

1989

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Recommended Citation

Tracey, Peter L. (1989) "International Advertising: Regulatory Pitfalls for the Unwary Marketer," *Penn State International Law Review*: Vol. 7: No. 2, Article 7.

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International Advertising: Regulatory Pitfalls for the Unwary Marketer

Advertising is as ubiquitous as the air we breathe. It arrives with the morning newspaper. We encounter it on our radios and on billboards while driving to work. It comes with the mail every day, in magazines and circulars. It interrupts the television programs we watch. It can be found on virtually every product package. I seriously doubt that any one of us is ever out of sight or sound of some sort of advertisement during our working hours. Anything that we experience with this sort of frequency wants . . . to be understood.¹

I. Introduction

For better or for worse, advertising permeates daily life in much of the world.² While the above observations concern the prevalence of advertising messages in the United States, they might well have been made in reference to almost any of the developed nations. This Comment focuses on the regulatory environment that confronts the international advertiser. As will be seen, the marketer who contemplates crossing national boundaries in order to sell a product must be prepared to deal with a plethora of rules and regulations; the international advertiser who fails to properly research the regulatory environment in a proposed market courts economic disaster.

An ancillary consideration is the development of an international advertising strategy:

A central component in the development of an advertising plan is the creation of the appeal or the message to be communicated to the target audience. Since the appeal is usually expressed in a combination of words and a picture, language and cultural barriers complicate the task of the international advertiser. The problem involves not only different languages but also different connotations of expressions that are meaningful in one

1. M. GEIS, *THE LANGUAGE OF TELEVISION ADVERTISING* xi (1982).

2. Advertising expenditure figures offer a useful measure of advertising intensity in various countries. Philip Morris, the tobacco giant, spent \$6.65 million for advertising on the Arabian Peninsula in 1986, and \$7.06 million in the Hong Kong advertising market. Of course, these figures seem trifling when compared with the \$1.364 billion that Philip Morris spent on U.S. domestic advertising in 1986. See *Tables Track Top 10 Ad Spenders Around the Globe*, *ADVERTISING AGE*, December 14, 1987, at 62.

setting but not in another.³

II. Economics and the Advertising Decision: Of Mousetraps and Men

While the nature of "pure" advertising is implicit in the above description, a definition of advertising, or at least an attempt to limit the boundaries of this discussion, will prove helpful. "Advertising" is "any paid form of non-personal presentation of products, services or ideas placed in one or more of the commercially available media by an identified sponsor."⁴ It is a common notion that if one builds a better mousetrap, the world will beat a path to one's door. The element that this aphorism overlooks, however, is the need for publicity. Unless the public at large is informed that a superior mousetrap exists, and told where it can be purchased, the inventor will have to be content with a rodent-free home, and not much else.

As a general rule, the evolution of advertising in a given social environment approximates that particular society's stage of economic development.⁵ In a society that functions at a bare subsistence level, the cost of consumer information is low, since the range of options open to consumers is extremely limited. As an economic system becomes more diverse, consumer information becomes more difficult and costly to obtain and, consequently, the demand for advertising grows.⁶ This trend is particularly apparent when relatively unimportant consumer choices are involved. While a consumer may be willing to rely on advertising representations in selecting a laundry detergent, it is unlikely that the same consumer would purchase an automobile solely on the basis of the seller's television commercials.⁷

To the extent that the buying decision is of sufficient import that the consumer is willing to engage in the time-consuming effort inherent in comparison shopping, the influence of advertising natu-

3. Rabino, *International Marketing Mix*, in HANDBOOK OF INTERNATIONAL BUSINESS 32.8-9 (I. Walter ed. 1982) (citing Dunn, *Effect of National Identity on Multinational Promotional Strategy in Europe*, 40 J. OF MARKETING 50 (1976)).

4. S. MAJARO, INTERNATIONAL MARKETING: A STRATEGIC APPROACH TO WORLD MARKETS 167 (1977).

5. Rabino, *supra* note 3, at 32.9.

6. W. COMANOR & T. WILSON, ADVERTISING AND MARKET POWER 13 (1974).

7. *Id.* Comanor & Wilson describe the cost/benefit analysis in these terms:

Consumer demand for advertising depends on the relative benefits as well as the relative costs of obtaining information from more objective sources. Where the gains from additional information are large, consumers are likely to allocate substantial resources to additional search, and there should be little demand for advertising. In the opposite case, where the gains from additional information are small, there should be more demand by consumers for advertising

This position is consistent with Katona's view that "the influence of advertising . . . decreases in proportion to the importance the consumer attaches to the matter."

Id. (quoting G. KATONA, THE MASS CONSUMPTION SOCIETY 58 (1964)).

rally diminishes. Even the most lavishly produced automobile commercial will not overcome the impressions formed on a test drive. As the pace of life quickens in a developing economy, however, consumers will abandon personal inspection and comparison in favor of selection patterns based purely on advertising claims, at least for minor purchases.⁸ The problem facing regulating authorities in an emergent economy is thus twofold: first, promoting a regulatory regime that encourages advertising as a natural concomitant of economic growth, and second, protecting consumers from advertising that preys on consumers through the use of false or misleading claims.

While the prevalence or absence of advertising in a given market provides a fairly reliable indication of that market's stage of development, the international marketing manager must focus primarily on the effectiveness of advertising vis-à-vis a particular product. Essentially, two quantitative determinations must be made: The marketer must first determine how advertising will affect the commercial success of the product, and then arrive at the amount to be budgeted for advertising each product.⁹ These determinations can be the result of any number of analyses, including:

- (a) Testing the effectiveness of different forms of promotion, given other elements of the marketing mix;
- (b) Testing the effectiveness of promotion relative to other elements of the marketing mix;
- (c) Testing how far promotional expenditure by the firm and its competitors has effects which cancel each other out or lead to genuine market expansion; and
- (d) Testing the link between promotion and achievement of business aims.¹⁰

Nearly all studies of the subject have found that there is a positive correlation between advertising and profitability at both the industry and the firm level.¹¹ Interestingly, however, advertising seems to be most effective not as a way of altering consumer preference toward various products, but rather, as a barrier to entry by new competition.¹² Thus, if companies A, B, and C sell a similar product in the same market, the primary effect of their advertising will be to

8. *Id.*

9. M. STONE, *MARKETING AND ECONOMICS* 135 (1980).

10. *Id.* at 142.

11. *Id.* at 136.

