Law and Business Review of the Americas

Volume 20 | Number 1 Article 2

2014

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Honey V. Gandhi

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INTRODUCTION

GENERALLY, most people associate franchising with fast food restaurants such as Subway, McDonald's, and Burger King. This is not surprising, because the restaurant industry is among the oldest and the most successful trades still operating under the franchising format. While restaurants and other food-related businesses represent a large segment of the total franchised businesses in America, the franchising model has become common and widespread in a diverse array of business services and industries.[1] Today, franchises span many areas of the U.S. economy, including but not limited to, hotel, automotive, real estate, personal and business services, convenience and retail businesses, education and children development activities, maintenance and domestic services, and fitness and health services.[2]

The Washington, D.C.-based International Franchise Association (IFA), the world's oldest and largest organization representing franchising worldwide, foresees a positive outlook for the U.S. franchising industry.[3] The IFA reports that in 2000, the franchising sector had accounted for more than 40 percent of all U.S. retail sales, with revenue collection of more than a trillion dollars per year from seventy-five different industries.[4] The industry analysts further reported that the franchising industry has witnessed rapid growth, with a new franchise opening in the country every eight minutes.[5] Even with the harsh economy and skeptical business climate of the past few years, the franchising model continues to be a very strong and resilient business format that generates jobs and contrib-

* Bachelor of Commerce, Mumbai University, India, *distinction*, 2000; B.S., Member, Institute of Company Secretaries of India; Texas Wesleyan University, *cum laude*, 2006; SMU Dedman School of Law, *cum laude*, 2013. Associate, Stutzman, Bromberg, Esserman & Plifka, a Professional Corporation, Dallas, Texas.

1. Tracy Stapp Herold, *Top Food Franchises*, ENTREPRENEUR (July 5, 2013), *available at* http://www.entrepreneur.com/article/226750#.
2. *See id.*
3. *The Entrepreneur's Source-Answers to the IFA's 21 Most Frequently Asked Questions about Franchising*, INT'L FRANCHISE ASS'N, 1, 9–11, *available at* http://www.nextaff.com/resource_centers/business/Franchising%20FAQs.pdf (last visited Feb. 24, 2014).
4. *Id.* at 2.
5. *Id.*

utes positively to North America's GDP.[6] The franchise sector contributed approximately $472 billion to the U.S. GDP in 2013 and is estimated to contribute even more in 2014.[7] Moreover, it also accounted for approximately 8.3 million jobs in the United States in 2013 and is estimated to create an additional 192,000 new jobs in 2014.[8] According to the International Franchise Association, the outlook for the franchise sector in 2014 not only looks positive, but the industry is also predicted to outpace growth in other business sectors this year as well.[9]

This article surveys the various laws applicable for franchising in the United States. Part I provides a brief understanding of the meaning and history of franchising. Part II examines the statutory franchising laws, both at the federal and the state level. Part III explores the interplay between franchising and other laws, such as antitrust and intellectual property laws. Part IV discusses an emerging issue about whether franchisees are independent contractors or employees of the franchisor. Finally, Part V presents an overview of the termination and post-termination issues arising in the franchising context.

I. FRANCHISING-MEANING & HISTORY

A. What Is Franchising?

With the explosive growth of franchised businesses and the evolving practice of franchise law, franchising can be categorized as an industry in all respects. Franchising is technically not an industry, but a business format—a tried and tested method of distributing goods and services. The International Franchise Association defines franchising as:

> [A] method of distributing products or services. At least two levels of people are involved in a franchise system: (1) the franchisor, who lends his trademark or trade name and a business system; and (2) the franchisee, who pays a royalty and often an initial fee for the right to do business under the franchisor's name and system.[10]

Usually, a franchising arrangement is stipulated by way of an agreement whereby the franchisor provides the franchisee the right to use his business format, operating methods, and intellectual property, such as signs, logos, trademarks or trade names, to distribute a product or service

6. *See 2014 Franchise Business Economic Outlook*, Int'l Franchise Ass'n, Jan. 2014, *available at* http://franchiseeconomy.com/wp-content/uploads/2014/01/Franchise_Business_Outlook_January_2014-1-13-13.pdf; *Slow, Steady Growth to Continue for Franchise Businesses in 2013*, Int'l Franchise Ass'n (Dec. 20, 2013), http://www.franchise.org/Franchise-News-Detail.aspx?id=5891.

7. *2014 Franchise Business Economic Outlook*, *supra* note 6.

8. *Id.*

9. *Id.*

10. *See Frequently Asked Questions About Franchising-Answers To The 19 Most Commonly Asked Questions About Franchising*, Int'l Franchise Ass'n, http://www.franchise.org/franchiseesecondary.aspx?id=10008 (last visited Feb. 24, 2013).

in exchange for fees and royalties.[11]

Various styles of business franchising exist. The more common type of franchising involves using the franchisor's business format.[12] But franchising also includes product distribution.[13] Under the business format franchising, as the name suggests, the franchisee adopts the complete method to operate the business, including its format, operations manuals, marketing plans, and distribution techniques. For example, Taco Bell sells its complete business operations format to its franchisees.[14] On the other hand, the product distribution franchisor does not provide the franchisee with the complete business format to run it, but rather the franchisor licenses his trademark and logo to the franchisee for distribution of the product. For example, Coca Cola licenses with bottlers to manufacture the drink using its secret formula and distribute it under its trademark.[15] Further, a franchisor can restrict the franchisee's operational activity to that of either a single-unit franchise or a multi-unit franchise.[16] Single-unit franchise agreements grant the franchisee the right to open and operate one franchise unit versus a multi-unit agreement, which allows the franchisee to open and operate more than one unit within a specified area.[17]

B. History of Franchising

The franchising concept came into existence in mid-1800s with the distribution techniques adopted by Isaac Singer, the founder of Singer Sewing Company.[18] Singer, widely considered to be the father of modern-day franchising, was one of the first to develop franchise contracts with the aim to distribute his sewing machines over a widespread geographic area. He contracted with local salesmen, granting them the right to sell his machines within a specifically defined region in exchange for a licensing fee.[19] With the economic and infrastructural growth and the increase in the mobility of Americans in the early to mid-1900s, a wide variety of retail establishments and restaurants picked up on this licensing concept and started to formally develop franchises—for example, Kentucky Fried Chicken in 1952, Burger King in 1954, McDonald's in 1955, and Pizza Hut

