING*, (2017).

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AdCreep: The Case Against Modern Marketing

Adcreep manifests not only in the intrusion of advertising into new physical spaces. It also manifests in the surveillance of once-private activities, the exposure of once-internal thoughts, and the commodification of once-uncommodified aspects of human identity and social relations.

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Mark Bartholomew's latest book, *Adcreep: The Case Against Modern Marketing*, delves into the problematic aspects of modern marketing approaches. He calls for consumers to mobilize and push lawmakers and regulators to act on their behalf. He provides his readers with information regarding all of the new ways that advertising has entered their lives disguised – from advertising's infiltration of our public spaces to neuroscientific research controlling our subconscious commercial desires. In this review, I will explore the methods of advertising set forth by Bartholomew in his book and determine whether his suggested methods of combating this practice are realistic.

Mark Bartholomew is a professor at Buffalo School of Law.¹ He specializes his focus in advertising law, cyber law, intellectual property, and legal history.² Bartholomew received his B.A. from Cornell University and his J.D. from Yale Law School.³ After clerking on the Ninth Circuit Court of Appeals, he practiced law, both as a litigator and as a deputy county counsel Northern California.⁴ Additionally, he provides commentary on IP and advertising issues on the New York Times, Washington Post, LA Times, and Wall Street Journal.⁵ Bartholomew grew up in South Bend, Indiana and he is an avid football fan according to his Twitter feed.⁶

Adcreep generally discusses advertising law and administrative law while providing a history of advertising practices up until modern day. *Chapter 1 – Advertising on Trial* puts forth a history of how advertising came to be as well as consumer, legislative and legal responses to it. Consumers will look to two aspects of advertising primarily – informational content and emotional value. Legislative response to the possible issues stemming from those techniques including misinformation and deceptive practices resulted in the formation of new regulatory agencies such as the Federal Trade Commission. As an example of legal responses, Bartholomew discusses the relatively new recognition over a celebrity’s right of publicity, placing very strong limits on how advertiser’s could use the image and likeness of popular icons. Additionally, the Pure Food and Drug Act of 1906 which came directly in response to the emergence of false advertising of unsafe food products and medicines.

Chapter 2 – Colonizing New Advertising Spaces provides a history for the newer forms of advertising such as guerilla advertising and ace to face marketing. It discusses the infiltration of

¹ See University of Buffalo School of Law, *Mark Bartholomew*, archived at <https://perma.cc/AF5Q-4Y28>

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See *id.*; Mark Bartholomew (@markbartholo), TWITTER (Feb. 2, 2018, 11:32 AM), archived at <https://perma.cc/EZ5R-PV4J>

advertising into civic spaces and government spaces. Furthermore, chapter two assesses the divide amongst Americans regarding government paternalism and the public / private divide. In this chapter, Bartholomew highlights past governmental regulation of advertising in public spaces such as billboards. Finally, the second chapter discusses the balancing of commercial expression and public welfare.

Chapter 3 – The New Market Research evaluates the practices of advertisers utilizing electronic devices to create user profiles and accumulate personal data. Here, Bartholomew highlights the frightful reality that you can never truly be free to opt out of this kind of surveillance and discusses the harms of surveillance such as discrimination by brands on certain groups. In chapter three, Bartholomew questions where privacy law can play a role and assesses the argument that when you consent and contract away your rights to privacy through accepting user terms you cannot have an actionable cause against advertisers. While the benefits to consumers for this practice allow them to see more content that they will genuinely prefer, the dangers of consistently selling to someone based on information that your company learns from deceptive data collection far outweigh this convenient benefit.

In *Chapter 4 – From Market Share to Mindshare*, the author assesses the newest phenomenon of advertisers utilizing brain scan technology. This section of the novel highlights the dangers associated with instilling memories connected to brands through this research and finding new ways to make emotional appeals to consumers, even plant emotions into consumer's minds. It highlights the dangers associated with priming consumers to have an emotional connection to a brand or product. *Chapter 5 – Sellebrity* articulates the issues associated with celebrity and intellectual property, specifically right of publicity and micro-celebrities such as famous bloggers and influencers. Despite the Federal Trade Commission's recent efforts to

require disclosure of material relationships between influencers and companies, Bartholomew questions disclosure as a workable solution.