12. *Id.* See also Williamson, *Selling Expense as a Barrier to Entry*, 77 Q.J. OF ECON. 112 (1964). Effective advertising of local brands can stymie the market entry of products that have been well received elsewhere. In Japan, established domestic chocolate brands proved to be the undoing of Nestlé S.A.'s attempt to establish a market presence; France's Chambourcy yogurt withdrew from the U.S. after facing stiff competition in test marketing. Greenhouse, *Building a Global Supermarket*, N.Y. Times, Nov. 18, 1988, at D4, col. 2.

keep a fourth company, D, from entering the market, as opposed to any significant realignment of market share among the three initial competitors.¹³

If advertising and competition are indeed inextricably linked, the marketer who seeks to introduce a new product would do well to analyze the extent to which the product satisfies a demand that is not otherwise met by sellers already advertising in the market. This analysis is most applicable in markets that are already fairly well developed.¹⁴

While advertising may represent a barrier to entry in mature markets, promotional activity can serve a number of useful functions in emerging markets. The marketer can attempt to establish or reinforce brand loyalty, or increase the rate of consumption of the product.¹⁵ An existing brand's reputation can be used in helping to add a new line.¹⁶ The marketer also can employ advertising to "fine tune" the implementation of other marketing objectives or purposes. Not the least of these objectives, particularly from the standpoint of international marketers, is enhancement of an organization's corporate image.¹⁷

13. Stone notes, however, that

[t]he relationship between promotion and barriers to entry is not direct, such that the more spent on promotion, the higher the entry barrier created. Barriers are created not just by one firm's promotion but by the promotion of all firms in the competing group. The existence of a weak competitor, whose competitive policies do not provide good defence against entry, may open up entry possibilities. Promotional policies may in such situations be more effective if designed to close such openings by capturing the market of the weak firm.

M. STONE, *supra* note 9, at 136.

14. *But cf.* J. BACKMAN, ADVERTISING AND COMPETITION 79 (1967):

The generalization that large-scale advertising creates a barrier to entry is subject to numerous exceptions. This is not an area where a *per se* rule can be adopted, that is, setting up a percentage of advertising to sales or a dollar volume of advertising as a level which automatically creates a barrier to entry. The situation for each product must be examined together with all the factors which effect entry before deciding that advertising is *the* significant barrier.

Id.

15. Rabino, *supra* note 3, at 32.7.

16. *Id.* A. RIES & J. TROUT, POSITIONING: THE BATTLE FOR YOUR MIND (1981), caution, however, that "[i]ne-extension names are forgettable because they have no independent position in the [consumer's] mind. They are satellites to the original brand name. Their only contribution is to blur the position occupied by the original name." *Id.* at 147.

17. Rabino, *supra* note 3, at 32.8. For a discussion of public relations planning and the multinational corporation, see D. BLAKE, MANAGING THE EXTERNAL RELATIONS OF MULTINATIONAL CORPORATIONS (1979):

In most countries the social, economic, and governmental systems can be understood and provide a degree of predictability. Moreover, the firm itself can measure — or at least is able to know rather precisely — what its impacts are and will be on the host country. With this information, the firm is in a position to predict its relationship with the host country and the kinds of issues which are likely to be of concern to various groups within that nation.

Id. at 5. See also S. SETHI, UP AGAINST THE CORPORATE WALL, 162-205 (1982).

III. Options for the International Advertiser

Recognizing that markets may differ radically in their need for a given product, and their response to advertising for that product, international marketers have developed a number of basic marketing strategies. Among these strategies are: product-promotional extension, product extension-promotional adaptation, product adaptation-promotional extension, dual adaptation, and product invention.

A. *Product — Promotional Extension*

The simplest marketing strategy is “product-promotional extension.”¹⁸ Using this strategy, the company sells internationally using the same product and advertising that it employs in the United States.¹⁹ This technique has been employed with great success by the Coca-Cola Company.²⁰ Product-promotional extension allows marketing communication to be standardized; significant manufacturing economies of scale are also obtained, while additional research and development costs are eliminated.²¹

The concept of global marketing has spawned a lively debate in academic and business circles. Professor Theodore Levitt of Harvard has articulated a theory of “global homogenization”:

The rapid acceleration of cheap and easy communication, transport, and travel globalizes competition and cosmopolizes consumption. The world’s consumption preferences are driven simultaneously toward both standardization and pluralization — standardization in the sense that these preferences now appear everywhere, and pluralization in the sense that everywhere people want the same variety — in the stores, at home, in factories, fields, mines, offices, laboratories, schools, temples; regarding the sacred and the secular, work and play, study and diversion, reality and fantasy.²²

Critics of this view are pointed in their skepticism; one advertising executive has stated, “There are about two products that lend them-

18. Rabino, *supra* note 3, at 32.4.

19. *Id.*

20. Hill & Winski, *Goodbye Global Ads*, ADVERTISING AGE, November 16, 1987, at 22. Harvard University Professor Theodore Levitt describes product-promotional extension this way: “The product is not a hamburger at McDonald’s. The product is McDonald’s itself. A hamburger is a generic product. Is the service, ambiance and image of McDonald’s not the same around the world?” *Id.* at 36. *But cf.* the argument of Barry Rosen, Assistant Professor of Marketing and International Business at Baruch College at City University of New York, who believes that “[g]lobalization overstates things When you get down to it, it is not that way at all.” *Id.* at 22.

21. Rabino, *supra* note 3, at 32.5.

22. Levitt, *The Pluralization of Consumption*, HARV. BUS. REV. May-June 1988, at 8. See also Greenhouse, *supra* note 12, at D1, col. 3 (many marketing executives agree that trend toward “global supermarket” fosters growing similarity in consumer tastes around the world).

selves to global marketing — and one of them is Coca-Cola.”²³

B. *Product Extension — Promotional Adaptation*

A second international marketing method, “product extension-promotional adaptation,”²⁴ is currently in vogue.²⁵ Under this strategy, the same product is sold in all markets, but advertising is adapted to local conditions.²⁶ An additional cost is incurred in developing a number of promotional campaigns, but the inherent risk of a particular market rejecting a “global” campaign is minimized. This is an important consideration because a minor cultural variation can destroy the effectiveness of a campaign.

Proctor & Gamble Company (P&G), for example, ran a series of advertisements for its Camay soap in Japan. In the commercials, men directly complimented women on their appearance, which is unusual behavior for Japanese males. When Camay performed weakly, Proctor & Gamble withdrew the campaign.²⁷ The Proctor & Gamble approach would seem to run counter to a trend toward diversification. A study of U.S. companies selling goods in European Economic Community (EEC) countries in 1983 indicated that fifty percent of the companies were tailoring their advertising to national markets, compared with seventeen percent in 1973.²⁸

C. *Product Adaptation — Promotional Extension*

A third marketing technique that the international marketer may elect is “product adaptation-promotional extension.”²⁹ As its name suggests, this strategy contemplates that the marketer will use a unified advertising approach, while making minor adaptations in the product itself, in order to accommodate market variations.³⁰ The

23. Lipman, *Marketers Turn Sour On Global Sales Pitch Harvard Guru Makes*, Wall St. J., May 12, 1988 at 1, col. 6 (quoting Carl Spielvogel, chairman and chief executive of ad agency Backer Spielvogel Bates Worldwide).

24. Rabino, *supra* note 3, at 32.5.

25. See generally Hill & Winski, *supra* note 20.

26. Rabino, *supra* note 3, at 32.5.

27. Hill & Winski, *supra* note 20, at 22. Proctor & Gamble ranked first worldwide for advertising expenditures in 1986, with total outlays of \$1.8 billion. Of this figure, 21.8% was spent outside the U.S. *Advertising Age's Top 50 Non-U.S. Marketers*, ADVERTISING AGE, Dec. 14, 1987, at 58. Proctor & Gamble was not alone in its failure to adjust its advertising to local conditions. Parker Pen Co.'s “one world, one voice” campaign, a 1985 effort to sell writing instruments with a worldwide approach, failed because the company ignored national differences. When the company (under new ownership) returned to tailoring its campaigns to local markets, losses turned into profits. Hill & Winski, *supra* note 20, at 22. See also Lipman, *supra* note 23, at 4, col. 1.