11. Howard Yale Lederman, *Franchising and the Franchise Law–An Introduction*, 92 Mich. Bar J., 34, 34 (Jan. 2013) *available at* http://www.michbar.org/journal/pdf/pdf4article2150.pdf.
12. *See* Barbara Beshel, An Introduction to Franchising 2 (2001), *available at* http://www.franchise.org/uploadedFiles/Franchise_Industry/Resources/Education_Foundation/Intro%20to%20Franchising%20Student%20Guide.pdf.
13. *Id.*
14. *Id.* at 2-3.
15. *See id.* at 2; James H. Amos, Jr., The Complete Idiot's Guide to Franchising 5 (2005).
16. Beshel, *supra* note 12, at 3.
17. *Id.*
18. Amos, *supra* note 15, at 15.
19. *Id.* at 5-6.

in 1958.[20] Since then, the franchising model has not only become more popular, but has also posed new problems with the sophistication of players, legislative growth in antitrust, competition, and contract laws, and the increasing influence of technology and intellectual property rights.

Franchising is now regulated both at the state and federal level, but this was not the case until the 1970s.[21] The explosive growth of franchising, which really began gaining momentum in the 1950s and 1960s, experienced several ups and downs, and consequentially led to important legal and regulatory developments in the franchise industry.[22] The industry had a very impressive and steady growth chart during the 1950s and 1960s, and reported that its revenue growth over the fifteen-year period from 1955–1970 was at a striking 3,600 percent.[23] However, by the end of the 1960s, the franchising system and protocols adopted by the players started to show some weaknesses and flaws.[24] Several lawsuits, big and small, including class actions, were filed against the franchisors, and most cases pointed to the "pervasive power of [franchisor] control" over the disclosure of information; ease of entry into the franchise industry, coupled with the lack of adequate capital and/or experience among franchisees; undefined franchise relationship terms regarding termination, cancellation, and renewal of the contract; or simply the widespread exploitative practices adopted by the franchisor.[25] While the federal legislators showed reluctance in legislating concrete disclosure requirements and business practices for franchising, some of the state legislators reacted positively to the urgent need for franchise regulation.[26] In 1971, California became one of the first states to enact a franchise disclosure law, and several other states followed its lead.[27] Finally, in 1979, the Federal Trade Commission (FTC) enacted the federal franchise regulation titled "Disclosure Requirements and Prohibitions Concerning Franchis-

20. DAVID JOHN COLE ET AL., ENCYCLOPEDIA OF MODERN EVERYDAY INVENTIONS 13 (2003).
21. *See* William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship*, 28 FRANCHISE L.J. 23, 27 (Summer 2008).
22. *See id.* at 25–26.
23. *Id.* at 25.
24. *See id.*
25. *Id.* at 26. Many experts analyzed the franchise market, and criticized the franchisors' operations and the bargaining inequality between the franchisors and the uninformed franchisees. *See id.* at 23. New York Attorney General Louis Lefkowitz's investigations into the franchising trend discovered that in most of the franchise arrangements, franchisees were investing their life savings in franchises, which were actually "fly-by-night operations." *Id.* at 26. News articles also pointed out that the franchisors used skillful pressure tactics to convince inexperienced persons to invest monies, without much disclosure of business operation details. Sylvia Porter, *Franchising Frauds' Flood Post Office*, SARASOTA-HERALD TRIBUNE, May 10, 1971, at 11A. There were also class actions filed by the franchisees, the most publicized being *Siegel v. Chicken Delight, Inc.*, where the Court found the franchisor engaged in an illegal tying arrangement. 448 F.2d 43 (9th Cir. 1971).
26. *See* Killion, *supra* note 21, at 27.
27. California Franchise Investment Law, CAL. CORP. CODE § 31000 (1971).

ing and Business Opportunity Ventures," commonly known as the "FTC Rule," to regulate the franchise industry and protect the franchisees' interests.[28]

II. FEDERAL & STATE LAWS ON FRANCHISING

A. Federal Franchising Law

Currently, the franchising laws regulate two areas of franchise practice: (1) the disclosure requirements prescribed at the federal level and the registration, notice, and additional disclosure requirements prescribed at the state level for the offer and sale of the franchise; and (2) the relationship laws adopted by some states that govern the on-going relationship between the franchisor and franchisee.[29] To offer a franchising opportunity to a prospective franchisee, the franchisor generally has to comply with both federal and state laws, in addition to any industry-specific regulations.[30]

The FTC Rule, promulgated in 1979, required the franchisor of a franchise operation to make disclosures of twenty-three items to the franchisee by way of the Uniform Franchise Offering Circular (UFOC) at the first face-to-face meeting or at least ten days prior to signing the franchise agreement with the franchisee.[31] Among other pertinent information, the disclosure items included information on the franchised business and its operations, the franchisor's litigation history, the franchisor's financial representation, and past and present franchisees.[32] The FTC Rule was enacted in response to widespread fraudulent, deceptive, and unfair trade practices adopted by several franchisors across the country.[33] The primary purpose of mandating the timely disclosures was (1) to ensure that the prospective franchisee has all the available information and resources needed to make an informed decision about investing in a particular franchise; and (2) to discourage the franchisor from engaging in high-pressure tactics and provide the franchisee with a "cooling-off" period before signing the franchise agreement.[34]

The franchisors continued to make the mandated disclosures under the UFOC until July 1, 2008, when the Amended FTC Rule of 2007 came into effect.[35] Under the Amended FTC Rule, the FTC modified its original rule to align the disclosure requirements with those of the states.[36]

28. Killion, *supra* note 21, at 28.
29. *See id.*
30. Lederman, *supra* note 11, at 37. Some industries such as automotive, petroleum, soft drinks, alcohol may be subject to industry-specific state and federal laws, in addition, to the franchise statutes. *Id.*
31. 16 C.F.R. § 436 (1979); Lederman, *supra* note 11, at 36.
32. *Id.*
33. *See* Lederman, *supra* note 11, at 35–36.
34. Franchise Rule, 64 Fed. Reg. 57,294, 57,301 (proposed Oct. 22, 1999).
35. Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436 (2007); Lederman, *supra* note 11, at 36.
36. 16 C.F.R. § 436–37.

