Franchisors in a Jam: Vicarious Liability and Spreading the Blame

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Franchising serves as one of the most popular forms of owning and operating a business. As the franchise model has grown, so too have issues in vicarious liability. Over the years, multiple methods of allocating the blame to franchisors have developed, such as through statutory construction or the emergence of vicarious liability in the common law. With legal classification and the level of control of the utmost importance, franchisors tread lightly in establishing oversight procedures that do not cross over into control of day-to-day operations.

Traditional tests for vicarious liability assess the level of control a franchisor may exercise over a franchisee and whether the entity benefitted from the actions that caused the harm. Other approaches have potentially expanded vicarious liability beyond the agency context. While franchisors try to disclaim their liability, efforts have emerged to hold trademark owners liable for the unfettered use of their marks by a franchisee or licensee. It is a trend tending to favor the injured customer who, after all, seldom knows the difference between franchisor and franchisee. Further, as online presence and sales both increase, so too does the risk of social media and website-based contractual or tort obligations and of deep linking liability within franchise networks.

Consumer surveys about the meaning of licensed trademarks, especially in franchising, and a review of 250 franchisor websites—both undertaken for this article—reveal practical and systemic problems as well as a way forward. Part of the way is through private action, individually or in groups, as consumers must advocate for themselves while also calling for greater oversight from the states or the FTC. Improved supervision of franchisors, such as monitoring their websites and trademarks, can protect consumers and incentivize franchisor behavior. Also, progress can be systemic. With a clearer legal landscape as to vicarious liability, society generally and franchisors particularly can ensure that franchisees meet acceptable business practices and that potential or actual customers of the franchisee are protected from legally flawed and factually dubious interpretations of agency-based responsibility.

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I. INTRODUCTION 573
A. A Roadmap for the Article 573
B. Franchising: Background and Legal Definitions 573
C. Franchise Legislation: A Way Forward? 577
II. TRADEMARKS 580
A. Trademarks and Agency 580
1. Dealing with Problematic Franchisees 587
2. Joint and Several Liability for Licensees and the Licensor 592
3. Social Insurance: Balancing Consumer Expectations 593
4. "Strict" Franchisor Liability 596
B. Disclaimers 600
1. Expectations From Franchisee Display of the Franchisor's Trademarks 600
2. Meeting Standards in Order to Issue a Disclaimer or Otherwise Avoid Liability 603
3. A Presumption of Non-Liability 605
4. The Apparent Manufacturer Doctrine 607
5. Trademark-Based Liability and Disclaimers 609
III. TECHNOLOGY IN FRANCHISE LAW 611
A. Website and Social Media Usage 611
B. Deep Linking 614
IV. PROPOSALS AND CONCLUSION 621
APPENDIX 623
Public Survey – Franchising and Trademarks 623
Website Survey – Franchising and Trademarks 625

I. INTRODUCTION

A. A Roadmap for the Article

For franchised businesses, developments in trademark usage and technology have created new methods to allocate blame. Franchising has grown, and so too have the battles about imposing vicarious liability on franchisors for the actions or inaction of their franchisees.

Part I of this Article progresses through the various statutory and common law approaches to defining a franchise and the grounds for imposing liability. It considers legislation as a means to reform the law and empower franchise parties seeking to foster better standards and practices. Part II delves deeper into some fundamental vicarious liability issues in franchise law, focusing on complications that arise when franchisors authorize a franchisee to use its marks and identify itself to customers. Trademark-based liability may better serve the public by placing the burden on the franchisor, which has historically had more power in the franchise relationship. The use of disclaimers may absolve some liability, but, as indicated by a survey conducted for this Article, many customers remain unaware of the differences between a franchisor and a franchisee, especially when they use the same trademark. Since the franchisor has a unique interest in protecting its brand, state and FTC regulations can incentivize consumer protections before an injury occurs.

Part III further develops the distinct issues of website, social media use, and deep linking, all of which have become increasingly prevalent as franchise networks are entirely hidden from the public. Websites can be connected with the click of a link, sending the customers to another website without realizing that they ever left the first site. The main website may have some sort of control or a common theme that induces customers to believe they are still dealing with the same entity, regardless of a party's actual status (whether franchisor or franchisee). Injuries could be blamed on distributors and resellers who deep-link to a manufacturer or seller of products. The injured customers may be positioned to impose liability on the principal as well as the agent under the agency theory of apparent authority, modified to the deep linking context. The author believes that there should be an affirmative duty, enforced by the state or the FTC, to monitor information on the internet and what is placed on a franchisor's site. That will lead to a reduction in consumer injuries and a concomitant diminution in franchisor liability for a franchisee's actions.

