
Imagine sitting in front of the television and seeing the following commercial: M.C. Hammer, a famous rap singer, is performing on stage for thousands of enthusiastic fans in his usual macho rap style. During a brief break, someone in his crew hands him a can of Coca-Cola. Much to the chagrin of his fans, Hammer suddenly lapses into a soft rendition of “Feelings.” Just as Hammer gets to the sappy chorus, a fan saves the day by opening and handing him a can of Pepsi, a sip from which returns Hammer to his upbeat, rhythmic style.

The next commercial that comes on shows a number of different pain relievers and several people who appear to be in various kinds of pain. The spokesman

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says, "[y]our body knows the difference between these pain relievers . . . and . . . Anacin." Then the commercial asserts "Anacin can reduce inflammation that comes with most pain, Tylenol cannot." \(^2\)

The preceding commercials are examples of comparative advertising, advertising that compares one competitor with another. \(^3\) The use of comparative advertising and advertising in general by American companies has been increasing recently, not only in the United States, but also in many foreign countries. \(^4\) The growing importance of foreign advertising markets is due, among other things, to flourishing economies in Europe and Asia, the elimination of trade barriers in the European Community, \(^5\) and evolving free market economies in Latin America. \(^6\) Advertising expenditures in foreign markets are expected to continue increasing because of the need of companies to globalize their products in order to keep up with worldwide competition. \(^7\)

Many foreign governments have placed restrictions on their advertising markets, which create barriers to entry for American companies. \(^8\) Consequently, companies need to know the legal and cultural barriers in various foreign countries before implementing an advertising campaign overseas.

This comment is a practical guide for U.S. lawyers and their clients who wish to engage in comparative advertising overseas. \(^9\) Section I explains what

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5. Id. at 57. Foreign advertising volume in 1988 was $121.4 billion; U.S. advertising volume was $118.1 billion. Id. at 56-57.
6. See Robert G. Vaughn, Consumer Protection Laws in South America, 17 HASTINGS INT’L & COMP. L. REV. 275, 276 (1994). This is due to a decrease in government-owned production facilities. Id. at 276. Of course, NAFTA will increase U.S. advertising in Mexico and other Latin American countries even more. See id. at 276-77.
7. USITC, supra note 4, at 57-58. Foreign advertising is also expected to continue because mature products can continue to grow only by entering new markets and because many countries have recently deregulated the television broadcasting industry. Id.
8. Id. at 66. These restrictions concern ownership and right of establishment, internal payment transfers, national procurement policies, language and content of advertising materials, and transborder broadcasting advertising. Id.; see also id. at 67-72.
9. When a client brings J.J. Boddewyn and Katherine Marton a U.S. or foreign comparative advertisement for legal approval, they offer the following advice. (1) "[T]he comparison should be on a factual basis only" because facts can be tested and proved, while thoughts and feelings cannot. (2) The product to be compared with should actually be a competitor in order to decrease the risk of confusion. (3) "Compare competitive products that are similar in price and that the consuming public considers to be of the same general quality." (4) Only compare significant attributes of the products. (5) "[D]o not imply overall superiority unless" the claim can be supported by facts. J.J. BODDEWYN & KATHERIN MARTON, COMPARISON ADVERTISING: A WORLDWIDE STUDY 34-35 (1978).
comparative advertising is and why it is an effective tool in marketing new or existing products and services. Section II outlines the current U.S. comparative advertising law and the various causes of action and remedies available to companies injured by the comparative advertising practices of their competitors. Section III analyzes the current comparative advertising proposal in the European Community and explains individual European countries' laws and attitudes regarding comparative advertising. Section IV explores the current views toward comparative advertising in Asia, and Section V follows up with a forward look toward comparative advertising law in certain Latin American countries, including Mexico.

I. Comparative Advertising in General

Comparative advertising is defined as advertising that "identifies the competition for the purpose of claiming superiority or enhancing perceptions of the sponsor's brand," as opposed to advertising that promotes one's product solely on its own merits. The comparison may be of a specific attribute of the product, such as price or taste, or it may be a general, all-encompassing comparison. The comparison may be subtle, or it may show or name a specific competitor, usually the market leader.

Even though comparative advertising is perceived by some people as "being more offensive as well as less believable, honest, or credible than is non-comparative advertising," it is used and even encouraged in the United States.

10. James & Hensel, supra note 3, at 54 (citation omitted). Comparative advertising is also defined as "a technique by which a product is compared to a competitive product with the intent of proving its superiority." Paul E. Pompeo, To Tell the Truth: Comparative Advertising and Lanham Act Section 43(a), 36 CATH. U. L. REV. 565, 565 (1987).


12. Darrel D. Muehling et al., The Impact of Comparative Advertising on Levels of Message Involvement, J. ADVERTISING, Sept. 22, 1990, at 41. An example of a subtle comparative advertisement is Burger King's proclamation of the virtues of "flame broiling" hamburgers versus "frying" them. Burger King's ad implies that some other fast food restaurants fry their hamburgers without making a specific reference to their competitor (known to be McDonald's, the market leader). James & Hensel, supra note 3, at 55. An example of a direct comparative advertisement is Pepsi's M.C. Hammer ad, again attacking the market leader, Coke. See Ormonde, supra note 1, at 14. Experts contend that market leaders that use comparative advertising gain nothing, and, in fact, probably lose, because they give their rivals free exposure, and because comparing one's product to the market leader is often considered an admission of inferiority. Comparative Advertising: Red in Tooth and Claw, supra note 1, at 80. Comparative advertising is much more effective when the advertiser has a small percentage of the market. See BODDEWYN & MARTON, supra note 9, at 222. For example, when Mazda introduced its new Hatchback in 1977, Mazda compared the car with four of its competitors in a comparative advertisement in the United Kingdom. Id. At the time, the hatchback only had 1% of the market. Id. When Mazda put itself against the better-known models with respect to price comparison, its sales increased. Id.

13. James & Hensel, supra note 3, at 60 (citations omitted). When using advertising that appears negative to its viewers, there is danger that the negative view will be attributed to the advertiser.
Approximately one-third of all advertising in the United States is comparative in one way or another, in part because comparative advertising has become an easy way to take away market share from competitors. Research shows that it is effective. A 1994 study showed that 21 percent of comparative advertisements were persuasively superior, while only 18 percent of noncomparative advertisements were persuasively superior. Studies have also shown that a comparative advertisement produces greater attention and message recall than a noncomparative advertisement.

II. United States Law on Comparative Advertising

Ideally, comparative advertising should be honest, should not mislead, and should not exaggerate. When a company crosses the honesty/exaggeration line, it may find itself in court answering to various causes of action, even in the United States.

What is now known as misleading comparative advertising used to be considered false defamation of a business and comparative disparagement of its goods. Such advertising was actionable under common law as unfair competition. In 1938 "the assertion that your product is better than that of a specifically designated competitor . . . [was] generally regarded as unethical and [not] practiced by self-respecting business men." Some thought that actionable unfair competition should include "giving customers or prospective customers factual information about a rival's goods, business or business policies, unless vital interests of the informant, or of the public, cannot be protected by other means." Common


16. Id.

17. Muehling et al., supra note 12, at 42-44. A comparative advertisement will produce greater attention because of the perceived relevance and meaningfulness of the information. It will generate more message recall because more thought process is involved, and therefore it is easier to retrieve from memory. Id.