The Amended FTC rule requires disclosure of information in twenty-three specific categories under a disclosure document called the "Franchise Disclosure Document" (FDD).[37] Such disclosures are required to be made fourteen days prior to signing any agreement or paying any consideration.[38] In addition, the franchisor is required to furnish executed copies of the agreement at least seven days before signing where the franchisor has made changes to the agreement not initiated by the franchisee.[39] Further, the franchisor is also required to make supplemental disclosures to update his disclosure within 120 days after the close of the franchisor's fiscal year and quarterly, where there have been any material changes to the information disclosed under the FDD.[40]

The FDD calls for information on the following:

- Background on the franchisor, its parents, predecessors, and affiliates; business experience; and litigation and bankruptcy history (Items 1–4)
- Fees to be paid to the franchisor and estimate of initial investment (Items 5–7)
- Restrictions on sources of products & services and territorial restrictions; franchisor's obligations; assistance by franchisor, training, advertising; financing (Items 9–12)
- Intellectual property: trademarks, copyrights, and patents (Items 13–14)
- Franchisee's obligations, restrictions on sales; provisions regarding renewal, termination, transfer, and dispute resolution; and public figures (Items 15–18)
- Financial performance representations (Item 19)
- Franchisee information (Item 20)
- Financial statements (Item 21)
- Contracts (Item 22)
- Receipts (Item 23)[41]

Of all the disclosure items, one of the most notably disputed items is Item 19, financial performance representations.[42] Financial performance representations usually deal with the sales or earnings projections made by the franchisor with respect to the franchised business.[43] The franchisor is not required to make performance representations in the FDD, and if it chooses not to, then the franchisor is strictly prohibited from making these representations in any other place or form—be it ne-

37. *Id.* § 436.
38. *Id.* § 436.2(a).
39. *Id.* at 436.2(b).
40. *Id.* at 436.7.
41. *Id.* at 436.5.
42. *See* Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15444 (Mar. 30, 2007).
43. *See* 16 C.F.R. § 436.5(s)(3).

gotiations, marketing materials or even sales discussions.[44] Moreover, if no representations are made under Item 19 of the FDD, then the franchisor is even prohibited from discussing actual sales or revenues.[45] On the other hand, if the franchisor does elect to make any financial performance representations, the franchisor is required to have made them on a "reasonable basis," and corroborate with written substantiations for such representation upon request.[46] While this standard makes Item 19 disclosure complicated, the legislators wanted to make sure that the franchisors do not relay any misleading information, which includes misrepresentations, overstatements, or false promises that attempt to portray untrue prospects of the franchise to the franchisees.

The disclosure responsibility and the protections under the FTC rule are only applicable to a business relationship that falls within the definition of a "franchise" under the rule.[47] A "franchise" under the rule is defined as a business or commercial relationship that has the following three elements:

(1) Trademark: the franchisor grants the franchisee the right to operate a business identified by the franchisor's trademark and to use the trademark in conducting the franchisee's business operations;
(2) Control: the franchisor exerts or has the right to exert a significant degree of control over or provide significant assistance to the franchisee's business operations; and
(3) Consideration: the franchisee promises to pay the franchisor $500 or more in exchange for the right to operate the franchise.[48]

All franchisors offering franchises in the United States have to comply with the Amended FTC Rule and make the mandated disclosures to the prospective franchisee before the sale is consummated. Failure to comply with the Amended FTC disclosure requirements could result in civil penalties of up to $16,000 per violation.[49] However, the federal law does not call for registration of the franchise or the filing of the FDD.[50]

B. States on Franchising Regulation

As for the pre-sale requirements, most states have disclosure, registration, and/or notice requirements. The Amended FTC Rule does not preempt the stricter state disclosure laws, meaning that depending upon the regulations of the states having jurisdiction over a particular franchising offering, the franchisor may have to make additional disclosures and comply with other formalities beyond the requirements under the

44. *See* N. Am. Sec. Adm'rs Ass'n, Inc., 2008 Franchise Registration and Disclosure Guidelines 58 (Aug. 6, 2011), *available at* http://www.nasaa.org/wp-content/uploads/2011/08/6-2008UFOC.pdf [hereinafter NASAA].
45. *See id.* at 57–58.
46. *Id.* at 58.
47. *See* 16 C.F.R. § 436; Lederman, *supra* note 11, at 36–37.
48. 16 C.F.R. § 436.1(h).
49. 16 C.F.R. § 1.98.
50. *See* 16 C.F.R. § 436; NASSA, *supra* note 44, at 1.

Amended FTC Rule.[51]

Registration states typically require a pre-offer review and approval process of a registration application.[52] All registration states require the registration application form in the FDD format as prescribed under the Amended FTC Rule discussed above.[53] Some states have prescribed further disclosures, in addition to those mandated under the Amended FTC Rule.[54] The examiners of the governing state authority conduct a merit review of the application and advise the franchisor of their approval or need for amending the application.[55] The following states require registration of the offering: California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Rhode Island, South Dakota, Virginia, and Washington.[56] In most of these states, the franchisor is prohibited from selling or offering the franchise for sale until the registration application has been approved or the franchisor has been granted exemption.[57] The franchisor is also required to pay a registration fee at the time of application.[58]

On the other hand, the notice states prescribe a less time-consuming and simpler process. These states typically require the franchisor to complete and file the respective state's notice application form, however, they do not call for the filing of the FDD prepared under the Amended FTC Rule.[59] Also, there is no merit review of these applications and hence, the process is very straightforward.[60] States that follow this approach include Connecticut, Florida, Kentucky, Nebraska, Texas, and Utah.[61] While the filing is usually a one-time filing, some states such as Florida and Utah require annual filings.[62] Until the notice application forms are filed properly, the franchisor in these states is prohibited from selling or offering for sale any franchise offering.[63]

Whether a business relationship or business model constitutes a franchise largely depends upon the applicable state's definition of a "franchise." Similar to the Amended FTC Rule definition of a "franchise," most states typically have the three elements within their

51. 16 C.F.R. § 436.10.

52. JOEL R. BUCKBERG & DAVID J. KAUFMAN, FRANCHISE SALES AND DISCLOSURE LAWS AT 49TH ANNUAL CONVENTION OF THE INTERNATIONAL FRANCHISING ASSOCIATION 6 (Feb. 14–17, 2009), *available at* http://www.franchise.org/uploadedFiles/Franchise_Industry/Events/Sales%20Compliance%20Summit.pdf.

