FRANCHISES AS MORAL RIGHTS

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I. INTRODUCTION

Imagine living the American dream of owning a small business, such as a franchise. Now imagine what it takes to keep that dream alive – the everyday operations of this fictional franchise location. There are inventory, customers, employees, products, and of course the franchisor to consider. At the end of the day, with all crises averted, the franchise becomes profitable. In fact, the business is a local sensation. The website also draws thousands of hits each week. Yet, upon the close of the franchise agreement term, the franchisor refuses to renew the contract. Suddenly, the brand name can no longer be associated with your business. Meanwhile, the franchisor has opened near your store a new franchise location where many of your once-loyal customers now flock. You receive a cease-and-desist letter regarding the use of the brand name on your website. It seems as if all of the work put into making the franchise location a success has been undone.

Conversely, imagine heading a company that spent years and millions of dollars to stake out a brand name. You seek to expand the brand name by franchising. However, one franchisee is frequently late paying royalties, and is only consistent in its disregard for quality standards. You decide that discontinuing the franchise relationship would be in the company's best interest. Yet the former franchisee continues to use the brand name on its own website, ignoring a cease-and-desist letter. You fear the former franchisee could harm the brand's reputation by association and thus feel compelled to take action through the court system.

These two stories are the backdrop of an unaddressed issue in U.S. franchise and intellectual property rights law: who owns the "intangibles," such as goodwill and reputation? In this article, the nature of that inquiry leads to a proposal respecting law and theory while conforming to practical concerns: moral rights.

A. Contracts and Torts

There are two scenarios in which one may witness moral rights in action: torts and contracts.[1] In the tort scenario, there is a conflict between an artist and an unauthorized user.[2] Tort litigation can arise regarding the moral rights of disclosure, attribution, and integrity.[3] In the contract scenario, an artist may exercise her moral rights against authorized users of her work, i.e., licensees or copyright holders.[4] A copyright infringement action typically cannot be brought against a licensed holder; thus artists must rely on moral rights to prevail.[5]

These two scenarios concerning intellectual property in torts and contracts can be analogized to issues in franchise law. The question of who owns the goodwill and work product of the franchise network, be that the franchisor or franchisee, may be assessed using moral rights.[6] The ownership of goodwill is sometimes divided between goodwill developed by the franchise as a whole or by a particular franchise location.[7] Who owns the goodwill becomes important, for example, in the context of contract clauses against competition, when a "franchisor's contribution to local goodwill is deemed to support the enforcement of a noncompete covenant."[8] Of course, "[i]f an ex-franchisee continues to operate a store under a different name in the terminated location, many consumers will understand that it is essentially the same store; [a]ccordingly, the ex-franchisee would be free riding on the franchise system's goodwill."[9] On the other hand, if a franchisee is responsible for the goodwill of the franchise, then ownership of the goodwill may negate a non-compete agreement.[10] A franchisee may lose its investment in goodwill at a particular location if a non-compete agreement is enforced.[11]

Similarly, the owner of a franchise's goodwill must consider the possible negative impacts on reputation that can decrease the value of the franchise trademark or brand. By analogy, an artist's reputational interests are threatened by prejudicial alterations, treatments, and uses of her work because "each of an artist's works is an advertisement for all of the others."[12] This negative impact on the artist's reputation will adversely affect the value of the artist's other existing and future works.[13] Just as a franchisor is keen to impose strong quality standards on its franchisees, "an artist has an interest in preventing the reputation of his work in general from being depreciated by the opportunistic adulteration of individual works."[14] An artist's name, like the signaling mechanism of a franchise bearing the name "McDonald's," will for the public serve as a ready indicator of quality and status in the contemporary art market.[15] Whether to determine the ownership of goodwill or protect the reputation of a brand, there is broad economic justification for moral rights in the context of franchise law.

B. Roadmap of Article

This article seeks to discuss the origins and current application of moral rights and later introduce them to the world of franchise law. It begins by defining moral rights and how the concept of moral rights has been used thus far, particularly in Europe, regarding intellectual property. This discussion also considers to what extent, if any, moral rights are employed in U.S. federal and state intellectual property law, and to what effect.

This article then shifts to the world of franchise law, detailing current issues both parties of the franchise relationship face. I discuss broad topics, such as the current franchise business model favoring franchisors and the problems inherent in trademark litigation of a franchise brand. Then the article addresses specific franchise problems, such as fraud in franchise contracting, encroachment into a party's territory, abuses by franchisors, retaliatory or simply unfounded termination, and lack of franchisee collective action. As remedies for these problems, this article refers to state legislation and then highlights current practices on franchise websites, discusses attribution and moral rights in franchising, and deals with what this may mean in the long term for franchise relationships.

This article concludes by combining a discussion of moral rights in intellectual property law and the issues of franchise law. I argue that the problems plaguing franchise law, particularly the ownership of a franchise brand's goodwill, can be relieved, if not resolved, by federal legislation that employs moral rights. That is, a cohesive set of laws regarding the intangible but invaluable aspects of franchise ownership should be set in place to protect franchisees and franchisors alike.

II. MORAL RIGHTS

A. Introduction to Moral Rights

The term "moral rights" encompasses three concepts: the moral right of disclosure, of paternity, and of integrity.[16] The moral right of disclosure allows an artist to decide the form of a work and timing of the work's display.[17] The moral right of paternity prevents a person from claiming to be the creator of another person's work.[18] Lastly, the moral right of integrity allows an artist to prevent her work from being displayed in an altered, distorted, or mutilated form.[19]

Meanwhile, there are three legal approaches that address artists' rights. First, the French doctrine of *droit moral,* or moral right, was adopted by many civil law countries.[20] *Droit moral*

is the most protective of all of the rights because an artist's moral rights are viewed as perpetual, inalienable, and non-waivable.[21] Second, the Berne Convention set a minimum standard for artists' literary and artistic rights, including moral rights.[22] In the 1971 revision of the *Berne Convention for the Protection of Literary and Artistic Works*, a moral rights provision was adopted.[23] Article 6*bis* recognizes the right of paternity and a limited right of integrity.[24] Thus far, France provides the greatest protection under the Convention, with Germany and Italy close behind.[25] However, several nations not a part of the Berne Convention provide extensive protection for moral rights as part of their copyright laws.[26] For example, Ecuador protects an author's right of paternity, disclosure, integrity, and withdrawal.[27] Third, an artist's economic rights, but not moral rights, are protected under United States law.[28] This is the least protective legal approach to artists' rights, which perhaps stems from a difference in the origination of these laws.[29] Continental European copyright law, for instance, is "informed to a greater degree by natural rights and a concern to protect the personality interests of the author."[30]

B. Foundation for Moral Rights: Disclosure, Withdrawal, Attribution, and Integrity

Moral rights were established in France at the end of the nineteenth century, well after economic rights were in place.[31] The moral rights established in France at this time included the rights of disclosure and withdrawal.[32] The right of disclosure entitles an author to decide when her work is complete, i.e., ready for publication and commercialization.[33] The right of withdrawal empowers an author to retract the economic rights that she may have assigned or licensed to a third party in order to enable that third party to exploit the work.[34]

Two other moral rights that developed during this time include the rights of attribution and integrity.[35] The right of attribution gives an author the right to claim authorship in her work, including the right to determine whether and how the author's name shall be affixed to the work.[36] Specifically, the author has the right to relief against anyone who falsely claims to be the author of the work, omits the author's name from a specific work, or falsely attributes the author's work to a third party.[37] Thus, the right of attribution gives the author a right to publish anonymously, stop her name from being attached to another's work, and stop another's name from being attached to her works.[38] For example, in *Gilliam v. ABC, Inc*., the comedy troupe Monty Python prevailed in a trademark infringement action based on a misattribution claim against ABC, Inc.[39] The *Gilliam* court's reasoning is respected, if not controlling, in some jurisdictions.[40] In the franchising context, a preliminary injunction is typically awarded to a licensor bringing a trademark claim because there is a presumption that if a licensor cannot control its trademark, consumers may associate their opinions of the licensee with the marks, thus irreparably harming the licensor's reputation.[41]

Meanwhile, the moral right of integrity is the author's right "to object to any distortion, mutilation or other modification of, or another derogatory action in relation to, [the author's or artist's] work, which would be prejudicial to [the author's or artist's] honor or reputation."[42] The right of integrity is perhaps the most important moral right in fine arts and literature because it provides an author with a right to prohibit modifications of her work without her consent, regardless of whether the modification would negatively or positively impact the work.[43] For example, in 1993, a French court held that changing the interior design of a building was an infringement of an architect's right of integrity.[44] The court reasoned that the changes were significant, and the owner made these changes without first approaching the architect, despite a contractual provision reiterating the owner's duty to safeguard the architect's moral rights.[45]

The value of the right of integrity lies in the ability to offer some form of protection to the artist against a non-economic type of harm to her "personality" interest when an undesired alteration is made to the work in question.[46] Artists are thus empowered with the ability to control the actions of others who have proprietary titles over a work of art and generally control the artistic "voice."[47] Lastly, the right of integrity incentivizes the artist because "creative efforts are encouraged and the wider community benefits from the increased availability of artworks. With respect to works of particular cultural significance to the wider community, the instrumental value of integrity rights may also be reflected in their ability to preserve the cultural heritage of that community."[48]

In summary, the rights of disclosure, withdrawal, attribution, and integrity are the moral rights given to authors of works under French law. These rights remain with the author, but can be transferred upon the author's death.[49] However, even these far-reaching rights have problems.[50] Moral rights litigation is no different from the woes of litigation generally—it is expensive and time consuming.[51] Perhaps, therefore, it is unsurprising that moral rights have also been eroded elsewhere, such as Canada.[52]

C. American Copyright Law

The centerpiece of American copyright law is the Copyright Act of 1976.[53] The Act covers thirteen chapters, the first of which defines the scope of copyrights to include only "original works of authorship fixed in any tangible medium of expression."[54] Section 106 of the Copyright Act covers the rights authors have in their works, including reproduction, distribution, and performance.[55] There are also rights conferred to artists that protect their works from being attributed to another and distorted.[56] However, these rights are limited by four factors: the extent of modification, the life of the author, transfer, and the defense of fair use.[57] Chapter 5 of the Act lists the remedies for copyright infringement, such as injunctions, impounding, and the award of damages and attorney's fees.[58]

1. A Creator's Waiver of Rights

The Copyright Act of 1976 allows no protection for the personal rights of creators, but instead focuses on the inherent economic value of a copyright.[59] This lack of personal, non-economic protection is criticized[60] because copyrighted works may be considered products of the creator's mind, heart, and soul for which protection beyond financial returns is warranted.[61] To the extent that a creator's personality interests can be recognized, U.S. courts are forced to rely upon other established legal theories to address issues implicating moral rights, such as unfair competition law, contract law, defamation, invasion of privacy, and copyright law.[62] Yet even in these areas of U.S. law most states only recognize one component of moral rights: the right of disclosure.[63] Similarly, American case law rarely recognizes an author's rights.[64] In fact, U.S. courts infer a waiver of moral rights from the artist's sale of a property right, even if the owner severely distorts the art or fails to credit the artist.[65]