28. Hill & Winski, *supra* note 20, at 22. International marketers similarly adapt their advertising approach for the United States market. While Heineken beer is aimed at the working-class consumer in Great Britain, the product is sold with the cachet of a premium beer in the U.S. Greenhouse, *supra* note 12, at D4, col. 2.

29. Rabino, *supra* note 3, at 32.5.

30. *Id.*

Proctor & Gamble Company once again provides an interesting example of how research can "make or break" a product:

When Proctor & Gamble entered the Japanese market with Pampers disposable diapers in 1977, it was guided by a belief at Cincinnati headquarters that "a baby is a baby" everywhere. It tried to sell the same diaper to Japanese mothers that it sold in the U.S.

Initially, it met with great success. But then its growth slowed. One reason, it discovered, was that Japanese housewives do their laundry daily - not weekly like U.S. housewives - and were using the disposables only at night.

A Japanese competitor, Moony, was more attuned to Japanese ways and came out with a diaper that had some reusable parts, which appealed to the thrifty Japanese. P & G's market share, early on as high as 90%, fell to under 10%.

P & G last April [1987] introduced New Pampers, a smaller, thinner diaper more suited to Japanese babies and reportedly is gaining market share.³¹

Any number of American companies have adapted their products in order to accommodate local tastes. Food and beverages are a particular concern: McDonald's serves beer in Germany, while General Foods Corporation increases the sugar level in Kool-Aid and Tang powdered drinks sold in South America.³² Brazilians prefer yeast doughnuts, and Dunkin' Donuts only began to project profits in Brazil when its licensee shifted from cake-style American donuts to a yeast recipe.³³

D. Dual Adaptation

Alternatively, "dual adaptation" implies that both the product and its accompanying advertising will be tailored individually in each market.³⁴ While this approach can be costly, it may be unavoidable; as one observer has commented, "There is a danger when you standardize [K]eeping a standard product creates niche opportunities in the market. Other marketers can create the specialty product that will cater to local needs."³⁵

31. Hill & Winski, *supra* note 20, at 36. Note that Proctor & Gamble modifies many of its products to suit individual markets. "The smell of Camay, the flavor of Crest, the formula of Head & Shoulders shampoo all vary." *Id.*

32. *Id.*

33. *Id.* Nestlé S.A. produces more than 200 blends of Nescafé developed for local markets. Greenhouse, *supra* note 12, at D4, col. 2. Betty Crocker cake mixes were only successful in Great Britain when the mixes were reformulated so that the consumer had to add an egg, which apparently satisfied the English consumer's psychological need to feel like an active participant in the baking process. *Id.* at D4, col. 5.

34. Rabino, *supra* note 3, at 32.5.

35. Hill & Winski, *supra* note 20, at 36 (quoting Barry Rosen, Assistant Professor of Marketing and International Business at Baruch College at City University of New York).

Professor John Quelch, a colleague of Professor Levitt³⁶ at the Harvard Business School, argues that “[f]or a very large number of products . . . there is still very little case to be made for standardization.”³⁷ Professor Quelch theorizes that only certain products can be marketed similarly and only after a thorough analysis of variables such as marketing mix and culture.³⁸

E. Product Invention

A final possibility for the international marketer is “product invention.”³⁹ In this approach, a product is invented specifically to meet the needs of overseas customers. The Colgate-Palmolive Company introduced a small, inexpensive, hand-powered washer to help meet the needs of the 600 million people in the world who wash their clothes by hand. While the product itself is, of course, designed to be profitable, an important ancillary consideration for Colgate-Palmolive was that the washer’s success might lead to increased demand for Colgate-Palmolive detergents.⁴⁰

IV. The Challenge of International Advertising: Breaching Babel’s Barrier

The selection of an appropriate marketing strategy is strongly tied to the availability of various media in a desired export market. The advertiser must also research the demographic and psychographic profiles of local target markets.⁴¹ The job of getting the message through is a formidable one:

The sender’s task is to get his or her message through to the receiver. There is considerable noise in the environment — people are exposed to over fifteen hundred commercial messages a day, aside from everything else they must attend to. Members of the audience may not get the intended message for any of three reasons. The first is *selective attention*, in that they will not notice everything around them. The second is *selective distortion*, in that they will twist the message to hear what they want to hear. The third is *selective recall*, in that they will retain only a small fraction of the messages that reach them.

36. See *supra* notes 18-23 and accompanying text.

37. Lipman, *supra* note 23, at 4, col. 3.

38. *Id.* The Colgate-Palmolive Company, for example, makes a spicy toothpaste for the Mideast market and sells its Cadum baby soap only in France. *Id.*

39. Rabino, *supra* note 3, at 32.6.

40. *Id.* The importance of a logical approach is illustrated by Proctor & Gamble’s introduction of Vizir, a liquid detergent, in the European market. Vizir initially failed because European washing machines were not designed to accept liquid detergent. Proctor & Gamble then developed a reusable dispensing ball that sits on top of the washload. Vizir’s market position subsequently improved. Hill & Winski, *supra* note 20, at 36.

41. Rabino, *supra* note 3, at 32.8.

The challenge to the communicator is to design a message that wins attention in spite of the surrounding distractions.⁴²

The challenge is met in terms of designing the appropriate "marketing mix."⁴³ It has already been observed that there is a clear association between advertising volume as a percentage of GNP and the general level of a given country's economic development.⁴⁴ Yet while two markets may theoretically be equally receptive in terms of economic viability, they may differ radically when media availability in each market is compared.

Regional variations in media use assume many forms. The literacy rate for a given area will provide an indication of the relative effectiveness of the print medium, as opposed to radio or television.⁴⁵ A caveat is necessary here, however, since an advertiser who seeks to target an upscale market may deliberately seek out a more select print audience.⁴⁶ In some areas, radio and television may not be offered, or are so limited that they do not represent realistic options.⁴⁷

While each market possesses its own idiosyncrasies, some general observations can be made. The proportion of advertising expenditure for print media is low in Latin America, and comparatively high in the Middle East and Africa.⁴⁸ Television expenditures are well above average in Asia, and very low in the Middle East and Africa.⁴⁹ Aside from purely technological considerations, an element in television's limited acceptance in Africa and the Middle East is the fact that Islam forbids human images to be reproduced.⁵⁰ The proportion of total advertising expenditure committed to radio is significantly higher in the Middle East, Africa, Latin America, and Australia/New Zealand than in the United States, Canada and

42. P. KOTLER, *MARKETING MANAGEMENT* 605 (5th ed. 1984).

43. Rabino, *supra* note 3, at 32.16 ("Marketing-mix variables are viewed as controllable variables, or variables that are influenced and manipulated by internal managerial decisions. Thus . . . management has to a large degree control over the characteristics of the product it manufactures, the price it sets, the media it selects, and the distributor it uses.").