20. Id. at 1317.

21. Id. at 1332.
law actions became inadequate, and when times changed, so did the laws and attitudes toward comparative advertising.\textsuperscript{22}

A. THE FEDERAL TRADE COMMISSION

In 1971 the Federal Trade Commission (FTC) endorsed comparative advertising in order to promote a greater disclosure of product differences.\textsuperscript{23} Until then, comparative advertising had rarely been used in the United States.\textsuperscript{24} The FTC’s policy on comparative advertising states that it benefits consumers.\textsuperscript{25} The FTC “encourages the naming of, or reference to competitors, but requires clarity, and, if necessary, disclosure to avoid deception of the consumer.”\textsuperscript{26} The FTC believes that “[c]omparative advertising, when truthful and nondeceptive, is a source of important information to consumers and assists them in making rational purchase decisions. . . . [It] encourages product improvement and innovation, and can lead to lower prices.”\textsuperscript{27}

One remedy for the harm a comparative advertisement might cause is available when the FTC acts in the public’s interest and brings a cause of action against the advertiser. The injured business, however, has little control over bringing the action since the FTC decides whether it will take action in a particular case.\textsuperscript{28}

The FTC considers an advertisement deceptive if it “contain[s] a representation, practice, or omission likely to mislead reasonable consumers and if the representation, practice, or omission [is] material to consumer choice.”\textsuperscript{29} Therefore, in order to be successful on a deceptive advertising claim, the FTC merely has to prove that a reasonable consumer is likely to be misled and that the advertisement played a material role in the consumer’s purchasing choice.\textsuperscript{30} The FTC also requires the advertisers to substantiate the truthfulness of their implied or express advertising claims.\textsuperscript{31} The usual remedy the FTC obtains in a comparative

\textsuperscript{22} See Ross D. Petty, \textit{The Evolution of Comparative Advertising Law: Has the Lanham Act Gone Too Far?}, J. PUB. POL’Y & MARKETING, Fall 1991, at 161. Under common law, a company could also sue under a passing-off theory. \textit{Id.} Passing off occurs when one advertiser makes a false representation that makes the viewer believe that the advertiser’s product is really that of another company. \textit{Id.}

\textsuperscript{23} Pompeo, \textit{supra} note 10, at 565.

\textsuperscript{24} Petty, \textit{supra} note 22, at 161; see also Boddewyn & Marton, \textit{supra} note 9, at 11, 26.


\textsuperscript{26} FTC Commercial Practices, 16 C.F.R. §14.15(b) (1994). In fact, an advertiser can disparage its competitor(s) all it wants as long as the statements are truthful and not misleading. \textit{Id.} §14.15(c)(1).

\textsuperscript{27} \textit{Id.} §14.15(c); see also \textit{In re} Personal Protection Armor Ass’n, No. 921-0070, 1993 FTC LEXIS 353, at *2-3 (Jan. 27, 1993).

\textsuperscript{28} Petty, \textit{supra} note 25, at 48. When the FTC decides to pursue a case, it bears all legal expenses. \textit{Id.} at 49.

\textsuperscript{29} \textit{Id.} at 50; see Petty, \textit{supra} note 22, at 161.

\textsuperscript{30} \textit{Id.} at 50; see Petty, \textit{supra} note 22, at 161.

\textsuperscript{31} Petty, \textit{supra} note 22. The advertiser must provide the FTC with complete documentation prepared before the claim was made in the advertisement in order to substantiate the advertising claims. Boddewyn & Marton, \textit{supra} note 9, at 30.
advertising case is a cease and desist order, although the FTC may also order affirmative disclosure of information to prevent the deception. The FTC's low burden of proof is offset by its policy encouraging comparative advertising and the infrequency with which it brings cases.

B. The United States International Trade Commission

A way to remedy a harmful comparative advertisement of imported goods is to file a complaint with the International Trade Commission (ITC). The complaint must "define and describe the domestic injury caused by the practices" and "include facts that constitute an unfair method of competition or unfair act." However, filing a complaint does not guarantee that the ITC will take any action toward the competitor. The ITC decides, based on the complaint, whether it will pursue a formal investigation. If the ITC decides that the complaint is worth pursuing, it will complete its investigation within a year and recommend a remedy. The usual remedy in ITC advertising cases is, as with the FTC, a cease and desist order enforceable in federal district court against the unlawful conduct.

The ITC's and the FTC's rules are similar, although the ITC does not have an affirmative policy encouraging comparative advertising. The ITC permits a company to "refer to the product of another for purposes of honest comparison between the products, as long as the public remains aware of who produces which product." However, there have been few ITC comparative advertising cases because the complainant's high burden of proof makes it difficult to prove actual damages and injury to the industry.

32. Petty, supra note 25, at 50-51.
33. BODEWYN & MARTON, supra note 9, at 33; Petty, supra note 22. After the FTC endorsed comparative advertising in 1971, it pursued fewer cases. Petty, supra note 22. Compared to the volume of comparative advertisements, the FTC initiates few cases. Id. For an example of a recent FTC case, see Kraft, Inc. v. Federal Trade Comm'n, 970 F.2d 311 (7th Cir. 1992) (holding that the FTC could rely on its own reasoned analysis rather than extrinsic evidence to determine what claims, including implied ones, were conveyed in the challenged advertisement).
34. Petty, supra note 25, at 56.
35. Id. The ITC must decide within thirty days of filing the complaint whether it will pursue a formal investigation. Id. The ITC will at least conduct a preliminary investigation in all cases where a complaint has been filed. Id.
36. Id. at 57. The penalty for noncompliance with the order is the greater of $100,000 or twice the value of the goods per day of noncompliance. Id.
37. See id. at 68-69.
C. Section 43(a) of the Lanham Act

In response to the difficulty of getting the FTC or ITC to intervene and the consequent need for a new federal remedy for a variety of unfair competition problems, Congress passed section 43(a) of the Lanham Trademark Act. The Lanham Act is presently the predominant law for false advertising in the United States. Under this act, companies can bring private suits directly without having to rely on a government entity to do so for them.

The act makes a company "civilly liable to another who is or is likely to be damaged by the false description or representation of goods or services" in a comparative ad. The complaining party must prove that the competitor's advertising is actually false or misleading by proving a lack of substantiation to back up the competitor's claim. The plaintiff also must prove that "[1] the false statements either have deceived or have the capacity to deceive a substantial segment of the audience, . . . [2] the deception is material to the purchasing decision, and . . . [3] the plaintiff is injured. . . . by the statement." Therefore, the burden of proof is higher in a Lanham Act case than in an FTC or ITC case. On the other hand, Lanham Act cases have found deception more often than FTC cases, due, in part, to a judicial recognition of a strong public interest in consumer protection.

Several remedies are available under section 43(a). In order to receive damages under section 43(a), the "plaintiff must establish that the buying public was actually deceived; in order to obtain equitable relief, only a likelihood of deception need be shown." If the plaintiff's product or name is specifically identified in


40. Pompeo, supra note 10, at 568, 569; see also Petty, supra note 22, at 161. Section 43(a) of the Lanham Act provides:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

41. Petty, supra note 22.
42. Pompeo, supra note 10, at 568.
43. Petty, supra note 25, at 52.
44. Id.; see also Petty, supra note 22, at 161.
45. Petty, supra note 22.
46. Pompeo, supra note 10, at 572 (emphasis in original; footnote omitted) (quoting Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 783 (N.D. Ill. 1974)). The Skil case established a five-part test to establish a case of false advertising under section 43(a). Id. at 572. It also broadened and defined the application of section 43(a). Id. at 571, 572.
the advertisement, and the ad is considered false or misleading, the plaintiff does not have to show monetary damages in order to get an injunction. If, however, the plaintiff is not specifically named in the advertisement, it must show actual damages in order to get an injunction.47 If the defendant’s representations are explicitly false, the plaintiff need not show actual impact on consumers. If the defendant’s representations are implicitly false, the plaintiff must conduct consumer reaction surveys in order to determine whether deception has occurred.48