Additionally, the United States tends to have a presumption in favor of alleged waivers of the creator's "right of paternity."[66] American law follows the traditional rule that the creator is not entitled to credit unless a contractual provision requires such credit.[67] In other words, if the contract is silent as to crediting the author of the work, the contract is viewed as a waiver of the right of paternity.[68] This rule contrasts with the more modern rule adopted in some foreign

countries: there is no presumption that the creator waived the right of paternity if the written contract includes nothing about that right.[69] A major criticism of the traditional U.S. approach is that relatively unknown creators face a disparity of bargaining power that frequently results in a loss of valuable protections.[70] This is analogous to problems in franchising, where the franchisee is easily "outgunned" by the franchisor.[71]

On the other hand, there is one situation in which U.S. courts recognize rights for the creator of a work.[72] In *Gilliam*, the court held that significant editing, without permission, of a work protected by common law copyright constitutes copyright infringement, even without a contract between the parties.[73] The court recognized this limited right under the Lanham Act, i.e., U.S. trademark legislation, so the decision falls short of granting true moral rights protection.[74] Overall, if a contract does not contemplate modification, American courts will only protect an artist against excessive mutilation of her work.[75] American creators are thus less successful in lawsuits regarding modification than artists protected by moral rights.[76]

2. The Moral Rights Doctrine Should be Applied in the United States

A creator's personality rights and society's interest in preserving the integrity of its culture are not the primary focus of any of the alternative theories, all of which developed in response to completely different social concerns.[77] For example, as a consequence of a creator's inability to take its moral rights cause of action into any other existing theory, consider *Shostakovich v. Twentieth Century-Fox Film Corp*.[78] The Shostakovich court discussed the inherent difficulties in defining the boundaries of moral rights:

> The application of the doctrine presents much difficulty . . . there arises the question of the norm by which use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined.[79]

a. Federal Application of Moral Rights

The Visual Artists Rights Act ("VARA") is federal legislation that includes a moral rights provision for works of fine art[80] and is thought to be, in essence, the United States' attempt to conform with the Berne Convention.[81] Section 106A of the Act creates rights of attribution and integrity, which belong to an author whether or not the author is the copyright holder and endure until the death of the author.[82] VARA also creates an opt-out system that places the burden on the buyer to contract around moral rights.[83] This default position to moral rights is more favorable to the artist who is often in a weaker bargaining position and less knowledgeable.[84]

Otherwise, U.S. copyright law focuses on economic exploitation of an artist, but largely ignores the other sorts of harms that could befall an artist.[85] Courts continue to struggle with the lack of federal laws protecting artists. For example, in *Stevens v. National Broadcasting Co.*, the court granted a filmmaker's request for a preliminary injunction to stop destructive editing of a motion picture.[86] The court stated in its decision that "a court of equity has a duty when

presented with a novel situation to fashion remedies to protect parties and litigants against new harms where it appears that there is an inadequate remedy at law."[87]

b. State Law

Eleven states have enacted moral rights statutes.[88] In the California, Massachusetts, and Pennsylvania statutes, the states recognize the right of integrity by prohibiting physical defacement, mutilation, alteration, or destruction of fine art.[89] These statutes do not require that the work be displayed or published, or that damage to the artist's reputation be proven.[90] Meanwhile, in the Louisiana, Maine, New Jersey, and New York statutes, any alternations, defacements, mutilations, or modifications are prohibited.[91] The work, however, must knowingly be displayed or published and proof of damage or likely damage to the artist's reputation is required.[92] Besides rights of integrity, all seven states recognize the right of paternity.[93]

Between the lack of moral rights under U.S. federal law and the limited moral rights granted in only seven states, there remains a void to fill to protect the work of artists and authors.[94] The importance of protecting these rights includes "foster[ing] creativity" and "protect[ing] our cultural heritage."[95] On the matter of fostering creativity, moral rights not only protect an artist's interest in a work, but also give an artist bargaining power when contracting.[96]

While moral rights may appear to be an intangible ideal, they can grant distinct economic rights, too.[97] Economic rights that are given to artists under moral rights laws include a decrease in the search costs of buyers and a monetary incentive to create without the worry that others may unfairly reap the benefits.[98] Additionally, moral rights can help protect our cultural heritage by preserving the work for future generations to enjoy.[99] To adopt moral rights throughout the United States is not a radical posture, but one grounded on notions of fairness, on its economic benefits, and on the reasoning of various commentators.[100]

D. Moral Rights Outside the "Box" of the Artist's Studio

Moral rights are not just useful in protecting the rights of authors and artists in their works. In fact, moral rights may be used to protect something even broader—reputation and business goodwill. For instance, Australian law provides moral rights protection against "passing off," which is a type of misattribution claim.[101] However, unlike a general misattribution law, Australian law against passing off targets harm done to a business's goodwill.[102] Unlike Australia, American jurisprudence's implied covenant of good faith and fair dealing does not encompass the expansive rights recognized in other countries.[103] In other countries, franchise law extends beyond U.S. protections.[104] For example, South Korea takes an "activist stance" on the franchise relationship.[105]

The general counsel to the International Franchise Association noted "Korea's 'repetitive use of a standard of 'fairness,' and commented that the Korean franchise dispute resolution mechanism is like nothing we have ever seen in the world of franchising. Much the same can be said of [Korean franchise] legislation in its entirety."[106] Perhaps, as with foreign intellectual property law and burgeoning franchise law, the United States could benefit from adopting moral rights to better protect its franchises. In other contexts, for example, French law has more interest in achieving a kind of contractual justice as understood in a moral sense and achieved only by examining the parties' subjective intent to determine if they have broken their

promises.[107] Furthermore, the European Union follows the approach in France and many other Civil Law nations by employing the *savoir-faire* concept—in effect, a moral duty of franchisors to provide "secret, substantial, and identified" know-how to the franchisee.[108] With that duty, the effect upon the franchise contract may be to make it more than just the mandatory *savoir-faire*, but a relationship—a for-the-life-of-the-franchise web of communications—constituting "a package of non-patented practical information, resulting from experience and testing by the supplier" of that know-how.[109]

III. FRANCHISING

Franchises are businesses that operate by creating one brand or identity and, in a sense, licensing that brand or identity to others.[110] Brands, like an artist's work, include value beyond sheer economics.[111] Like art, franchise brands must also be protected from misuse, augmentation, and destruction.[112] Indeed, both reputational externalities[113] and negative servitudes[114] signal that franchising networks could be protected with some of the same concepts that lie behind moral rights. Franchisees might be better protected from the actions of franchisors and fellow franchisees through application of moral rights principles.

A. The Dilemmas of Franchising

Although some states have relationship laws, the current general theme is pro-franchisor.[115] Analogizing the franchise relationship to the problems artists face, incorporating moral rights concepts is an option for lending more protection to franchisees. The analogy is difficult, however. Franchisees are not the same as authors or artists. The creativity of a franchisee is different from that of an artist. Franchisees are not the usual consumers, and they are often considered independent, advised, experienced, and knowledgeable businesspersons.[116]

On the other hand, there is a well-informed argument that many franchisees are not on equal footing with franchisors.[117] Many franchisees have a limited business background.[118] This may be due to the franchisor's business model, which takes a legal approach to relationships with franchisees that is "positivist, adversarial, and centered on a commercial model targeted at unsophisticated consumers."[119] Such an approach works against the franchisee, and "is at variance with the trend in consumer law both domestically and abroad."[120] Meanwhile, the franchise contract document itself has become "one-sided and unfair."[121] The typical franchise contract now exceeds seventy-five pages, nearly triple the length of contracts written several years ago.[122] The Chairman of the American Bar Association's franchise forum testified that the lengthy listing of contractual rights of franchisors and obligations and acknowledgements of franchisees has "gone beyond reasonable limits."[123]

One particular franchise contract issue concerns advertising funds.[124] Franchisees "may reasonably believe that the 'fruits of the contract' include advertising and marketing support and may reasonably believe that the advertising monies will be spent in a manner benefiting the franchisees who contribute the advertising dollars."[125] Yet franchisors can concentrate their advertising to areas with more company-owned sites.[126] The importance of the freedom to contract gives franchisors much bargaining power.[127] Franchisees need better protections if this form of business operations is to have a bright future, especially given the potential for encroachment on the franchisee's market or territory, perhaps especially with the burgeoning option of Internet-based sales.[128]

As discussed in more detail,[129] there is a debate about who owns the goodwill of a franchise.[130] Start-up franchises have not built their brand and customer loyalty yet, so the franchisee could be significantly contributing to the franchise's goodwill.[131] On the other hand, there is likely not much franchisee-developed goodwill concerning well-established franchises such as McDonalds, Holiday Inn, and H&R Block.[132] There are many issues facing this area of business law, such as disparity of bargaining power and ownership of goodwill, that are unaddressed by legislation, with courts often coming to inconsistent decisions.

