

FRANCHISE LAW INSIDER™

A Publication Reviewing Recent Franchise Developments

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David E. Holmes

FRANCHISE LAW

“It is an inviolable law of human affairs that, in order to accomplish anything, one must act, and to accomplish anything of significance, one must risk.”

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FRANCHISING EXPANDS IN NEW ZEALAND

The Franchise Association of New Zealand was formed in July 1996. The Association administers the Franchising Code of Practice and Code of Ethics, to which all members must adhere. Prior to that date, New Zealand had been part of the Franchise Association of Australia and New Zealand Limited. The Franchise Association of New Zealand is very active and growing at a fast rate. When it was formed in 1996 it had about 30 franchisors and a few service providers, but the Association now boasts a membership of over 150 with over 80 franchisors belonging to it.

The fifth annual Survey of the Franchise Association of New Zealand was published in August 2001. It shows that the total number of systems operating in New Zealand is 300. It also confirms that franchising in New Zealand can be estimated to account for NZ\$10 billion annual turnover.

Other key statistics coming out of the Survey include the following:

- The number of people working within franchising is estimated to be 70,000.
- The number of franchised and company-owned units is estimated to be 14,000.
- The number of systems, outlets, and those employed in them, exhibit a 20% increase per annum.
- 20% of the systems franchised started within the last three years.

The largest industry groupings are moving from the Retail (Food and Non-Food) sector (34%), to services (56%).

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FRANCHISE LAW INSIDER

FRANCHISE LAW INSIDER™ is published to provide our clients and friends with information on recent legal developments affecting the franchising world. The articles and/or opinions presented are necessarily of a general nature and should not be construed as legal advice or opinions on specific facts.

We'll be happy to provide additional information regarding any of the articles contained herein, or to discuss how they may apply to your situation.

We invite your comments, questions, or any short articles of a pertinent nature for possible inclusion in a future newsletter. Please contact our offices if you're interested.



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NEW ZEALAND, from previous page

These are made up of:

- Property and Business (16%)
- Construction and Trade (14%)
- Personal and Other (7%)
- Finance and Insurance (5%)
- Education (5%)
- Cultural and Recreational (4%)
- Health and Community Services (3%)
- Accommodation, Cafes and Restaurants (2%).

77% of the operations originate in New Zealand. The median total start-up cost is NZ\$125,000 (currently approximately US\$55,300).

New Zealand is the most deregulated country in the world to conduct franchising. US franchisors and franchisors from any overseas jurisdictions are most welcome. New Zealand has a double taxation treaty with the U.S. and income earned can be repatriated very easily with non-resident withholding tax deducted at the rate of 10% and with a tax credit being granted for claiming back in the U.S. jurisdiction.

The Franchise Association of New Zealand has a Code of Practice mandatory upon all members, and key provisions include the requirement for publishing a disclosure document, a seven-day cooling off period, and having dispute resolution procedures, with mediation being the favored form of resolving disputes. 

For further information on franchising in New Zealand, please contact Stewart Germann. Stewart Germann Law Office is the only New Zealand member of the IFA. In February 2001, Germann was appointed to the Board of the Supplier Forum (previously the CFS) Board and he is the first person from outside of the US or Canada to be so appointed. Mr. Germann can be reached by calling Tel: 64-9-308-9925 or by e-mail: stewart@germann.co.nz.

FRANCHISE MEDIA GUIDE FOR AD CAMPAIGN PLANNING

An important part of any successful franchise development plan is media planning. The IFA and Olson & Associates have produced a useful web based resource for both developing and determining the effectiveness of your media (www.franchisemediaguide.com). There you'll find a comprehensive list of resources, including print (magazines, directories, newspapers, etc.), Internet (commercial web sites), trade shows, and public relations firms, plus advertising tips. You'll also find a handy list of upcoming franchise related seminars and workshops. If you're looking to learn how to boost your message and recruit new franchisees, this is definitely a site to bookmark.

**"New Zealand is
the most
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world to conduct
franchising."**

CHINA REVISES TRADEMARK LAWS

By Wilkinson & Grist

On the 27th of October 2001, the 2nd revision to the PRC Trademark Laws were passed by the 24th Session of the Standing Committee of the Ninth National People's Congress.