The remedy that section 43(a) plaintiffs most prefer is an injunction, because it takes the advertisement in question out of the marketplace so that no further harm will come to the plaintiff.49 Injunctions can be obtained very quickly compared to other legal remedies, always within months and often within weeks of filing the complaint.50

A two-part test exists for determining whether an injunction is appropriate. The plaintiff first must show that it ‘will suffer irreparable injury if an injunction is not issued and the abusive message is allowed to persist.’51 The plaintiff must then show either ‘(1) the likelihood of success on the merits, or ‘(2) sufficiently serious questions going to the merits to make them fair ground for litigation.’’52 Other remedies available under section 43(a) are damages, corrective advertising, and monetary awards.53

In summary, a company has three ways to seek redress in the United States when it thinks the comparative advertising of a competitor has harmed it. The

47. BARRY R. FISCHER & DOUGLAS J. WOOD, COMPARATIVE ADVERTISING: WHAT EVERY ADVERTISING EXECUTIVE SHOULD KNOW ABOUT COMPARATIVE ADVERTISING LAWSUITS UNDER § 43(a) OF THE LANHAM ACT 4 (1991). For example, suppose that the fictional Utopia Company makes a claim in an advertisement that “Widgets made by the Utopia Company are the best made widgets in the world.” Id. This is a comparative advertisement that does not actually name a specific competitor. Id. Suppose the claim is actually false on its face, meaning Utopia widgets are not the best in the world. Id. The Nirvana Company, which also makes very good widgets, believes that it has been harmed by Utopia’s ad. Id. In order to successfully bring a section 43(a) action, Nirvana would have to show that “It is within the ‘targeted zone’ of the advertising—that consumers will assume that Utopia is claiming superiority over all competitors, including Nirvana, and that the claim may have an adverse effect on consumers’ purchasing decisions.” Id. Nirvana would also have to show that the misrepresentation was material. Id. at 5. For example, if Utopia claimed their widgets were stronger, and in fact they were, but Utopia also showed Nirvana’s widgets in the wrong color, Nirvana would not have a section 43(a) action because the color of its widgets is not likely to affect a consumer’s purchasing decision. Id.

48. Pompeo, supra note 10, at 575. For a description of how consumer impression surveys are conducted, see FISCHER & WOOD, supra note 47, at 3-4.

49. Pompeo, supra note 10, at 573.

50. Id.; BODDEWYN & MARTON, supra note 9, at 29.

51. Pompeo, supra note 10, at 574 (quoting Coca-Cola Co. v. Tropicana Products, Inc., 690 F.2d 312, 316 (2d Cir. 1982)). The Coca-Cola case sets forth the requirements for obtaining an injunction.

52. Id. at 575 (footnote omitted) (quoting Coca-Cola, 690 F.2d at 314-15).

53. See Pompeo, supra note 10, at 576-83. A plaintiff may recover the defendant’s profits, actual damages, and court costs. In special circumstances, the plaintiff can also get treble damages and attorney’s fees. Id. at 577. Corrective advertising, when ordered, must be designed to give the consumer the truth and erase the deception that caused the confusion. Id. at 578.
FTC, which actually encourages comparative advertising, can bring an action against the advertiser. The injured company can file a complaint with the ITC, which may investigate the case. Or the company can bring a private suit directly against the competitor under section 43(a) of the Lanham Act. Recently, more cases have been tried and won under the Lanham Act than by the FTC or ITC. The future of comparative advertising in the United States is likely be as it is now.

III. The European Community

As comparative advertising becomes more popular in America, governments of many other countries are feeling pressure to liberalize their rules on comparative advertising. Since the 1960s Europe, for example, has been going through an economic transition during which the European Community (EC) countries have tried to harmonize their laws. Advertising is one area of EC law that is not yet completely developed. Different countries have different cultures and different laws, which affect the way a firm can advertise. A company cannot simply create a uniform, generic advertising campaign and run it in all European countries. Advertisers must take into account cultural, linguistic, and legal differences.

With the recent opening of European borders, across-the-board advertising has run into problems. Comparative advertising, in particular, may be permitted in one European country and prohibited in another. This section explores which countries do and do not allow comparative advertising.

A. The European Community Proposal on Comparative Advertising

The wide assortment of rules on comparative advertising in the European countries has created a need for a uniform proposal on comparative advertising that would permit it throughout the EC with certain restrictions. The European Commission wrote a proposal with the realization that to have harmonization the single market must have a free flow of information. The proposal would "guarantee better information for consumers, increase competition and keep

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54. See Boddewyn & Marton, supra note 9, at 29.
55. Comparative Advertising: Red in Tooth and Claw, supra note 1, at 79.
57. See id.
58. Cross-Border Advertising: Why It's Catching on, BUS. EUR., June 27, 1994, at 3. For example, the color white is a symbol of death and mourning in the east, but not in the west. Id. Another example is that the Toyota MR2 had to be renamed in France because of its similarity to vulgar language. Id.
59. Edward Fennell, Smoke Signals More Business for British, THE TIMES, Jan. 28, 1992, Life & Times sec., at 9. An ad must be approved in each country before it can be aired. Id.
60. Id.; Comparative Advertising Text, EUROFOOD, June 1994, at 3.
61. Rawsthorn, supra note 14, at *2.
coherent control over advertisers." At the same time, the proposal would help to create a single market for advertising.

In 1978 the first proposed directive containing standards for misleading, unfair, and comparative advertising was written in order to facilitate the economic integration of the EC. The Commission was concerned with consumer protection throughout the EC. Six years later, in 1984, the directive on misleading advertising was passed and adopted, and has been the law in all Member States since 1986. In 1984 the Commission also considered a directive on comparative advertising, but discarded the idea because of disagreements between the member governments. The directive on comparative advertising reappeared in 1991 as a Commission proposal, but has yet to be adopted.

The 1984 Directive requires each member country to have procedural mechanisms and remedies in place to address the problem of and prevent misleading advertising. The new 1991 amendment would also prohibit comparative advertise-
tising that (1) "explicitly or implicitly identifies a competitor or competing goods or services, unless the comparison is representative, relevant, material, verifiable and fairly chosen"; 68 (2) misleads consumers or creates the risk of confusion; 69 (3) "discredit[s] or defame[s] a competitor or competing products or trademarks"; 70 or (4) "refer[s] to the personality or personal situation of a competitor." 71 These rules have a restrictive effect because "ads must be scientifically verifiable...; they cannot feature a rival's trademark...; and they must include all 'relevant' comparisons." 72

The 1994 version of the amendment would make the fairness requirements more binding. 73 It also would prohibit Member States from enacting stricter controls on comparative advertising than are in the directive. 74

Even with all the work that has been done and the debate that has occurred over this directive in the last sixteen years, no decision is expected any time soon because the subject is so controversial. 75 The directive must be approved by a majority of the EC governments before it can take effect. 76 If the 1994 version is adopted, it will take effect in December 1995. 77 However, since comparative advertising is used in only 2 percent of European advertising, the proposed directive is not expected to have a great impact on European advertising law. 78

B. INDIVIDUAL EUROPEAN COUNTRIES' LAWS ON COMPARATIVE ADVERTISING

1. The United Kingdom

Comparative advertising has been practiced in the United Kingdom for about as long as in the United States. 79 Yet, the British approach to competition is much