1. Franchise Problems

At heart, the issues in franchising law arise as matters of contract—the terms, alleged breaches, and remedies.[133] Rarely is it the case that a court finds the franchisor to be a fiduciary of the franchisee.[134] Thus, franchise relationships are guided by contract terms, which are skewed in favor of the franchisor.[135] Furthermore, franchisors often use operations manuals, contractual collective action clauses, reviews when deciding for or against renewal, and compliance audits so that, among other things, they can "exercise nearly total discretion over the franchisee."[136] Although franchisees may not be forced or coerced into signing a franchise contract, franchisees may still be confused due to the complex, dense, and lengthy terms, perhaps compounded by the franchisor's deception or the franchisee's lack of business knowledge.[137]

a. The Franchise as a Relational Contract

Although franchise contracts, in practice, often appear one-sided, the agreement is most beneficial to the franchise when treated as a relational contract.[138] A relational contract is one that is formed from an ongoing relationship between two parties.[139] Their relationship is such that each party trusts and comes to expect certain concessions from the other. An example would be a franchisor and franchisee negotiating an extended franchising contract, where each side makes sacrifices to ensure the success of the parties' distinct, but intertwined, businesses.[140]

The issues franchisors and franchisees must consider when engaging in a business relationship come down to quality control and opportunism.[141] The quality control issue stems from an inherent difference between the goals of the franchisee and franchisor.[142] According to Gillian K. Hadfield, a professor of law and economics at the University of Southern California, "[a] franchisee wants to maximize her profits from the operation of the outlet; she does not wish to undertake any efforts or expenditures that will not compensate the undertaking." [143] Conversely, the franchisor's mission is to increase the number of franchise locations and thus revenue.[144] The more a particular franchise location sells, the more royalties the franchisor can collect.[145] Also, for the franchisor, creating a recognizable brand name or trademark is key.[146] The more sales that occur under a brand, the more likely that a potential customer has seen the trademark, thus increasing the value of the brand name.[147] The importance of the trademark to creating sales gives way to a free riding problem.[148] Franchisees want to profit from a strong brand name, yet do not want to compete with other franchise locations or contribute to the strengthening of the brand name as a whole.[149] Franchisors, on the other hand, have been accused of simply seeking to "saturate the market with franchises."[150] Franchisors may also want a franchisee to act in ways that seem contrary to the franchisee's interest, but help the trademark to grow.[151] For example, a franchisor may ask a franchise location to operate twenty-four hours a day to create a reputation for "consumer convenience," although the franchisee does

not profit from late night sales.[152] As Hadfield states, "[f]rom the franchisor's perspective, bringing the franchisee's interests in line with its own is the central difficulty of this method of doing business."[153]

The second major issue in franchising relationships is opportunism.[154] When a franchisee operates a business although she is sustaining losses with sunk costs, a "franchisor can make decisions that induce such losses without the franchisee going out of business" and can extract value from these losses.[155] The franchisor may directly raise the price of goods sold to the franchisee, increase rent, or levy fees.[156] Indirectly, the franchisor can extract value from the franchisee's losses by requiring franchisees to make excessive advertising investments, participate in non-cost effective promotional programs, and undertake unnecessary renovations.[157]

b. Trademark Litigation

American trademark law, like its copyright law, is covered under federal legislation, also known as the Lanham Act.[158] The Lanham Act gives rights to the owner of a trademark, which is defined as any symbol, mark, word, phrase, etc. that signifies a brand.[159] Trademark protection can last indefinitely,[160] but the protection is largely dependent on the holder's ability to police the use of the mark. Similar to copyright law, a trademark holder can lose his rights.[161] Limitations for holders include the mark becoming generic or allowing the mark to be used in association with anything other than what was registered.[162] To ensure trademark rights persist over time, owners can enjoin use, recover damages against misuse, or seek destruction of infringing articles.[163]

In the context of franchising, a franchisor maintains the brand by ensuring consistent use of the trademark and quality of goods or service by the franchisee.[164] Failure to do so may result in the franchisor losing its trademark protection.[165] While a franchisor is concerned with building goodwill associated with the trademark, the franchisor must also be aware of the legal duties a trademark owner has in maintaining the mark.[166] Thus, franchisors often include compliance with these principles into the franchise contract and periodically inspect the franchisee's adherence, even after the end of a franchise relationship.[167] For example, in *Baskin-Robbins Ice Cream Co. v. D & L Ice Cream Co., Inc.*, Baskin-Robins sued D & L Ice Cream, a franchisee, for trademark infringement.[168] The franchisee used the Baskin-Robins' trademark after the franchise contract ended.[169]

However, there are brand concerns that can be overlooked by a franchisor. In *What's in A Name? A Lot Trademark and Brand Protection Strategies for Franchisors*, Marisa Faunce and Benjamin Reed argue that franchisors need to "monitor and control" the use of trademarks in Internet advertising as well.[170] They argue that "[s]uch policies enable franchise companies and their franchisees to utilize the web while simultaneously protecting the goodwill and property interests associated with the marks."[171] The importance of the use of trademarks over the Internet can also be seen in court cases, such as *California Closet Co. v. Space Organizational Systems, Inc.*[172] A U.S. District Court temporarily enjoined a franchisee from using a trademark as a domain name.[173]

A separate but related issue is trade secrets.[174] In *Who Takes What: The Parties' Rights to Franchise Materials at the Relationship's End*, Clay A. Tillack and Mark E. Ashton discuss problems that franchisors and franchisees encounter regarding confidential information.[175] While franchisors worry that they are imparting information to a franchisee that would empower

her to leave the franchise and run her own competing business, the franchisee is concerned that a franchisor expects her to "unlearn" this information and "consciously choose to use a less effective system."[176] Tillack and Ashton suggest the parties anticipate these issues and draft appropriate provisions into a franchise contract.[177] The result of competing interests between parties and contractual oversight, as discussed above, is the rapid increase of franchise trademark, trade secret, and related litigation.[178]

2. Specific Franchise Problems

While there are "big picture" issues in franchise law, such as the nature of the franchise agreement and any subsequent trademark litigation, there are also specific problems not necessarily inherent to franchising. However, these issues of fraud, encroachment, general abuse, termination, and collective bargaining arise with regularity and need to be addressed as well.

a. Fraud

Franchise fraud refers to fraud in the formation of a franchise contract and is most often seen in the form of franchisors allegedly misrepresenting the terms of an agreement with a franchisee.[179] Fraud is a franchise problem some contend is increasing in frequency.[180] The recent recession is thought to be the catalyst for a "new wave of fraudulent franchising activity."[181] Particularly, franchise business failures and the extended abuse of franchisees in established companies result in more fraud in franchise arrangements.[182] According to the Federal Trade Commission, many investigations of franchise fraud and misrepresentation target on nationally established franchisors.[183]

b. Territory and Encroachment

Another specific issue in the world of franchising is territory and encroachment.[184] As discussed earlier, franchisees inherently want less competition, including competition from their own franchise.[185] However, franchisors have an interest in increasing the number of franchise locations, even at the expense of a particular franchisee's business.[186] Additionally, franchisors can use this tactic to push out franchisees that the franchisor does not wish to be bound to by agreement.[187] Instead of breaking a franchise contract, with all of its associated legal costs, the franchisor may simply make the franchisee's business too unprofitable to continue.[188] Regardless of the reasons why a franchisor chooses to do so, when a franchisor allows franchises to open within close proximity to an existing franchisee-owned location, the result is encroachment.[189] While some franchise contracts anticipate this conflict, others do not, or the bargaining power of the franchisor results in unfavorable contract terms for the franchisee.[190]

In recent years, the frequency of franchise encroachment based litigation may have risen.[191] Encroachment, however, is not a new concept, as there were lawsuits on this issue in the 1970s. For instance, in *Photovest Corp. v. Fotomat Corp*., a franchisor was found to have breached the implied covenant of good faith and fair dealing by trying to saturate the market with franchisor-owned stores, as well as stopping all pick-up and delivery services to the franchisee.[192] In *Burger King Corp. v. Family Dining, Inc*., a franchise contract required a franchisee to open ten outlets in ten years.[193] When the franchisee only opened nine, the

franchisor terminated all nine franchise locations and sought to sell the locations for a higher price, after the franchise became well established.[194] The court held that giving strict effect to the condition would in effect mean that the franchisee forfeited the franchise.[195] On the other hand, there have been a number of cases where courts did not find any contractual provision or theory to stop encroachment by a franchisor.[196]

c. Abuses Generally

There are franchise problems that do not fall into any particular category, but can generally be referred to as abuse by a franchisor. The danger of abuse by franchisors is inherent in the franchising business format, which gives a franchisor power over many facets of the franchisee's business.[197] Alleged franchisor abuses include manipulating price or quantity of products or services sold to the franchisee, adding new fees or requiring additional purchases, collecting more advertising fees, attempting to buy out a successful franchise, increasing exposure of a franchise name, and changing the image of the franchise without considering the impact on the franchisee.[198]

For example, in *Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc*., franchisors attempted to make franchisees terminate voluntarily.[199] The Mazda dealership gave new model vehicles to new franchisees, which attracted customers to the new franchisees. The earlier franchisees could not compete with the sales from these newer models and were in essence put out of business.[200] Similarly, in *Eastman Kodak Co. v. Image Technical Services*, the U.S. Supreme Court found that franchisor abuses could give rise to an anti-trust claim.[201] The franchisor tied the aftermarket purchase of supplies to the initial purchase of a xerographic copier, setting a low maximum resale price and tie-ins that forced the franchisee to pay supracompetitive prices for the tied product.[202] Due to sunken investments, the franchisee was thus locked into an unprofitable relationship and exploited by the franchisor.[203]

Another business practice with the potential for abuse is co-branding.[204] For example, the Taco Bell, KFC, and Pizza Hut brands are all owned by one company, Yum! Brands,[205] a joint franchise location with different franchises offering different products or services (e.g., sales of tacos, or fried chicken, or pizza).[206] The main criticism of the co-branding strategy is that while it may increase total gross revenues for a franchisor, it could dilute value in particular brands.[207]

d. Termination

Termination, or the prospect of termination, is often the focal issue in franchising. It is no exaggeration to call the possibility of a franchise's early demise, whether forced by circumstances (e.g., poor sales) or by franchisor invocation of contract terms (terminations), as the brooding omnipresence in many franchise relationships.[208] Termination or the threat of termination can be the franchisor's supreme tactic for control over franchisees.[209] Franchisors have terminated franchise contracts without cause[210] and refused to renew agreements.[211] Yet there are cases in which franchisors are within their right to terminate a franchise relationship, be that for the franchisee's failure to pay fees,[212] failure to maintain quality standards,[213] or misbranding of the trademark.[214]

Once a franchise relationship is terminated, there are additional concerns about intellectual property.[215] The removal of trademarks and service marks from the franchisee's

website, Internet directories, domain name, and telephone number are all issues franchisors must consider upon termination.[216] When a franchisee has created a second level domain name, which has gained brand association and goodwill, disputes may arise as to whether the domain name will remain with the franchisee.[217]

e. Collective Action

Another franchise problem concerns collective action.[218] Unions or associations present a method whereby individuals with little bargaining power on their own can come together to negotiate more favorable terms with a franchisor.[219] However, it is often the case that franchisees cannot easily form associations.[220]

3. State Legislation

All states have statutes or common law governing trade secrets and confidential information, and many states have relationship laws.[221] Some states even require franchisors to buy back equipment and inventory from franchisees.[222] The problem with these protections is that there is no uniformity of laws and regulations in the franchising context among the states. A few states have taken the lead in addressing franchises particularly. For instance, the Franchise Practices Act in New Jersey was established after the state recognized unequal bargaining power in the motor fuel business.[223] Likewise, Connecticut has enacted a franchise act,[224] the goal of which is to "prevent a franchisor from taking unfair advantage of the relative economic weakness of the franchisee."[225]

B. Franchise Websites

Courts should look to the websites of franchisors or franchisees in determining questions of ownership of goodwill. In the case of physical locations, courts have divided goodwill between the franchise system as a whole and the goodwill of a particular franchise location.[226] Similar logic can be used to determine the brand ownership rights in websites. Observing who owns and operates the website may provide insight in determining who owns the goodwill and work product of the franchise network.[227]