B. Franchising: Background and Legal Definitions

Even with the economic tailspin precipitated by COVID-19, franchising remains a popular form of doing business. In the United States, franchised businesses have long accounted for at least one-third of all retail sales.[1] The pandemic has compelled the closure

1. The 33% to 40% range has long been considered franchising's rough percentage of the total retail economy. ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING 26–27 n.28 (2005). For earlier statistics, see LAVERNE L. LUDDEN, FRANCHISE OPPORTUNITIES HANDBOOK (1995); Robert W. Emerson, *Franchising Covenants Against Competition*, 80 IOWA L. REV. 1049, 1050–51 n.4 (1995) (citing numerous sources concerning the rapid growth of franchising in both the 1980s and the early 1990s); *Fun Franchise Facts*, FRANCHISE GUARDIAN, https://franchiseguardian.com/franchise-guardian-strategy/whats-

of about 4% of all franchised units,[2] bringing total units down to about 750,000.[3] However, it is expected that an economic recovery will lead to a percentage rise in the number of franchises far exceeding any percentage increase in employment at the franchised locations.[4] Furthermore, with well over 3,200 different franchisors in 225 or more distinct business categories,[5] franchising, directly and indirectly, accounts for at least 16.1 million private jobs in the United States.[6] This pervasiveness stems in part from the relatively inexact definition of a franchise, which requires only three main elements: substantial association with a trademark, ongoing fee payments by the franchisee, and—depending on the jurisdiction—some form of community of interest or a prescribed marketing plan from the franchisor.[7]

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franchising/ [https://perma.cc/S9HQ-ZV9J] (last visited Feb. 7, 2022) (franchising accounts for 40% of all retail sales).

2. FRANDATA, INC., SIX-MONTH COVID-19 IMPACT ANALYSIS ON FRANCHISING MARKET 3–4 (2020), https://www.franchise.org/sites/default/files/2020-09/Six-Month%20COVID%20Impact%20on%20Franchising.pdf [https://perma.cc/HX99-FGWC].

3. *Id.*

4. *See* H. Lee Murphy, *Franchise Industry Sees a Spring Thaw Ahead*, CRAIN'S CHI. BUS. (Jan. 25, 2021), https://www.chicagobusiness.com/private-intelligence/franchise-industry-sees-spring-thaw-ahead [https://perma.cc/238T-5EAL] (noting that, as stated by Stephen Worley of the International Franchise Association, in past recoveries from recessions, "franchises recovered at a faster rate than non-franchised small businesses" and that, in effect, 2021 is predicted to follow that pattern; concluding that economic conditions (e.g., a sluggish job market, substantial equity in homes and retirement accounts) are especially favorable for persons choosing to invest in a franchise rather than trying to replace their lost middle-income jobs). Worley's prediction appears to have proven accurate. *See* INT'L FRANCHISE ASS'N, 2022 FRANCHISING ECONOMIC OUTLOOK 1-2 (2022), *available at* https://www.franchise.org/sites/default/files/2022-02/2022%20Franchising%20Economic%20Outlook.pdf [https://perma.cc/R8GJ-6ENE] ("[I]n 2021 total output generated by franchised establishments improved significantly by 16.3%, [and] estimated nominal GDP growth contributed by franchising reached an all-time high of 6.2% in 2021," while overall "GDP grew at an annualized rate of 5.7% in 2021"). *See also* FRANDATA, *supra* note 2, at 8 ("[A] large percentage of unemployed workers [are] choosing to invest in franchises. With continuous efforts in developing the system and strengthening the support that franchisees receive in order to survive the crisis and minimize risks, the franchising market is expected to experience a steady and stronger recovery from the pandemic.").

5. *See, e.g.*, Eddy Goldberg, *The Basics of Franchising*, FRANCHISING.COM, https://www.franchising.com/guides/what_is_franchising_the_basics.html [https://perma.cc/7QVA-ZM3Q] ("[A]bout 3,400 established franchise brands operate in 29 industry sectors spread across more than 225 subsectors"); *Franchises A-Z*, FRANCHISING.COM, https://www.franchising.com/franchises/ [https://perma.cc/U6ME-RCR9] (listing 3,346 distinct franchise systems); PRICEWATERHOUSECOOPERS, THE ECONOMIC IMPACT OF FRANCHISED BUSINESSES: VOLUME IV E-1 (2016), https://www.franchise.org/franchise-information/franchise-economy/the-economic-impact-of-franchised-businesses-volume-iv-2016 [https://perma.cc/37KF-WFWS] (referring to 300 franchising business sectors).

