

THE ACCIDENTAL FRANCHISE:
"A ROSE BY ANY OTHER NAME ..."

by

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**Presentation to the American Bar Association's
Section on Patent, Trademark and Copyright Law
Los Angeles, California
March 31, 1992**

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I. INTRODUCTION

A. Many attorneys who practice in the intellectual property area do not realize that whenever a transaction involves a trademark license, there is the possibility that a franchise relationship has been created.

B. If a franchise has been created, there are certain consequences to the licensor: he may have to register the license, and his relationship with the licensee may be regulated by various state and possibly federal laws or regulations.

C. The purpose of this paper is to identify what constitutes a franchise in order to assist the practitioner in advising his or her client in how to structure a transaction; to delineate the consequences of a transaction being classified as involving a franchise; and to provide some insights into how experienced attorneys sometimes approach the problems which will be cited in this paper.

D. Note that the name given to the relationship between a trademark licensor and licensee will not be determinative as to whether the relationship will, for legal purposes, be classified as a "franchise." Partnership agreements, securities, marketing arrangements, distributorship agreements, manufacturing or requirements contracts, as well as more traditional trademark licensing agreements, can unknowingly be franchises. As Shakespeare said, "What's in a name? That which we call a rose by any other name would smell as sweet."

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E. For purposes of this paper, the term "trademark" will be used to include trademarks, service marks, trade names, logos and other commercial symbols.

F. While not necessarily a conceptually difficult area, franchise law can be technically complex. This paper is intended to give its readers a loose and brief introduction to franchise law; to achieve brevity, many of the statements contained herein are over simplifications of the law or otherwise technically imprecise.

G. Attached as Appendix I is a bibliography of more comprehensive materials discussing various aspects of franchise law. I particularly recommend Fundamentals of Franchising, published by and available from the American Bar Association's Forum on Franchising, because it gives concise, comprehensive and practical discussions of common legal issues which practitioners must face when confronted by a franchising problem. Commerce Clearing House's Business Franchise Guide, also listed on this bibliography, is a compilation of federal and state laws and regulations and judicial decisions involving franchising and is a "must" for any lawyer who must routinely address franchise problems.

II. A BRIEF OVERVIEW OF FRANCHISE REGULATION

A. Unfortunately, to give meaning to the problems of the accidental franchise, it will be necessary to temporarily put the cart before the horse. This paper will therefore briefly discuss the framework of franchise regulation, then address the question of what is a franchise, and then, returning to the subject of the framework of franchise regulation, discuss the consequences of being a franchise.

B. Generally speaking, there are two aspects of franchises that are regulated: franchise sales, and franchise relationships.

1. Franchise Sales.

a. Federal Regulation. In 1979, the Federal Trade Commission adopted its franchise rule, which is officially entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," 16 C.F.R. § 436 (the "FTC Rule"). The FTC Rule governs franchise sales; it does not attempt to

regulate how a franchise relationship must be managed. The FTC Rule requires the franchisor to provide a disclosure statement in a prescribed form to a prospective franchisee at least ten business days prior to the consummation of the franchise sale. The FTC Rule also limits the use of so-called "earnings claims," and regulates the types of statements that may be made in materials advertising franchises for sale. There is no filing requirement with the FTC under its Rule.

b. State Regulation.

(i) Fifteen states regulate the sale of franchises. See Appendix II. In contrast to the FTC Rule, most of these statutes require that the franchise be registered with the state prior to being offered for sale. The registration process includes filing an application with the appropriate state administrator (usually the Securities Commissioner or the Attorney General). The application will include a disclosure statement (often called an offering circular or prospectus) similar to the one required by the FTC. The state administrator will review the disclosure statement, and may suggest various modifications. Once the administrator's comments have been appropriately addressed, the administrator will issue an effective order, after which franchises can then be sold in that particular jurisdiction. An effective order does not constitute an approval by the state administrator.

(ii) The state statutes also: regulate franchise sales advertising; limit in certain respects the use of earnings claims; permit the state administrators to require escrow or bonds; and provide for civil and criminal penalties in the event state law is violated.

(iii) While the state laws governing franchise sales are similar in many respects, they all have their own peculiarities. The Michigan statute, for example, has, in

practice, no review process; only a filing requirement.