69. Id.
70. Id.
71. Comparative Advertising Text, supra note 60, at 3.
72. Comparative Advertising: Red in Tooth and Claw, supra note 1, at 79. Thus, if Pepsi were to run its M.C. Hammer commercial in Europe under the new directive, it would have to provide scientific evidence that Coke makes Hammer's voice change dramatically in style. Id.
74. Tritell, supra note 65.
76. EC Reveals Plan to Permit Comparative Advertising, supra note 63.
78. Tritell, supra note 65.
79. See BODDEWYN & MARTON, supra note 9, at 167.
more courteous than the American approach, and the British feel strongly that advertising should center around images rather than facts. 80 The British find direct comparative advertising distasteful because it appears to them to be very negative, and they believe that negative advertising is impolite. They prefer a pleasant, self-praising, soft sell to a more American, comparative, hard sell. 81

While the United Kingdom has no absolute ban on comparative advertising, the use of a competitor’s trademark in an advertisement, which is hard not to do in a comparative advertisement, may create a cause of action under trademark infringement law. 82 For example, when Pepsi ran its M.C. Hammer commercial in the United Kingdom in 1991, the Coke can had to be replaced with an anonymous soft drink. 83

Nevertheless, Britain’s laws are gradually changing. 84 The United Kingdom recently passed the Trade Marks Act of 1994, which will relax some of the older, more restrictive trademark infringement laws and effectively allow more comparative advertising. 85 The Trade Marks Act went into effect at the end of October 1994. 86 Designed to ensure that consumers have “sufficient information to compare sensibly the prices and qualities of competing goods and services,” the Act “will permit references to a competitor’s registered trademark, provided that the advertiser operates within certain guidelines.” 87 An advertisement will be a trademark infringement under the new Act “if it is not in accordance with ‘honest practices in industrial and commercial matters’ or if . . . it takes ‘unfair advantage of or is detrimental to the distinctive character or repute of the trademark.’” 88

Outside of trademark law, a company can bring another common law cause of action in the United Kingdom if it believes that it has been injured by a comparative advertisement. This cause of action is called “passing off” and is demonstrated by a 1993 British case, Ciba-Geigy plc v. Parke Davis Co. 89

80. Id. at 69. However, among those few that are familiar with comparative advertising, many look favorably toward it. Id.
81. See Adland Ponders the Hard Sell, Marketing, Jan. 27, 1994, at 3.
82. Diane Summers, Light Touch in Battle for Brands: A Free Speech Issue, a Clever Marketing Ploy or an Unfair Promotional Device?, Fin. Times, Mar. 31, 1994, at 17, available in LEXIS, News Library, FINME File; see also Tritell, supra note 65; EC Reveals Plan to Permit Comparative Advertising, supra note 63; Boddewyn & Marton, supra note 9, at 136, 168. See, e.g., Duracell Int’l, Inc. v. Ever Ready Ltd., 1989 Ch. 731 (Eng. C.A.). In the United Kingdom, the comparative advertising law is such that a company can mention a competitor’s corporate names but not their trademarked products. See Comparative Advertising: Red in Tooth and Claw, supra note 1.
83. Rawsthorn, supra note 14.
85. Id.
86. Id.
87. Id.
88. Id. Advertising takes “unfair advantage” of the “distinctive character” of a trademark when it creates confusion in the mind of the consumer as to whom the trademark belongs—to the advertiser or the competitor. Id.; see also Summers, supra note 82.
The advertisement at issue in this case sought to show that the defendant’s product was as good as the plaintiff’s. The ad asserted that the defendant’s brand of anti-inflammatory drug was a 25 percent cheaper substitute for the plaintiff’s brand. The plaintiff tried to prove that the ad was passing off, which is illegal. The court, however, said that this claim was merely puffing and therefore was not actionable at common law even if the plaintiff could prove actual damages.\(^{90}\) The rationale underlying the passing-off cause of action is that no company should be allowed to represent that its goods are the goods of another.\(^{91}\)

In summary, the United Kingdom tolerates but, unlike the United States, does not encourage comparative advertising. Most of Britain’s comparative advertising law comes under trademark infringement. The new trademark law that went into effect in 1994 will make it easier to run a comparative advertising campaign, but distinct rules do exist.

2. Portugal

Portugal allows comparative advertising as long as the advertiser does not use another’s registered trademark or act contrary to honest standards and usages.\(^{92}\)

3. France

Unlike in the United States, in France hard-sell advertising is largely unknown.\(^{93}\) When comparative advertisements were used, they ran into trouble under trademark protection legislation.\(^{94}\) In addition, the French Civil Code prohibited acts that unnecessarily harmed others, which confusing or discrediting comparative ads were thought to do.\(^{95}\)

On January 18, 1992, the French Constitutional Council amended article 10 of the French Legal Code to allow comparative advertising only if it is “fair,

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90. Id. at *7, *12, *13.
91. Id. at *5. To establish a prima facie case of passing off, the plaintiff must prove:
   (1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him (4) which is calculated to injure the business or goodwill of another trader . . . and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or . . . will probably do so.

92. BODDEWYN & MARTON, supra note 9, at 141; see also EC Reveals Plan to Permit Comparative Advertising, supra note 63; Rawsthorn, supra note 14; Tritell, supra note 65.
94. Rawsthorn, supra note 14. Article 422.2 of the French Penal Code forbade the use of a competitor’s trademark without permission. BODDEWYN & MARTON, supra note 9, at 125. Comparative ads that were allowed in France were comparative ads requested by customers, defensive comparisons, objective comparisons of methods, and superlative statements not directed toward a certain competitor. Id. If a company violated the penal code provisions, it would have to pay penalties and damages, and the enforcing entity could get a cease and desist order. Id.
95. BODDEWYN & MARTON, supra note 9, at 124.
true, objective and not misleading to consumers." Comparative advertisements must be based on "substantial, significant and verifiable qualities." In addition, "[a]ny price comparison must consider identical products sold under the same conditions, and explicitly state the amount of time the price is applicable." Therefore, although comparative advertising in France is technically allowed, the restrictions still make creating an ad difficult.

4. Spain

Before 1988 comparative advertising in Spain fell under the Law of Industrial Property of 1902 and the Statute of Advertising of 1964. The Law of Industrial Property forbade advertising, whether true or false, that tended to "depreciate the quality of a competitor's products." The Statute of Advertising prohibited advertising that tended to "discredit competitors or their products; and generally, all advertising activities which are contrary to correct usages and commercial practices." Together, the two laws had the practical effect of a ban on comparative advertising.

In 1988 the Spanish Government passed the General Advertising Law, which permits comparative advertising with some restrictions. The law considers comparative advertising unfair and therefore prohibited if it is not based on "essential, analogous and verifiable characteristics." Products also cannot be compared with other products if the advertiser is unknown or has a "limited participation in the market." As a practical matter, advertisers in Spain do not use direct (as opposed to indirect or general) comparative advertising because, under the law, it is very difficult for companies to prove their products' superiority. Instead, advertisers compare their product with an unnamed brand.

96. Annyvonne Jeanmaire, The Advertising Market in France, MARKET REP., Jan. 14, 1994, at 5; see also French Minister Favors New Law Permitting Comparative Advertising, 59 Antitrust & Trade Reg. Rep. (BNA) No. 1484, at 475 (Sept. 27, 1990); Cross-Border Advertising: Why It's Catching on, supra note 58; Rules of Competition, BUS. INT'L FORECASTING, Mar. 1, 1992. It took over a year for the law to pass because it was so controversial. Id. See also Tritell, supra note 65.


98. Jeanmaire, supra note 96, at 5; see also France Gives Green Light, supra note 97. The "same conditions" means that a small corner drugstore, for example, would not be able to compare its prices on the same products to those at a big, retail department store. Id.

That comparative advertising is now allowed in France is good news for U.S. advertisers because France presently has many favorable opportunities for U.S. advertising. Jeanmaire, supra note 96, at 1.

