

Chapter 1 : FLA Singapore | Fundamentals of Franchise Management

Fundamentals of International Franchising, Second Edition Fundamentals of International Franchising, Second Edition This practical guide provides a framework for counsel advising franchisors on the domestic front as they move into the international arena.

Advertising fees Bookkeeping charges Purchase price for sales kits, brochures, programs, fixtures, equipment, display cases, tools, supplies, linens, utensils, and other necessary or desirable goods Providing Locations or Accounts and Other Business Opportunity Law Elements. Some things that frequently trigger inadvertent coverage under business opportunity or seller assisted marketing plan laws include: The Federal Trade Commission and 16 states including Florida regulate the offer and sale of franchises in much the way that sales of securities are regulated. Although these statutes are described as merely disclosure and review statutes, in practice they have come to regulate some of the substantive terms of the agreement between licensor and licensee. These state statutes prohibit the offer or sale of a franchise without registration or, in some cases, notice filing with the applicable state regulatory authority. Similarly, 25 states regulate the offer and sale of business opportunities without advance filing of a disclosure document with the state and delivery of that document to the offeror a number of days in advance of the execution of an agreement or payment of any money. These statutes also commonly require posting of a bond. Statutory remedies include rescission rights, civil damages, regulatory cease and desist orders, fines, and other penalties. Franchisors should seek to use a strong mark that will enable the acquisition of a great deal of good will, in association with the mark, over time. Trademarks are generally divided into two types of strong marks. Fanciful marks are made-up words, or meaningless symbols or logos. Exxon and Xerox are fanciful marks. These are words that have meaning, but the marks are not used relative to that meaning. Arbitrary marks may suffer if there are many uses of them for different products or services. Mustang is an example of an arbitrary mark that is widely used. Over time, consumers will associate quality and value with these marks and they are therefore said to have acquired good will.. There is one weak type of trademark that may serve as a mark, but it will never be as strong as the first two categories. These are called suggestive marks. Suggestive marks are legally distinctive but they will never acquire the strength that the stronger categories will. These are merely descriptive of the product or service offered. Finally, generic words, including slang words, may never serve as trademarks. Although trademarks can acquire legal protection under common law, franchisors should acquire federal registration of their marks with the United States Patent and Trademark Office PTO. This will provide the best type of protection for the marks and may exempt coverage under certain business opportunity laws. The franchisor should select three marks from the fanciful or arbitrary categories. The first mark selected should then be subjected to a trademark search. The search should examine federal, state, Internet domain names and business listings. No search is exhaustive. However, the search will indicate whether registration makes sense. If the search is positively indicative, the franchisor can apply for registration on the principal register for trademarks with either an intent to use application, which requires subsequent filing of proof of actual use, or an actual use application if the mark has already been used in interstate commerce. None of these uses can be mere token uses for the purpose of registration, however. Once registration has been accomplished, the trademark owner must use the trademark in a manner to show that it is being treated as a trademark, the indication of the quality of the goods and services associated with the mark originating from a particular source, the owner. The mark should be used only as registered. The mark should be bolded and thus differentiated from the surrounding text. TM or SM should be used prior to registration. The mark should always be used in text as an adjective, never as a noun. The mark, if plural, should never be used as a singular and vice versa. The owner is responsible to police the mark and to act against infringements. Therefore, the owner should hire a trademark watching service to police the mark. The penalty for creating trademark licenses without sufficient quality control provisions is abandonment of the trademark. The burden of proof is on the party challenging the license. The design of a location and its signage also contribute to the trade dress of the services sold by the business. A franchisor perfects exclusive rights to its trade dress in so far as the

total image portrayed is capable of associating its products and services as originating from a specific source. Distinctive trade dress is protectable under Sec. This protection is based on principles similar to those applicable to trademarks and service marks. Secondary meaning is an association, which grows over time, in the minds of the consumers with a particular trademark or image despite the fact that that trademark is merely descriptive. The state laws are usually based upon the uniform act quoted above and the state common law. Some things that have been found to be trade secrets include the following: Trade secrets are usually subject to fact driven analysis under state law. However, there is also a new federal trade secret law. This legislation became effective in October of and is called the Economic Espionage Act of Its primary purpose is to provide criminal sanctions against the theft of trade secrets as part of espionage activities. However, it does have prohibitions against the theft in relation to trade secrets in interstate commerce. Enforcement is by the U. This act has been used in the business context. The author or her designee generally has the exclusive right to: Reproduce the copyrighted work in copies or phonorecords, ii. Prepare Derivative Works based upon the copyrighted work, iii. Distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending, iv. Perform the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, and v. Display the copyrighted work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work. See First Sale Topic Below. Copyright protection subsists from the time the work is created in a fixed tangible form. Therefore, a graphic created in some application software is protected as soon as it is printed or the file is saved to a floppy disk or hard drive. Similarly, copyright subsists in a newsletter or manual when it is printed or saved in the computer or on a disk. Copyright does not cover an idea. Public policy compels that ideas should not be locked up under copyright protection. Ideas are rather to remain the property of everyone. Copyright does, however, apply to the expression of an idea. This distinction between an idea and its expression, although easy to conceive, has proved difficult to apply. Generally, copyright may not be obtained in any work, which is not fixed in a tangible form of expression such as an improvisational speech which has not been written or recorded. In addition, copyright does not apply to titles, names, short phrases, and slogans, familiar symbols or designs, mere variations of typographic ornamentation, lettering, coloring or mere listings of ingredients or contents. Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices are not copyrightable, as distinguished from a description, explanation, or illustration. Works consisting only of information that is common property and containing no original authorship; such as, standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources, are also not copyrightable. The Public Domain is the accumulation of all works which for one reason or another are not protected by copyright. This includes all works which are: Subject to a copyright which has been lost or which has expired, iii. Authored by the federal government, and iv. Specifically granted to the public domain. The First Sale Doctrine prevents an owner of copyright in a work from controlling subsequent transfers of copies of that work. The Copyright Act states: Notwithstanding the provisions of section 3 [which grants copyright owners the exclusive right to distribute copies or phonorecords of a work], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord. The first sale doctrine does not allow transmission of a work, through the internet for example, because a transmission would necessarily also involve a reproduction of the work and that is not exempted by the foregoing Section These may not be rented, leased or lent for direct or indirect commercial advantage. Prior to , the copyright notice was required. Under the current Copyright Act the copyright notice is not required; however, it is strongly recommended. This defense can be countered by applying copyright notices to all copyrightable works. The notice may be affixed in a number of different locations and methods. Computer software for example may display the notice on the disk, on the screen, in the source code, in a pop up screen and on the printouts. The recommended form of notice for literary works is as follows: Registration provides prima facie evidence of validity and ownership if filed within five years of the first publication. An owner can

not sue to enforce copyrights until registration has occurred. In addition, registration makes statutory damages available for infringements that take place after registration. This can be particularly beneficial in the event that actual damages are small or difficult to prove. Statutory damages may be elected in lieu of actual damages at any time prior to final judgement. The Copyright Act also provides for injunctions, impoundments and destruction of copies as possible remedies. Registration may be done at any time during the life of the copyright. It is best to register the work within three months of the first publication. There are several different filing forms depending on what type of work is to be registered. Both franchise manuals and software programs may be registered with the copyright office under a procedure that protects trade secrets.

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