

Contents

Foreword	xvii
Preface	xix
Acknowledgments	xxi
Preface to the First Edition	xxiii
Introduction	xxv

CHAPTER 1

Intellectual Property Rights	1
<i>William A. Finkelstein and Sherin Sakr</i>	
1-1. Introduction: Intellectual Property and Franchising	2
1-2. Types of Intellectual Property	3
(a) Trademarks	3
(b) Trade Dress	4
(c) Copyrights	5
(d) Patents	5
(e) Trade Secrets	5
1-3. Setting Up the Intellectual Property Compliance Program	6
(a) Corporate Commitment	6
(b) Identifying Sources of Conflict	7
(c) Intellectual Property Assets Inventory	7
(d) Acquisition of Trademark Portfolios	7
(e) Intellectual Property and Franchise Agreements	8
1-4. Trademarks	8
(a) Creation and Selection	8
(b) Searching and Clearance	9
(c) Perfecting Trademark Rights: Registration	9
(d) Maintenance of Rights	10
(e) International Protection of Trademarks	11
(i) Considerations and Strategy	11
(ii) European Community Trade Mark System	11
(iii) Madrid Protocol	11
1-5. Enforcing Trademark Rights	12
(a) Infringements	12
(b) Opposition and Cancellation Proceedings	12
(c) Cybersquatting	12
(d) Enforcement Strategy	13
(e) Settlement	13
1-6. Copyrights	14
(a) Creation and Work for Hire	14
(b) Registration and Enforcement	14

(c) Notice	15
(d) Term	15
1-7. Conclusion	15
Notes	16
Checklist 1-1: Intellectual Property Assets Inventory	17
Checklist 1-2: Corporate Policies Impacting Trademarks	20
Checklist 1-3: Selection of New Trademarks	21
Checklist 1-4: Prior to Searching New Trademarks	22
Checklist 1-5: Searching and Clearance of New Trademarks	24
Checklist 1-6: Protection and Maintenance of Marks after Clearance and Adoption	26
Checklist 1-7: “Bona Fide Intent” Requirements for U.S. Trademark Applications	28
Checklist 1-8: Trademark Portfolio Management Systems.	30
Checklist 1-9: Trade Dress Protection	31
Checklist 1-10: Policing Trademark Rights.	33
Checklist 1-11: Policing Trademark Rights—Deciding Whether to Litigate and/or Oppose.	35
Checklist 1-12: Preparing for Trademark Enforcement	39
Checklist 1-13: Essential Trademark Provisions in Franchise Agreements	40
Checklist 1-14: Trademark Portfolio Acquisition—Due Diligence	42
Checklist 1-15: International Protection of Trademarks.	44
Form 1-1: Trademark Infringement Report.	47
Form 1-2: Prototype Contested Application Settlement Agreement.	48
Form 1-3: Sample Trademark-Relevant Provisions in a Franchising Agreement.	50
Form 1-4: Sample Provisions—Asset Purchase Agreement.	56
Form 1-5: Sample Provisions—Stock Purchase Agreement.	57
Form 1-6: Blanket Assignment	59
Form 1-7: Independent Contractor/Work for Hire/Assignment Agreement.	60

CHAPTER 2

Franchise Disclosure and Sales Compliance 63

Leslie D. Curran, Mark B. Forseth, and Karen Spencer

2-1. Introduction	65
2-2. Overview of Franchise Registration and Disclosure Laws.	65
2-3. What Is a Franchise?	66
(a) The FTC Definition—The Federal Law	67
(b) State Laws	67
(i) Marketing Plan	68
(ii) Community of Interest	68