44. See *supra* note 5 and accompanying text. See also *Advertising Age's Top 50 Non-U.S. Marketers*, *ADVERTISING AGE*, Dec. 14, 1987, at 58; *Tables Track Top 10 Ad Spenders Around the Globe*, *id.* at 62.

45. Rabino, *supra* note 3, at 32.9.

46. India provides a useful example in this instance. Many Indian advertisers favor print advertisements in English because such ads target the affluent opinion makers of Indian society. Thus, while only 18% of the country's 21,000 publications are printed in English, English newspapers and periodicals account for more than 50% of the \$350 million spent annually on print advertising in India. See Tefft, *Babel of Languages Towers Over Ad Scene*, *ADVERTISING AGE*, Dec. 7, 1987, at 52.

47. Sweden and Norway, for example, both ban television advertising. See Bartal & Wentz, *Danes Phase in TV Spots*, *ADVERTISING AGE*, Nov. 23, 1987, at 42.

48. Rabino, *supra* note 3, at 32.9.

49. *Id.*

50. See, e.g., *Iran Rattles Sabres to Kill Ad in Brazil*, *ADVERTISING AGE*, Oct. 12, 1987, at 70 (Iran threatened to disrupt its trade with Brazil until an advertisement featuring a picture of the Ayatollah Khomeini was pulled.).

Europe.⁵¹

India provides an interesting example of how an international advertiser must approach a market. Over 460 million dollars are spent annually on advertising in India;⁵² of this total, more than half is aimed at the literate, middle-class urban citizen.⁵³ Advertisers direct movie house commercials to the illiterate segment of the population. Radio is not a major medium, since most of the government-controlled radio stations are not permitted to carry commercials.⁵⁴ Television advertising in India has risen 809 percent in the last 10 years,⁵⁵ as advertisers have begun to develop more sophisticated methods of dealing with one of the most important concerns facing the international marketer — the problem of translation.

With fourteen major languages, and even more dialects,⁵⁶ India might well represent an advertiser's nightmare. While the translation problem can be particularly acute when television production is involved, the dramatic growth in Indian television advertising illustrates that such hurdles are not insurmountable.⁵⁷ As a practical matter, whenever an international advertiser contemplates the preparation of advertising copy, the Institute of Practitioners in Advertising suggests that the following guidelines should be observed:

1. Idioms, jargon, and English "buzz-words" must be avoided.

2. Layout and artwork should be designed with enough "free area" to expand the text where necessary. Foreign languages often use more words than English to communicate the same message. Latin languages take up 20 percent more space and German and Slav languages 25 percent. Pictographic languages like Chinese and Arabic may need up to 50 percent more space than the English equivalent.

3. Legal requirements or recognized codes of conduct that control the content of advertising material must be checked very carefully [I]nfringements of local laws can involve the ad-

51. Rabino, *supra* note 3, at 32.9.

52. Tefft, *supra* note 46, at 52.

53. Rabino, *supra* note 3, at 32.9. *See also supra* note 46.

54. Rabino, *supra* note 3, at 32.9.

55. Tefft, *supra* note 46, at 52.

56. *Id.*

57.

One technique is to do a voice-over in which an unseen commentator advertises the product in various languages. Another method is to reshoot the spot, with actors sometimes speaking in many different languages. Although more effective, the latter technique can increase production costs by 50%.

Christopher D'Rozario, creative director at Trikaya, Bombay, Grey Advertising's affiliate in India, said one answer is to make the message visual. "We try to avoid having people talking," he said.

vertiser in serious problems.⁵⁸

4. The translation must be carried out by competent and professional translators. In this connection, it is important that the translators used are familiar with the every-day language of the country in question. It is well known that UK English differs in many respects from American English. Spanish spoken in the Argentine is marginally different from the language used in Spain. With oriental languages like Arabic one often encounters as many dialects as countries that speak such languages. In the UK the Institute of Practitioners in Advertising keeps a register of translation bureaux.

5. Translators must be thoroughly briefed. It is not enough to hand over a document to a translator and ask him to carry out the assignment. He must be fully conversant with the details of the product, its nature and purpose. Technical phrases and points of special significance must be explained to him. It must be remembered that the translator's true function is the production of a *total translation* of the original thoughts and ideas rather than the exact words appearing in the original text. Otherwise, one may get the absurd mishap that "out of sight, out of mind" in English may translate into "invisible lunatic" in Turkish!⁵⁹ The translation must be checked by competent linguists or by the local distributor, agent or personnel of the local subsidiary. In this connection translating-back the copy into the original language can be a very effective safeguard. Any anomalies that might have crept into the translation should be detected by this simple device. Having the final checking done by the local distributors or agents is a useful participative method for ensuring that those who have to use such material will have an opportunity of voicing their criticism before it is too late.

6. Typesetting and printing must be undertaken by specialist foreign language printers. It is most unwise to use typesetting specialists and printers who have had no experience in carrying out this type of work in a foreign language. The smallest error can make the whole copy look embarrassingly unprofessional. One encounters from time to time sales aids or other communication devices translated from foreign languages and typeset overseas which can only make the reader squirm with discomfiture at the travesty of message they purport to convey. The professional marketer never falls into this trap.⁶⁰

58. See *infra* notes 83-107 and accompanying text.

59. "Body by Fisher" has become "Corpse by Fisher" in some translated versions, and Pepsi's "Come Alive" metamorphosed into "Come out of the grave." Rabino, *supra* note 3, at 32.9.

60. S. MAJARO, *supra* note 4, at 178-79 (quoting INSTITUTE OF PRACTITIONERS IN ADVERTISING, *TRANSLATING FOR ADVERTISING* (1972)).

V. Advertising Restrictions: Life in the Regulated Lane

Advertising and Psychology

The successful international advertiser's inquiry does not end with a simple determination that certain media are available in a given market, while other media are not. Once the basic advertising terrain is identified and surveyed, a far more subtle process begins. The choice of advertising medium is closely tied to the audience that is sought:

Communicators have been looking for audience traits that correlate with their degree of persuasibility. People of high education and/or intelligence are thought to be less persuasible, but the evidence is inconclusive. Women have been found to be more persuasible than men, but men who feel socially inadequate also show this trait. Persons who accept external standards to guide their behavior and who have a weak self-concept appear to be more persuasible. Persons who are low in self-confidence are also thought to be more persuasible The communicator should look for audience traits that correlate with persuasibility and use them to guide message and media development.⁶¹

To the extent that advertising represents a psychological tug-of-war between advertiser and audience, many nations have moved to regulate consumer advertising.⁶² Certainly the potential for conflict between the perceived national interest in regulation, and the marketer's desire to publicize his product, should be a source of concern.

A secondary focus is the question of freedom of commercial speech. Can principles that are accepted virtually without question in the United States be subsumed as part of an international marketing order, or is the marketer who plans to advertise internationally subject to the regulatory whims of each national market that he seeks to enter?