6. PRICEWATERHOUSECOOPERS, *supra* note 5. Some estimates are higher. *See* Matthew Haller & Jenna Weisbord, *Franchise Businesses Produce Significant Impact on U.S. Economy*, INT'L FRANCHISE ASS'N, https://www.franchisefoundation.org/new-economic-impact-study-shows-franchise-businesses-produce-significant-impact-us-economy (last visited Apr. 2, 2022) [https://perma.cc/LW2W-BDJF] (putting the figure at over 7.6 million directly employed persons and another 13.2 million jobs indirectly related to franchising); PRICEWATERHOUSECOOPERS, *supra* note 5 (estimating the total jobs derived directly from franchising at nearly nine million).

7. *E.g.*, Safe Step Walk-In Tub Co. v. CKH Indus., Inc., 242 F. Supp. 3d 245, 260 n.12 (S.D.N.Y. 2017) ("[I]n New York, a franchise will be found where there is a franchise fee *plus* a marketing plan *or* a license . . . ."); *see also* Susan A. Grueneberg & Jonathan C. Solish, *Franchising 101: Key Issues in the Law of Franchising*, BUS. L. TODAY, Mar.–Apr. 2010, at 12 (noting the existence of a third standard, besides community of interest or a marketing plan, by the FTC—the franchisor's exercising significant "control over the putative franchisee's

The first requirement, "substantial association," pertains to the heart of franchising: the franchisee's use of a well-known or famous trademark.[8] The trademark allows the franchisee to tap into the reputation associated with the mark or name and develop the business without having to start from scratch.[9] Additionally, the franchise agreement is nothing more than a contract, with the trademark serving as a major part of the consideration. The franchisor receives the benefit of expanding the trademark's recognition without having to invest her own money into the development.[10]

The second requirement, ongoing fee payments, pertains to the royalties and initial fees a franchisee pays to the franchisor in exchange for using the trademark.[11] The category may be expanded to include any necessary fee for the right to operate the franchise.[12]

The third requirement in the definition of a franchise generally consists of three possible standards: (1) the franchisor provides material and opportunity to promote the franchise (a marketing plan); or (2) the franchisees and their franchisor have a "community of interest"; or (3) the franchisor wields control over its franchisees (the FTC standard for purposes of its disclosure requirement, also useful in states with no state franchise statute).

Unfortunately, whether a marketing plan is present is subjective[13] and contributes to the ambiguity of whether a true franchise exists. Common factors among the jurisdictions include the contract itself, the parties' course of dealing, and industry customs.[14] Some states, such as California, allow the marketing factor to be satisfied by granting exclusive territories, requiring supplier approval, imposing uniform requirements, and other actions to ensure consistency among its franchisees.[15]

The states that do not mandate a marketing plan instead require a community of interest. This community standard considers how long the parties have been involved with each other, the nature and extent of their obligations, the relative amount of time and revenue attributable to franchisees' selling of the franchisor's products or services, and the percentage of revenues received from licensors' products or services, among other concerns.[16]

Proving a community of interest necessitates an inquiry into how much financial dependence exists between the two parties. Overall, this community of interest requirement

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method of . . . operation"); *see also* 16 C.F.R. § 436.1(h) (2007) (defining "franchise").

8. Grueneberg & Solish, *supra* note 7, at 11.

9. ROBERT W. EMERSON, BUSINESS LAW 348 (6th ed. 2015). Note that goodwill is also an aspect of the community of interest factor. *See* 62B AM. JUR. 2D *Private Franchise Contracts* § 14 (2022) ("Facets which a court should examine to determine whether . . . there is a community of interest include . . . good will of the alleged franchise.").

10. J. Thomas McCarthy, *Trademark Franchising and Antitrust: The Trouble with Tie-ins*, 58 CALIF. L. REV. 1085, 1087 (1970).