99. BODDEWYN & MARTON, supra note 9, at 132.

100. Id.

101. Id. at 133. An advertiser, however, could use general comparisons with unnamed competitors and superlatives. Id.


103. Id.

104. Id.

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In 1990 the Spanish Cabinet approved a bill allowing comparative advertisements that are not deceitful, misleading, or subliminal. Europeans now generally consider comparative advertising to be permitted in Spain with conditions.

5. Denmark

Comparative advertising is allowed in Denmark subject to tight restrictions. The comparative advertisement must not be "false, misleading, unreasonably incomplete, or unfair" toward competitors or consumers because of irrelevant comparisons. An advertiser also cannot use a competitor's trademark without permission merely to promote the advertiser's own product as superior, although a company can use a trademark to assist consumers in their purchasing choices. The use of comparative advertising by advertising firms in Denmark is increasing, and therefore is becoming a safer practice.

6. Belgium

Belgium is one of two European countries that explicitly ban comparative advertising. The Belgian Commercial Practices Law forbids comparative advertising that is misleading or denigrates competitors. Comparative advertising is also prohibited under trademark law. An advertiser cannot use comparisons even if they are completely truthful. Belgium also prohibits price comparisons with any named brand. Nevertheless, puffery and self-defense exceptions are available.

105. Hayden, supra note 14, at 73 n.44.
106. See Rawsthorn, supra note 14; EC Reveals Plan to Permit Comparative Advertising, supra note 63; Tritell, supra note 65. See, e.g., Bowes & Kilburn, supra note 1 (stating that the M.C. Hammer commercial in Spain used the mysterious white paper cup instead of the Coca-Cola can, leading one to infer that showing Coke's trademark was not allowed).
108. Boddewyn & Marton, supra note 9, at 124.
109. Id. An example of a comparative advertisement that was not allowed is a language school's ad in which the school claimed to be "[t]he only specialist in intensive language training." Id. at 159. The Danish consumer ombudsman's office, which ensures that the consumer laws are followed, found the statement to be misleading. Id. The advertiser acted "unfairly toward competitors since its claim could not be substantiated." Id.
110. Id. at 159. Most businesses still refrain from the use of comparative advertising because they consider it damaging to the image of advertising and business. Id.
111. The other is Luxembourg. See infra part IV.B.7.
112. Boddewyn & Marton, supra note 9, at 122. Under the Commercial Practices Law, an advertisement cannot even identify a specific business, regardless of whether that business is a competitor of the advertiser. Under trademark law, the injured competitor can challenge any use of its trademark that would cause it damage without a good reason. Id.
113. Id. at 141-42.
114. Id. at 143.
115. Id. at 142. Another exception to the ban is comparisons of systems or methods, such as when an outlet store compares its prices to retail stores. Id. But even a method comparison must be objective and cannot name a particular store or group of stores. Id. If an advertiser acts in bad faith, the government may have an action against it under the penal code. Id. at 143.
Belgium’s strict ban on comparative advertising is rooted in Belgian commercial law that traditionally favors business over consumers. The trend, however, is toward recognizing consumer interests, specifically the need for information. Consumer groups in Belgium want more comparative advertising because they believe it would be more informative than the present advertising, which they consider misleading, subjective, and uninformative. Businesses, on the other hand, oppose comparative advertising because they think it is inherently unfair. So far it seems that between business and consumers, business is winning.

The fact that a strong prohibition against comparative advertising exists in Belgium means that if the proposed EC directive on comparative advertising is passed, it will be in direct opposition to existing principles in Belgium. Until the directive is passed, advertisers should consider it nearly impossible and rather dangerous to run a comparative advertisement in Belgium.

7. Luxembourg

Comparative advertising is also explicitly banned, by name, without question, under Luxembourg commercial law. It may also be prohibited under trademark infringement law. Advertisers simply should not attempt to run a comparative advertisement in Luxembourg. As a consequence of the explicit ban on comparative advertising in Belgium and Luxembourg, the proposed EC directive will disrupt the law in those two countries more than in any other European country, which is part of the reason the directive has had so much trouble getting passed.

116. Id.
117. Id. at 144. Stressing the need for information, in 1974 a Belgian representative proposed a bill (which was not passed) stating that:
   Of course all falsely based and denigrating comparisons should remain forbidden. On the other hand, comparisons referring to the real qualities or to the actual defects of particular products provide consumers with evaluative data which allow them to choose well. Allowing comparison advertising would thus benefit consumers. Should this allowance be abused, competitors would undoubtedly state the truth of the matter, and thus provide advertising useful to honest producers and tradesmen as well as to consumers.

118. Id. at 146.
119. Id. at 147. Businesses believe it is unfair to use a competitor’s property for their own promotional benefit. They also believe that comparative advertising cannot be completely objective because the underlying goal of persuasion must be one-sided. Id.
120. See id. at 143.
122. See id. at 95 n.26; ABA Probes Comparative Analysis of U.S., EC Competition Enforcement, supra note 56; Cross-Border Advertising: Why It's Catching on, supra note 58; Summers, supra note 82; Trapp, supra note 75; Tritell, supra note 65.
123. See Stuyck, supra note 121; ABA Probes Comparative Analysis of U.S., EC Competition Enforcement, supra note 55; Rawsthorn, supra note 14; Summers, supra note 81; Tritell, supra note 64.
124. Boddewyn & Marton, supra note 9, at 140.
125. See Stuyck, supra note 121, at 97.
8. Germany

Of the EC countries, Germany has some of the strictest rules on comparative advertising. Comparative advertising is prohibited under unfair competition law. German antitrust laws allow competitors to bring suit if the advertising violates "good manners," which includes advertising that "usurps the efforts, reputation or advertising of a competitor." These unfair competition rules are not easy to circumvent. For example, in 1994 a Carlsberg beer commercial that proclaimed the beer as "[p]robably the best lager in the world" was not allowed to air on German television. An even more extreme example is the Avis car rental slogan, "We try harder," which was also prohibited on the theory that consumers could presume that Avis was referring to its main competitor in Germany, Hertz, even though Hertz's name was not directly mentioned or shown.

As in the United Kingdom, in Germany Pepsi's controversial M.C. Hammer commercial had no Coke can or trademark shown or mentioned. Instead Hammer was handed a white cup containing a mystery cola drink.

An advertisement that asserted "[w]e offer more" was not allowed in a magazine because readers would most likely know the identity of the advertiser's two competitors. To say that one's product or service is "better" or "cheaper" is lawful if the public is deemed not to recognize competitors. Since only rarely would the buying public not know the competitors of a certain advertiser, comparative advertising is essentially banned in Germany.

One reason for the prohibition of comparative advertising is that Germany has strict standards regarding what is misleading information. The German Government has imposed these standards because of its concern for consumer protection.

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126. Summers, supra note 82; Rawsthorn, supra note 14; see also Stuyck, supra note 121, at 94-95.
128. Trapp, supra note 75.
129. Id.; Summers, supra note 82.
130. Bowes & Kilburn, supra note 1, at 33.
132. Id.
133. The German ban on comparative advertising has some exceptions: (1) comparisons of new technology when objective and not specifically directed against a competitor; (2) defending against a competitor's comparative attack; (3) comparisons that come as a result of a request from a customer, if the comparison is verifiable; (4) when a product's advantages cannot be demonstrated without a comparison; and (5) unique qualities if the competitor cannot be identified. Boddewyn & Marton, supra note 9, at 138.
135. See id.
as explained above, does not regard comparative advertising as unfair competition, but rather as encouraging product improvement and assisting consumers in their purchasing decisions.