2. Franchise Relationship Laws. Seventeen jurisdictions have adopted legislation regulating franchise relationships. These statutes often cover termination rights, renewal rights and assignment rights. The statutes vary considerably from state to state. Some statutes are more procedural in nature (e.g., they establish a notice requirement before the franchisor may refuse to renew a franchise), while others more directly affect the substantive relationships between the parties (see, for example, the Wisconsin Fair Dealership Law). A list of the relationship laws having general applicability is set forth on Appendix III.

C. There are two federal industry-specific statutes (the Automobile Dealer Franchise Act, 15 U.S.C. §§ 1221-1225, and the Petroleum Marketing Practices Act, 15 U.S.C.A. § 2801 et seq.) that regulate franchise relationships. There are also numerous industry-specific state statutes. Affected industries often include beer and wine, and farm and construction equipment. The scope of these statutes is beyond the purview of this paper.

D. There are also twenty-four states that regulate the sales of business opportunities. Under most of these statutes, the term business opportunity excludes a marketing plan sold in conjunction with a license to use a registered mark.

III. THE MULTIPLE DEFINITIONS OF "FRANCHISE"

A. Given the various types of regulation in this field, it should come as no surprise that the term "franchise," as used in the FTC Rule and state laws, is not singular in meaning. The term has been given one definition for purposes of the FTC Rule, a different meaning under each state statute governing franchise sales (although there is some commonality among certain of the state statutes) and often another meaning for purposes of franchise relationship laws.

B. The FTC Rule. The FTC Rule defines "franchise" as follows:

"(a) The term 'franchise' means any continuing commercial relationship created by any arrangement or arrangements whereby:

(1)(i)(A) a person (hereinafter 'franchisee') offers, sells, or distributes to any person other than a 'franchisor' (as hereinafter defined), goods, commodities, or services which are:

(1) Identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person (hereinafter 'franchisor'); or

(2) Indirectly or directly required or advised to meet the quality standard prescribed by another person (hereinafter 'franchisor') where the franchisee operates under a name using the trademark, service mark, trade name, advertising or other commercial symbol designating the franchisor; and

(b)(1) The franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operating, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs; or

(2) The franchisor gives significant assistance to the franchisee in the latter's method of operation, including, but not limited to, the franchisee's business organization, management, marketing plan, promotional activities or business affairs; Provided, however, That assistance in the franchisee's promotional activities shall not, in the absence of assistance in other areas of the franchisee's method of operation, constitute significant assistance; ... [and]

(2) The franchisee is required as a condition of obtaining or commencing the franchise operation to make a payment or a commitment to pay to the franchisor, or to a person affiliated with the franchisor."

[For purposes of this paper, I have excluded the second part of the FTC's definition of a "franchise," which covers certain types of so-called business opportunities (i.e., vending machines, rack

displays, and other product sales displays); these ventures will be deemed franchises even when no trademark is involved.]

C. There are several exclusions and exemptions from the term "franchise," as used by the FTC. The most relevant one to a trademark practitioner is commonly referred to as the "Single License" exclusion, which is defined as follows:

"An agreement between a licensor and a single licensee to license a trademark, trade name, service mark, advertising, or other commercial symbol where such license is the only one of its general nature and type to be granted by the licensor with respect to that trademark, trade name, service mark, advertising, or other commercial symbol."

D. The state statutes regulating franchise sales generally define a franchise in one of two manners:

1. Many states have adopted the so-called "marketing plan" definition. The Virginia statute is typical. It provides:

"(b) 'Franchise' means a written contract or agreement, whether or not a franchise fee is required, between two or more persons by which:

(1) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services at retail under a marketing plan or system prescribed in substantial part by a franchisor; and

(2) The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate."

(3) The franchisee is required to pay, directly or indirectly, a franchisee fee of \$500 or more.