11. LISA C. THOMPSON & BRENT A. OLSON, 9A ARIZONA PRACTICE SERIES: BUSINESS LAW DESKBOOK § 21:11 (2017–2018 ed.).

12. Grueneberg & Solish, *supra* note 7, at 11.

13. Rochelle B. Spandorf, *Franchise Player*, L.A. LAW., at 34, 37 (Dec. 2006).

14. *Id.* at 38; *see* 62B AM. JUR. 2D *Private Franchise Contracts* § 7 (2020) (listing the factors an alleged franchisor should show to prove the existence of a marketing plan); *see e.g.*, Mrs. Fields Brands, Inc. v. Interbake Foods LLC, No. 12201, 2017 WL 2729860, at *31–33 (Del. Ch. June 26, 2017) (finding that Ms. Fields did not materially breach the terms of a franchise licensing agreement for failing to engage in marketing efforts to support its brand after analyzing the parties "past practice[s].").

15. BRENT A. OLSON, 20A1 MINNESOTA PRACTICE SERIES: BUSINESS LAW DESKBOOK § 21:65 (2017).

16. Grueneberg & Solish, *supra* note 7, at 12.

relates to the final requirement imposed by the FTC, the control requirement.[17] One state that requires the community of interest is New Jersey.[18] The Supreme Court of New Jersey stated

> [C]ommunity of interest exists when the terms of the agreement between the parties or the nature of the franchise business requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skills that will be of minimal utility outside the franchise.[19]

In a more articulate manner, the requirements to find a community of interest are that (1) the distributor's investments must have been substantial, franchise-specific investments, and (2) the distributor must have been required to make these investments by the parties' agreement or the nature of the business.[20] Other courts focus on how the franchisor benefits from the franchisee's marketing and how the franchisee benefits from the franchisor's marketing.[21] Indeed, these community of interest issues between franchisors and franchisees often pertain to goodwill. In *Beilowitz v. General Motors Company*,[22] for example, the court examined the parties' circumstances to determine whether a community of interest existed between the franchisor and franchisee.[23] The standard the court implemented was "the reputation and goodwill of the network, created . . . by the efforts of each . . . individual franchisee [that] passes back to the franchisor without compensation to the franchisee."[24] The franchisee sponsored local events, prominently displayed the franchisor's intellectual property, hosted automotive clinics, and provided excellent customer service.[25] The court also considered monetary investments into inventory and the physical premises.[26] Based on the monetary investments and goodwill development, the court found that there was a community of interest between the franchisor and franchisee.[27]

The final possible standard, provided in the Code of Federal Regulations, is that the

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17. *See id.* at 6–9 (establishing the relationship between the community of interest requirement and the control requirement).

18. N.J. STAT. ANN. § 56:10-3a (West 2010). Other states with the community of interest standards include Hawaii, Minnesota, Mississippi, Missouri, Nebraska, and Wisconsin. *See, e.g.*, HAW. REV. STAT. § 482E-2 (2019); MINN. STAT. § 80C.01 subdiv. 4(a) (2019); MISS. CODE ANN. § 75-24-51(6) (West 2019); MO. REV. STAT. § 407.400(1) (2019); NEB. REV. STAT. § 87-402(1) (2019); WIS. STAT. § 135.02(3)(a) (2019) (applying to dealerships, not franchisees, which have a separate statute).

19. Instructional Sys., Inc. v. Comput. Curriculum Corp., 614 A.2d 124, 142 (N.J. 1992) (quoting Cassidy Podell Lynch, Inc. v. SnyderGeneral Corp., 944 F.2d 1131, 1143 (3d Cir. 1991)); *see also* C.N. Wood Co. v. Labrie Env't Grp., 948 F. Supp. 2d 81, 85 (D. Mass. 2013) (discussing community of interest in the automobile industry).

20. Engines, Inc. v. MAN Engines & Components, Inc., No. 10-277, 2010 WL 3021871, at *6 (D.N.J. July 29, 2010); Atl. City Coin & Slot Serv. Co. v. IGT, 14 F. Supp. 2d 644, 659 (D.N.J. 1998).

21. 62B AM. JUR. 2d *Private Franchise Contracts* § 11 (2018).

22. Beilowitz v. Gen. Motors Co., 233 F. Supp. 2d 631 (D.N.J. 2002).

23. *Id.* at 639.

24. *Id.* (citations omitted) (stating that franchise-specific investments can include intangible assets such as goodwill).

25. *Id.*

26. *Beilowitz*, 233 F. Supp. 2d, at 639.