9. Italy

The Italian Civil Code considers any reference to someone else's products denigration of the competitor's products, and, therefore, prohibits it as unfair competition. Comparative advertising may also be actionable under trademark infringement law if the advertiser creates confusion or appropriates the competitor's product.136

The existing ban on comparative advertising in Italy was almost overturned in 1993 when the Italian Parliament considered passing a bill that would have allowed comparative advertising.137 The bill did not pass, and comparative advertising remains generally prohibited in Italy.138

10. Switzerland

Until 1988 comparative advertising in Switzerland was governed by the Unfair Competition Act of 1943.139 Under this act, comparative advertising was allowed if it was objective, not misleading, and not unnecessarily injurious.140 If the comparison was not necessary to demonstrate the advertised product's qualities, courts were strict in their review of the fairness of the ad.141 Advertisers also could not use a competitor's trademark under applicable trademark infringement law.142

Switzerland has a new unfair competition law that took effect in 1988.143 As an amendment to the 1962 Federal Cartels and Similar Organizations Act, the law forbids misleading comparative advertising and allows consumers to take action directly against unfair selling practices.144 The law also prohibits competition aimed solely at barring or significantly hindering competitors' activity.145 "Hindering competitors' activity" includes undercutting competitors' prices. Nevertheless, a company can limit competition when it is "justified by overriding

136. BODDEWYN & MARTON, supra note 9, at 127-28. Exceptions to the ban on comparative advertising are puffery, self-defense as a reaction to another's comparative advertising, objective comparative statements of a technical nature, and customer requests. Id. at 128.
138. See STUYCK, supra note 126; Bowes & Kilburn, supra note 1; Cross-Border Advertising: Why It's Catching on, supra note 58; Summers, supra note 82.
139. See BODDEWYN & MARTON, supra note 9, at 135.
140. Id.
141. Id. at 136.
142. Id. The comparison must have been "necessary to point out the qualities of the advertiser's goods." Id.
144. Id.
145. Id.
legitimate interests and when [the] results do not adversely affect the public welfare.\footnote{146}

In sum, Switzerland is another European country that does not explicitly ban comparative advertising, but does make it extremely difficult.\footnote{147}

11. The Netherlands

The Netherlands neither explicitly prohibits nor encourages comparative advertising.\footnote{148} The Dutch Civil Code prohibits unfair competition that unnecessarily harms others, thus possibly prohibiting comparative advertising.\footnote{149} There is no clear law or dividing line; it merely depends on the circumstances and the advertisement itself.\footnote{150} There is evidence that offensive statements are not allowed, but comparisons that deal with relevant product characteristics may be allowed.\footnote{151} The trend, however, is toward allowing more comparative advertising.\footnote{152}

12. Greece

As in many other European countries, comparative advertising in Greece is subject to no specific ban.\footnote{153} Greek unfair competition law prohibits any act that is contrary to good morals.\footnote{154} What exactly would be allowed in Greece is unclear since comparative advertising is rarely used there.\footnote{155} An uncritical comparison may

\begin{itemize}
  \item \footnote{146} Id.
  \item \footnote{147} Boddewyn & Marton, supra note 9, at 136. Since comparative advertising is primarily used in print media and only for consumer goods, Swiss laws on comparative advertising are unlikely to have a great effect on the advertising market. Id.
  \item \footnote{148} Id.
  \item \footnote{149} Id.
  \item \footnote{150} Id. at 130-31. The Uniform Law on Trademarks allows an injured business to challenge the use of its trademark. Id. at 130. Comparative advertising that is allowed includes comparisons by customer request, answers to criticism or provocation, and comparisons of systems and methods. Id. Since there is no clear answer as to what the law of comparative advertising is in The Netherlands, one can get many different ideas from different sources. See, e.g., ABA Probes Comparative Analysis of U.S., EC Competition Enforcement, supra note 56 (comparative advertising is prohibited in The Netherlands); Rawsthorn, supra note 14 (comparative advertising falls afoul of trademark protection legislation); EC Reveals Plan to Permit Comparative Advertising, supra note 63 (comparative advertising is allowed in The Netherlands).
  \item \footnote{151} Boddewyn & Marton, supra note 9, at 130-31.
  \item \footnote{152} Id. at 131. An example of a comparative advertisement that was allowed in The Netherlands is a liquid dishwashing detergent commercial by Unilever comparing its Lux brand to Procter & Gamble’s Dreft brand. See id. at 218, 220. Unilever ran the ad in response to Procter & Gamble’s commercial that claimed that one teaspoon of Dreft washed more dishes than Brand X (either Lux or another brand). Id. at 218. While this claim was true at the time, the ad did not state that Dreft was more expensive. Id. Unilever changed the formula of Lux to be the same concentration as Dreft. Id. Unilever then ran its own defensive comparative ad that stated one teaspoon of Lux cleans exactly the same as Dreft except Lux costs less. Id. at 218, 220. As a result of the ad, sales of Lux increased. Id. at 220.
  \item \footnote{153} See Boddewyn & Marton, supra note 9, at 126.
  \item \footnote{154} Id.
  \item \footnote{155} See id. at 126-27.
\end{itemize}
be allowed. What is clear is that when Pepsi ran its M.C. Hammer commercial in Greece, Hammer was served the mysterious white cup instead of the Coke can.

13. European Summary

To summarize the European countries, four categories of degree of prohibition of comparative advertising exist. Countries in the first category include the United Kingdom and Portugal, which have comparatively liberal policies. The English and Portuguese Governments allow much comparative advertising, and its use is increasing in those countries. The second category, which allows comparative advertising subject to restrictions, includes France, Spain, and Denmark. The countries in the third category either explicitly ban comparative advertising, like Belgium and Luxembourg, or have legislation which makes it nearly impossible, like Germany, Italy, and Switzerland. The last category includes The Netherlands and Greece, which have no clear law on comparative advertising and take it one case at a time.

With all the different laws on comparative advertising from one European country to another, a company must make sure that its proposed advertising campaign complies with the rules in each country before running it. Eventually, if the EC directive on comparative advertising is passed, companies will have only one set of rules to consider, which will save many American companies time and money.

IV. Asia

A. Japan

In no other country around the world did Pepsi's M.C. Hammer commercial cause more controversy than in Japan. Until the Pepsi commercial, ads that did not compare objectively or that slandered a competitor's product were banned. Being the first blatant and direct comparative advertisements in Japan, the commercial, which debuted in Japan in March 1991, was a shock to the Japanese culture.
The Pepsi commercial sparked a fierce debate in Japan about the pros and cons of the relatively new phenomenon of comparative advertising.\textsuperscript{167} The young Japanese public loved the commercial.\textsuperscript{168} Japanese advertising agencies want more comparative advertising.\textsuperscript{169} Free market proponents in Japan believe comparative ads would facilitate the free flow of information to consumers and lower the barriers to entry into the marketplace.\textsuperscript{170} However, the advertising regulators, who make the rules, believe that comparative advertising is slanderous and deceptive.\textsuperscript{171} As a result of the controversy that Pepsi created, Coke was successful in getting the Japanese television stations to take the commercial off the air after running for only two months.\textsuperscript{172}

Comparative advertising technically has been legal in Japan since 1987.\textsuperscript{172} The ban against comparative advertising was lifted in 1987 due to pressure from U.S. companies, which felt that the ban prevented new products from breaking into the market.\textsuperscript{174} Comparative advertising is now permissible "where the content is impartial and objectively verifiable, and when the competing product is not subject to slander or libel."\textsuperscript{175} Despite its legality, the taboo against comparative advertising still exists in Japan.\textsuperscript{176} Most Japanese consider "explicit comparative advertising . . . to be ill-mannered, crass and generally disruptive to civilized relations between competitors."\textsuperscript{177} Japanese business thinks it bad business to make a frontal attack on a competitor, because in Japan, even competitors live in harmony.\textsuperscript{178}