53. NASAA, *supra* note 44, at 1.

54. *See generally* BUCKBERG & KAUFMAN, *supra* note 52.

55. *Id.* at 25.

56. *Id.* at 5.

57. *Id.* at 6.

58. *Id.* at 41.

59. *Id.* at 7.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

definition of the term.[64] The definition usually involves a written or oral agreement under which: (1) the franchisor grants the franchisee the right to engage in the business of offering, selling or distributing goods or services under the franchisor's marketing plan or business format; (2) the franchisee's operation of such business or marketing plan is associated with the franchisor's trademark or other commercial symbol; and (3) in exchange, the franchisee is required to pay consideration in the form of fee and/or royalties.[65] As under the federal law, the states also require that all elements of the definition be present for the business to constitute a franchise under state law.[66]

To determine what disclosure laws the franchisor is required to comply with, the franchisor would need to inquire which states have jurisdiction over the franchise offering.[67] Whether a franchise sales activity triggers a particular state's franchise regulations may depend on several factors such as whether:

(1) The offer to sell originates in the state
(2) The offer to sell is directed to the state
(3) The acceptance of the offer is made in the state
(4) The franchisor domiciles in the state
(5) The franchisee resides in the state
(6) The proposed franchise will be located or operated in the state or the sales territory granted to the franchisee will fall within the state.[68]

Considering these factors, there may be scenarios where the franchisor would come within the purview of more than one state and would be responsible for complying with registration, disclosure, and/or notice requirements of multiple states to avoid penalties.[69]

C. Exemptions from Disclosures

While the rule of thumb is that a franchisor is obligated to make disclosures under the Amended FTC Rule and the applicable state's registration and notice regulations, exemptions from these disclosures have been promulgated both at the federal and the state level.[70] But there may be situations where the franchisor is able to seek exemption at the state level but would still have to comply with the FTC disclosure requirements, or

64. *See* Thomas M. Pitegoff & W. Michael Garner, *Brief History and Overview of Franchise Relationship Laws*, *in* Fundamentals of Franchising 188 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).
65. *Id.* at 188–89.
66. *Id.*
67. Rochelle B. Spandorf & Mark B. Forseth, *Franchise Registration*, *in* Fundamentals of Franchising 133 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).
68. *Id.*
69. *Id.*
70. Judith M. Bailey & Dennis E. Wieczorek, *Franchise Disclosure Issues*, *in* Fundamentals of Franchising 97–98 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

vice versa.[71] The Amended FTC Rule provides exemptions primarily for three types of franchisee sales: (1) sale to a large franchisee that has a net worth of at least $5 million and has been in the business for at least five years; (2) sale to a party related to franchisors, i.e., where the franchisee has been part of the franchisor's management for at least two years, and either owns at least fifty percent interest in the franchise and/or twenty-five percent equity interest in the franchisor; and (3) sales in which the franchisee has a large initial investment of $1 million or more.[72] The states also offer exemptions to large, experienced franchisors, franchisees that are part of the franchisor's management, and sophisticated franchisees, such as financial institutions or high net worth or net income individuals.[73] Also, some states exempt transactions for sale, renewal, or extension of an existing franchise, where there are no material changes in the agreement terms or where the franchisee sells on his account.[74]

D. Franchising Relationship Laws

The "state relationship laws govern post-sale relationship and franchise contract issues."[75] Several states and U.S. territories, such as Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Dakota, Rhode Island, South Dakota, Virginia, Washington, Wisconsin, Puerto Rico and the Virgin Islands, have enacted relationship laws.[76] These states have created better protection for franchisees against the abuse of the franchisor, who is usually the party represented by counsel that often drafts the franchise agreement.[77] The relationship laws typically deal with various facets of issues arising during the term of a franchise agreement, such as termination and renewal provisions, assignment and transfer of a franchise, restriction of free association of franchisees, repurchase of the remaining inventory by the franchisor upon the termination of the franchise, encroachment by the franchisor, and termination only with good cause.[78] To avoid future disputes and participation in unfair practices, it is imperative that the franchisors comply with their relationship obligations to the franchisee in accordance with the applicable state relationship laws.

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71. *Id.* at 98–99.
72. 16 C.F.R. § 436.8.
73. Buckberg & Kaufmann, *supra* note 52, at 35–38.
74. *Id.* at 38.
75. *Id.* at 3.
76. Pitegoff & Garner, *supra* note 64 at 187 n.7.
77. *Id.* at 186–87.
78. *Id.* at 187.

III. FRANCHISING & INTERPLAY WITH OTHER LAWS

A. Intellectual Property & Franchising

Intellectual property, particularly in the form of trademark, trade dress, and copyright, plays a very important role in replicating successful business models through franchising. In a franchising transaction, a major part of what the franchisor is selling and what the franchisee is buying is "the brand," or the so-called goodwill of the franchisor.[79] The brand most prominently involves the franchisor's name—the trademark—but it may also have various other intellectual property assets that support and nurture the brand, such as use of the trade dress (the exterior or interior appearance of a restaurant), copyrights (the manuals and brochure materials), business systems, logos, patents, and designs.[80] These assets are essential for the franchisor in selling its brand to the franchisee and for the franchisee in selling the brand to the public. Therefore, it is imperative that the intellectual property assets associated with the franchise are properly identified, created, owned, protected, and commercialized for the success of all—the franchise, the franchisor, and the franchisee.

1. Trademarks

A trademark may be a word, symbol, name, device or a combination of these, which a merchant uses to identify and distinguish his products from the products sold by the other merchants in the market.[81] The scope of what features of a product could be termed as its trademark is not restrictive—it could be phrases, color, or any other characteristic, provided the mark identifies the source of the product and sufficiently distinguishes it from the other brands.[82] For example, the phrase "Just Do It" is a slogan that is commonly associated with Nike and distinguishes it from its other competitors such as Reebok or Puma. Trademark protection works for the benefit of the consumers and society—it promotes competition and maintains product quality. Where the brand uses distinctive design features in the appearance or image of the product, for example, the use of colors in product packaging or the design of a store, to distinguish itself from the rest of the brands, these features typically falls under the definition of trade dress.[83] Trade dress is often an important asset in franchising business, especially in restaurant franchising, where the brand is associated with the interior and exterior décor and appearance of the restaurant, the design of the menu, and the packaging of the food items.[84]

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79. Steward Hershman & Andrew A. Caffey, *Structuring a Unit Franchise Relationship*, *in* FUNDAMENTALS OF FRANCHISING 62 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).
80. *Id.* at 67.
81. 15 U.S.C. § 1127.
82. William A. Finkelstein & Christopher P. Bussert, *Trademark Law Fundamentals and Related Franchising Issues*, *in* FUNDAMENTALS OF FRANCHISING 3 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).
83. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 cmt. a (1995).
84. Finkelstein & Bussert, *supra* note 82, at 47.