2. A few states have adopted a "community of interest" definition. The Minnesota statute provides in part:

"'Franchisee' means (a) a contract or agreement, either express or implied, whether oral or written, for a definite or indefinite period, between two or more persons:

(1) by which a franchisee is granted the right to engage in the business of offering or distributing goods or services using the franchisor's trade name, trademark, service mark, logotype, advertising, or other commercial symbol or related characteristics;

(2) in which the franchisor and franchisee have a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise; and

(3) for which the franchisee pays, directly or indirectly, a franchise fee"

E. Each statute may also have various exemptions or exclusions which may be applicable to a given situation. Some states (New York, Washington and Illinois) exempt certain isolated sales of franchises. Most states have a "large franchisor" exemption.

F. The definition of franchise found in most relationship statutes generally follows one of the patterns set forth above.

1. For example, the New Jersey Franchise Practices Act provides:

"'Franchise' means a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise."

2. In some states, the provisions governing relationships are part of the statute that regulates franchise sales. See, for example, the Illinois Franchise Disclosure Act.

G. As a short-hand in testing for the presence of a franchise, most practitioners look for the following elements:

1. A fee requirement.
2. The presence of a trademark.
3. Either a marketing plan, a community of interest in the success of the project, substantial assistance from the franchisor or significant controls upon the franchisee.

Like all short-hands, this one omits the fine innuendos, which can often answer the question at hand.

IV. SOME HYPOTHETICALS

A. The following examples are presented as food for thought. In each case, consider whether a franchise is present.

1. Big airline and commuter airline enter into a marketing agreement under which commuter airline operates under big airline's colors. Commuter airline pays big airline a marketing fee. Big airline provides marketing assistance.

2. Manufacturer signs up distributors. Distributors are allowed to display manufacturer's trademark on their signs. Distributors pay manufacturer a training fee for training.

3. Manufacturer engages independent sales representatives. Sales representatives must pay \$500 for marketing materials. Sales representatives solicit business under manufacturer's name.

4. Shirt manufacturer enters into trademark license agreement with noted soft drink maker. The agreement gives shirt manufacturer the right to use soft drink logo on its products in exchange for a percentage royalty. Soft drink manufacturer retains

the right to approve all advertisements, advertisement placements, and frequency of advertisements.

5. Photo lab organization sells a Seattle, Washington retail shop to a purchaser in a standard asset transaction. Seller licenses buyer to continue operating under seller's registered mark, and allows the buyer to purchase advertising and participate in group buying discount programs already in place among the seller's other licensees.

6. Nationally-known cellular telephone company licenses independent providers to use its service mark to identify cellular services in the purchaser's market. Purchaser must meet service quality minimums as determined by regular customer surveys. Substantial royalties are charged based on purchaser's market population.

7. A television repair shop is designated as an "Authorized Service Provider" of a TV manufacturer, and includes such a statement on all of its advertising. Shop conducts extensive warranty work and is reimbursed by the manufacturer for that work.

B. Conclusion. There are frequently some very fine lines as to whether a particular arrangement can be cast as a franchise.

V. WHEN TRADEMARK LICENSES COME CLOSE TO THE FRANCHISE LINE

A trademark license which gives a licensee the right to use the licensor's trademarks may be considered a franchise, if other elements noted above are present. Courts have extended state franchise investment laws and relationship laws to trademark licenses when the trademark element of the definition of a franchise in the relevant law is satisfied.

Most of the franchise investment law definitions require that the franchisee's business be "substantially associated" with the franchisor's trademark, a rather fluid concept that has not lent itself to precise definition in the cases. Generally, courts investigate facts showing how a trademark is used in the business, on products, and in advertising, as well as whether a licensee's use of a trademark is likely to convey to the public that the distributor's business is associated with a trademark owner. In the following examples,

courts have most often found trademark licenses satisfy the trademark element of a franchise when there is a close association between the goods or services distributed and the trademarks, when the owner of the trademarks imposes quality standards on the distributor with respect to goods or services distributed, and when the distributor operates under a name that includes the trademark, in whole or in part. As noted in Section III above, the FTC Rule's trademark element will be satisfied when the franchisee is given the right to distribute goods and services which bear the franchisor's trademarks. It does not require that the franchisee's business be identified by the trademark, as is most common in state law interpretations.

A. Use of the Trademark in Business. Courts have found franchises exist regardless of whether use of the trademark in a business is mandatory or permissive. Under the FTC Rule Guidelines, use of the licensor's marks must be expressly prohibited in order to avoid that element of the definition. See Bus. Franchise Guide (CCH) ¶ 6205.