61. P. KOTLER, *supra* note 42, at 607.

62. For a useful study of the manipulation of language in television advertising, see generally M. GEIS, *supra* note 1:

As anyone can see for himself, or herself, by turning off the sound while watching (previously unseen) television commercials, language can and usually does play a crucial role in interpreting what is presented visually. Moreover, language is crucial to the articulation of the "lessons" to be learned from television commercials. The fact that television advertisers are beginning to employ the recently developed technique of closed captioning to reach hearing impaired people suggests that advertisers recognize the great importance of what is said during television commercials.

Id. at 2.

A. Regulation in the United States and Great Britain: Prophets in Their Own Country

1. *The FTC and the Politics of Regulation.*—While an exhaustive discussion of advertising regulation in the United States is outside the scope of this Comment, advertisers are presumably familiar with domestic practice; thus an overview of the American regulatory scheme will provide a useful introductory focus. The Federal Trade Commission (“FTC”) is the regulatory body charged with oversight of advertising in interstate commerce.⁶³ Congress amended Section 5 of the FTC Act with the Wheeler-Lea Act in 1938. The Wheeler-Lea Act declared that “[u]nfair methods of competition in commerce, and unfair or deceptive acts, are declared unlawful.”⁶⁴ Notably absent from the statute are definitions of the terms “unfair” and “deceptive”; the last fifty years have witnessed an ongoing battle between advertisers and the FTC over interpretation of these standards.⁶⁵ As one commentator has noted,

Over the decades, the FTC adopted a test standard of intelligence considerably below that of the common law’s “reasonably prudent man.” In fact . . . a semi-moronic “wayfaring idiot” came to be regarded as the proper legal conception of the American: “General stupidity is not the only attitude of the beneficiary of FTC policy. He also has a short attention span; he does not read all that is to be read but snatches general impressions. He signs things he has not read, has marginal eyesight, and is frightened by dunning letters when he has not paid his bills. Most of all, though, he is thoroughly avaricious.”⁶⁶

In the 1960s, the Commission brought suit against the Colgate-Palmolive Company, asserting that advertisements for Palmolive Rapid Shave were deceptive.⁶⁷ The ads claimed that Rapid Shave could soften sandpaper enough to give the paper a close shave.⁶⁸ The Ted Bates Agency, which prepared the ads, had used plexiglass sprinkled with sand, rather than actual sandpaper, in its commer-

63. See Federal Trade Commission Act, 15 U.S.C. §§ 41-77 (1982).

64. 15 U.S.C. § 45(a)(1) (1982).

65. For an enlightening discussion of the FTC’s role in American advertising, see P. GOLD, *ADVERTISING, POLITICS, AND AMERICAN CULTURE* 159-75 (1987).

66. *Id.* at 162 (quoting G. ALEXANDER, *HONESTY AND COMPETITION: FALSE ADVERTISING LAW AND POLICY UNDER FTC ADMINISTRATION* 8 (1967)).

67. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1964).

68. *Id.* at 376.

Each of the commercials contained the same “sandpaper test.” The announcer informed the audience that, “To prove RAPID SHAVE’s super-moisturizing power, we put it right from the can onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke.” While the announcer was speaking, Rapid Shave was applied to a substance that appeared to be sandpaper, and immediately thereafter a razor was shown shaving the substance clean.

Id.

cials.⁶⁹ The Supreme Court ultimately declared such “mock-ups” illegal.⁷⁰

Encouraged by its success in the *Colgate-Palmolive* case, the FTC maintained a combative stance through the early 1970s. In 1971, *Advertising Age* offered a tongue-in-cheek sampler of “acceptable” advertising, such as this one for a mythical bank:

The money you borrow from First National Bank is made by the United States Government, for the most part.

We suppose that an occasional bad twenty slips by us, but we try real hard to pass out only the genuine article, made and backed (but not guaranteed to retain its value) by the U.S. government.

First National Bank, Member FDIC, like most other banks.⁷¹

At present, the FTC has become a far more docile watchdog; the aggressive regulation of previous years is but a painful memory for advertisers.⁷²

2. *Brittainia's Rules: A Laissez-Faire Policy*.—It should not be forgotten that one of the most famous cases of all time concerned advertising in nineteenth-century England. In *Carlill v. Carbolic Smoke Ball Co.*,⁷³ the company had advertised that a

£ 100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after hav-

69. *Id.*

70. *Id.* at 395. The *Colgate-Palmolive* Court found that the use of plexiglass was a material deceptive practice. The Court analogized the case to

those cases in which a seller induces the public to purchase an arguably good product by misrepresenting his line of business, by concealing the fact that the product is reprocessed, or by misappropriating another's trademark. In each the seller has used a misrepresentation to break down what he believes to be an annoying or irrational habit of the buying public — the preference for particular manufacturers or known brands regardless of a product's actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives.

Id. at 389.

71. *Where Will It End?*, *ADVERTISING AGE*, May 31, 1971, at 10.

72. P. GOLD, *supra* note 65, at 174-75.

In the end, the anti-advertising animus faded away. By 1974, the prime movers had all departed the agency, and the Ford administration evinced no great ardor for continued prosecutions. Commission investigations and general hearings had turned up no revelations not available in any advertising or marketing textbook, and the evidence was beginning to cumulate that corrective advertising, even when conducted for years, had no discernible effects. Ultimately, Congress reined in the Commission, which was saved from real emasculation only by the intervention of the Carter White House. Today, corrective advertising remains an available regulatory tool, but one infrequently applied.

Id.

73. 1 Q.B. 256 (1893).

ing used the ball three times daily, for two weeks according to the printed directions supplied with each ball. £ 1000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter⁷⁴

A Mrs. Carlill came forward and claimed the reward; when the Carbolic Smoke Ball Company refused to pay, she sued. The court held for Mrs. Carlill, holding that the offer was not a "mere puff," but rather an offer under which "the reward [was] offered to any person who contract[ed] the epidemic or other disease within a reasonable time after having used the smoke ball."⁷⁵ Apart from its didactic immortality as a lesson in the contractual intricacies of offer and acceptance, the *Carbolic Smoke Ball* case serves as a reminder to advertisers that it is safer to err on the side of caution in preparing advertising copy.⁷⁶

Great Britain does not have a governmental regulatory agency comparable to the FTC. Government supervision has emerged, however, in the form of advertising controls contained in a plethora of statutes.⁷⁷ When the Town and Country Planning Act, 1947 was passed, an attempt to include a list of legislation affecting outdoor advertising was abandoned, since the planners quickly discovered that over four hundred local statutes were involved.⁷⁸

Apart from statutory and judicial restrictions, self-regulation by advertisers is the norm in Great Britain. The British Code of Advertising Practice, first issued in 1962, was created to provide a framework of standards for advertisers and advertising agencies.⁷⁹ According to the Code, as a general consideration, advertising is to be "legal, clean, honest, and truthful."⁸⁰ More specifically, the Code seeks to regulate the use in advertising of scientific terms and statistics, testimonials, price claims, guarantees, and comparative claims.⁸¹ It is worth noting that the British regulatory system, with

74. *Id.* at 256-57.

75. *Id.* at 263-64.