(c)	Understanding the Definitional Elements	68
(i)	Payment of a Fee	68
(ii)	Trademark	69
(iii)	The “Control” Element	69
(iv)	Marketing Plan Definition	70
(v)	Community of Interest Definition	71
2-4.	Preparing the FDD	71
(a)	Information Required to Be Disclosed	72
(b)	Compiling the Information for the FDD	86
(c)	Using and Registering the Completed FDD	87
(d)	Capitalization Requirements	89
(e)	Use of a Multistate FDD or Roll-Up FDD	90
(f)	Filing of Franchise Sales Advertising	91
(g)	Effective Dates, Annual Renewal, and Interim Updating	92
(i)	Annual Renewal	92
(ii)	Interim Updating Requirements	93
2-5.	State Law Applicability	95
(a)	Jurisdictional Requirements	95
(b)	Multistate Transactions	97
(c)	Delivery of FDD	97
(d)	Delivery Methods—Electronic Disclosure	98
(e)	Who Must Receive Disclosure	99
(f)	Delivery of Franchise Agreements	100
2-6.	Exemptions and Exclusions from Franchise Laws	100
2-7.	State Business Opportunity Laws	102
2-8.	Document Use, Filing, and Control	103
2-9.	Permissible Representations	104
2-10.	Negotiation with Prospective Franchisees	104
2-11.	Franchise Disclosure Violations	105
(a)	Private Rights of Action	105
(b)	Administrative Liability under State Franchise Laws	106
2-12.	Implementing Sales Compliance Policies	106
(a)	Role of Counsel	107
(b)	Internal Compliance Manual	108
(c)	Sales Compliance Training	108
(d)	Internal Auditing and Monitoring Compliance	110
(e)	Curing Franchise Sales Law Compliance Violations	111
2-13.	Granting the Franchise	114
(a)	Legal Considerations	114
(b)	Business Considerations	115
2-14.	Coordinating Growth Strategies and Compliance for Litigation Avoidance	116
(a)	Traditional and Nontraditional System Expansion	116
(b)	Communication of Expansion Policies with Franchisees	120

2-15. Dispute Resolution Mechanism	121
2-16. Conclusion	123
Notes	123
Exhibit 2-1: Sample Charts and Excerpts from FDD	131
Exhibit 2-2: Excerpts from FDD Questionnaire to Gather Information	144
Exhibit 2-3: Initial FDD Filing Requirements for Registration States	171
Form 2-1: State Franchise Registration Forms	174
Exhibit 2-4: Summary of Provisions That May Not Be Enforceable under State Franchise Sales Laws (and Other Special Requirements).	186
Exhibit 2-5: State Advertising Filing Requirements.	189
Form 2-2: Advertising Tracking Form.	191
Exhibit 2-6: Summary of Expiration Dates and Renewal Filing Dates	192
Exhibit 2-7: Renewal Filing Requirements	195
Exhibit 2-8: Filing Requirements for Amendments	198
Exhibit 2-9: Chart of State Franchise Law Jurisdictional Requirements.	200
Checklist 2-1: Sample Registration Summary Checklist	202
Exhibit 2-10: Compliance Questionnaire	203
Checklist 2-2: Franchise Compliance Checklists	206
Exhibit 2-11: Information and Checklists Prepared by Consultant	209
Exhibit 2-12: Excerpts from McDonald's and Burger King Franchise Agreements	223
Exhibit 2-13: Excerpts from Dunkin' Donuts Store Development Agreement.	226
Exhibit 2-14: Excerpts from Cottman Transmission License Agreement	227
Exhibit 2-15: Excerpts from Motel 6 Franchise Agreement.	228
Exhibit 2-16: List of State Franchise Examiner Websites.	229

CHAPTER 3

Franchise System Operational Issues	231
<i>Brian Cole, Andra Terrell, John Richardson, and Sandra Wall</i>	
3-1. Introduction	233
3-2. Operations Manuals	233
(a) Getting Started	234
(b) Establishing the Basics	235
(c) Developing Standards and Procedures	236
(d) Team Membership	237
(e) Tips on the Creation and Organization of the Manual	238
(f) Distribution of Operations Manual	239
(g) Updating the Manual	240
(h) Monitoring and Enforcement	242
3-3. Advertising	243
(a) Overview	243
(b) Best Practices for National and Local Advertising Funds	246