A franchise can also exist if a dealer holds himself out as an outlet, rather than merely an "authorized dealer" of the trademark, owner's products or services. For example, even though a reseller was appointed to promote a mark, no franchise was found where the agreement did not give the reseller the right to hold himself out to the public as having "a special relationship or connection" with the company. Instructional Systems, Inc. v. Computer Curriculum Corp., Bus. Franchise Guide (CCH) ¶ 9680 (N.J. Super. Ct., App. Div. 1990).

In addition, according to various state administrative opinions and rulings, a franchise may exist if a trademark license gives the licensee the right or obligation to:

- a. Adopt a store trade dress displaying the trademarks;
- b. Present the trademarks or trademark owner's name on machines, contracts or receipts signed by customers, on letterhead and/or business cards.
- c. Use forms, brochures or literature bearing the trademarks;
- d. Display signage bearing the marks;
- e. Conduct contests or promotions using the trademarks; or

f. Offer a credit service of the trademark owner.

B. Use of the Trademark on Products. Although courts have considered whether use of a trademark on a product sold by a distributor indicates the presence of a franchise, a franchise is generally not found unless prominent sales of the trademark products identify to the public that the distributor's business is associated with the franchisor, especially in states requiring that franchises are indicated by a "substantial association" with a franchisor's marks.

C. Use of the Trademark in Advertising. It has been said that franchising is successful in the U.S. economy because of the marketing strength inherent in a common identity and trademark. The role of the trademark in presenting this common identity is of vital importance to the relationship, and for this reason the advertising of a trademark licensee is closely examined by courts.

"The cornerstone of a franchise system must be the trademark or trade name of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product." Susser v. Carvel Corporation, 206 F.Supp. 636, 640 (S.D.N.Y. 1962), aff'd, 381 U.S. 125 (1965).

One Seventh Circuit decision found that the trademark element under the Wisconsin Fair Dealership Law was not satisfied because a manufacturer's representative name on labels affixed to product catalogs was not sufficiently "prominent." Wilburn v. Jack Cartwright, Inc., 719 F.2d 128, Bus. Franchise Guide (CCH) ¶ 8063 (7th Cir. 1990).

The Seventh Circuit has more recently ruled that distributors using advertising materials bearing Ricoh's trademarks satisfied the trademark element of a franchise under Indiana law. Wright-Moore v. Ricoh, 908 F.2d 128, Bus. Franchise Guide (CCH) ¶ 9665 (7th Cir. 1990).

The Illinois franchise law trademark requirement was satisfied by a finding that the licensee used a licensor's name on all promotional material according to the supplier's instructions to rely on the "purported good name of Dialist" when marketing the product. Blankenship v. Dialist International, Bus. Franchise Guide (CCH) ¶ 9808 (Ill. App. Ct. 1991).

By its designation of its licensee as an authorized service center which could hold itself out as such in its advertising, Litton "gave its imprimatur to (a service representative's) business enterprise in respect to Litton's product and induced the consuming public to expect from (the representative) a uniformly acceptable and quality controlled service endorsed by Litton itself." The extent of Litton's authorization to the licensee to use the trademarks was found to be sufficient to constitute a license as contemplated by the New Jersey Franchise Practices Act. Neptune T.V. and Appliance Service v. Litton Microwave Cooking Products Division, Litton Systems, 190 N.J. Super. 153, Bus. Franchise Guide (CCH) ¶ 8023 (App. Div. 1983). Compare Colt Industries, Inc. v. Fidelco Pump & Compressor Corp., 844 F.2d 117, Bus. Franchise Guide (CCH) ¶ 9095 (3d Cir. 1988) (right to use licensor's name in advertising but not in business name held not to meet N.J. law definition of trademark license); and American Business Interiors, Inc. v. Haworth, Inc., 798 F.2d 1135, Bus. Franchise Guide (CCH) ¶ 8642 (W.D. Mo. 1986) (license found sufficient under Missouri law where dealer was entitled to call itself an authorized dealer, used employees trained by the manufacturer, and was required to maintain the manufacturer's image in its market).