From the franchisor's perspective, tightly controlling website trademark use may avoid questions of ownership in the future. For example, policing trademarks or the franchise brand can become an issue when a terminated franchisee continues to use the brand name on the franchisee website.[228] Under state unfair competition laws, a franchisor may have a cause of action based on the theory that "people associate the domain name with the franchise system due to its use during the term of the franchise agreement."[229] Such cases may be based on common law claims such as misappropriation of goodwill,[230] encroachment,[231] or dilution of trademark.[232] These cases may also be based on federal law such as the Lanham Act[233] or the Federal Trademark Dilution Act of 1995.[234] A franchisor may avoid this problem by providing a central website, therefore eliminating any future questions about goodwill and the need to police a franchisee's website.[235]

There are several cases in which franchising parties disputed Internet territorial rights.[236] In *Hale v. Conroy's, Inc*., the parties had an agreement to operate a flower shop and granted the plaintiff (franchisee) a two-mile exclusive territory in which the defendant (franchisor) would not

operate or franchise a store.[237] The court held that the franchisor's actions in opening a website did not rise to the level of operating a franchised store when the franchisee explicitly agreed to allow the franchisor to develop new technologies.[238] In *Franklin 1989 Revocable Family Trust v. H & R Block, Inc*., an arbitration panel held the phrase "from a location within the franchise territory" was ambiguous as to a franchisor's Internet sales.[239] The panel reasoned that there was no violation of good faith on the part of the franchisor because there had not been an "unreasonable intrusion" on the franchisee due to the Internet tax preparation by H & R Block.[240] Also, in *Armstrong Business Services, Inc. v. H & R Block, Inc.*, franchisees argued that a franchisor competed with them by selling tax preparation software and selling services accessible from the Internet.[241] However, the franchise agreements were created long before the existence of the Internet.[242] Thus, the jury found the defendant was encroaching on the plaintiffs' territories and awarded damages for the Internet sales.[243]

These cases illustrate that the terms of the franchise agreement are determinative of the judicial outcome.[244] Whether the implied covenant of good faith and fair dealing will be applied to an ambiguous contract, particularly one that does not anticipate franchisor Internet sales, depends largely on the specific facts of the case.[245] Even if the franchise agreement does not contemplate Internet sales, franchisors can still "develop an Internet strategy that avoids the franchisees' exclusive territories."[246] Within the confines of the agreement, "franchisors might also try to offer somewhat different products or services, or use different trademarks."[247]

1. Practices in Franchise Website Operations

As may be apparent in the above cases, there is tension between franchisors and franchisees regarding Internet activities, including sales. According to Gaylen L. Knack and Ann K. Bloodhart in *Do Franchisors Need to Rechart the Course to Internet Success*?, "franchisees think that the franchisor[s are] receiv[ing] an unjustified windfall from Internet sales at the expense of the franchisees." [248] Sometimes, a disappointed franchisee, in retaliation or to ready an exit strategy, will set up unauthorized websites and advertisements.[249] A landmark case, *Drug Emporium*, became a "wake-up call" to franchisors that Internet sales are not exclusively the domain of the franchisor and must be contemplated in a franchising contract.[250] The decision led to tremendous changes in franchise agreements and Internet practices.[251] The franchise agreement in question did not anticipate the franchisor developing the brand name in any way other than through brick-and-mortar expansion.[252] Rather, it "supported the inference that the franchisees had exclusive rights . . . to exploit the Drug Emporium name so long as they complied with the franchisor's schedules."[253] The panel thus held that the franchisor's Internet sales were an unlawful encroachment on franchisees' rights to use the brand name and territories.[254]

The *Drug Emporium* outcome should lead franchisors to consider policies and contract terms that protect their rights in all franchise-related Internet activities.[255] One option for franchisors is to establish a central marketing website.[256] If a franchisor opts to allow a franchisee to have a subpage, the franchisor must consider whether a franchisee can add data to that page and, if so, to what extent the franchisor will control the postings.[257] Franchisee subpages can have a useful purpose in creating "more personal service," which could "promot[e] local advertising campaigns [and] . . . highlight special offerings to the local public."[258] In both cases though, "the best practice is for the franchise agreement to provide that website content on these subpages cannot be changed without the express approval of the franchisor."[259]

Another reason why tight controls of franchisee websites are useful is to avoid liability for trademark infringement of another company's trademark.[260] Franchisors have a heightened obligation to police the franchisee or be held contributorily liable if the franchisor is aware that the franchisee has a history of infringing on another's trademark on its website.[261] To prevent future liability, franchisors should prohibit franchisees from purchasing keyword advertising based on the franchise's trademarks. Such advertising may, for example, be susceptible to trademark infringement claims or to claims from other franchisees complaining of encroachment if the advertisements are not geographic-specific.[262]

2. Attribution and Moral Rights in Franchising

Franchisor websites, like the contracts franchisors draft, tend to favor franchisor practices and interests. For instance, while a franchisor typically is reticent to provide detailed information about its finances and business practices until it must, under law, a vast majority of franchisor websites ask for background information on the potential franchisee, such as net worth and income, before communicating with or providing the Franchise Disclosure Document to the potential franchisee.[263] Moreover, many websites have disclaimers such as the one found on the Century 21 website, *"This website is not intended, and shall not be deemed, to constitute any offer to sell a franchise. A franchise offering is made only by a Franchise Disclosure Document. For more information contact us."*[264]

Upon termination of a franchise agreement, there is the issue of a franchisee's website.[265] If a franchisor controls one webpage, the franchisor can easily terminate the franchisee's sub-page.[266] However, if the franchisee maintains its own domain name, a franchisor must go through a lengthy process to terminate the website.[267] Franchisors may have to file suit for "breach of the franchise agreement and trademark infringement[,]" seek preliminary injunction, and seek to have the domain name transferred, pursuant to the Anti-Cybersquatting Consumer Protection Act.[268]

To avoid future litigation, franchise contracts should anticipate Internet use, whether for sales or advertising. The agreement should contemplate whether a franchisee may establish and operate its own website, the franchisor's right to determine the content and use of a franchisee website, the franchisor's ownership of the system-wide website, the franchisor's right to establish Internet guidelines, a franchisee acknowledgment that its conduct on the Internet will be subject to the terms of the franchise agreement, and a franchisee acknowledgment that certain information obtained through participation in the franchisor's website or other Internet strategies is confidential.[269] The franchisor may also wish to create a code of conduct for franchisees to follow when operating on the Internet.[270] The code of conduct, if drafted separate from the contract, would allow the franchisor the ability to modify rules when needed.[271]

C. Good Faith and Fair Dealing: Attribution as a Moral Right in Line with the Lanham Act

Based on both legal doctrine and their own professional conditioning, American jurists may appear to find disquieting any "blending" of morality and contract law.[272] However, as an equitable doctrine, good faith and fair dealing reflect societal mores.[273] Franchise attorneys, Tillack and Ashton, note that "[e]ven the most carefully crafted and detailed franchise agreement may not clearly address the rights of the respective parties with respect to such assets."[274]

Granting broad attribution rights to franchises can help franchise customers with liability claims.[275] Indeed, Professor Kwall suggests narrowing integrity rights in conjunction with an expansion of attribution rights,[276] which would align the law and the parties' interests.[277] This is particularly efficacious if one considers that a primary concern of laws dealing with the franchise brand is the protection of the brand name.[278] Moral rights offer a way to safeguard the brand name and goodwill of a franchise, and its rightful owner.

IV. CONCLUSION

Franchising conflicts frequently stem from a difference in goals: the franchisor's aspiration for larger, network-wide gross revenues, and the franchisee's simple objective of individual profit-maximization (that is, *net* revenues).[279] Parties may disagree on matters such as goodwill, territory, and termination. As a result, the franchise agreement is often the basis for solving any potential problems. However, the franchisee agreement is commonly drafted by the franchisor and as a result it tends to favor the interests of the franchisor over those of the franchisee. Contractually-based economic rights thus pose practical limitations on those who seek to create more reasonable standards or at least more equal and robust positions from which franchisees can advance their business interests under that particular brand.

Proactively, franchise parties should draft agreements that anticipate problems and contract around them. This may explain provisions in franchise contracts or operations manuals outlining rules for marketing, be it via advertising, websites, or other methods. Franchise terms of disclosure may lay out strict grounds for activity using the brand name. But a no-holds-barred contract is no way to fashion fair, long-term relationships, or perhaps even to meet the parties' own expectations.[280] Because franchisors ordinarily have the upper hand in contracting, which may lead to unfavorable terms for the franchisee, courts must consider employing moral rights.

The moral rights doctrine could assist in filling the gaps sure to exist when evaluating a strictly economically-focused set of intellectual property rights. There is value beyond that of sheer profits, as illustrated by the strong moral rights afforded to artists in almost all other countries besides the United States. Franchise law, with rules advancing moral rights concepts, can protect a franchisee's name and reputation. The standing and business goodwill of franchises can benefit from treatment holding that what is associated with a franchisor may also be the moral right of a franchisee. Some states have already started to experiment with moral rights, and the grounding of a moral rights approach to franchising is already discernible, based on the parties' own concerns for developing and maintaining the franchise brand. Whether franchisors or franchisees realize it, they may further protect the franchise network—and thereby shelter the system's and the individual parties' reputations—by recognizing that a franchise can constitute a moral right.

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[1] *See* U.S. COPYRIGHT OFFICE, WAIVER OF MORAL RIGHTS IN VISUAL ARTWORKS (2003), *available at* http://www.copyright.gov/reports/exsum.html ("Nations that provide their authors and artists with protection in the nature of moral rights protection do so using various approaches. Some use statutory law to balance the interests of artists and their creations with the interests of copyright owners and other users of works. The statutes may be categorized as laws of copyright, design rights, passing-off, unfair competition, tort, or contract. In other countries, the personal rights of attribution, paternity, and integrity have been defined and shaped by the courts.").

[2] *Id.*; s*ee generally* Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1341–64 (2011) (discussing the torts that protect reputation, such as misappropriation).

[3] Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 368 (2006).

[4] *See* U.S. COPYRIGHT OFFICE, *supra* note 1.