Trademarks are regulated both at the state and federal level. At the federal level, the most prominent statute that governs trademarks is the Lanham Act.[85] Franchisors who wish to obtain federal registration of their trademarks have to submit their application to the United States Patent and Trademark Office (USPTO).[86] To be eligible for registration, the registrant has to show that the mark is distinctive and used or intended to be used in commerce.[87] Also, the Lanham Act lays down statutory restrictions and refuses registration of marks that may be immoral, scandalous, deceptive, or falsely suggest connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute.[88] Also, the marks, which are merely descriptive, i.e., describe the products rather than say what they are, are not eligible for registration until they attain secondary meaning by gaining market recognition.[89]

Although registration of a trademark is not essential to protect the right in itself, it is the preferred practice among most franchisors.[90] The right to a trademark can also be obtained without registration, provided the owner is the first to use the distinctive mark in commerce.[91] Unregistered trademarks may be eligible to receive protection under state common law.[92] However, this protection is limited to the specific geographic area in which the trademark was first put to use in commerce.[93] On the other hand, registration of a trademark with the USPTO gives the owner the right to use the mark nationwide, except in the specific geographic area where it was already being used by another entity.[94] Further, registration of the trademark stands as nationwide constructive notice of the owner's right to the trademark and also makes the trademark owner eligible to file suit in case of infringement in the federal court and claim treble damages and other remedies under the Lanham Act.[95]

Because trademarks are typically the most important asset of a franchising unit, it is imperative that franchisors as well as the franchisees ensure that the rights to the trademark are intact. Sometimes, the rights to a trademark can be lost due to discontinued use for a prolonged period (three years or more), abandonment, improper licensing or loss of origi-

85. Lanham Act, 15 U.S.C. §§ 1051–72 (2008).
86. *Id.* § 1051(a)(1).
87. *Id.* § 1052.
88. *Id.*
89. Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 113-14 (1938). Secondary meaning is acquired distinctiveness, where the mark "has become distinctive, in that, as a result of its use, prospective purchasers have come to perceive it as a designation that identifies goods, services, businesses, or members . . ." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13(b).
90. Finkelstein & Bussert, *supra* note 82, at 5–6.
91. 15 USC § 1151(b)(5); ADAM L. BROOKMAN, TRADEMARK LAW: PROTECTION, ENFORCEMENT, AND LICENSING § 10.02[A] (1999).
92. Finkelstein & Bussert, *supra* note 82, at 22–23.
93. *Id.*
94. *Id.* at 25.
95. 15 U.S.C. §§ 1072, 1117, 1121.

nal distinctiveness of the mark.[96] To avoid losing the trademark, it is particularly important in the franchising arena for the franchisor to properly grant the license to use trademark to the licensor.[97] This entails exercising adequate quality control of the products distributed by the franchisee to ensure that the distinctive quality and image of the product matches that of the brand.[98]

2. *Copyrights*

Copyright is an expression of idea or ideas in a tangible form that can be perceived, reproduced or communicated through a device or machine.[99] Copyright protects vast variety of original works of authorship—literary works, musical works, dramatic works, pictorial and graphic works, motion pictures, audiovisual works, sound recordings, and architectural works.[100] In a franchising model, copyright protection could be sought in many operational aspects—in the operations and training manuals, program or advertising brochures, menu cards, proprietary business systems, or a musical advertising jingle. It is to be noted that copyright only protects the expression of ideas, not the ideas.[101] Hence, a right in the copyright of the franchisor's training manual, for example, protects the duplication of the expression of those training systems and not the systems themselves. To prevent competitors from copying his system, the franchisor would have to protect it as a trade secret.

In franchising, the franchisor grants copyright licenses to the franchisee as a part of the business model.[102] A franchisee receiving a copyright license could receive the right to reproduce the copyrighted work, create derivative works, or perform the work.[103] Such licenses could either be exclusive or non-exclusive, however an exclusive license to use the copyright must be in writing and signed by the owner.[104]

Copyright protection is afforded to unregistered copyrights or even where the copyright notice is not provided on the copyrighted work.[105] Basically, copyright protection is available to all works of authorship, provided they are original.[106] All copyrighted works are afforded protection for the term of the author's life plus an additional seventy years after

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96. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 19, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197.
97. Finkelstein & Bussert, *supra* note 82, at 41.
98. *Id.* at 42.
99. 17 USC § 102 (1976).
100. *Id.*
101. *Id.*
102. Ian Cockburn, *Franchising & Licensing — What Are They and How Can You Benefit from Them?*, WORLD INTELLECTUAL PROP. ORG., www.wipo.int/export/sites/www/sme/en/documents/pdf/franchising.pdf (last visited Feb. 26, 2014).
103. 17 USC § 201(d) (1976).
104. *Id.* § 204(a).
105. *Id.* §§ 405, 408.
106. *See id.* § 102.

the death of the author.[107]

While registration of copyright is optional, a franchisor and franchisee may choose to register the copyright with the Copyright Office.[108] Registration establishes a public record of the copyright claim.[109] Moreover, registration is required before the owner can file an infringement suit.[110] Further, registration of the copyright will also allow the owner to claim additional remedies such as statutory damages and attorney fees in case of an infringement lawsuit.[111]

B. Franchising & Antitrust Laws

Antitrust law regulates all relationships among competitors and between the businesses and the consumers, with the primary purpose of promoting competition for the benefit of the consumers.[112] In franchising, the antitrust laws commonly regulate three broad categories of conduct:

1. Tying Agreements

In a franchising transaction, the franchisors primarily sell to the franchisor the right to distribute its products using the associated trademark and the business model of the franchisor. The franchisee believes in the competitive strength of the franchisor's trademark, and thus elects to invest his resources in running the franchised business. The consumers possibly buy the product from the franchise for the quality offered under the franchisor's trademark.[113] Given that, it becomes imperative to maintain the original brand image of the trademark. To maintain his trademark's brand image and receive the consumers' continued business, the franchisor puts in place quality controls. One such quality control effort is known as a tying arrangement, where the franchisor mandates that the franchisee buy certain supplies and materials required in the franchise's operations from the franchisor or designated suppliers.[114] While the franchisor may reason that this control is necessary to maintain consistency in quality of the final product brought to the market, the franchisor may have ulterior motives through this tying arrangement. It would have the benefit of having a ready market and opportunity to charge marked-up prices for the tied products to the franchisee, who is now obligated to pay the higher price. Alternatively, the franchisor may earn kickbacks

107. *Id.* § 302.
108. *Id.* § 408.
109. U.S. Copyright Office, Copyright Basics Circular 7 (2012), available at http://www.copyright.gov/circs/circ1.pdf.
110. *Id.*
111. *Id.*
112. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890; Clayton Antitrust Act, 15 U.S.C. §§ 12-27 (1914); Federal Trade Commission Act, 15 U.S.C. § 45 (1914).
113. *See* Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).
114. Robert T. Joseph & Lee N. Abrams, *Antitrust Law*, *in* Fundamentals of Franchising 259 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008).

from the designated suppliers for having his franchisee buy the supplies from them. In both scenarios, the franchisor places restraints on trade and competition. It places restrictions on the franchisee's right to choose as to who he could buy the supplies from and also obstructs market entry for new suppliers, thereby suppressing competition.

While tying arrangements are not per se illegal, federal courts have found tying arrangements illegal in some scenarios.[115] The statutes that prohibit tie-ins are Section 1 of the Sherman Act and Section 3 of the Clayton Act.[116] The Sherman Act provision focuses on regulating any actions "in restraint of trade" and the Clayton Act provision prohibits any conduct that substantially lessens competition.[117] To state a tying claim, the franchisee would have to show that (1) the tied products are two distinct products and the franchisor has tied the sale of these two products; (2) the franchisor has "appreciable economical power" in the tying market such that the franchisor has the power to force the franchisee to make the purchase of the tied product; and (3) the arrangement has an effect on the substantial volume of commerce in the tied product market.[118] If the trademark of the product is only remotely related to the alleged tied products, the courts, as in the case *Siegel v. Chicken Delight, Inc.*, are bound to find that the two products tied together are distinct and separate.[119] In *Siegel*, the court found an illegal tying arrangement where some miscellaneous items, which did not have any special design nor uniquely supported the franchise brand, were tied to the licensing of trademark.[120] On the other hand, the franchisor Baskin-Robbins' policy of requiring the franchisee to buy the ice cream to be sold at the franchise from the franchisor itself was not found to be an illegal tying arrangement because the court found that the quality of the ice cream and the brand image of Baskin-Robbins trademark was so "inextricably interrelated" in the consumer's minds.[121]

Also, whether a trademark was separate from the alleged tied product depends upon the type of franchising. For example, under a business format system, the franchisor merely provides the business format and the franchisee is usually responsible for manufacturing and distributing the product. Under this system, the franchisee could use a component of his choice, provided the quality of the end product correctly reflects the franchisor's trademark. For example, in *Siegel*, the court found that the franchisor could not coerce the franchisee to buy cooking equipment, paper packaging and food mixes that were purchased from the market and resold to the franchisee.[122] But, in a distribution format, the goods are

115. Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).
116. Sherman Antitrust Act, 15 U.S.C. § 1; Clayton Antitrust Act, 15 U.S.C § 14.
117. *Id.*
118. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461–62 (1992).
119. 448 F.2d 43.
120. *Id.* at 46.
121. Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1354 (9th Cir. 1982).
122. *Siegel*, 448 F.2d at 47–49.

either manufactured by the franchisor or by the franchisee as per the franchisor's secret formula or specifications, as is the case with brands such as Coca-Cola. Under this format, it is undeniably important for the franchisor to have the franchisee distribute the exact product to maintain the goodwill and value of the attached trademark, and courts are therefore reluctant to find tying arrangements illegal.

As for proving the franchisor's market power, uniqueness of a distinctive trademark is not sufficient evidence. But, courts have held that market power can be inferred in a lock-in case under the *Kodak* lock-in theory, where upon purchasing one product, the franchisee is locked-in to buying another.[123] Sometimes, the franchisor allows the franchisee, under the franchise agreement, the liberty to purchase from a list of approved suppliers. Subsequently, post-contract the franchisor changes its policy and designates a specific supplier for the franchisee to purchase the necessary supplies from. A similar situation arose in a rather recent case, *Burda v. Wendy's Int'l, Inc.*[124] In *Burda*, Wendy's International, the fast-food franchisor, initially had a list of approved suppliers from whom the franchisee could request bids for purchase of food products.[125] Post-contract, Wendy's changed its purchase policy, and coerced the franchisee, under the threat of termination, to purchase from the designated supplier or be charged a surcharge fee.[126] Relying on the *Kodak* lock-in theory, the franchisee brought an illegal tying claim against the franchisor, and the court agreed with the franchisee.[127] Distinguishing the franchise agreement in *Burda* from the one in *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, where the franchisor had informed the franchisee about the potential exclusive purchasing agreements prior to getting locked-in the contract, the court in *Burda* found that the franchise agreement did not give notice of the exclusive purchase arrangements prior to contracting, but instead misled the franchisee into thinking that competition was open.[128]

2. *Resale Price Maintenance*

Can franchisors control the resale prices of the products sold by the franchisee? Prior to the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, it was per se illegal for franchisors to set resale prices for their own products.[129] However, the Supreme Court in *Leegin* held that vertical price controls are not per se illegal and would have to be analyzed under the rule of reason, i.e. the vertical price controls should not unreasonably restrain trade nor substantially harm com-

123. *Kodak*, 504 U.S. at 477–78.
124. 659 F.Supp.2d 928 (S.D. Ohio 2009).
125. *Id.* at 931.
126. *Id.*
127. *Id.* at 935.
128. *Burda*, 659 F.Supp.2d 935-37; Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997).
129. 551 U.S. 877, 877 (2007).

petition in the market.[130] Hence, in a franchising context, the franchisor would have to show that the price controls do not substantially hinder competition and possibly show that the price controls in fact have a pro-competition effect. Moreover, the vertical price controls may require further analysis where the franchisor is involved in dual distribution, i.e., where the franchisor has company-owned outlets and competes against the franchisee.[131] In such scenarios, any resale price agreements between franchisor and franchisee may be considered to be horizontal agreements among competitors to fix prices and would be illegal.[132]

3. *Exclusive Dealings*

Exclusive dealings arrangements are entered in a franchising set-up to ensure that the franchisee does not sell products of competing brands. While it seems obvious that a franchisor's demand for the franchisee's loyalty to his trademark is an important business consideration, sometimes a franchisor goes beyond what is necessary, often stifling competition. Exclusive dealings stand in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act, where the franchisor imposing the exclusive dealing restriction has a significant market share or control to impede businesses to enter or exist in the market, and thereby forecloses the consumer's access to competitive products.[133] The key inquiry is whether the exclusivity provision in the franchise agreement in fact substantially forecloses competition in the market.