The Revised Trademark Laws, which came into effect on December 1, 2001, contain the following major changes:

- Apart from trademarks for goods and services, registration for collective and certification trade marks are now provided for.
- A trademark is defined to mean any distinctive visible mark including characters, devices, letters, numerals, three-dimensional mark, color combination or combination comprising any of the above.
- An inherently indistinctive or descriptive mark may be registerable on the basis of an acquired distinctiveness through use.
- Well-known marks are recognized and use or application for registration of a mark which is a copy or imitation of a well-known mark will not be allowed.

Where a registered mark contravenes the provision of the trademark laws or should have been refused on grounds of inherent unregistrability or has been obtained by fraud or unlawful means, the Trademark Office or any other entity may apply for cancellation of the registration within 5 years of approval of the registration. A registered mark may also be cancelled within a like period of 5 years if it is a copy of a well-known mark or has been registered without consent of the trademark owner or violates the prior rights of another party. There is, however, no time limit in applying for cancellation of registration of a well-known mark in bad faith.

Whereas under the previous laws, a decision made by the Trademark Review and Adjudication Board regarding any trademark application, opposition or cancellation is final, under the revised laws, all such administrative actions are subject to appeal to the People's Court within 30 days of the decision rendered by the Review and Adjudication Board.

In case of infringement, local administrative authorities may issue an order to stop all infringing activities, to destroy all infringing goods and tools exclusively used for the manufacture of it, and to impose a fine. The administrative bodies, however, are not empowered to order any compensation to

be paid to the trademark owner, and can only mediate on such issues. All such decisions of the administrative bodies, are subject to appeal to the People's Court within 15 days of receipt of the decisions.

In case of infringement, where the trademark owner can show irreparable damage would result if the infringing acts are

allowed to continue, interlocutory relief, including temporary restraining orders, and preservation of evidence and assets.

The present revised laws will bring the PRC trademark laws in line with international standards, and provide better and more solid protection for trademarks in the PRC. 🌐

Wilkinson & Grist are Agents for Trademarks & Patents located in Central Hong Kong and can be reached by e-mail: atiprop@wilgrist.com.

“Under the revised laws, all administrative actions are subject to appeal to the People's Court within 30 days of the decision.”

DIALOGUE: A LOW TECH SOLUTION IN A HIGH TECH WORLD

By Mary Ann O'Connell

Today, most franchise organizations contain an arbitration clause for the settlement of disagreements. It is considered the most expeditious and meaningful method of dispute resolution. It is also an ironic resolution.

Consider that arbitration is, by definition, a 'hearing.' It is a decision rendered by an individual who listens to both parties, tries to find common ground and craft a resolution that is fair to both parties. In most arbitration hearings, each side is allowed to present its case in full, undisputed and uninterrupted. Sometimes, this is all the party wants; to be heard, for someone to listen and tell them that there is some measure of validity to their story.

So, if the concept is so simple, and the skill needed is listening (something we all can do) why do so many situations escalate to the point where an arbitrator is necessary? Why is it that the first meaningful conversation happens under the aegis of a legal professional — an arbitrator?

The answer is that we communicate without dialogue.

Communication is 'one-way.' It is a bulletin, a wire, a news clip. It is the passing on of information, but it has nothing to do with what the receiver does with that information. And, as franchisors, you are the receiver of information as often as you are the dispenser of it. Dialogue is a conversation, an exchange of ideas or opinions; it is arbitration in its simplest form.

Dialogue and conversation can be undermined by

the technological efficiencies of today. We have Internet sites, email, auto responses, computerized tracking of franchisee sales, voice mail, faxes, auto drafting and chat rooms. These have worked to speed up communication, to move and analyze information faster so that we can provide the franchisees more feedback, quickly. Franchisors have been able to reduce the size of the Field Support Staff, and therefore save money. Franchisors have become the models of efficiency, but in doing so, have factored out the human element in this new business equation.