[5] Rigamonti, *supra* note 3, at 372.
[6] *See generally*, Robert W. Emerson, *Franchise Goodwill: Take a Sad Song and Make It Better*, 46 U. MICH. J. L. REFORM 349 (2013) (discussing franchise goodwill).
[7] Clay A. Tillack & Mark E. Ashton, *Who Takes What: The Parties' Rights to Franchise Materials at the Relationship's End*, 28 FRANCHISE L.J. 88, 124 (2008).
[8] *Id. See also* Robert Emerson, *Franchising Covenants Against Competition*, 80 IOWA L. REV. 1049, 1049–1107 (1995).
[9] Tillack & Ashton, *supra* note 7.
[10] *Id.*
[11] *Id.*
[12] Burton Ong, *Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights*, 26 COLUM. J.L. & ARTS 297, 305–06 (2003).
[13] *Id.*
[14] *Id.* Of course, opportunism is a recurring and troubling aspect of, or at least prospect in, franchising. *See generally* Antony W. Dnes, *Franchise Contracts, Opportunism and the Quality of Law*, 3 ENTREPRENEURIAL BUS. L. J. 257 (2009); infra Parts II, II.A, II.A.1, II.A.1.a.
[15] Xiyin Tang, *The Artist as Brand: Toward A Trademark Conception of Moral Rights*, 122 YALE L.J. 218, 229 (2012).
[16] *See generally* Justin Hughes, *American Moral Rights and Fixing the* Dastar *"Gap"*, 2007 UTAH L. REV. 659 (2007); *see also* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 95–96 (1997).
[17] Hughes, *supra* note 16, at 659.
[18] Hansmann & Santilli, *supra* note 16, at 96.
[19] Hughes, *supra* note 16.
[20] *See* Jacqueline D. Lipton, Copyright's *Twilight Zone: Digital Copyright Lessons from The Vampire Blogosphere*, 70 MD. L. REV. 1, 19 n.133 (2010) (mentioning that thirty-five non-European nations have adopted moral rights).
[21] *See* Lior Zemer, *Moral Rights*, 91 B.U. L. REV. 1519, 1524 (2011).
[22] *See* Hughes *supra* note 16; *see also* Hansmann & Santilli, *supra* note 16, at 95–96.
[23] The Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, was revised at Paris on July 24, 1971, and amended in 1979. *See* Bern Convention for the Protection of Literary and Artistic Works, art. 6bis, Jul. 24, 1971, 1161 U.N.T.S. 30.
[24] *See* Hannibal Travis, *WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians*, 16 VAND. J. ENT. & TECH. L. 45, 73 n.133 (2013).
[25] *See* Hansmann & Santilli, *supra* note 16, at 99; *see also* Hansmann & Santilli, *supra* note 16, at 99 n.19.
[26] *See* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 10–12 (1985).
[27] *Id.*
[28] *See* Laura Lee Van Velzen, *Injecting A Dose of Duty into the Doctrine of Droit Moral*, 74 IOWA L. REV. 629, 630–31 (1989).
[29] *Id.* at 631.
[30] *See* Hughes, *supra* note 16, at 662.
[31] *Id.* at 663 ("In 1976, Professor John Henry Merryman noted that the 'moral right of the artist [is] still comparatively young even in the nation of its origin' and that it probably 'has not reached anything like its full development.'").
[32] *Id.*
[33] Hansmann & Santilli, *supra* note 16, at 96.
[34] Rigamonti, *supra* note 3, at 362.
[35] Hansmann & Santilli, *supra* note 16, at 130.
[36] *Id.* at 130–34.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 113 n.54; *see generally* Gilliam v. ABC, Inc., 538 F.2d 14 (2d. Cir. 1976) (finding that the BBC originally owned the rights to the Monty Python comedy show, which it licensed to Time-Life, an American network. Under the agreement between the Monty Python team of writers-performers and the BBC, the shows were to remain largely original and only slightly edited. However, Time-Life substantially edited the shows, against Monty

Python's wishes and the rights under the Lanham Act.).

[40] *See* Gilliam, *supra* note 39; *see also* Nat'l Bank of Commerce v. Shaklee Corp., 503 F. Supp. 533, 544 (W.D. Tex. 1980) (citing *Gilliam* for the proposition that "an author should have control over the context and manner in which his or her work is presented").

[41] Tillack & Ashton, *supra* note 7, at 90.

[42] Hughes, *supra* note 16, at 663.

[43] Rigamonti, *supra* note 3, at 364.

[44] T.G.I. Paris, 3e ch., Mar. 25, 1993, 157 RIDA 1993, 354 (Fr.).

[45] *Id*.

[46] Ong, *supra* note 12, at 302; Hansmann & Santilli, *supra* note 16, at 102–07.

[47] Ong, *supra* note 12, at 302; *see also* Hansmann & Santilli, *supra* note 16, at 102–03. (Physical alteration of an artist's work after the work has left the artist's hands, or prejudicial display of the work, can harm the artist in a variety of ways. The most direct is simply the subjective personal anguish the artist feels from seeing his work abused, quite apart from-and even in spite of-what anyone else might think about it.).

[48] Ong, *supra* note 12, at 302; *see also* Hansmann & Santilli, *supra* note 16, at 102–03.

[49] *See* Van Velzen, *supra* note 28, at 633 (arguing that [c]urrent French law reflects the concept that an artist shall 'enjoy an exclusive incorporeal property right in the work, effective against all persons.' French artists enjoy *droit moral* as a personal right that remains with the original creator of the work, as a perpetual right that can be transferred to heirs at the artist's death, and as a nonwaivable inalienable right.").As to the survival of moral rights after an author's death, modifications to his work that damage the author's reputation could be just as, if not more injurious, because the author no longer can defend the integrity of his work. Kwall, *supra* note 26, at 15–16.

[50] Lipton, *supra* note 20, at 19 nn.133–34.

[51] *Id.*

[52] *Id.*; *see also* Margaret Ann Wilkinson & Natasha Gerolami, *The Author as Agent of Information Policy: The Relationship Between Economic and Moral Rights in Copyright*, 26 GOV'T INFO. Q. 321, 329–30 (2009).

[53] Copyright Act, 17 U.S.C. §§ 101–1332 (2012).

[54] *Id.* at § 102(a).

[55] *Id.* at § 106.

[56] *Id.* at § 106(a).

[57] *Id.* at §§ 106(a), 107, 109–12.

[58] *Id*. at §§ 501-505.

[59] The Lanham Act only protects against misattribution; it does not truly provide a right of attribution or integrity. *See* Hughes, *supra* note 16, at 659; Heymann, *supra* note 2, at 1401.

[60] *See* Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1735 (1984) (arguing that American law has "striking discrepancies, wide gaps, and theoretical conflicts" compared to French law).

[61] Kwall, *supra* note 26, at 2–3. *See generally* Hughes, *supra* note 16, at 659 (discussing the fact that the United States, the biggest producer of copyrighted works, "stubbornly" refused to align with the Berne Convention).

[62] Kwall, *supra* note 26, at 18.

[63] *See generally*, Kwall, *supra* note 26, at 18–33 (detailing the doctrines which American courts rely upon when protecting an artist's moral rights). "Implementation of the moral right doctrine in the United States not only would provide a uniform means of protecting a creator's personal interests, but also would free courts from reliance on legal theories that are not adequate substitutes for the moral right doctrine." *Id*. at 4.

[64] *See generally* Serra v. United States Gen. Servs. Admin., 664 F. Supp. 798 (S.D.N.Y. 1987) (holding that there is no right to prevent relocation of a sculpture within the signed boiler plate contract between artist and third party).

[65] Van Velzen, *supra* note 28, at 640.

[66] *See* U.S. COPYRIGHT OFFICE, *supra* note 1; *see also* U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS (1995), *available at* http://www.copyright.gov/reports/annual/archive/ar-1995.pdf (comparing the moral rights laws of the United States to foreign countries and discussing the ability to waive moral rights in U.S. law).

[67] *See* U.S. COPYRIGHT OFFICE, *supra* note 1; *see also* U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS (1995), *available at* http://www.copyright.gov/reports/annual/archive/ar-1995.pdf.

[68] Kwall, *supra* note 26, at 14.

[69] Kwall, *supra* note 26, at 21–22.

[70] *Id.*

[71] *See infra* notes 118–120 and accompanying text.
[72] *See generally Gilliam v. ABC, Inc.*, 538 F.2d 14 (2d. Cir. 1976).
[73] *Id*. *See also* Kwall, *supra* note 26, at 22 & n.79 (citing cases for the proposition that "injury might take the form of the publication of a mutilated version of the creator's work under the creator's name").
[74] *See* Kwall, *supra* note 26, at 23–24 & 24 n.89 (noting that while the Lanham Act, at §43(a), may afford some of the same protections as the moral rights of attribution and integrity, the Lanham Act and unfair competition laws have "significantly different objectives" than the moral rights doctrine, which means that any moral rights-like protections under the Act or the unfair competition laws is "fortuitous").
[75] *See* Kwall, *supra* note 26, at 21& n.77.
[76] *See* Kwall, *supra* note 26, at 22 (stating that "foreign courts that maintain an inalienable moral right will uphold contractual provisions allowing reasonable alterations of a creator's work in certain contexts, but they will refrain from holding that a creator tacitly has waived his right of integrity by signing an agreement silent on modification rights.").
[77] Kwall, *supra* note 26, at 23–24.
[78] *See generally* Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575 (N.Y. App. Div. 1948), *aff'd*, 87 N.Y.S.2d 430 (N.Y. 1949).
[79] *Id.* at 578–79.
[80] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified as 17 U.S.C. § 106A (2012)).
[81] Tang, *supra* note 15, at 221.
[82] *Id.* at 225. *See also* Lipton, *supra* note 20, at 19 nn.133–34.
[83] Tang, *supra* note 15, at 225.
[84] *See generally* Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523 (1988).
[85] Martin A. Roeder, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 HARV. L. REV. 554, 557 (1940).
[86] Stevens v. National Broadcasting Co., No. 871182, 1966 WL 6436 (Cal. App. Dep't Super. Ct. 1966).
[87] *Id.*
[88] Zemer, *supra* note 21, at 1527, 1527 n.52.
[89] CAL. CIV. CODE § 987 (West Supp. 1983); MASS. GEN. LAWS ch. 231, § 85S; PA. CONS. STAT. § 2104 (2008).
[90] *Id.*
[91] LA. REV. STAT. ANN. § 2155 (1986); ME. REV. STAT. tit. 27, § 303 (1985); N.J. REV. STAT. § 2A:24A-4 (1986); N.Y. ARTS & CULT. AFF. LAW § 14.03.
[92] LA. REV. STAT. ANN. § 2153; ME. REV. STAT. tit. 27, § 303(a); N.J. REV. STAT. § 2A:24A-5; N.Y. ARTS & CULT. AFF. LAW § 14.03.1.
[93] Van Velzen, *supra* note 28, at 665–66.
[94] *See* Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 554 (1940) ("In this country, scant recognition has been given overtly, aside from the copyright law, to the legal problems raised by artistic creativeness. Constant reference must be made to continental jurisprudence where the protection of the artist has been developed to a fine degree." (internal citations omitted)).
[95] Kwall, *supra* note 26, at 91.
[96] Van Velzen, *supra* note 28, at 675–76.
[97] *See* Economides, *supra* note 84 (discussing the economic impact of trademark law).
[98] *See* Economides, *supra* note 84, at 526–27 (arguing that trademarks make it easier for consumers to search for their favorite brand, and serve as an incentive to manufacturers to make better products).
[99]Sydney A. Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 249 (1978); Kwall, *supra* note 26, at 15–16, 69–70; Van Velzen, *supra* note 28, at 675–76.
[100] *See* ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 147–65 (2010) (discussing the shortcomings of VARA and proposing a new moral rights law that balances rights of authors and the interests of the public); NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 215–17 (2008) (arguing for a modified moral rights law for the United States); Wilkinson & Gerolami, *supra* note 52, at 327 (arguing that "inherent reasons [exist] why moral rights protection should be increasingly embraced by nations in the emerging information age."). However, Wilkinson and Gerolami also argue that there is an international trend of "neglecting" moral rights. " Wilkinson & Gerolami, *supra* note 52, at 329.
[101] *See* MAREE SAINSBURY, MORAL RIGHTS AND THEIR APPLICATION IN AUSTRALIA, 76 (2003) (stating that "[p]assing off is a tort intended to prevent economic loss by protecting the property in the goodwill of a business

which is likely to be injured by the misrepresentation made by creating the impression that one person's goods or services are the goods or services of another.").