IV. FRANCHISEE—AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE?

Franchisor and franchisee are generally presumed to be two independent work units. But recent court decisions have attacked this presumption and challenged the franchising model in general.[134] The question that has sent chills down the spines of several franchisors is whether franchisees are independent contractors or the franchisor's employees. Several courts have found that they are in fact employees.[135] If the franchisor is found to be a putative employer of the franchisee, the effect on the franchisor can be extremely devastating and expensive. The

130. *Id.* at 877–78.
131. Quentin R. Wittrock & Jeremy L. Johnson, *Can Franchisors Control Franchisee Prices?*, 28 FRANCHISE L.J. 199, 199 (Spring 2009).
132. *Id.* Horizontal price agreements are per se illegal. *Leegin* 551 U.S. at 877.
133. 15 U.S.C. §§ 1, 14.
134. *See, e.g.*, Awuah v. Coverall N. Am. Inc., 707 F. Supp. 2d 80, 83–84 (D. Mass. 2010); De Giovanni v. Jani-King, Int'l, Inc., 262 F.R.D. 71, 84–86 (D. Mass. 2009); Patterson v. Domino's Pizza LLC, 143 Cal. Rptr. 3d 396, 399 (Ct. App. 2012) (*rev. granted*).
135. *See, e.g.*, *De Giovanni*, 262 F.R.D. at 85 (holding that the franchisees were employees because the franchisee was found to be conducting the same business as the franchisor); *Patterson*, 143 Cal. Rptr. 3d at 399 (holding that the franchisee was deemed franchisor's agent and the franchisor was also vicariously liable for franchisee's employee's actions of sexual harassment against another co-worker).

franchisor would not only be responsible for paying back the franchise fees paid by the franchisee under the franchise agreement and would be liable to pay worker's compensation, insurance benefits, overtime, employment tax, but the franchisor could also be held vicariously liable under the principles of agency law for any acts done by the franchisee or its agents under this newly found relationship.[136] Moreover, the franchisors could also be made liable to pay attorney's fees and treble damages.

There is a growing anxiety among franchisors about the worker status of the franchisee, as the courts across the nation wrestle with this question. A recent decision from a Massachusetts court, which was highly discussed and publicized, ruled against the franchisor, finding that the franchisees were employees.[137] In *Awuah v. Coverall North America Inc.*, the Supreme Judicial Court of Massachusetts held that the franchisor, a commercial cleaning company, had misclassified its franchisees as independent contractors.[138] The court used the infamous "ABC" three-prong test for its analysis.[139] Under this test, to prove that a worker was an independent contractor, the defendant must show that: (1) the worker performs his services free from control of the defendant; (2) the services performed are outside the usual course of business of the defendant or outside the overall business of the defendant; and (3) the worker is customarily engaged in independently-run trade or business of the same nature as the services provided.[140] The *Coverall* court relied only on the second prong and found that Coverall was involved in the same business as the franchisee.[141] According to the court findings, Coverall provided employee training, identification badges, and uniforms to the franchisees.[142] Moreover, Coverall and not the franchisees was the one directly contracting with the customers and collecting the bills.[143] Based on these facts, the court held that Coverall was involved in the same business as the franchisees and the franchisees were in fact employees of Coverall.[144]

Following the *Coverall* decision, several other cases have been filed against franchisors claiming misclassification of the franchisees as independent contractors.[145] It seems that the primary focus of the courts evaluating these claims has been on the amount of control the franchisor has over the franchisee's operations and the means used to exercise it.[146]

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136. *De Giovanni*, 262 F.R.D at 84; *Patterson*, 143 Cal. Rptr. 3d at 399.
137. Awuah v. Coverall N. Am. Inc., 707 F.Supp.2d 80, 85 (2010).
138. *Id.*
139. *Id.* at 82.
140. *Id.*
141. *Id.* at 82–83, 85.
142. *Id.* at 84.
143. *Id.*
144. *Id.*
145. Juarez v. Jani-King of Cal., Inc., No. 09-3495 SC, 2012 WL 177564, at *4 (N.D. Cal. Jan. 23, 2012); Hayes v. Enmon Enters. LLC, No. 3:10-CV-00382-CWR-LRA, 2011 WL 2491375, at *3 (S.D. Miss. June 22, 2011).
146. *Juarez*, 2012 WL 177564, at *4; *Hayes*, 2011 WL 2491375, at *3.

For example, California courts used the control test which, among other factors, looks at whether the principal has the authority to terminate, the level of skill required, the supplier of tools and other instrumentalities, the length of time for which services are to be performed, the discretion to hire or fire, and the amount of supervision required.[147] The District Court of Mississippi also applied a similar ten-factor control test in *Hayes v. Enmon Enterprises, LLC*, finding that while the franchise agreement termed the franchisee as an independent contractor, the terms of the agreement were akin to an employee-employer relationship.[148]

The IFA argues that the *Coverall* court's ABC test, which is followed by many states across the nation, does not account for the "symbiotic relationship" shared in a franchising relationship and has appealed to states across the nation for legislative changes.[149] The IFA argues that most franchising arrangements would fail on all three prongs of the test.[150] It contends that franchisors are legally required to enforce adequate controls over the franchisees' operations to maintain its trademark.[151] Moreover, the franchisor is often involved in the same business in which it has corporate-owned units as well.[152] Finally, the nature of franchising arrangement is such that the franchisee is dependent upon the franchisor's trademark to continue its operations and would not be able to operate if the trademark is withdrawn upon the termination of the franchise relationship.[153] To protect the franchising industry, the IFA has appealed to several states, including Georgia, Delaware, Indiana, Massachusetts and Nebraska for legislative changes. Of these states, Georgia and Delaware have more recently passed legislation specifically announcing that franchisees are independent contractors and not franchisor's employees.[154]

There certainly is a tug of war between the franchisor's concern to maintain enough control to protect its trademark and his concern to cross the line and form an employee-employer relationship. But for genuine business franchisors, where that line could be drawn is a little uncertain. The recent analysis of this issue suggests that the franchisor should care-

147. *Juarez*, 2012 WL 177564, at *4.