(c)	Best Practices for Individual Expenditures	246
3-4.	Vicarious Liability	247
(a)	What Is Vicarious Liability?	247
(b)	Sample Cases	251
(i)	Reasonable Reliance	251
(ii)	Conspicuous Identification	253
(c)	Special Cases—Employment and ADA	253
(i)	Vicarious Liability in Employment Matters	254
(ii)	Vicarious Liability and the Americans with Disabilities Act	256
(d)	Practice Tips	258
(i)	The Franchise Agreement	258
(ii)	Disclaim Agency	258
(iii)	Require Conspicuous Franchisee Disclosure of Independent Status	259
(iv)	State Only Standards or Rights the Franchisor Intends to Enforce	259
(v)	Require Indemnification from Franchisee	259
(vi)	Require Insurance	259
3-5.	Direct Liability	260
3-6.	Records Management and Retention	263
(a)	Objectives of a Records Management Program	265
(b)	Design and Administration of a Records Management Program	267
(c)	Records Storage and Retrieval	267
(d)	Paper Records	268
(i)	Records Organization	269
(ii)	File Check-Out	271
(e)	Electronic Records	271
(f)	Protecting and Safeguarding Records	275
(g)	Records Retention	276
(i)	Typological Approach	277
(ii)	Functional Approach	278
(h)	Length of Time to Retain Records	279
(i)	Administering a Records Retention Program	283
(j)	Conclusion	286
3-7.	Purchasing Requirements	288
3-8.	Compliance Programs and Support	290
(a)	Compliance Programs	290
(b)	Franchising Standards	290
(c)	Quality Inspectors	290
(d)	Business Reviews	292
(e)	Avoiding Waiver Claims	293
(f)	Support Models	293

(g) Business Representatives 294
 (h) Cautions Regarding Giving Support 294
 3-9. Audit Program and Techniques 295
 (a) Developing an Audit Program 296
 (b) Mystery Shoppers 297
 (c) Auditing through the P.O.S. System 298
 (d) Purchasing Reviews 298
 (e) Practical Advice 298
 3-10. Conclusion 299
 Notes 299
 Form 3-1: Operations Manual Update 303
 Exhibit 3-1: Sample Completed Operations Manual Update 304
 Checklist 3-1: Records Management Program Checklist 305
 Exhibit 3-2: Sample Records Retention Schedule 308

CHAPTER 4

Franchise Relationship Management 313

Andrew C. Selden and Victoria Blackwell

4-1. Introduction 314
 4-2. Why Good In-System Relationships Matter 314
 (a) Interests of System Participants 314
 (b) Public and Regulatory Perspective 317
 4-3. Role and Responsibilities of Franchise Lawyers 317
 4-4. How to Go About Achieving Good Relationships 318
 (a) Methods of Identifying Common Ground 318
 (b) Methods of Communication 319
 (i) Methods of Communication between Franchisor
 and Franchisees 319
 (ii) Communication among Franchisees 321
 (iii) Methods of Communication with External Audiences 322
 (c) Means of Interaction 323
 (i) Councils and Associations 323
 (ii) Special Function Bodies: Co-ops 324
 (iii) External Trade Associations 326
 (iv) Resources 326
 4-5. ADR/Conflict Resolution 329
 4-6. Conclusion 332
 Notes 333
 Exhibit 4-1: IFA Code of Principles and Standards of Conduct 334
 Form 4-1: Franchise Termination Checklist 337
 Exhibit 4-2: CPR Procedure for Resolution of Franchise Disputes 342