[102] *Id.*

[103] *See* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 113 (2004) (arguing that the "American view of the implied covenant of good faith and fair dealing is too narrow," especially in comparison to law in other countries).

[104] *Id.*

[105] *Id.*

[106] *Id.* at 113 (internal quotations omitted). *See also id.* at 113 n.30 (stating that, while there was little regulation in China, Korea, and Japan in 2001, in 2003 that had begun to change).

[107] EVA STEINER, FRENCH LAW: A COMPARATIVE APPROACH 315 (2010).

[108] 2010 O.J. (L 102) 3. The phrase *savoir-faire* translates to the word "know-how" in the English translation of the regulation.

[109] *Id. See also* Robert W. Emerson, *Franchise Savoir-Faire: Clueless in America?* (on file with author).

[110] *See generally* Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C.L. REV. 905 (1994) (detailing the many facets of a franchising relationship, including rights and duties concerning trademarks).

[111] *See* Hansmann & Santilli, *supra* note 16, at 105–06 (arguing that an artist has both a pecuniary as well as a reputational interest in their work, and that society has cultural interest in protecting art); Tang, *supra* note 15, at 218 (stating that society has granted artists moral rights over their work).

[112] *See* Hansmann & Santilli, *supra* note 16, at 106 (stating that the loss of a major piece of art could negatively impact an entire community); *see also* Tang, *supra* note 15, at 218 (stating that legislation has been passed to protect art from destruction).

[113] INNOVATIVE CSR: FROM RISK MANAGEMENT TO VALUE CREATION 74 (Céline Louche, Samuel Idowu & Walter Filho, eds.) (2010) (defining reputational externalities as the reputation of one firm being judged by firms that are believed to be comparable in quality; noting, "as a matter of fact, the reputations of many industries have been hurt by the 'sins' of single members").

[114] Stephan Kinsella, *Intellectual Property Rights as Negative Servitudes*, CENTER FOR THE STUDY OF INNOVATIVE FREEDOM, (June 23, 2011), http://c4sif.org/2011/06/intellectual-property-rights-as-negative-servitudes/ (discussing the similarity between intellectual property laws and property law generally, particularly negative easements, which give to the dominant estate the right to deny certain actions of the servient estate on a piece of land).

[115] Roger D. Blair & Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 FRANCHISE L.J. 55 (2006) (discussing the benefits of franchising as opposed to vertically integrated operations, but recognizing that not all can be "smooth sailing" even though the franchisor and franchisee contribute to their mutual success).

[116] 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, 28 (2008) (positing that there is a false narrative about vulnerable franchisees of two franchising "myths" leading to franchise case law decisions and reasoning that "do disservice to franchisors, franchisees, and even the public welfare": first, that–when compared to franchisors–franchisees usually are naïve and unsophisticated and thus in need of special protection from the franchisor's opportunistic conduct; second, that a "gross bargaining disparity" between the larger, more experienced franchisor and the franchisee results in one-sided franchise agreements permitting franchisors to control unfairly the fortunes of franchisees).

[117] Steinberg & Lescatre, *supra* note 103, at 108 ("Franchisors speak of the sophistication of two parties to a commercial business contract, but the evidence belies this, as does the franchisors own marketing strategy.").

[118] *Id.* In point of fact, most franchisees may not have obtained any legal advice or negotiation assistance before they signed a franchise agreement. *See* Robert W. Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether to Hire Counsel*, 51 SAN DIEGO L. REV. (forthcoming 2014) (including a survey of franchisor lawyers).

[119] Steinberg & Lescatre, *supra* note 103, at 108.

[120] *Id. See* Robert W. Emerson, *South African Franchisees as Consumers*, 37 FORDHAM INT'L L. REV. 455 (2014) (comparing the South African consumer protection laws that include franchisees among the protected class (consumers) with the laws in Australia, China, France, and the United States).

[121] John J. LaFalce, U. S. Representative, Address at the Int'l Franchise Ass'n 24th Annual L. Symposium (May 22, 1991), BUSINESS FRANCHISE GUIDE ¶ 9809, *available at* 2009 WL 3955275. *See generally* Robert W. Emerson,

Franchise Contract Interpretation: A Two-Standard Approach, 2013 MICH. ST. L. REV. 641 (2013) (an appendix featuring surveys of franchise contracts from 1971, 1993, and 2013 showing over time a greater tilt towards pro-franchisor contract provisions in almost all facets of franchising).

[122] John J. LaFalce, U. S. Representative, Address at the Int'l Franchise Ass'n 24th Annual L. Symposium (May 22, 1991), BUSINESS FRANCHISE GUIDE ¶ 9809, *available at* 2009 WL 3955275. *See also* Michael E. Chionopoulos, *Franchising in Cyberspace; the Drug Emporium Decision Should Not Tranquilize eCommerce*, JURISNOTES.COM (2001), http://www.jurisnotes.com/IP/articles/franchising.htm.

[123] John J. LaFalce, U. S. Representative, Address at the Int'l Franchise Ass'n 24th Annual L. Symposium (May 22, 1991), BUSINESS FRANCHISE GUIDE ¶ 9809, *available at* 2009 WL 3955275.

[124] Steinberg & Lescatre, *supra* note 103, at 230; Emerson, *supra* note 121. Of the 2013 contracts surveyed by the author, 96% (an increase from 77% in the 1993 contracts) state that the franchisor controls and manages the franchise system's advertising, 63% (just 1% more than the 1993 contracts) affirm that the franchisor outright runs the advertisements, and almost all (99%, up from 94% for the 1993 contracts) dictate that the franchisee must spend on advertising a percentage of gross sales revenue—a median of 2.0% (down from 3.0% in the 1993 contracts). Emerson, *supra* note 121, at 696 app. § F(2)(a)-(c).

[125] Steinberg & Lescatre, *supra* note 103, at 230.

[126] *Id.*

[127] *Id.* at 112-15.

[128] For more on encroachment and territory, *see infra* Parts II, II.B, II.B.2. *See also* DAVID A. BEYER, CONSIDERATIONS IN THE DEVELOPMENT OF A FRANCHISE SYSTEM, (1993) (discussing many advantages and disadvantages of a franchise to the parties).

[129] *See supra* Parts II, II.A, II.A.1; *infra* Parts II.A.1.b., II.B.

[130] Emerson, *supra* note 6.

[131] *Id.*

[132] *Id.*

[133] *See* Emerson, *supra* note 121; Emerson, *supra* note 110.

[134] Steinberg & Lescatre, *supra* note 103, at 174. *But see Arnott v. Am. Oil Co.*, 609 F.2d 873 (8th Cir.1979) (holding franchisor has fiduciary duty to franchisee at termination). Over the years, a number of definitions have been advanced to define the fiduciary status and relationship. *See, e.g.*, *Id.* at 881 (holding that the franchisor owed fiduciary duties to the franchisee); *Id.* at 883 (contending that the treatment of franchisors as fiduciaries would prevent many of the abuses found in, and potential abuses inherent to, most franchising arrangements); BLACK'S LAW DICTIONARY 581, 1402 (9th ed. 2009) (stating that a fiduciary duty is "a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person" and that a fiduciary relationship arises, *inter alia*: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship)BLACK'S LAW DICTIONARY 626 (9th ed. 1990) (noting that the law prohibits fiduciaries from engaging in "business shrewdness, hard bargaining, and astuteness to take advantage" of the dependent party); BLACK'S LAW DICTIONARY 564 (5th ed. 1979) (stating that a fiduciary relation "exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence").

[135] Steinberg & Lescatre, *supra* note 103, at 115.

[136] *Id.* Commentators further note, "[t]he viability of reciprocal altruism as an adaptive behavior in franchising is problematic where the legal environment is tolerant of such practices as misstatements in pre-contractual dealings, encroachment, and price-gouging after the contract is signed and the investment made." Steinberg & Lescatre, *supra* note 103, at 130. *See also* Emerson, *supra* note 121, at 692–93 (Out of 100 franchise agreements reviewed in 2013, 99 included operating manuals and 98 had provisions for the franchisor to alter the manual. Forty-two agreements specified hours of operation, and 97 allowed for franchisor inspections of the premises.)

[137] *Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1223 (3d Cir. 1976).

[138]Thomas J. Chinonis, *Implied Covenant of Good Faith: A Two-Way Street in Franchising*, 11 DEPAUL BUS. L.J. 229, 230 (1998) (discussing how the success of a franchise depends on the "degree of cooperation, integration, and coordination between the parties involved" and addresses the potential for many disputes). *See also* Emerson, *supra* note 121, at 686–701 (listing the concessions made in 100 different franchise agreements and comparing these agreements throughout time).

[139] *See* Simon Board, *Relational Contracts and the Value of Loyalty*, 101 AM. ECON. REV. 3349, 3349 (2011);

Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 929 (1990); *see also* Emerson, *supra* note 121, at 646 n.21.

[140] *See generally* Emerson, *supra* note 121, at 646 (Franchising involves a long-term contractual relationship in which the franchisor grants the franchisee a right to use the franchisor's name and trademark and to sell the franchisor's products or adopt its overall business plan. In exchange for this right, the franchisee must pay the franchisor a royalty and other fees.).

[141] Hadfield, *supra* note 139, at 949–51. *See also* David Hess, *The Iowa Franchise Act: Towards Protecting Reasonable Expectations of Franchisees and Franchisors*, 80 IOWA L. REV. 333, 340 (1995) (discussing problems in the franchise system).

[142] Hadfield, *supra* note 139, at 950.