VI. THE CONSEQUENCES OF BEING A FRANCHISE

A. Franchise Sales Regulation.

1. At a minimum, an entity or person offering franchises for sale must comply with the FTC Rule. This will require the preparation of a detailed disclosure statement.

a. For purposes of complying with the FTC Rule, there are two acceptable disclosure statement formats. One format is described in the FTC Rule (the "FTC Format"). The other format, known as the "Uniform Franchise Offering Circular" ("UFOC"), was generated by the predecessor of the North American Securities Administrators Association.

b. The two formats overlap substantially. Both require, among other information: information relating to the background of the franchisor and the fees that a franchisee will be expected to pay; information concerning the

franchisor's marks; financial statements; a copy of the proposed form of franchise agreement; information regarding approved suppliers and specifications; a description of the franchisee's rights upon termination and the franchisee's renewal rights; a summary of provisions restricting customer base or territory or imposing in-term and post-term competition; information concerning number of units presently and formerly included in the franchise system; and litigation and bankruptcy histories for the franchisor and its directors and certain of its officers.

c. While the two formats have certain similarities, there are a couple of notable differences.

(i) The UFOC format allows the franchisor more freedom in using earnings claims (which may cover historical performance by franchisor or franchised units as well as forecasts or projections).

(ii) The UFOC rule requires the franchisor to provide a prospective franchisee with audited financial statements, while the FTC format allows new franchisors the right to use unaudited financial statements at first, and to phase into full audited financial statements over three years.

d. A franchisor cannot cherry pick between the two formats. It must choose either the FTC format in its entirety, or the UFOC format in its entirety.

e. The disclosure statement must be updated whenever a material change occurs, but in any event not less frequently than quarterly.

f. The disclosure statement must be delivered to a prospective franchisee not less than ten business days prior to the date a binding franchise agreement is entered into or money is paid to the franchisor.

g. The FTC Rule also contains provisions that regulate the use of earnings claims in advertising.

h. Violation of the FTC Rule can result in civil or criminal fines or injunctive relief. There is no private right of action under the FTC Rule.

2. As noted above, a franchisor may also have to comply with state laws that govern franchise sales.

a. Before offering franchises for sale in a particular jurisdiction which has adopted a law regulating franchise sales, a franchisor may file an application with the applicable state administrator. The application form will include the proposed form of disclosure statement.

(i) Most states will not accept disclosure statements prepared in accordance with the FTC format. Therefore, most practitioners prefer to use the UFOC format nationally since that document will meet the requirements of the FTC Rule and of state administrators.

b. Most statutes give the state administrator approximately 30 days to review the franchise application.

(i) If the administrator fails to object to the contents of the application, including the disclosure statement, technically speaking an effective order will be automatically entered, thereby allowing the franchisor to offer his franchises for sale.

(ii) As a practical matter, if the administrator has not finished his review of the application by the end of the applicable waiting period, he will ask the franchisor for an extension; if the franchisor refuses, the administrator may issue a stop order.

(iii) Because of the broad discretion given state administrators, most

practitioners believe it better not to disturb a sleeping giant, and voluntarily agree to the extension.

(iv) It is the exception, rather than the rule, that an administrator will fail to comment upon an application prior to the waiting period's expiration.

c. The administrator's response will normally be in the form of a comment letter setting forth the deficiencies in the franchise application.

(i) Many of the comments will be easily dealt with and require only small wording changes.

(ii) In other circumstances, the administrator may require changes that the franchisor finds unacceptable. Most alleged deficiencies are negotiable to some degree. However, an effective order will not be issued until all deficiencies are cured to the state administrator's satisfaction.

(iii) Deficiencies are cured by filing an amendment or revision to the franchise application. If the proposed cures to the deficiencies are not acceptable to the administrator, then a second comment letter will be issued. This process continues until the administrator is satisfied.

(iv) If the state administrator has concerns about the franchisor's financial abilities, the administrator may require the franchisor to escrow any initial franchise fees otherwise payable to the franchisor until the franchisee's business has commenced. In lieu of an escrow, the franchisor may often post a bond or agree not to collect initial franchise fees until the franchisee's business has commenced.

d. Once the deficiencies are cured, the effective order will be issued.