CHAPTER 5

Termination, Nonrenewal, and Transfer. 351

James Goniea and Jeffery Haff

- 5-1. Introduction: The Importance of Establishing and Following an Organized Compliance Program 352
- 5-2. Dispute Resolution—Forms of Dispute Resolution 354
 - (a) Informal Resolution 354
 - (b) Mediation 355
 - (c) Arbitration 355
 - (d) Litigation 356
- 5-3. Termination. 356
 - (a) How Potential Termination Situations Typically Arise. 356
 - (i) Financial Difficulties of the Franchisee 356
 - (ii) Disgruntled Franchisee 357
 - (iii) Operational Problems. 357
 - (b) How to Evaluate Potential Termination Situations 358
 - (c) Contractual Bases for Termination of a Franchise Agreement 359
 - (d) Statutory Restrictions on the Right to Terminate. 363
 - (e) Has the Contract Been Modified? Examination of the Parties’ Course of Dealings and Subsequent Performance 364
 - (f) Analyze All Potential Bases for Claims by the Franchisee 365
- 5-4. Nonrenewal. 367
 - (a) Differences between Nonrenewal and Termination. 367
 - (b) Contractual Framework 368
 - (c) Statutory Restrictions on Nonrenewal 369
 - (d) Additional Legal Considerations. 370
 - (e) Analyze All Bases for Potential Claims by the Franchisee 371
- 5-5. Transfer 372
 - (a) Transfer by the Franchisor. 372
 - (b) Transfer by the Franchisee 372
 - (i) Transfer for the Convenience of Ownership. 372
 - (ii) Transfer as a Work-Out Option 373
 - (iii) Transfer as an Early Exit Option 373
 - (iv) Transfer Due to Changes in the Effective Control of an Entity Franchisee 373
 - (v) Transfer as a Business Strategy 373
 - (vi) Transfer Due to Death or Disability. 374
 - (vii) Transfer Due to Offering by Franchisee 374
 - (viii) Transfer to a Family Member. 374
 - (ix) Transfers Due to Offers by Third Parties. 374
 - (c) Contractual Framework 374
 - (i) Personal Relationships. 374

(ii)	Transfers Defined	375
(iii)	Transfer Subject to Franchisor's Prior Written Consent	375
(iv)	Conditions for Consent	376
(v)	Miscellaneous Provisions	377
(d)	Statutory Restrictions on the Franchisor's Right to Approve or Disapprove a Transfer	378
(e)	Common Law Restrictions on a Franchisor's Approval or Disapproval of a Transfer Request	380
5-6.	Conclusion	381
	Notes	381
	Appendix 5-1: Summary of State Franchise Relationship Laws regarding Termination and Nonrenewal	387
	Checklist 5-1: Default and Termination	400
	Checklist 5-2: Nonrenewal	401
	Checklist 5-3: Transfer	402
	Exhibit 5-1: Sample Mediation Provision	403
	Form 5-1: Notice of Termination for Financial Default	404
	Form 5-2: Notice of Termination for Operational Default	406
	Form 5-3: Notice of Termination	408
	Form 5-4: Voluntary Termination of Franchise Agreement between [Franchisor] and [Franchisee]	410
	Form 5-5: Letter Agreement of Termination	413
	Form 5-6: Reinstatement of Franchise Agreement between [Franchisor] and [Franchisee]	416
	Form 5-7: Transfer and Release Agreement	418
	Form 5-7A: Guaranty and Subordination	421
	Form 5-7B: Scope of Work	423

CHAPTER 6

Mergers and Acquisitions of Franchise Systems 425

Kevin P. Hein and Ted Pearce

6-1.	Introduction to Mergers and Acquisitions	426
6-2.	Identifying the Acquisition Target	426
(a)	The Reasons Sellers Seek to Sell and Purchasers Seek to Purchase Franchise Systems	426
(b)	Identifying a Seller or Purchaser	427
(c)	Evaluating a Franchise System	428
6-3.	Preparing the Confidential Interest Memorandum and Negotiating the Letter of Intent	431
6-4.	Stock versus Asset Acquisition	434
(a)	Stock Acquisition	435
(b)	Asset Acquisition	436
(c)	Tax Issues	436