[143] *Id.*

[144] *Id.* For general information on the economics of franchisor opportunism and sales maximization, *see* ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING 214–18 (2005).

[145] Hadfield, *supra* note 139, at 950.

[146] Hadfield, *supra* note 139, at 950–51. *See also* Steinberg & Lescatre, *supra* note 103, at 108 (discussing the International Franchise Association (IFA) definition of a business format franchise, which includes "the licensing of a protected trademark").

[147] Hadfield, *supra* note 139, at 950–51.

[148] Consider the franchisee operating a unit for which repeat customers are relatively rare compared to other franchisees for the same system—e.g., a fast-food restaurant along an interstate highway. Absent effective franchisor monitoring, the franchisee may be able to shortchange customers with relative impunity. The franchisee thereby reduces its own short-term expenses (thus increase its profits), while the long-term costs of mistreating these customers pass to the system as a whole insofar as the customers generalize about their experience and blame the franchised network, not the undifferentiated individual franchisee.

> A franchisee who reduces the quality of the good or service he offers for a given price might increase his own profits, yet by disappointing buyers' expectations he could reduce by a greater amount the net returns to the common intangible goodwill asset—maintained by the franchisor and used jointly by his other franchisees.

Richard E. Caves & William F. Murphy, *Franchising: Firms, Markets, and Intangible Assets*, 42 S. ECON. J. 572, 577 (1976). *See generally* Victor P. Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91 (1979) (analyzing the free rider problem and discussing relevant cases).

[149] Hadfield, *supra* note 139, at 950–51.

[150] *See id. See generally* Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979) (discussing the actions of a franchisor who saturated franchisees' territories with company-owned outlets).

[151] *See* Emerson, *supra* note 122, at 652 n.60.

[152] Hadfield, *supra* note 139, at 950–51.

[153] *Id.* at 951.

[154] *Id.* at 951–52. *See generally* Steinberg & Lescatre, *supra* note 103 (discussing the various ways in which franchisors use franchisees to gain profits, despite the harm done to the franchisee, as well as remedies to this situation).

[155] Hadfield, *supra* note 139, at 952.

[156] *Id.* Emerson, *supra* note 6 at 367 ("Once the franchisee commits to the franchisor-crafted contract, 'franchisor opportunism' often results in a Hobson's choice for franchisees: acquiescence to, and uneasy dependence upon, the franchisor, or a separation from the franchisor accompanied by relative franchisee indigence").

[157] Hadfield, *supra* note 139, at 952; Emerson, *supra* note 6, at 367 More on issues of alleged opportunism is discussed in these articles: Emerson, *supra* note 6, at 354-55 & 365-68; Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 659 (2013); Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting Debate over Franchise Relationship Laws***,** 76 ALB. L. REV. 193 (2013).

[158] Lanham Act, 15 U.S.C. §§ 1051–1141 (2012).

[159] *Id.* at § 1127.

[160] *Id.* at §§ 1058(a), 1059(a).

[161] *Id.* at § 1064(3).

[162] *Id.*

[163] *Id. at* §§ 1116–1118.

[164] Marisa D. Faunce & Benjamin B. Reed, *What's in A Name? A Lot Trademark and Brand Protection Strategies*

for Franchisors, 19 BUS. L. TODAY 31, 34 (2010).
[165] *Id*. *See generally* Gary R. Duvall, *Using the Web More Effectively*, 24 FRANCHISE L.J. 173 (2005) (discussing how improper use of trademarks can result in a mark becoming generic, depreciation in mark value, and decrease in an owner's judicial resources to protect the mark); David Gurnick, *Intellectual Property in Franchising: A Survey of Today's Domestic Issues*, 20 OKLA. CITY U. L. REV. 347 (1995) (discussing trademark and intellectual property issues in franchising, including post-termination use of the trademark, multi branding, trade dress, trade secrets, and whether to use copyright law).
[166] 15 U.S.C. §1064(3) (2012). *See also* Ong, *supra* note 12 and accompanying text.
[167] Faunce & Reed, *supra* note 164 at 34. *See infra* note 168.
[168] Baskin-Robbins Ice Cream Co. v. D & L Ice Cream Co., Inc., 576 F. Supp. 1055, 1057 (E.D.N.Y. 1983).
[169] *Id*. at 1058–59.
[170] Faunce & Reed, *supra* note 164, at 34.
[171] *Id*. *See also* Duvall, *supra* note 165, at 180 (proposing that the approach to franchise trademark and marketing be centralized).
[172] BUSINESS FRANCHISE GUIDE ¶ 11,150, *available at* 2009 WL 3957032.
[173] *Id.*
[174] Tillack & Ashton, *supra* note 7, at 123.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] BUSINESS FRANCHISE GUIDE, *supra* note 121 ("[The increase in franchise-related lawsuits] illustrate that franchise relationships are becoming less harmonious and more prone to conflict and litigation. Indeed, many franchisees now appear to question whether any type of harmonious relationship was ever intended to exist."). *See* Beck Oil Co., Inc. v. Texaco Ref. & Mktg., Inc., 25 F.3d 559 (7th Cir. 1994) (summarizing Congress' concerns when enacting the Petroleum Marketing Practices Act, including discrimination and exercising "superior bargaining power"); *See also* Brach v. Amoco Oil Co., 677 F.2d 1213, 1216 (7th Cir. 1982) (discussing legislation in the field of petroleum marketing practices designed to strengthen franchisee independence, even bargaining power between the parties, and protect franchisees from "arbitrary or discriminatory" nonrenewal of contracts). Congress has taken a progressive stance on the protection of both petroleum and motor vehicle franchisees, targeting issues that are general to franchise relationships. Reynolds Publishers, Inc. v. Graphics Fin. Grp., Ltd., 938 F. Supp. 256, 265 (D.N.J. 1996) (detailing the legislature's concerns for motor vehicle franchisees when enacting the Franchise Act, such as inequality of bargaining power and its consequences).
[179] Steinberg & Lescatre, *supra* note 103, at 196–97 ("Franchisors are not liable for fraudulent misrepresentation where they promise a prospective franchisee that the franchisor will not encroach the franchisee, since failure 'to make good subsequent conditions which have been assured' or otherwise fulfill 'an agreement to do something at a future time' is breach of contract, not fraud.").
[180] BUSINESS FRANCHISE GUIDE, *supra* note 121, at ¶ 9809.
[181] *Id.*
[182] *Id.*
[183] *See* FED. TRADE COMM'N, ENFORCEMENT OF THE FRANCHISE RULE 3 (2001), *available at* http://www.gao.gov/assets/240/231939.pdf (discussing the results of a study of the enforcement of the federal franchise rules, including the number of investigations opened against franchisors).
[184] *Id.* ("One of the most vital legal debates in the field of franchise law has focused on one central question: whether encroachment—that is, the phenomenon in which the franchisor establishes a new franchise unit in unreasonable proximity to its existing franchisee—should be restricted by law."). *See also* Uri Benoliel, *Criticizing the Economic Analysis of Franchise Encroachment Law*, 75 ALB. L. REV. 205 (2012); Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191 (2010).
[185] *See generally* Hadfield, *supra* note 139.
[186] *See generally id*.
[187] Benoliel, *supra* note 184, at 214–15.
[188] *Id.*
[189] *Id. See also* Steinberg & Lescatre, *supra* note 103, at 182–83 ("Encroachment may be a result of . . . encroachment by one franchisee selling into another franchisee's territory, or by a shrinkage of the product's market due to population shifts or reduction in demand for the product itself. In some cases, a franchisor may even establish a second franchise under a different name to compete head-on with its existing franchisees.).

[190] *See* Steinberg & Lescatre, *supra* note 103, at 187 (discussing *Scheck v. Burger King*, a case in which the franchisee did not bargain for an encroachment clause in the contract and thus argued the implied covenant of good faith and fair dealing).
[191] Benoliel, *supra* note 184, at 207 ("Most large restaurant franchisors had been dragged into a court battle with frustrated franchisees over encroachment.").
[192] *See generally* Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (7th Cir. 1979).
[193] *See generally* Burger King Corp. v. Family Dining, Inc., 566 F.2d 1168 (3d Cir. 1977).
[194] *Id.*
[195] *Id.*
[196] *See generally* Barnes v. Burger King Corp., 932 F. Supp. 1420, 1424 (S.D. Fla. 1996); Carlock v. Pillsbury Co., 719 F. Supp. 791, 812 (D. Minn. 1989) (applying New York law); Patel v. Dunkin' Donuts of America, Inc., 496 N.E.2d 1159, 1161 (Ill. 1986); Super Valu Stores, Inc. v. D-Mart Food Stores, Inc., 431 N.W.2d 721, 723 (Wis. Ct. App. 1988). For more on encroachment, see Emerson, *supra* note 184; Robert W. Emerson, *Franchise Territories: A Community Standard*, 45 WAKE FOREST L. REV. 779 (2010).
[197] Hadfield, *supra* note 139, at 967–68. *See also* Steinberg & Lescatre, *supra* note 103, at 174 (discussing the post-sale relationship between the franchisor and franchisee).
[198] Hadfield, *supra* note 139, at 967–68.
[199] Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc., 806 F.2d 953, 953–61 (10th Cir.1986).
[200] *Id*.
[201] Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451 (1992).
[202] *Id*.
[203] *Id*.
[204] Steinberg & Lescatre, *supra* note 103, at 183.
[205] Yum! Brands, *Our Brands*, YUM.COM, http://www.yum.com/brands/.
[206] *See* DOUGLAS WEST, JOHN FORD & ESSAM IBRAHIM, STRATEGIC MARKETING: CREATING COMPETITIVE ADVANTAGE 369–70 (2d ed. 2012).
[207] Steinberg & Lescatre, *supra* note 103, at 183.
[208] Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.").
[209] *See* Robert W. Emerson, *Franchise Terminations: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates*, 35 AM. BUS. L.J. 559 (1998); Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 CHAP. L. REV. 1, 5 (2009) (arguing that opportunistic termination is bound to occur in a franchise relationship).
[210] *See* Bray v. QFA Royalties LLC, 486 F. Supp. 2d 1237 (D. Colo. 2007) (holding that the franchisee was likely to succeed on the merits of the claim against franchisor, who terminated the franchise agreements for posting the suicide letter of a former franchisee on an Internet website, without investigation or any consideration into franchisee's actions or role in the posting. It constituted a breach of the terms of the franchise agreements, which required the franchisor to use "judgment" in making a termination decision).
[211] Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co., 432 A.2d 48, 53 (N.J. 1981) (discussing the grounds for non-renewal of a franchise contract and citing the New Jersey Act at issue, which states that terminating, canceling, or failing to renew a franchise without good cause is a violation of the act).
[212] *See generally* Bonanza Int'l, Inc. v. Rest. Mgmt. Consultants, Inc., 625 F. Supp. 1431 (E.D. La. 1986) (holding that the franchisor properly terminated the franchise agreement after the franchisee failed to timely pay royalty fees and comply with operational requirements); *see generally* Robert W. Emerson, *Franchise Terminations: "Good Cause" Decoded* (Apr. 12, 2014) (on file with author) (a statistical analysis of approximately 300 cases in which franchise parties disputed whether the franchisor had "good cause" to terminate the franchisee; failure to pay fees was an important, statistically significant ground for "good cause" termination of the franchise).
[213] *See generally* Chia-Hsin (Charles) Huang v. Holiday Inns, Inc., 594 F. Supp. 352 (C.D. Cal. 1984) (denying the franchisee's request for an injunction on termination because the franchisee consistently failed to maintain quality standards); *see also* Emerson, *supra* note 212 (failure to maintain quality standards was an important, statistically significant ground for "good cause" termination of the franchise).
[214] *See* Wisser Co., Inc. v. Mobil Oil Corp., 730 F.2d 54, 56 (2d Cir. 1984) (holding that the hardship to franchisor outweighed harm to franchisee if termination of franchise agreement was enjoined. The court found that the franchisee was not entitled time to cure a breach where termination was for misbranding, and franchisee was buying

from other suppliers and selling under the franchisor's trademark). *See also* Emerson, *supra* note 212 (misbranding of the franchise system's trademark was an important, statistically significant ground for "good cause" termination of the franchise).