In the quest for expedient communication, we rely on electronic communications. Electronic communication is fast, easy and 'in-the-moment' but it is not personal. We humans have a documented need to make contact with other humans. It is a very real need and cannot be supplanted by electronic media. After the events of September 11th, we all

marveled at wireless communication and how it let people reach out to loved-ones in their final moments. Those stories were heartwarming and heart wrenching, but carried a big message — when in the face of calamity we need to have personal contact.

Franchisees are no different. In their day-to-day calamities and triumphs, they need to reach out to someone who can share the experience and share that moment. If a franchisee has a great sales week, they want to shout it to the rooftops and be congratulated. An email generated from the auto reports the franchisor gathers will not suffice, nor will a great article posted on the Intranet site. Therefore, the accomplishment becomes hollow and the joy of the business begins to diminish.

**“[Dialogue is] the
low-tech approach to
franchise retention
and system growth.”**

See DIALOGUE, on next page

EMOTIONAL BRANDING:

HOW SUCCESSFUL BRANDS GAIN THE IRRATIONAL EDGE

Courtesy of Info Franchise Newsletter

The goal of branding is to build emotional connections that engender trust.

'Branding' is a word on the lips of nearly every business leader and entrepreneur today. Yet very few understand that branding is not about advertising, image, or the marketing department. The true key to building a powerful, lasting, and successful brand lies in controlling the answer to one simple question: "How does it make you feel?"

A radical departure from the usual numbers and transactions approach to business, this concept is the premise of *Emotional Branding: How Successful Brands Gain the Irrational Edge* (Prima

Publishing, (800) 632-8676, primallyfestyles.com, \$27.95, ISBN 0-7615-2911-X). Written by noted branding consultant Daryl Travis, the book teaches that the goal of branding is to build emotional connections that engender trust within the hearts and minds of customers. And the relationship must be more than skin deep. Companies that build the most successful brands, Travis says, make a distinct and compelling 'Brand Promise' to the customer, and then make sure every aspect of the organization keeps that promise. Emotional Branding is not a textbook, but a "think book." It explores, in a conversational and highly readable style, how readers find new ways to prosper by learning to use the "F" word — F-e-e-l-i-n-g-s.

See EMOTIONAL BRANDING, on next page

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The same is true when the franchisee is stumbling. The franchisee needs help, but may be too proud to ask for it directly, or may not know what to ask. Their cry can be disguised in poor operations, failure to remit royalties, and obvious defaults against their agreement and your system. This will get your attention, and there is communication — a notice of default, a low review mark, a counseling visit from the field staff. But there is still no dialogue. And, if the franchisee does not come into compliance, the situation can evolve into arbitration.

All of this can be avoided with the occasional phone call or field visit that has no particular purpose, other than to listen to the franchisee. Whoever makes the call or the visit needs to be trained in dynamic listening skills. They need to let a person talk on their own terms, ask open-ended questions to keep the conversation going, and not to react or judge. They need to learn from what they hear and perhaps, incorporate the changes. If not, they need to work with the franchisee to help them out, or help them — out.

Calling regularly can also allow you to share and celebrate the franchisee's victories. Again, this is a perfect time to learn from your franchisees and improve your system. This is the low-tech approach to franchise retention and system growth. Take a franchisee to lunch or dinner. Try a round of golf. The approach is human and kind, albeit a little slow. Caring and contact will aid franchisee retention and thereby spur system growth. It's all about people.

If dialogue works for the arbitrators at the end of the relationship — try it from the beginning, and keep the arbitrators at bay. Put away the Palm Pilot, forget email, and surf the phone directory instead of the web site. Personal attention is the low-tech solution in this high-tech world. ☎

Mary Ann O'Connell is the owner of O'Connell and Company, a consulting firm that specializes in franchise operations and relations and can be reached by calling (714) 434-1516 or by e-mail: ocConnellco@attbi.com.

A few of the books insights:

“Products might leave your factory by the thousands a day, but brands are sold one at a time, and they are sold by F-E-E-L-I-N-G-S.”

“Your brand is not part of your business. It is your business.”


“The only way to gain a sustainable competitive advantage in today’s marketplace is by creating and keeping a true brand promise. There is simply too much competition and product parity to distinguish and build a business in any other way.”