76. See, e.g., Street, *Can Legislation Play a Useful Role in Promoting Better Advertising?*, in *ADVERTISING AND THE COMMUNITY* 135 (A. Wilson ed. 1968):

[N]o doubt all advertising agencies are familiar with Careill [sic]. At least I assume so because no advertisements of this sort, to my knowledge, ever appear today, and it is perfectly clear that merely to guarantee the efficiency of the product, to say that it will do what it says it will and so on, will never afford an action of the sort that Mrs. Careill had. You must have something to reinforce the intention to enter a legal contract as was evidenced by this deposit of a sum of money in the bank.

Id.

77. See P. LANGDON-DAVIES, *MODERN ADVERTISING LAW* (1963); Braun, *Voluntary Control Within the Profession*, in *ADVERTISING AND THE COMMUNITY* 120-21 (A. Wilson ed. 1968).

78. Braun, *supra* note 77, at 120-21.

79. Braun, *supra* note 77, at 125.

80. *Id.*

81. *Id.* Significantly, the Code has been adopted by the Advisory Committee of the In-

its various layers and sources of authority, has been criticized by some as unwieldy:

It is a great advantage to have all advertising controlled by one body. This is in contrast to the enormous overlapping and complexity of our present voluntary system. I welcome the idea of the same body framing the regulations for advertising standards, both with regard to what is prohibited and what is required and searching for violations and taking enforcement action.⁸²

B. Regulatory Trends in Various Markets: Innocents Abroad?

Outside of the relatively familiar American and British markets, advertising restrictions take many forms. Trade description legislation seeks to prevent deceptive statements concerning the price, contents, origin, composition, or qualities of effectiveness of a product. Such legislation also seeks to prohibit inaccurate product testimonials.⁸³ Arguably, an important step in a nation's move toward a developed economy is the institution of advertising regulations; this serves as notice to the "snake-oil" salesmen who prey on an unsophisticated populace that their days are numbered.

In December 1987, the People's Republic of China adopted a new system of advertising regulations, including rules that outlaw ads containing obscene, superstitious, and absurd material.⁸⁴ The regulations address a genuine problem; Chinese medicinal products, for example, frequently carry labels indicating that the product can cure ailments such as cancer and impotence.⁸⁵ Penalties for violating the regulations range from criticism to monetary fines. Serious offenders will have their licenses revoked or their businesses shut down.⁸⁶

The Chinese standard for advertising is that it be "true, wholesome, clear and understandable."⁸⁷ While subjective determinations in such matters are inevitable, there is presumably a threshold level of "truth in advertising" that represents a universal standard. Simply telling the truth, however, is not the key to worldwide acceptance of one's advertising copy. The international advertiser must confront a multitude of regulations that have their basis in the social mores of

dependent Television Authority set up under Section 8(1) of the Television Act, 1954.

82. Street, *supra* note 76, at 144. The removal of internal trade barriers within the EEC in 1992 may ultimately have a profound effect on Great Britain's regulation of advertising. Since Community law supercedes national law when conflicts emerge, Britain may be forced to develop a more centralized advertising regulation system in order to coordinate national regulatory efforts with the dictates of the EEC. See *infra* notes 121-22 and accompanying text.

83. S. MAJARO, *supra* note 4, at 176.

84. Curry, *China Fights Wild Ad Claims*, *ADVERTISING AGE*, Dec. 21, 1987, at 15.

85. *Id.*

86. *Id.*

87. *Id.*

the promulgating nations. The most familiar manifestation of this type of restriction concerns advertising for cigarettes and tobacco, drugs and other proprietary medicines, family planning products, and alcohol.⁸⁸

Tobacco products have recently been the object of a number of regulatory moves.⁸⁹ In Hong Kong, the government has ordered a three-year phase out of broadcast advertising for cigarettes.⁹⁰ This change has created a surge in demand for outdoor advertising space; Hong Kong now boasts the dubious distinction of having the largest outdoor billboard — a 3,200 square foot Marlboro cowboy.⁹¹ Similarly, Brazil, in the process of developing a new constitution, considered eliminating advertising for cigarettes, liquor, “health treatments,” and pesticides.⁹² The proposal was dropped after intense lobbying by Brazilian advertising agencies.⁹³ The fact that the controversy surfaced at all, however, is indicative of how rapidly a marketing environment can change.

Some countries prohibit certain words or expressions in advertising. Use of the words “pasteurized” or “sterilized” is sometimes restricted, on the theory that they may be misinterpreted by consumers. In the Netherlands, statements such as “free from sugar” or “low salt content” require prior consent by royal decree.⁹⁴ A marketer who has failed to do an appropriate regulatory analysis can also run afoul of various packaging restrictions. The Netherlands, for example, once required all margarine to be packed in the shape of a rectangular parallelepiped.⁹⁵

The content and style of advertising is frequently regulated, either by government agencies,⁹⁶ or through an advertising code that operates on a presumption of advertiser self-discipline.⁹⁷ In con-

88. S. MAJARO, *supra* note 4, at 176.

89. For perspectives on the health and public policy implications of cigarette smoking, see R. TOLLISON, *SMOKING AND SOCIETY* (1986); R. TOLLISON & R. WAGNER, *SMOKING AND THE STATE* (1988); R. TROYER & G. MARKLE, *CIGARETTES, THE BATTLE OVER SMOKING* (1983).

90. Fox & Montgomery, *New Problems Face Tobacco Marketers*, *ADVERTISING AGE*, Sept. 21, 1987, at 53.

91. *Id.* All may not be lost for cigarette marketers who lag in the race for billboard space. The television station on neighboring Macao, which is uncensored, will soon expand its broadcast range to reach most of Hong Kong. *Id.*

92. Michaels, *Brazil Mulls Bans*, *ADVERTISING AGE*, Sept. 14, 1987, at 90.

93. *A Global Glance at 1987*, *ADVERTISING AGE*, Dec. 28, 1987, at 25.

94. S. MAJARO, *supra* note 4, at 176.

95. *Id.* at 176-77. (“This seems a pretty useless bit of information to the average marketer. On the other hand, a person who was charged with the marketing of margarine in the Netherlands and was unfamiliar with this regulation could easily run into costly and embarrassing promotional misadventure.” *Id.* at 177.) A parallelepiped is a prism whose six faces are parallelograms. FUNK AND WAGNALLS *NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE* 1791 (rev. ed. 1947).