(i) The effective order will be valid for one year. Upon expiration, the franchise application must be renewed. Otherwise, the effective order will expire and sales in that jurisdiction will no longer be permitted.

(ii) The renewal process is usually somewhat simpler in that it only requires an updating of what had been previously submitted in the preceding year. However, it is not uncommon, due to a change in personnel or for other reasons, for an administrator's office to make a de novo review of a renewal application.

e. If there is at any time a material change in the information included in a disclosure statement, an amendment to the franchise registration must be promptly filed. Until the amendment has been deemed acceptable by the administrator, the franchisor may have to stop offering franchises for sale.

f. Franchise sales literature (i.e., advertising) must also be submitted to state administrators for review. Generally, the state administrators will issue comments on advertising materials very quickly.

g. In some jurisdictions, franchise brokers or salesmen must also register with the state administrator.

h. The failure to comply with state laws can result in the state administrator seeking civil penalties (up to \$50,000 per violation), criminal penalties or injunctive relief. In addition, franchisees can bring suit against franchisors who have violated the applicable statute, asking for monetary damages or possibly rescission.

3. The overlap between federal and state regulation can lead to some interesting situations.

a. Note that the franchisor must comply with both the FTC Rule and any applicable state law. The FTC Rule preempts state law, but only to

the extent that the state law affords less protection to a franchisee. In other words, states may impose more onerous requirements upon franchisors.

b. In some transactions, it is not clear what state law or laws will be applicable. Take, for example, the situation where a California franchisor offers a franchise to a resident of Maryland, who will operate franchises in Virginia and New York (all of these states are registration states).

(i) Most practitioners believe that in order to be completely safe, the franchisor must register in Maryland, Virginia and New York and must give the prospective franchisee disclosure statements that comply with the laws of each of these jurisdictions (lawyers may be a forest's worst enemy!).

(ii) Note that even though the franchisor is based in California, it did not have to comply with the laws of that state in the hypothetical listed above. Most state franchise registration laws are intended to protect the integrity of sales or offers to sell made to residents of those states. The New York statute, however, requires any franchisor operating within that jurisdiction to register even though all sales are made out-of-state. Thus, if we reverse the terms "New York" and "California" in the foregoing example, it may be necessary to give the prospective franchisee four disclosure statements.

B. Relationship Statutes.

1. Termination Provisions.

a. Most statutes that regulate a franchisor's right to terminate a franchise agreement essentially provide for a system of due process.

(i) The statutes generally require "good cause" and usually give the franchisee a period in which to cure the default.

(ii) Good cause is usually defined as a breach of any lawful provision of the franchise agreement.

b. Most franchise agreements specify what constitute defaults that would permit termination and in most instances give a franchisee the opportunity to cure the default, although the contractual period in which to cure is usually shorter than the statutory one. In a state having a relationship statute, the longer statutory cure period would apply.

c. In some instances (bankruptcy, abandonment, repeated failures), the statute may not grant a franchisee notice and cure rights.

2. Non-renewal.

a. Most current franchise agreements grant a franchisee renewal rights, provided that the franchisee meets certain conditions. These may include executing the form of franchise agreement being offered to new franchisees at the time the agreement is renewed; remodelling the facility from which the franchise is operated; being current on royalty and other payments; and executing a general release in favor of the franchisor. In some instances, the franchisee will be granted the right to renew only once; in other cases, the renewal rights may be perpetual. The statutes regulating renewals vary considerably.

b. Several statutes simply provide that if the franchisor refuses to renew, he must notify the franchisee in advance.

(i) Some statutes give the franchisees additional protections. For example, the franchisor may have to give the franchisee the opportunity to sell the business, or the franchisor may be prohibited from enforcing

any non-competition provision set forth in the franchise agreement.

(ii) The Wisconsin Fair Dealership Law virtually gives franchisees automatic renewal rights in perpetuity. The definition of "franchise" is broad enough to cover virtually all distributorship agreements as well.

c. A couple of states may require the payment of lost goodwill if the franchisor refuses to renew the franchise.

d. One question that puzzles practitioners is whether a renewal on terms substantially different than the terms of the original agreement is truly a "renewal."