The work concludes with *Chapter 6 – Stopping Adcreep* where Bartholomew proposes solutions to end invasive advertising as we know it – primarily by suggesting that consumers must take action to urge legislators to act on their behalf. At this point, the book veers into a different direction and begins a true analysis of how consumers can combat the many horrors mentioned in the preceding chapters. The thesis of this book, prevalent throughout the work but specifically mentioned within chapter six, is that regulators and the Supreme Court are not the proper avenues to combat modern advertising. Instead of utilizing those avenues immediately, consumers must mobilize by creating a new consumer movement if they want to see governmental action. The consumer movement can prevail by emphasizing the complexity of this advertising problem, private paternalism of marketers (not the government), and brand tyranny.

Bartholomew recognized the weaknesses in his arguments while still countering those weaknesses with more strengths. For example, in his suggestion of corporate research boards acting similarly to internal research boards that review academic research, he mentions the possible pitfalls in its execution such as passing confidential information over to outsiders and potential lack of oversight. He disputes these possible pitfalls by suggesting that the boards may contain insiders but should have at minimum one outsider's presence and putting forth gatekeepers who can monitor the effectiveness of this oversight.

In a clear and logical way, Bartholomew's words easily connect with any audience. His very readable, and fast paced writing style provides examples that can be referenced for any generation to connect with and understand. *Adcreep* is a valuable contribution to the field of law,

particularly due to the extensive research made evident on every page but also because of Bartholomew's ability to write for a wide variety of audiences. *Adcreep* is easy to understand, provides the perfect amount of scare tactic to make consumers wary of these practices, and calls for a solution where readers can begin participating as soon as they finish reading. It is impossible to put the book down when every page utilizes at least three examples of how advertising is infiltrating your privacy interest daily. Perhaps most frightening, Bartholomew commits an entire chapter to the discussion of neuromarketing. Gone are the days when neuromarketing allowed marketers to understand emotional reactions to specific advertising through voluntary studies. Now, marketers can place technology in retail spaces or supermarkets to track our reactions to products and study our behavior such as when we pick up a product or how long we hold onto it until we decide not to buy it.

However, Bartholomew may have difficulty in garnering consumer movement due to the vast breadth of forms of adcreep discussed. He utilizes examples of guerilla advertising in politically commoditized public spaces, microcelebrity in social media, and neural brain scan studies adding skepticism of modern marketing to the reader as they engage with each chapter. However, these methods of advertising are not similar enough in execution or levels of intrusion upon consumer privacy. A reader would be much more troubled by reading about the neuromarketing techniques of implanting emotions than they would be over a social media influencer's failure to disclose an advertising relationship in a sponsored post. For those reasons, these forms of adcreep may need to be handled differently from a legislative standpoint. The benefits of this vast expanse of adcreep discussion is that it makes it impossible for the reader to discredit the invasion of these techniques. Bartholomew's pleas for consumer action are aided by his discussion of the many

different resources that marketers have to avoid regulatory authority and continue these practices.

It is, however, questionable as to whether all of these forms of adcreep can be influenced by his call for consumer movement to spur legislative and regulatory action. As individuals are already accustomed to this form of invasion, it might be difficult to muster consumer upset to the level that it would need to reach for change. Additionally, in this present time with social movements such as Black Lives Matter, Time's Up, and the March for Our Lives gaining support for causes such as gender discrimination, race discrimination, and gun violence, it is doubtful that these advertising privacy issues would garner substantial resistance in comparison.⁷ Despite his rejection of the disclosure requirements from the FTC, I believe that this may be the best avenue for change in terms of adcreep. Bartholomew concedes that the regulatory agency has the authority to address the problem but lacks the ability to follow through with aggressively fighting it. I believe that if they aggressively pushed disclosure requirements, as they have been with the social media microcelebrities, individuals will begin to understand the vast extent of advertising that they are shown each day. This will spur more of the consumer movement that Bartholomew is rightfully urging through *Adcreep*.

⁷ See BLACK LIVES MATTER, archived at <https://perma.cc/KZ6R-96DY> (last visited Apr. 12, 2018); TIME'S UP, archived at <https://perma.cc/DY7S-MMWG> (last visited Apr. 12, 2018); MARCH FOR OUR LIVES, archived at <https://perma.cc/N9X6-LAGN> (last visited Apr. 12, 2018)