[215] Gaylen L. Knack & Ann K. Bloodhart, *Do Franchisors Need to Rechart the Course to Internet Success?*, 20 FRANCHISE L.J. 101 (2001).

[216] *Id.* at 142.

[217] *Id.*

[218] Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1156–57 (1990).

[219] *Id.*

[220] Associating can sometimes be interpreted as a hostile action against the franchisor, resulting in lawsuits under unfair competition and antitrust. *See e.g.*, McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1232–73 (E.D. Mich. 1978) (holding that franchisees did not breach antitrust or unfair competition laws from associating with one another in private).

[221] Tillack & Ashton, *supra* note 7, at 88.

[222] *Id.*

[223] Shell Oil Co. v. Marinello, 307 A.2d 598 (N.J. 1973) (discussing the advent of the Franchise Practices Act in New Jersey).

[224] *See generally* Rudel Mach. Co., Inc. v. Giddings & Lewis, Inc., 68 F. Supp. 2d 118 (D. Conn. 1999) (discussing the goals of the Connecticut Franchise Act).

[225] *Id.* at 124–25.

[226] Tillack & Ashton, *supra* note 7, at 124.

[227] *See* Emerson, *supra* note 6.

[228] *See* Tillack & Ashton, *supra* note 7 (discussing that use of a trademark after termination is largely considered "per se infringement"); *see also* Cardservice Int'l, Inc. v. McGee, 950 F. Supp. 737 (E.D. Va. 1997).

[229] Tillack & Ashton, *supra* note 7, at 125.

[230] *See generally* Coca-Cola N. Am. v. Crawley Juice, Inc., 2011 WL 1882845 (E.D. N.Y. 2011) (holding that New York law for misappropriation of goodwill requires facts proving the wrongful taking of another party's skills, expenditures, or labor); ITC Ltd. v. Punchgini, Inc., 880 N.E.2d 852 (N.Y. 2007) (noting that this wrongful taking of the plaintiff's property or commercial advantage is for the defendant to use in competing against the plaintiff).

[231] W. MICHAEL GARNER, FRANCHISE DISTRIBUTION LAW AND PRACTICE § 7:36 (2013) (citing Girl Scouts of Manitou Council, Inc. v. Girl Scouts of USA, Inc., 646 F.3d 983 (7th Cir. 2011) for the proposition that a franchisor's putting additional franchisees in the territory where a franchisee promoted the franchise brand is misappropriation of goodwill).

[232] GARNER, *supra* note 232, at § 7:44 (discussing statutes in at least twenty-one states protecting mark owners and providing damages or injunctions due to dilution of the mark or of its owner's business reputation).

[233] Lanham Act, 15 U.S.C. §§ 1125, 1051–1141 (2012) (supporting that this unfair competition claim is based on Section 43 of the Lanham Act).

[234] GARNER, *supra* note 232, at § 7:43 (citing 15 U.S.C. §§1125(c) and 1127 and stating that the owner of a "famous" mark can obtain relief against another party whose use of a mark or name, or an unauthorized variant thereof, dilutes the mark's distinctive quality; dilution is all that is needed, as the infringing use need not compete with the plaintiff or even cause a likelihood of confusion or deception).

[235] Tillack & Ashton, *supra* note 7, at 125.

[236] Duvall, *supra* note 165, at 175.

[237] Hale v. Conroy's, Inc., No. 1220022498 (2001).

[238] *Id.*

[239] Franklin 1989 Revocable Family Trust v. H & R Block, Inc., No. 16114005401 (2002).

[240] *Id.*

[241] Armstrong Bus. Serv., Inc. v. H & R Block, Inc., 96 S.W.3d 867, 870 (Mo. Ct. App. 2003).

[242] *Id.*

[243] *Id.*

[244] Duvall, *supra* note 165, at 175–76.

[245] *Id.* at 176.

[246] *Id.* at 175–76.

[247] *Id.*

[248] Knack & Bloodhart, *supra* note 215, at 139-41 ("When the contract permits the franchisee to operate a store or a shop, the franchisor may argue that an e-commerce website is prohibited because it is not a store or a shop, but rather an alternative method of distribution. This argument is bolstered if the franchise agreement expressly reserves to the franchisor the right to pursue alternative distribution channels. . . . Meanwhile, franchisees may attempt to argue that Internet sales are from their stores . . . because their computers are located there. . .").
[249] Judith A. Powell & Lauren Sullins Ralls, *Best Practices for Internet Marketing and Advertising*, 29 FRANCHISE L.J. 231, 236 (2010). Powell and Ralls contend that either "(a) they are dissatisfied with their ability to get sufficient exposure for their location or for particular promotions they are doing from the franchisor's approved channels; or (b) they are disgruntled and are preparing an exit strategy." *Id.* They continue, "[i]n the latter case, the site may well be co-branded, displaying the franchisor name and mark together with an additional name and a catchy descriptor that the franchisee intends to use for competitive business activities." *Id.*
[250] *See generally* W. Michael Garner, *Inside the Drug Emporium Decision*, 20 FRANCHISE L.J. 101 (2001).
[251] *See generally id.*
[252] *Id.* at 147.
[253] *Id.*
[254] *Id.* at 101.
[255] *Id.* at 101. *See generally* Powell & Ralls, *supra* note 249.
[256] Powell & Ralls, *supra* note 249, at 231. *See also* Knack & Bloodhart, *supra* note215, at 141 (finding that a central website marketing location could avoid future brand dilution issues).
[257] Powell & Ralls, *supra* note 249, at 233. Additionally, franchisors must be concerned with the data that is displayed on the franchisee's webpage. Knack and Bloodhart argue that a:

> Franchisor's position should be that it owns the information, since the data are acquired using the goodwill of the franchisor's marks, and the franchisor owns all such goodwill. Some courts do not attribute all goodwill to the franchisor, however, so there remains the possibility that the franchisee will own the data collected by its website.

Knack & Bloodhart, *supra* note 215, at 142.
[258] Knack & Bloodhart, *supra* note 215, at 140.
[259] Powell & Ralls, *supra* note 249, at 233.
[260] *See generally* Alexander G. Tuneski, *Hey, That's My Name! Trademark Usage on the Internet*, 31 FRANCHISE L.J. 203, 203 (2012).
[261] *See* Tiffany v. eBay, 576 F. Supp. 2d 463 (S.D.N.Y. 2008). *But see* Mini Maid Services v. Maid Brigade Systems, Inc., 967 F.2d 1516, 1519-20 (holding that "the law imposes a duty upon [the franchisor] to supervise the [franchisee's] use of the [franchisor's] own trademark, [b]ut [this] duty . . . cannot be blindly converted into a duty to prevent a licensee's misuse of another party's trademark").
[262] *See* Tuneski, *supra* note 260, at 203 ("Franchisors can use social media policies and franchise agreements to control the use of trademarks on the Internet by franchisees.").
[263] This is based on the author's reviewing, in January to February 2014, the websites of 104 restaurant and fast-food franchisors.
[264] *C21 Franchise: Next Steps*, CENTURY 21, http://www.century21.com/careerfranchise/franchise/whatsnext.jsp (last visited May 14, 2014, 8:23 PM).
[265] Powell & Ralls *supra* note 249, at 234–40 (2010) (discussing the benefits of a single website upon termination as well as the need for franchisors to control content on franchisees' sites). *See also* Knack & Bloodhart, *supra* note 215, at 140 (explaining that terminating a website is particularly important because the "consuming public may not recognize that a website pertains to only one store out of an entire system.").
[266] Powell & Ralls, *supra* note 249, at 234.
[267] *Id.*
[268] *Id.*
[269] *Id.* at 234–37.
[270] Knack & Bloodhart, *supra* note 215, at 139.
[271] *Id.*
[272] Steinberg & Lescatre, *supra* note 103, at 239.
[273] *Id.*
[274] Tillack & Ashton, *supra* note 7, at 88.
[275] *See* Lipton, *supra* note 20, at 54–7 & nn.370–83 (discussing commentary about moral rights).
[276] KWALL, *supra* note 100, at 151 (recommending a "broadly defined right of attribution" and a "narrowly tailored

right of integrity").

[277] *See* NETANEL, *supra* note 100, at 217 ("Creative Commons has estimated that, as of February 2005, authors chose licenses requiring attribution some 94 percent of the time and, in contrast, chose licenses prohibiting the making of a derivative work less than one-third of the time."); Lipton, *supra* note 20, at 56–57 (noting that how most American authors are more interested in attribution than integrity).

[278] Rupert M. Barkoff, *Vicarious Liability: A Continuing Enigma*, FRANCHISING BUS. & L. ALERT 1, 7 (2012) (contending that a franchisor's focus should be on protecting the network's brand more than on contracting against or insuring coverage for vicarious liability).

[279] Territorial conflicts typically arise due to this basic difference in motivation:

> [T]he major reason encroachment constitutes a bone of contention between franchisees and franchisors is the simple difference between net profits and gross sales. Franchisees seek to make their individual units as profitable as possible, while franchisors profit from the licensing of the trademark and the collection of royalties across the franchised system. When a market reaches the saturation point, the two goals begin to conflict, with franchisors making money—a percentage of gross franchise revenue—regardless of how profitable the individual franchise was.

Emerson, *supra* note184, at 203–04 (citations omitted).

[280] *See generally* Emerson & Benoliel, *supra* note 157.