96. See, e.g., Gadacz, “Scrap KOBACO,” *Ad Industry Pleads*, *ADVERTISING AGE*, Nov. 30, 1987, at 62.

97. S. MAJARO, *supra* note 4, at 176. See also *supra* notes 79-82 and accompanying

forming to the local regulatory regime, the advertiser occasionally will encounter official agencies such as South Korea's KOBACO, which operates under a mandate "to improve broadcasting practices, promote cultural life and welfare of the people through the media in general by setting up a broadcast system that could better serve the public interest."⁹⁸ While pursuing these noble aspirations, KOBACO's concomitant responsibilities include censoring advertisements and brokering advertising time on the state-owned radio and television networks.⁹⁹

While comparative claims have recently become a staple of the American advertising diet, a number of countries strictly limit comparative advertising.¹⁰⁰ This can lead to some rather bizarre consequences. In Spain, advertisers are allowed to compare their brands only to other brands that they own. As a result, marketers create and register fictitious brand names, and compare these phantom products to their real brands.¹⁰¹ In West Germany, a comparative claim must be valid against every competing brand.¹⁰² When a German snack food marketer introduced potato chips that supposedly contained forty percent less fat, a competitor sued.¹⁰³ A Hamburg court prohibited the marketer from marketing the low-fat claim, because the claim was not valid against every existing brand.¹⁰⁴

The international advertiser must also be prepared to face advertising taxes as an element of marketing cost in some countries.¹⁰⁵ In what appears to be a developing trend, however, Thailand and Italy rejected proposals for advertising taxes in 1987, while South Africa is presently considering a repeal of its twelve percent general sales tax on advertising.¹⁰⁶ South African authorities estimate that repeal of the tax could generate more than sixty million dollars in advertising spending.¹⁰⁷

text.

98. Gadacz, *supra* note 96, at 62.

99. *Id.*

100. S. MAJARO, *supra* note 4, at 177. See also Phillips, *Germans Crunch Low-Fat Chip Rollout*, *ADVERTISING AGE*, Dec. 21, 1987, at 24; *Comparative Ads May Get OK in Spain*, *ADVERTISING AGE*, Oct. 12, 1987, at 68.

101. *Comparative Ads May Get OK in Spain*, *supra* note 100, at 68. A new law presently before the Spanish Congress would change this situation. Comparative claims "based on features that are proven and essential to the product or service being advertised" would be allowed. However, "[e]ven if it becomes legal to mention rival brands by name . . . very few marketers would do so because it could be considered in bad taste." *Id.*

102. Phillips, *supra* note 100, at 24.

103. *Id.*

104. *Id.*

105. S. MAJARO, *supra* note 4, at 176. Advertising taxes generally take the form of turnover taxes, value added taxes, or straight advertising taxes. *Id.* While advertisers in Italy presently pay an 18% value added tax, the amount paid is deductible. *Ad Taxes Wither Overseas*, *ADVERTISING AGE*, Oct. 19, 1987, at 96.

106. *Ad Taxes Wither Overseas*, *supra* note 105, at 96.

107. *Id.*

VI. Advertising Regulation and Economic Growth: Strange Bedfellows?

Professor J.J. Boddewyn of the City University of New York has identified the following regulatory trends:¹⁰⁸

1. Prior substantiation of advertising claims is becoming the norm.
2. Growing product restrictions affect their advertising.
3. More informative ads are in order.
4. Advertising language is being restricted.
5. "Vulnerable" groups, such as children, are becoming the particular target at advertising regulations.
6. More groups and people can now sue advertisers.
7. Penalties are getting stiffer.

As the foregoing discussion illustrated, the international marketer must be sensitive to the regulatory climate in each nation where advertising activity is planned. An examination of current regulatory developments in two disparate regions should prove useful in testing the Boddewyn analysis.

A. Europe and the EEC

In 1986, the European Economic Community (EEC) took steps to regulate advertising throughout the Community. The EEC Council of Ministers adopted a directive on misleading advertising; this directive guarantees consumers the right to file complaints against advertisers.¹⁰⁹ When such complaints are filed, the burden is on the advertiser to prove the accuracy of its claims.¹¹⁰ The Commission of the European Communities has placed elimination of dishonest advertising at the forefront of its consumer protection agenda.¹¹¹ The regulation of comparative advertising is also an EEC concern.¹¹²

Of particular concern in the EEC is the problem of cross-border broadcasting transmissions.¹¹³ The emergence of Sky Channel, a pan-European satellite television channel, has led to litigation over the question of who bears responsibility for advertising that originates in one country, yet is transmitted into a second nation.¹¹⁴

108. Rabino, *supra* note 3, at 32.20 (citing J.J. Boddewyn, The Global Spread of Advertising Regulations (paper presented at the regional meeting of the Academy of International Business (Jan. 1980))).

109. COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN FILE NO. 12/87, THE EUROPEAN COMMUNITY AND CONSUMERS 9 (1987).

110. *Id.*

111. *Id.*

112. *Id.* See *supra* notes 100-104 and accompanying text.

113. See, e.g., COMMISSION OF THE EUROPEAN COMMUNITIES, EUROPEAN FILE NO. 14/86, TELEVISION AND THE AUDIO-VISUAL SECTOR: TOWARDS A EUROPEAN POLICY 7 (1986).

114. Wentz, *TV Nationalism Clouds Sky Gains*, ADVERTISING AGE, Dec. 14, 1987, at 56.

In 1986, McDonald's Corporation sponsored a series of commercials on Sky Channel that offered customers a free toy plastic boat with the purchase of a hamburger.¹¹⁵ Finland subsequently took McDonald's to court, arguing that the advertisements offered children boats, not hamburgers, in violation of national promotion rules.¹¹⁶ The local McDonald's franchise insisted that it had no control over the advertising, which was booked through McDonald's United Kingdom advertising agency in London.¹¹⁷ The Sky Channel's policy is to accept advertising that meets the regulatory requirements of the jurisdiction in which the broadcasting originates.¹¹⁸

While Finland is not an EEC member, the "boat and burger" controversy is illustrative of the problems that the EEC faces. The Community has been attempting to define a threshold level of regulation; member states could then use these guidelines as a takeoff point for broader restrictions.¹¹⁹ An EEC code on advertising has not yet been finalized;¹²⁰ suffice it to say that debate on the subject has been "very wide-ranging."¹²¹ The EEC is presently adopting new rules in preparation for the removal of internal trade barriers by the end of 1992.¹²² As EEC member states encounter advertising regulations promulgated by the Community that conflict with local practice, any number of disputes will presumably find their way to the European Court of Justice.¹²³

The trend in Europe indicates a general expansion of commercial television. In September 1987 a commercial channel commenced operation in Belgium.¹²⁴ Denmark began to phase in commercial tel-

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. COMMISSION OF THE EUROPEAN COMMUNITIES, *infra* note 122, at 7.

120. Montgomery, *Belgium Begins Commercial TV*, ADVERTISING AGE, Oct. 5, 1987, at 76.

121. COMMISSION OF THE EUROPEAN COMMUNITIES, *infra* note 122, at 7. Under one proposal, EEC member states would establish the amount of airtime allowed for advertising on their national services. Member states

could not prevent retransmission of TV advertisements coming from other Member States if the amount of the advertising were below a certain threshold (15% of the transmissions receivable in the country of origin), or provided, in the event of this threshold being exceeded, that certain other conditions are fulfilled. [T]he proposal also provides for separation of advertising from programmes, general standards in regard to the interruption of programmes for advertising and to sponsorship, the banning of tobacco advertising, limits on advertising for alcoholic drinks and advance checking of advertisements.

Id. For the general trend of limitation on advertising for tobacco and alcohol, see *supra* notes 88-93 and accompanying text.