\textsuperscript{167.} Comparative Advertising: Red in Tooth and Claw, supra note 1, at 79; Comparative Ads Run into Walls in Image-Careful Japan, supra note 1, at 258; Rawsthorn, supra note 14. 
\textsuperscript{168.} Ormonde, supra note 1; Comparative Ads Run into Walls in Image-Careful Japan, supra note 1, at 258. 
\textsuperscript{169.} Comparative Advertising: Red in Tooth and Claw, supra note 1, at 79. Advertising agencies think comparative advertising is an effective way for new brands "to break into markets, or for established but 'tired' ones to regain lost market share." Id.  
\textsuperscript{170.} Id.  
\textsuperscript{171.} Id.  
\textsuperscript{172.} Ormonde, supra note 1; Comparative Advertising: Red in Tooth and Claw, supra note 1, at 79; Comparative Ads Run into Walls in Image-Careful Japan, supra note 1, at 257. If there is a complaint about an advertisement, television stations will immediately take it off the air because they do not like getting involved in disagreements. See Comparative Ads Run into Walls in Image-Careful Japan, supra note 1.  
\textsuperscript{173.} Comparative Advertising: Red in Tooth and Claw, supra note 1, at 79.  
\textsuperscript{174.} Comparative Ads Run into Walls in Image-Careful Japan, supra note 1, at 257.  
\textsuperscript{175.} Ormonde, supra note 1. This rule seems "to have dissuaded all but the most adventurous companies from pursuing what remains a largely unexplored and unwanted art form in Japanese business." Id.  
\textsuperscript{176.} Comparative Ads Run into Walls in Image-Careful Japan, supra note 1, at 257. See also Comparative Advertising: Red in Tooth and Claw, supra note 1. The reason for the taboo against comparative advertising in Japan is that the Japanese prefer a soft-sell, fantasy approach to advertising much more than a direct, comparative approach. Johny K. Johansson, The Sense of 'Nonsense': Japanese TV Advertising: Special Issue on International Advertising, J. ADVERTISING, Mar. 1994, at 17.  
\textsuperscript{177.} Ormonde, supra note 1.  
\textsuperscript{178.} Comparative Ads Run into Walls in Image-Careful Japan, supra note 1, at 258.
Since Pepsi’s brave trek into the new world of Japanese comparative advertising, businesses have responded to consumers’ requests for more comparative advertisements by gradually running more such advertising.\textsuperscript{179} Japanese consumers are now, more than ever, concerned with achieving value for their money instead of being concerned with just getting emotional satisfaction from advertising.\textsuperscript{180} They want more aggressive ads and more information.\textsuperscript{181}

General Motors, for example, followed Pepsi’s lead with a comparative ad asking consumers to compare the fuel efficiency of its Cadillac Seville with the Japanese Infinity.\textsuperscript{182} The advertisement worked, as General Motors’ Japanese sales increased.\textsuperscript{183} The success of comparative ads and the slowly changing attitudes of consumers suggest a growing trend toward more comparative advertising.\textsuperscript{184} Notwithstanding, advertisers and businesses disagree as to whether comparative advertising will ever be popular in Japan.\textsuperscript{185}

B. CHINA

The advertising industry is very young in China.\textsuperscript{186} An advertiser must approach advertising there delicately,\textsuperscript{187} foreign companies must act like guests in China and develop the ad specifically for the Chinese market.\textsuperscript{188}

In 1978 the Chinese Government lifted many restrictions on advertising in order to encourage foreign advertising and increase China’s trading with western nations.\textsuperscript{189} Nevertheless, one restriction remains: comparative advertising is not allowed.\textsuperscript{190} Chinese consumers are very brand conscious and distrust new brands, which are often the ones that want to use comparative advertising.\textsuperscript{191}

In 1994 the Chinese Government reformed its advertising laws in order to increase fair competition.\textsuperscript{192} China does not censor ads, but will not tolerate deceptive ads, and still allows no comparative advertising.\textsuperscript{193}

\textsuperscript{179.} See \textit{Social and Demographic Trends}, \textit{Bus. Int’l Forecasting}, June 1, 1992, \textit{available in LEXIS WORLD} Library, BIFSVC File.\textsuperscript{180.} Id.\textsuperscript{181.} Id.\textsuperscript{182.} Barrager, \textit{supra} note 1.\textsuperscript{183.} Id.\textsuperscript{184.} See \textit{id}. In 1994 the Japanese Finance Minister partially lifted the ban on comparative advertising by insurance firms in response to consumers’ need for more information to help them distinguish between and choose among different insurance companies. \textit{MOF Allow Comparison Ads by Insurance Firms, Dateline: Tokyo}, June 9, 1994, \textit{available in WESTLAW, JAPANECON Database}.\textsuperscript{185.} \textit{Comparative Ads Run into Walls in Image-Careful Japan, supra} note 1, at 258.\textsuperscript{186.} Bruce Horovitz, \textit{Beijing Beckoning Madison Avenue, L.A. Times}, Apr. 14, 1987, \textit{Bus. Sec.}, at 9.\textsuperscript{187.} See \textit{id}.\textsuperscript{188.} Id.\textsuperscript{189.} Id.\textsuperscript{190.} Id.\textsuperscript{191.} Id.\textsuperscript{192.} See \textit{China—Advertising Industry Reform, Market Rep.}, Jan. 14, 1994, at 1.\textsuperscript{193.} Id. at 2.
C. THE FOUR ECONOMIC ASIAN TIGERS: SINGAPORE, HONG KONG, TAIWAN, AND SOUTH KOREA

Few comparative advertisements are used in Singapore due to the strict application of advertising standards there. The 1976 Singapore Code of Advertising Practice requires that "where items are listed and compared with those of a competitor’s products, the list should be complete or else the advertisement should make clear that the items are only a selection, and advertisements should not unfairly attack or discredit other products, advertisers, or advertisements directly or by implication." If comparative advertising is used, it almost always involves indirect comparisons. Comparative advertising in Singapore is used most often with products that are very similar from brand to brand. Despite the strict standards, advertising agencies like comparative advertising and encourage its use as long as the claim can be substantiated and the advertiser refrains from showing its competitor in a bad light.

The other three Tigers are not as open-minded as Singapore. Hong Kong has regulations that prohibit comparative advertising. Pepsi was not allowed to run a television ad showing chimps choosing Pepsi over Coke even when the words "leading cola" were used instead of "Coke." Comparative advertising is also shunned and seldom used in Taiwan and South Korea.

D. ASIAN SUMMARY

The Asian advertising market is not nearly as open to the idea of comparative advertising as in the United States or Europe. The Japanese may gradually accept comparative advertising, although its use is still hotly debated. However, do not expect China to accept comparative advertising to any degree any time soon. The Asian Tigers are not yet open to the idea of comparative advertising either since they are newly industrialized. With their incredible growth over the last few years, however, anything could happen.
V. Latin America

A. Generally

The various governments and economies in Latin America, including Mexico, are going through changes at the same time as the EC is changing. The entire Latin American region is experiencing a similar economic integration. Centralized economic planning by government is decreasing, and free market mechanisms are increasing.

In response to these economic changes, many Latin American governments are adopting consumer protection laws. Mexico's and Brazil's consumer protection codes have been models for recent consumer protection legislation in other Latin American countries. These laws protect the economic interests and the dignity and integrity of the individual; they also help to increase consumer confidence in the new free market.