148. *Hayes*, 2011 WL 2491375, at *3 (finding that there was a genuine issue of material fact for the jury to decide on the relationship between the franchisor and franchisee, as there were conflicting factors in the franchise agreement).

149. Dean Heyl, *Franchisees are Independent Contractors, But Not as Easy as "ABC" in Some States*, FRANCHISING WORLD (Oct. 2012), *available at* http://www.franchise.org/Franchise-Industry-News-Detail.aspx?id=58705.

150. *Id.*

151. *Id.* (noting that franchisors, as trademark owners, have a fiduciary duty to protect their trademark and enforce quality controls).

152. *Id.*

153. *Id.*

154. *See, e.g.*, H.B. 55, 147th Gen. Assemb. (Del. 2011) *available at* http://openstates.org/de/bills/147/HB55/documents/DED00003458/ (last visited Feb. 26, 2014); H.B. 548, 2011-2012 Reg. Sess. (Ga. 2011) *available at* http://www.legis.ga.gov/Legislation/20112012/126994.pdf (last visited Feb. 26, 2014).

fully provide adequate control to the franchisees both under the agreement and in practice.

V. PRE- & POST-TERMINATION ISSUES

Termination of a franchising arrangement can be carried out under a mutual agreement or at the choice of one of the parties. If under the latter scenario, this could raise either a pre- or post-termination dispute, or both.

Franchising arrangements are usually governed by franchise agreements. Most of the time, the reason for termination could be due to breach of the contract provisions, failure to make royalty payments, non-adherence to the quality standards, failure to meet reasonable sales goals, damage to franchisor's trademark or reputation, sale of competitor products, encroachment over franchisee's exclusive territory or discrimination by franchisor, non-renewal of franchise agreements, or breach of the implied covenant of good faith and fair dealing.[155] Upon a breach, the aggrieved party may proceed with a default or termination.[156] But many times the agreements do not address all the issues. The party should then investigate if any state relationship laws would apply and provide a remedy.[157] At present, there are nineteen states, other than Puerto Rico and the U.S. Virgin Islands, that have enacted laws addressing franchise terminations.[158] To determine which state's law applies, the franchisor must identify if there is any choice-of-forum or choice-of-law clause governing state law.[159] In the absence of such a clause, the party shall determine the jurisdiction based on the states' jurisdictional laws, if any, or otherwise if the franchise outlet is located in that state.[160]

Prior to termination of the franchise relationship, the terminating party should conform to the mandated procedures. The party would have to comply with the all formalities under the franchise agreement provisions and/or state relationship laws. In this regard, some states require that franchisors have good cause before terminating, send notices of default to franchise, provide cure periods, and send notice of terminations.[161] To

155. Christine E. Connelly, Robert Lichtenstein, & M. Elizabeth Moore, Int'l Franchise Ass'n, Franchise Default and Termination–Best Practices to Enforce the Contract and Protect the System, 3 (2012), *available at* http://www.franchise.org/uploadedFiles/IFA_Events/SecondaryPages/Franchise_default.pdf.

156. *Id.*

157. *Id.*

158. *Id.* at 11.

159. It should be noted that choice-of-forum clauses are more readily enforced by many jurisdictions versus choice-of-law clauses, where the court commonly requires that the parties establish connections with the designated state. *See* Jonathan Klick, Bruce Kobayashi, & Larry Ribstein, *Federalism, Variation, and State Regulation of Franchise Termination*, 3 Entrepreneurial Bus. L.J. 355, 367–68 (2009), *available at* https://www.law.upenn.edu/cf/faculty/jklick/workingpapers/3Entrepreneurial BusLJ355(2009).pdf.

160. Connelly, Lichtenstein, & Moore, *supra* note 155, at 12.

161. *Id.* at 13.

avoid any penalties, the terminating party will have to review and comply with the applicable obligations.

One of the more common post-termination issues arises with regard to non-compete covenants. Non-compete covenants protect the franchisor's legitimate business interest in preserving its goodwill and stopping competition. These covenants gain more importance, especially in reference to post-termination period and are incorporated in most franchising agreements. By including non-competition clauses, a franchisor can protect its trademarks, trade secrets, goodwill, market share, and protect itself and its other franchisees from unfair competition. While assessing the non-compete covenants, courts usually enquire if the covenant is "reasonable."[162] Reasonableness, in this context, refers to the length of time or the coverage of the restricted area, and is determined on a case-by-case basis.[163] If the non-compete is found to be reasonable, it can be enforced not only against the signatory but sometimes also against non-signatories, who are operating the competing business. In such cases, the non-signatory is usually a family member of the signatory, who acts in concert with, aids, or abets the breaching franchisee.[164]

CONCLUSION

Franchising offers franchisors, as well as franchisees, a mechanism to access opportunities of success. Moreover, the franchising model has proven successful even in the tough economic market, and has probably shown that it is a rather secure technique of running a business. But the parties to a franchise agreement often struggle to strike the right balance between the somewhat conflicting desires of the franchisor and the franchisee. While the franchisor wants to adopt standardization and quality control to maintain its goodwill and brand recognition in the market, the franchisee is hungry for autonomy and self-control. As each party is responsible in the success and failure of the relationship, the franchisor seems to bear the greater onus to comply with the statutory regulations as well as maintain a fair paradigm to ensure a successful and rewarding venture for both the parties.

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162. RESTATEMENT (SECOND) OF CONTRACTS §§ 186, 188 (1981).
163. *Id.*
164. *See, e.g.*, McCart v. H & R Block, Inc., 470 N.E.2d 756, 761 (Ind. Ct. App. 1984) (enforcing the non-compete against the non-signatory spouse because he was found to have conspired with the franchisee in operating a competitive business); Michael R. Gray & Jason M. Murray, *Covenants Not to Compete and Nonsignatories: Enjoining Unfair Conspiracies*, 25 FRANCHISE L.J. 3, 9 (Winter 2006).