3. Assignment.

a. Many franchise agreements provide that the franchisor may refuse, in the franchisor's sole and absolute discretion, to permit the franchisee's rights to be assigned to a third party. Other agreements may state that the franchisor will not unreasonably withhold its consent to a transfer. In most agreements, several conditions to transfer may be delineated.

b. Some statutes prohibit a franchisor from refusing to allow a transfer without good cause. Good cause is sometimes spelled out in the statute and may include the fact that the prospective franchisee is unqualified; the transferee refuses to comply with the franchise's obligations; or the transferor has failed to cure existing defaults.

c. In some jurisdictions, the franchisee is required to notify the franchisor of its intent to transfer the franchise and the franchisor has a specified period of time in which to respond.

4. General Observations Regarding Franchise Relationship Laws.

a. Generally the statutes will not be retroactively applied. Thus, where a franchise

agreement was executed prior to the effective date of a statute, the statute will not be binding upon the franchisor.

(i) As a practical matter, most franchisors will nevertheless adhere to the requirements of a post-franchise agreement statute in order to eliminate one possible objection to the franchisor's termination of a franchise or decision not to renew, or to refuse a transfer of, a franchise.

b. Most practitioners believe that relationship laws involve matters of public policy. Therefore, in making a decision that will affect the franchise relationship, the franchisor should comply not only with the laws of the jurisdiction specified in the franchise agreement as being controlling, but with the laws of the jurisdictions where the franchisee resides and where the franchise is operated.

c. In addition to the legislative enactments that may regulate the franchise relationship, there are common law decisions that may further limit a franchisor's rights. It is generally thought that in every franchise agreement there is an implied obligation on both parties to act in good faith and to deal fairly with one another. What this means in practice is still unsettled.

(i) Many courts have announced that they will not rewrite the terms of a contract. Therefore, if the contract expressly covers a particular set of circumstances, these courts will not vary the contractual arrangements.

(ii) Other courts have suggested that a party may not deprive a party of the fruits of the contract, and are less concerned about contractual provisions. An interesting case that discusses the implied covenant of good faith and fair dealing is Steven A. Scheck v. Burger King Corp., Bus. Franchise Guide (CCH) ¶ 9760 (1991).

VII. CONCLUSION

For the attorney who routinely handles trademark matters, franchising may be the pool of quicksand that lies just on the other side of the hill. If he is conscious of its whereabouts, he often can avoid it altogether. On the other hand, if he forgets or is unaware of its presence, he may find himself in an embarrassing situation from which it may be difficult to disengage. And finally, if he cannot avoid it, he may find that he can adjust to its presence, even though it may limit his options.

Appendix I

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M. Stuart Sutherland, The Risks and Exposures Associated with Franchise Noncompliance, 42 Business Lawyer 369 (1987).

Appendix II

LIST OF STATE FRANCHISE REGISTRATION AND DISCLOSURE LAWS

California	Franchise Investment Law, Cal. Corp. Code §§ 31000 <u>et seq.</u> (West 1977), Bus. Franchise Guide (CCH) ¶ 3050.01 <u>et seq.</u>
Hawaii	Franchise Investment Law, Haw. Rev. Stat. tit. 26 § 482E-1 <u>et seq.</u> (1985), Bus. Franchise Guide (CCH) ¶ 3110.01 <u>et seq.</u>
Illinois	Franchise Disclosure Act of 1987, ch. 85-551, Ill. Ann. Stat., Bus. Franchise Guide (CCH) ¶ 3130.01 <u>et seq.</u>
Indiana	Franchise Law, Ind. Code Ann. § 23-2-2.5-1 <u>et seq.</u> (West 1989), Bus. Franchise Guide (CCH) ¶ 3140.01 <u>et seq.</u>
Maryland	Maryland Franchise Law, Md. Ann. Code, art. 56 § 345 <u>et seq.</u> (1988), Bus. Franchise Guide (CCH) ¶ 3200.01 <u>et seq.</u>
Michigan	Franchise Investment Law, Mich. Comp. Laws Ann. § 445.1501 <u>et seq.</u> (West 1989), Bus. Franchise Guide (CCH) ¶ 3220.01 <u>et seq.</u>
Minnesota	Minn. Stat. Ann. § 80C.01 <u>et seq.</u> (1986), Bus. Franchise Guide (CCH) ¶ 3230.01 <u>et seq.</u>
New York	N.Y. Gen. Bus. Law § 680 <u>et seq.</u> (1984), Bus. Franchise Guide (CCH) ¶ 3320.01 <u>et seq.</u>
North Dakota	Franchise Investment Law, N. Dak. Cent. Code § 51-19-01 <u>et seq.</u> (1989), Bus. Franchise Guide (CCH) ¶ 3340.01 <u>et seq.</u>
Oregon	Oregon Transactions, Or. Rev. Stat. § 650.005 <u>et seq.</u> (1988), Bus. Franchise Guide (CCH) ¶ 3370.01 <u>et seq.</u> (Disclosure obligation only; no registration required).
Rhode Island	Franchise and Distributorship Investment Regulations Act, R.I. Gen. Laws § 19-28-1 <u>et seq.</u> (1989), Bus. Franchise Guide (CCH) ¶ 3390.01 <u>et seq.</u>