“The fact that there are two scoops of raisins in a package of Kellogg’s Raisin Bran (rational difference) translates easily in to the feeling of better taste and smart choice. But it’s a warm familiarity (feeling) with the two scoops (fact) that will keep it part of the customer’s morning routine.”

“It’s disconcerting when you walk into your favorite tavern and there’s a new person behind the bar. Because she doesn’t know you, the new one treats you like a customer rather than a friend, and you’re suddenly a stranger buying a beer in a

transaction. This illustrates the security a customer finds in the relationship. The Cheers theme song comes to mind: You want to be where everybody knows your name.”

“Obviously, quality matters. But the fact is that if being better were more important than being different, people would buy only the products that made the grade in Consumer Reports.”

“Moribund brands can be revived. A brand is indeed a collection of memories. When they make a comeback, we’re often ready to welcome them with open-armed affection and willing wallets. We’re all happy to see a good brand gain the ruddy glow of health again after what looked like a serious illness.” 

Author, Daryl Travis, is CEO of Brandtrust, an elite corps of brand consultants based in Chicago, and chancellor of Arian, Lowe & Travis a nationally recognized advertising agency.

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LEGISLATION, REGULATION AND COURT CASES

INTERNATIONAL LEGISLATION

Australia

As practitioners in this area are probably already aware, the revised version of the Australian Franchising Code of Conduct has been amended by regulations that became effective October 1, 2001 (CCH 7001).

Among other things, the amendments accomplish the following:

Removes the requirement that a selling Franchisee provide a disclosure document to a prospective purchaser.

Allows use of a ‘Short Form disclosure’ document where expected annual revenues of a franchise will be less than AUSS\$50,000 (currently about US\$25,000).

Requires Franchisors to update their disclosure documents within 3 months after the end of each year.

Permits the delivery of disclosure documents electronically (provided the information is readily accessible and the recipient consents — a lesson for the U.S.?)

Requires disclosure of relevant material facts.

China (PRC)

On October 27, 2001, revisions to the existing PRC Trade Mark laws were passed. These changes, effective December 1, 2001 include major changes, many of which will make it substantially easier for Franchisors to enforce their trademark rights. See the article in this newsletter 'China Revises Trade Mark Laws' for highlights in further detail.

COURT CASES

John Keenan Company, Inc. v. Norrell Corporation, 2001 U.S. Dist. LEXIS 10473 (E.D. La 2001)

Summary

Franchisor did not violate exclusive territory provision, or covenant of good faith and fair dealing, when it merged with another staffing services franchisor that operated offices within the plaintiff's exclusive territory.

Facts

Keenan operated a Norrell franchise and was granted the exclusive right to operate a staffing services business using the 'Norrell' name in New Orleans and surrounding parishes.

In 1999, Norrell and Interim Services, Inc., another staffing services franchisor, merged. The merged entity became known as Spherion. At the time of the suit, Spherion operations (company-owned and franchised) were either Spherion/Interim or Norrell. The two businesses were apparently operated separately. Although Spherion assumed Norrell's obligations under the Keenan franchise agreement, the Keenan operation still utilized the 'Norrell' name.

At the time of the suit, several company-owned Interim offices were located in Keenan's exclusive territory.

After the merger occurred, the franchisor offered to buy back Keenan's franchise. The proposed price was more than Keenan would have received if the franchise were bought back at the end of the term, pursuant to the contract.

Analysis

The court found that the exclusivity provision should be interpreted as written. Because Interim/Spherion businesses did not use the Norrell name, there was no breach of contract. To interpret the exclusivity provision as encompassing uses of other names would directly contradict its terms.

The franchisee also argued that the franchisor's conduct breached the covenant of good faith and fair dealing. Since the covenant cannot override express contractual terms, the court rejected this theory. The court was favorably disposed to a Georgia case involving a similar exclusivity provision in a real estate services franchise agreement. *Re/Max of Georgia v. Real Estate Group of Peachtree*, 201 Ga. App. 787 (1991). In that case, Re/Max operated a real estate brokerage business within its franchisee's exclusive territory, but it did not use the "Re/Max" name or any derivative thereof. The Georgia court concluded that it was a Re/Max office "in fact" because Re/Max supported it. The Keenan court concluded that if the business operations of Norrell and Interim/Spherion ever merged, the franchisee might have a claim.