6-5. Conducting Due Diligence 439

 (a) Franchise Disclosure Documents and Franchise Agreements. 439

 (b) Franchisees in Renewal Pipeline 440

 (c) Trends in Franchise Sales and Unit Counts 440

 (d) Franchise Financing Issues 441

 (e) Supplier Contracts 442

 (f) Leases 442

 (g) Franchisee Satisfaction 443

 (h) Franchisee Litigation 444

 (i) Management of the Advertising Fund 444

 (j) Special Deals Given to Franchisees 444

 (k) Territorial Issues. 445

 (l) Franchisee Associations 446

6-6. Negotiating the Purchase Agreement and the Credit Agreement 446

 (a) The Purchase Agreement. 446

 (b) The Credit Agreement 447

6-7. Ongoing Operations during Sale Process 448

 (a) Effect on the Franchise Sales Process. 448

 (b) Preservation of Filing Exemptions 449

 (c) Notifying Existing and Prospective Franchisees 450

 (d) Managing the System after the Transaction 452

6-8. Posttransaction Legal Issues 452

6-9. Conclusion 453

Notes 453

Exhibit 6-1: Sample Letter of Intent 455

Checklist 6-1: Sample Due Diligence Checklist 460

Checklist 6-2: Sample Closing Checklist 470

CHAPTER 7

International Franchising 473

Alison C. McElroy and Robert A. Lauer

7-1. Introduction 475

7-2. Initial Considerations for International Expansion 475

 (a) Protection of Intellectual Property 475

 (b) Internal Organizational Structuring and Personnel 475

 (c) Supply Chain Considerations 476

 (d) Potential Agreement Structures 477

 (i) Direct Unit Franchises 477

 (ii) Multiple Unit or Area Development Franchise 477

 (iii) Master Franchise 478

 (iv) Area Representative 479

 (v) Joint Venture. 479

 (e) Market Analysis Considerations 479

(f)	General International Business Considerations	480
(i)	FCPA	480
(ii)	OFAC/Sanctions/Antiterrorism/SDN List.	481
(iii)	Export Controls.	481
(iv)	Antiboycott.	482
(g)	Role of Consultants and In-House, Outside, and Foreign Counsel	483
7-3.	International Disclosure and Registration.	483
(a)	International Disclosure Laws.	483
(b)	International Disclosure Format and Substantive Requirements	484
(i)	Mandatory Disclosure Formats	485
(ii)	Mandatory Local Language Requirements	486
(iii)	Mandatory Franchisor Director/Officer Certifications	486
(c)	International Registrations and Filings.	487
(i)	Franchisor Filings	487
(ii)	Offering Filings.	487
(iii)	Intellectual Property License Filings	488
(iv)	Foreign Investment Filings	489
(d)	International Sales Issues	490
(i)	Earnings Claims	490
(ii)	Operating Information	491
7-4.	International Relationship Laws	492
(a)	Existence and Scope of Franchise Relationship Laws and Regulations	492
(i)	Restrictions on Termination, Transfer, and Renewal	492
(ii)	Mandatory Choice of Law and Forum	494
(iii)	Statutory Limitations on Contractual Terms and Conditions	494
(iv)	Mandatory Franchisor Experience or Franchisee Safeguard Requirements	495
(v)	Good Faith Requirement	496
(b)	Agency Laws	496
(i)	Mandatory Filings and Coverage.	496
(ii)	Avoiding Filings and Coverage	497
(c)	Government or Trade Association Policies.	497
7-5.	Selected Continuing Legal and Operational Considerations	498
(a)	Privacy and Data Protection Issues.	498
(b)	Tax and Currency Issues	499
(c)	Language and Translation Issues.	500
(d)	Religious and Cultural Issues	500
(e)	Local Ownership and Real Estate Issues	502
(f)	Competition Law Issues.	503
7-6.	International Dispute Resolution.	504
(a)	Governing Law	504

(b) Forum and Enforcement of Court Judgments	505
(c) Arbitration and Enforcement of Awards	505
(d) Enforcement Tools and Practices	505
(i) Letter of Credit and Bank Guaranties	506
(ii) Nonexclusivity or Territorial Alteration Rights	506
(iii) Auditing	506
(iv) Workouts	506
7-7. Conclusion	507
Notes	507
Exhibit 7-1: Sample Project Plan for Evaluating and Launching an International Franchising Effort	511
Exhibit 7-2: Sample International Franchise Agreement Provisions	519
Exhibit 7-3: Sample Development Schedule	523
Checklist 7-1: Checklist of Terms for Master Franchise Agreement	524
Exhibit 7-4: Resources for U.S. Companies Expanding Abroad (including Key Government Websites)	525
Exhibit 7-5: Sample International Franchise Application and Compliance Provisions	526
Exhibit 7-6: Sample International Letter of Intent	539
Checklist 7-2: Sample Closing and Organizational Checklists	550
Exhibit 7-7: Sample Irrevocable Letter of Credit	554
Table of Cases	557
Index	563
About the Editor	579
About the Authors	581

<http://www.pbookshop.com>