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South Dakota	Franchises for Brand-Name Goods and Services, S.D. Codified Laws Ann. §37-5A-1 <u>et seq.</u> , Bus. Franchise Guide (CCH) ¶ 3410.01 <u>et seq.</u> (1986)
Virginia	Retail Franchising Act, Va. Code Ann. § 13.1-557 <u>et seq.</u> (1989), Bus. Franchise Guide (CCH) ¶ 3460.01 <u>et seq.</u>
Washington	Franchise Investment Protection Act, Wash. Rev. Code § 19.100.010 <u>et seq.</u> (1989), Bus. Franchise Guide (CCH) ¶ 3470.01 <u>et seq.</u>
Wisconsin	Wisconsin Franchise Investment Law, Wis. Stat. Ann., § 553.01 <u>et seq.</u> (1983), Bus. Franchise Guide (CCH) ¶ 3490.01 <u>et seq.</u>

Appendix III

LIST OF STATE FRANCHISE RELATIONSHIP LAWS OF GENERAL APPLICABILITY

Arkansas	Franchise Practices Act, Ark. Code Ann. §§ 4-72-201 to -210 (1987).
California	California Franchise Relations Act, Cal. Bus. & Prof. Code §§ 20000 to 20043 (West 1987).
Connecticut	Trading Stamps, Mail Order, Franchises, Credit Programs, Subscriptions Act, Conn. Gen. Stat. Ann. §§ 42-133e to -133h (1989).
Delaware	Delaware Franchise Security Law, Del. Code Ann. tit. 6 §§ 2551 to 2556 (1974).
District of Columbia	Franchising Act of 1988, D.C. Code Ann. §§ 29-1201 to -1208 (1991).
Hawaii	Franchise Investment Act, Haw. Rev. Stat. tit. 26 § 482E-6 (1985).
Illinois	Franchise Disclosure Act, Ill. Ann. Stat. ch. 121-1/2 para. 1718-20 Smith-Hurd Supp. 1991.
Indiana	Deceptive Franchise Practices Act, Ind. Code Ann. § 23-2-2.7-1 (West 1989).
Michigan	Franchise Investment Law, Mich. Comp. Laws Ann. § 445.1527 (West 1989).
Minnesota	Franchise Act, Minn. Stat. Ann. § 80C.14 (1986).
Mississippi	Pyramid Sales Scheme Act, Miss. Code Ann. §§ 75-24-51 to 78-24-61 (1987).
Missouri	Pyramid Sales Scheme Act, Mo. Ann. Stat. §§ 407.400 to 407.420 (Vernon 1990).
Nebraska	Franchise Practices Act, Neb. Rev. Stat. §§ 87-401 to 87-410 (1987).
New Jersey	Franchise Practices Act, N.J. Rev. Stat. Ann. §§ 56:10-1 to 56:10-12 (West 1989).

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Virginia	Retail Franchising Act, Va. Code Ann. §§ 13.1-557 to 13.1-574 (1989).
Washington	Franchise Investment Protection Act, Wash. Rev. Code Ann. §§ 19.100.180 and 19.100.140 (1989).
Wisconsin	Fair Dealership Law, Wis. Stat. Ann. §§ 135.01 to 135.07 (West 1989).

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