As a result of the increased awareness of the need for consumer protection, the new consumer codes have put many restrictions on advertising in general and comparative advertising specifically. The motivation behind many of these regulations is a recognition that "advertising influences consumer choices and consumer behavior." As Mexico and other Latin American nations become more competitive with each other and with more developed nations, such as the United States and Canada, advertising will become more aggressive, and companies will want to use comparative advertising more often. Comparative advertising has been taboo for a long time in Latin America, but the situation is changing. Direct comparative advertising is starting to increase despite the restrictions on it.

B. Countries

1. Mexico

Direct comparative advertising has become legal in Mexico. Until recently, however, while the Mexican Government did not prohibit truthful comparative advertising, it did scrutinize the ads strictly, and often the ads did not pass

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207. See Vaughn, supra note 6, at 276.
208. Id.
209. Id. at 277.
210. Id. at 278.
211. Id. at 288.
212. Id. at 291.
213. See id. at 300.
214. Id.
216. See id.
218. Boddewyn & Marton, supra note 9, at 140.
this scrutiny.\textsuperscript{219} Industry also did not encourage comparative advertising.\textsuperscript{220} The Ministry of Health discouraged advertising comparisons between health-related products. The Mexican Association of Automotive Dealers has censored some comparative advertisements of cars.\textsuperscript{221}

The first direct comparative advertisement run in Mexico was a Pepsi ad. In Mexico, Pepsi showed both brands. As it did in Japan, Coke complained, and the preference claim was taken out of the commercial.\textsuperscript{222} The use of comparative advertising is increasing in Mexico because of its new legality, because of the increase in brand choices, because more young people are moving out on their own,\textsuperscript{223} and perhaps because of Pepsi.

2. Argentina

To date, Argentina has no explicit ban on comparative advertising, but "brands" law forbids the naming of a competitor in advertisements.\textsuperscript{224} Comparative advertising has also been effectively prohibited by Argentina's unfair competition laws, trademark laws, and its Advertisers' Association's restrictions, which are all applied to review the appropriateness of an advertisement.\textsuperscript{225} The government believes that assertions made in an ad about a product's characteristics become part of the contract between the advertiser and the consumer, a contract to which the advertiser can presumably be bound.\textsuperscript{226} The Argentine advertising industry also operates on an unwritten code of ethics that discourages direct comparisons.\textsuperscript{227}

Despite the effective ban, Pepsi again felt compelled to push the rules to their limits. In 1993 Pepsi ran a commercial in Argentina that showed people taste-testing Pepsi and another unknown brand of cola (obviously Coke).\textsuperscript{228} Pepsi failed, though, when the "Pepsi challenge" was banned the same year.\textsuperscript{229} As in Japan, in Argentina the Coke/Pepsi battle started the comparative advertising trend moving,
and some believe it may cause Argentina to abandon its laws against comparative advertising. 230

3. Brazil

Comparative advertising in Brazil is free from government control. It is allowed as long as the advertisement does not denigrate either the competitor’s product or the competitor too much. 232 An advertiser must be able to prove any superiority claims made in an ad, and is required to keep all “factual, technical, and scientific data on which [its] advertising is based.” 234

Advertising in Brazil is considered misleading, and therefore prohibited, when it is in any way false or has any chance of misleading the consumer with respect to the various aspects of the product. Misleading advertising includes an essential omission. 235 The use of comparative advertising is increasing in Brazil partly because active consumer groups make consumer protection an important public issue. 237

4. Chile

The laws in Chile require advertisers to support their claims about product characteristics. 238 Unlawful comparative advertising may be actionable under tort and criminal law theories. 239

5. Venezuela

Venezuela is one of two Latin American countries that specifically address comparative advertising by law. Advertisers are permitted to address the disad-

232. BODEWYN & MARTON, supra note 9, at 123. Under the Brazilian unfair competition statute, an injured competitor can “recover losses and damages caused by other acts of unfair competition . . . tending to prejudice another’s reputation or business.” Id. at 122. The law that regulates the Brazilian advertising profession states that “advertisements shall not ‘attribute defects or faults to competing merchandise, products or services.’ ” Id.
233. Newman, supra note 215, at 7; Vaughn, supra note 6, at 300.
234. Vaughn, supra note 6, at 302.
235. Id. at 300-01. Brazil also “specifically prohibits discriminatory advertising and advertising that incites violence, exploits fear or superstition, takes advantage of a child’s lack of judgment and experience, or that is capable of inducing the consumer to behave in a way that is harmful to the consumer’s health and safety.” Id. at 301.
236. BODEWYN & MARTON, supra note 9, at 123.
237. Vaughn, supra note 6, at 290.
238. Id. at 301. The proposed Chilean consumer code regulates misleading advertising only with regard to certain aspects of the product, which are “[t]he components of the product and percentage of each, benefits of the product, basic characteristics of the product including dimension, capacity, quantity, origin, or other attributes, dates of development or manufacture, minimum duration, date of expiration, approvals, price, and cost of credit.” Id. at 301 n.141 (quoting PROPOSED CHILE CONSUMER CODE tit. III, ch. I, arts. 22-23).
239. BODEWYN & MARTON, supra note 9, at 139.
vantages and risks of a competitor’s product, but they must be able to support their claims with facts. Moreover, the laws require advertising claims regarding a product’s characteristics to be “subject to objective verification.” Practically, though, such ads may be effectively barred by intellectual property law, which prohibits the mention of a trademark of a competitor.

6. Paraguay

Paraguay is the other Latin American country with laws that specifically address comparative advertising. However, unlike Venezuela, Paraguay prohibits comparative advertising.

7. Latin American Summary

The future of comparative advertising law in Latin America remains to be seen. Opening borders, integrating economies, and protecting consumers all point to an increase in the use of comparative advertising. Some countries plan to pass legislation either to allow it or at least to specifically address it. Two countries now specifically address it; one allows it, and one prohibits it. Therefore, as in the many different European countries, in Latin America an advertiser must get approval for its comparative ad before it runs the ad.

VI. Conclusion

A U.S. resident may not realize that comparative advertising is such a controversial issue in other countries around the world. In the United States no one can watch commercial television without seeing one company disparaging another. Precisely for this reason, growing U.S. companies need to be aware of the rules regarding comparative advertising in countries where they might want to introduce a product.

As this comment suggests, comparative advertisements that run outside the United States need to be relatively truthful, not misleading, verifiable, and as

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240. Vaughn, supra note 6, at 302. Interestingly, Venezuelan law also regulates advertising of certain categories and types of products. Advertisements of goods or services that endanger human health, threaten animals or plants, or harm the atmosphere must contain warnings . . . [describing] the risks or the negative effects that the products or services pose and specify . . . how the risks can be reduced. Id. at 303.

241. Id. at 300. The advertiser has the burden of proving “the truthfulness of product claims contained in advertising.” Id. at 302.


243. Vaughn, supra note 6, at 302. The Paraguay Consumer Code prohibits the “promotion of products or service ‘by diminishing or depreciating other products, service or recognizable brands that operate in the national market or abroad, through direct allusions, figures, or suggestions whether in words or images.’ ” Id. at 302 n.152 (quoting PARA. CONSUMER CODE art. 22(d)).

244. See Newman, supra note 215, at 7; Vaughn, supra note 6, at 300.


246. Vaughn, supra note 6, at 302.
objective as possible without losing their persuasive appeal. The laws in Europe are expected to become uniformly tolerant of comparative advertising. Japan is relaxing its stance as well. China and the Asian Tigers will take a while. Latin American countries also are expected to allow the increasing use of comparative advertising. For now, though, advertisers should be careful. They should never assume that an advertisement acceptable under the laws of one country will be equally acceptable in other countries.