Conclusion

As in many cases, the language of the license agreement won the day here. That Norrell prevailed is a testament to careful drafting and planning.

KMS Restaurant Corp. v. Wendy's International, Inc. CCH Bus. Fran. Guide Para. 12,154 (11th Cir. 2000)

SUMMARY

A proposed purchaser of 27 Wendy's franchises could pursue a tortious interference claim against the franchisor for failing to approve the sale.

Facts

Plaintiff entered into a contract with Citicorp to purchase 27 Wendy's franchises, which Citicorp had acquired through foreclosure. The purchase agreement was contingent upon the franchisor's approval of the transfer.

The franchisor's initial response to the plaintiff's approval request was to provide a list of conditions. Shortly thereafter, a franchisor representative contacted the plaintiff and said that if the plaintiff would associate with a particular Wendy's board member, the transfer would certainly be approved. When the plaintiff contacted the board member, he said that he would not become involved unless the plaintiff disassociated itself from two of its shareholders. After the plaintiff acceded to this request, by buying out the shareholders, the Wendy's board member declined to become involved, citing a potential conflict of interest. The plaintiff then re-associated itself with the scorned shareholders and completed the remaining transfer conditions initially listed by the franchisors.

The franchisor denied the transfer. Its rationale was that all of the plaintiff's recent management and equity changes suggested instability. The franchisor then purchased the stores from Citicorp.

Analysis

The court found that the plaintiff's claim against the franchisor for tortious interference with the plaintiff's purchase contract with Citicorp was not subject to dismissal. Generally, a party to a contract, or upon whom a business opportunity depends cannot be liable for interfering with the

contract or the business opportunity. Florida recognizes an exception to this rule: if the interfering party acted wrongfully or with an improper motive, a tortious interference claim can be viable.


Here, the plaintiff argued that the franchisor created the 'instability' precisely so that it could turn down the transfer request and acquire the stores for itself. Such a motivation would be the basis for a tort claim.

Conclusion

The lesson from this case is that, while a franchisor can utilize contractual language to protect itself from interference claims brought by the franchisee, it may still face claims from the purchaser, if it is not objective in assessing the merits of the transfer.

GENERAL

CCH has announced the publication of a new book series that may be helpful to practitioners in this area (unreviewed). Initial volumes in the series include the following:

- International Franchising in Emerging Markets: Central and Eastern Europe and Latin America
- International Franchising in Emerging Markets: China, India and Other Asian Countries. 

IFA FRANCHISE BUSINESS NETWORK MEETINGS — YOUR BEST BUY FOR LEARNING AND NETWORKING

We encourage taking advantage of the no-cost learning and networking opportunities available by attending the quarterly IFA Franchise Business Network Meetings held throughout the country (formerly 2nd Tuesday Meetings). Each quarter you'll be presented with the opportunity to meet with other franchisors, franchisees and suppliers, and be educated on a variety of topics relevant to the franchise industry by leading business experts.

We're proud to announce that as of January 2002, we have become the host of the Orange County, California Franchise Business Network Meetings, along with our of counsel attorneys, Steve Weiner, Lori Lofstrom and Peggy Narodick. Held quarterly, the Orange County meetings are regularly scheduled for the 2nd Wednesday mornings of January, April, July and October. Please join us at the next scheduled meeting, April 10, 2002 at The Village Farmer Restaurant, 3851 Bear Street in Santa Ana (in the South Coast Plaza, across from Nordstroms), where we'll meet from 7:30 am to 9:30. This quarter's presenter is Steve O'Leary, founder of the T & O Group, a prominent Orange County advertising services and marketing agency. Steve will present "Managing Your Advertising Fund: Keeping Results and Franchisees Positive." You'll learn everything you've ever wanted to know about managing and maintaining an advertising program. If interested in receiving a copy of the meetings hand-outs and highlights, please call 1(805) 547-0697 or, e-mail us at info@HolmesFranchiseLaw.com, subject: OCFBN meeting notes. You may reach Steve O'Leary by calling 1(949) 833-8006.

To find the location and date of the next meeting nearest to you, please call us or visit the IFA website at www.franchise.org.