122. See, e.g., Greenhouse, *The Court That Helps to Pull Europe Together*, N.Y. Times, Dec. 16, 1988, at B7, col. 3.

123. *Id.* The European Court of Justice exercises jurisdiction over a variety of civil matters within the EEC, including trade, antitrust, individual rights, and environmental law. *Id.*

124. Montgomery, *supra* note 120, at 76.

elevision on a new regional channel in October 1987.¹²⁵ Of the European nations, only Sweden and Norway presently ban television advertising entirely.¹²⁶

B. *The Soviet Union*

If one accepts the premise that advertising content is being more closely regulated (and arguably the prudent international marketer has no choice but to do so), it seems something of a paradox that the various media through which advertising is conveyed should be abandoning traditionally hostile attitudes toward commercial communication. If concern is growing over the messages that are being conveyed, however, it is equally true that there is an emerging awareness of the power of advertising on many fronts. Nowhere is this more evident than in the Soviet Union; while the "dream-peddlers" of Madison Avenue will probably not lose many accounts to their Soviet counterparts, the Gorbachev government has recognized that "[t]o stand up to the tough competition of most sophisticated Western advertising firms, Soviet advertising needs efficient planning and better organization."¹²⁷

In analyzing Soviet advertising, it is important to distinguish between advertising that is targeted toward foreign trade and that which is aimed at the domestic market. Vneshtorgreklama, the foreign trade advertising organization, was set up in its present form in 1965.¹²⁸ While the latest Soviet marketing efforts are clearly geared toward the export market,¹²⁹ a number of domestic advertising institutions have been active in increasing the level of consumer advertising within the country.¹³⁰ Numerous outlets are available to Soviet advertisers; for example,

[d]isplay advertising of consumer goods now appears regularly in the press, most notably in a weekly advertising supplement to the Moscow city evening paper, Verchernyaya Moskva. It can be seen on television, though admittedly in small doses. There has even been a commercially-sponsored television quiz game, and some commercial use of 'editorial' copy in the press. All the usual media are now used in some degree for commercial advertising, and Soviet books and articles on advertising since the

125. Bartal & Wentz, *supra* note 47, at 42.

126. *Id.* This is not to say that all European nations are enlightened in their approaches to television advertising; any number of arcane restrictions can be found both within and without the precincts of the EEC. See *supra* notes 115-18 and accompanying text.

127. Tinsley, *Soviets Ponder Agency Prowess*, *ADVERTISING AGE*, Nov. 9, 1987, at 57 (quoting Nina Matveyeva and Marat Zhenikov, officials of the government-controlled ad agency Vneshtorgreklama).

128. P. HANSON, *ADVERTISING AND SOCIALISM* 17 (1974).

129. Tinsley, *supra* note 127, at 57.

130. P. HANSON, *supra* note 128, at 17.

mid-1960's are quite numerous.¹³¹

VII. Conclusion: Are International Standards Desirable?

The fact that advertising has carved a niche, and even proliferates, in societies where the concept of "freedom of speech" is unheard of, inevitably leads to the question of whether regulation of commercial speech should be an item of concern on the international agenda. As the foregoing discussion illustrates, the international advertiser must be sensitive to both the nuances of the advertising message itself, and the legal requirements imposed on that message, in each market where promotion is contemplated.

J. Donald McNamara, President of the Interpublic Group of Companies, stated in 1982:

It seems to us a measure of human progress that there are indeed so many places in the world where people have gained the freedom to choose between competing products, services, and ideas.

. . . .

. . . [T]he basic issues are:

- the right to inform
- the right to be informed
- the right to choose

With respect to economic implications of encroachments on these freedoms, restrictions on advertising will eventually place an economic burden on advertisers and manufacturers. For example, they may not be able to market new products; new competitors may not be able to get a foothold in established industries.

It is principally the advertisers, not the advertising agencies, that will suffer. The agencies will still be able to make a good living in the industrialized nations which permit communication. However, the large multinationals which sell their products in many markets of the world will feel the economic pinch.¹³²

Few would argue that advertisers should have unbridled freedom to make whatever claims suit their fancy. While the market may eventually "weed out" dishonest advertisers, the cost of this process to society can be extremely high.¹³³ The United States Supreme Court has recognized that the federal Constitution accords a lesser degree of protection to commercial speech than to other con-

131. *Id.* at 17-18.

132. THE MEDIA INSTITUTE, 2 ISSUES IN INTERNATIONAL INFORMATION 59-60 (1982).

133. *See, e.g.*, Curry, *supra* note 84, at 15.

stitutionally guaranteed expression;¹³⁴ nevertheless, the first amendment protects commercial speech from unwarranted governmental intrusion.¹³⁵ As the unwary marketer will discover, one who seeks to advertise outside the boundaries of the United States without extensively researching the advertising regulations and customs of the proposed market, proceeds at his or her own peril.

Professional embarrassment is not the only risk run by a marketer who fails to properly identify regulatory issues. Recent litigation suggests that a market researcher may expose itself to tort liability by failing to accurately assess a product's chance for success in a given market. In *Beecham v. Yankelovich*, a case presently pending before a federal district court in Manhattan, a detergent manufacturer seeks twenty-four million dollars in damages from a market researcher.¹³⁶ The research organization had predicted great success for a new detergent called Delicare; when Delicare flopped, the manufacturer sued the researcher on theories of negligence, negligent misrepresentation, professional malpractice, and breach of contract.¹³⁷

While the *Beecham* case itself may not resolve the issue,¹³⁸ the questions that the case raises about the duty of a market research organization to properly identify market receptivity to a product could conceivably have profound implications in the international arena. The vagaries of translation, and the mysteries of taste preference, may produce many amusing anecdotes; however, the financial gravity of these concerns will become more apparent if a failure to properly "read" the international market results in ruinous lawsuits.¹³⁹

134. See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The *Central Hudson* Court suggested that the distinction between "speech proposing a commercial transaction," and "other varieties of speech" is derived from common sense; commercial speech operates in an area that has traditionally been subject to government regulation. *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978)).

135. *Id.*

In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

136. Beck, *Marketing Malpractice: Newest Tort?*, AMERICAN LAWYER, March 1988, at 32 (Supp.).

137. *Id.* at 33.

138. "Beecham is taking a chance with this suit. Not only do many lawyers and market research veterans consider it a very hard case to win, but Beecham is also exposing its management and marketing practices to public scrutiny and criticism." *Id.* at 34.

139.

Although Beecham may face an uphill battle, the case has nevertheless sent the

Essays addressing international issues, such as advertising regulation, frequently conclude with a panegyric that sounds the clarion call for yet another international treaty. While it is true that international communications issues are susceptible to international agreement,¹⁴⁰ the unique problems presented by transnational advertising — including cultural differences, media availability, and language barriers — suggest that for the present, the most useful advice to the international advertiser is *caveat venditor*.

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industry scurrying to review its practices and assess its exposure. The 49,000-member American Marketing Association has sponsored two conferences on the legal issues raised by the suit. Jeffrey Heilbrun, AMA executive director, says the litigation has forced market researchers to reconsider the need for carefully drafted written contracts and may cause some companies to avoid difficult projects.

Id.

140. See generally E. PLOMAN, INTERNATIONAL LAW GOVERNING COMMUNICATIONS AND INFORMATION (1982).