27. *Id.* at 641 (noting that while investments are usually tangible in the franchise context, such as building specifications and special equipment, they can also include intangible assets, such as goodwill and operating under the franchisor's name).

franchisor must "exert a significant degree of control over the franchisee's method of operation."[28] But what defines a "significant degree of control" remains unclear and often varies between jurisdictions.[29] However, a franchisor's demand for adherence to a large number of standards, policies, and manuals may be sufficient to demonstrate a significant degree of control.[30] Additionally, the franchisor's right to inspect and audit the franchisee's accounts, books, records, and tax returns at any reasonable time may also be sufficient to demonstrate a significant degree of control.[31]

An example of additional factors may be found in *Safe Step Walk-In Tub Company v. CKH Industries, Incorporated.*[32] In this case, the parties contracted that there was no franchise relationship.[33] Nonetheless, the court had to determine whether a franchise relationship, in fact, existed.[34] The "franchisee" was able to use the intellectual property, and the "franchisor" was able to force the franchisee to alter its business model, set the franchisee's minimum sales requirements, assist in the franchisee's marketing plan, terminate the agreement for failure to complete mandatory training or not providing monthly financial documents, and prevent the franchisee from selling any competitor's products.[35] Based on the aforementioned factors, the court found that the necessary significant degree of control was present.[36]

C. Franchise Legislation: A Way Forward?

Other business models do exist for the owner of a trademark. A business that chooses not to franchise may instead enter into a licensing agreement to expand its company. Businesses that enter into licensing agreements exert almost no control over the licensee.[37] While franchisors exercise varying degrees of control over the franchisee's business model

28. 16 C.F.R. § 436.1(h) (2007).

29. *Compare* Estate of Miller v. Thrifty Rent-A-Car Sys., Inc., 637 F. Supp. 2d 1029, 1040 (M.D. Fla. 2009) (noting that the franchisor maintained control over the franchisee for the purpose of uniformity and standardization between the franchises), *with* Stuart M. Kreindler, *Franchisor Liability for Franchisee Actions*, BAKER DONELSON (Sept. 19, 2011), https://www.lexology.com/library/detail.aspx?g=74665ac1-1749-4174-8f9d-558b91a609a4 [https://perma.cc/MJZ9-2PUB] (stating that some franchisors regulate their franchisees' day to day operations).

30. J.K.P. Foods, Inc. v. McDonald's Corp., 420 F. Supp. 2d 966, 972 (E.D. Ark. 2006).

31. *Id.* at 973; *see* Juarez v. Jani-King of Cal., Inc., No. 09-3495, 2012 WL 177564, at *4–5 (N.D. Cal. Jan. 23, 2012) (holding that when a franchisee had the power to hire and fire employees and the franchisor did not exert control besides to protect the franchisor's trademark, then summary judgment should be granted for the franchisor on whether a franchisor was an employer or franchisor); Ambrose v. Avis Rent-a-Car Sys. Inc., 2014 Wage & Hour Cas. 2d (BNA) 345463, No. 11-cv-09992, 2014 WL 6976114, at *9–12 (C.D. Cal. Dec. 8, 2014) (holding a franchisee needs to show a franchisor exerted control over the franchisee beyond what was necessary to protect and maintain the trademark to show an employment relationship).

32. 242 F. Supp. 3d 245 (S.D.N.Y. 2017).

33. *Id.* at 251 (noting the parties agreed the franchisee was to be an independent contractor and not a franchisee).

34. *Id.* at 253.

35. *Id.* at 258.

36. The court later concluded that a franchise existed. *Id.*

37. *Licensing vs. Franchising*, INTERNICOLA, https://www.franchiselawsolutions.com/franchising/licensing-versus-franchising/ [https://perma.cc/YL69-WLLK].

and territory, a licensor sets no standards for the licensee.[38] Therefore, unlike franchising agreements, mere licensing agreements are unregulated precisely because of the lack of control.[39] Ironically, the franchisee wants to "be his own boss," but is governed by federal and state franchise regulations, as well as the rules imposed by the franchisor in the parties' agreement or in ancillary documents, such as the operations manuals.[40] Due to these legislative and franchisor-imposed restrictions, franchisees are not completely free to run the business as they see fit.

In an effort to simultaneously provide protective measures for the franchisee, legislation targeted to regulate franchising has been enacted.[41] The legislation presents numerous problems for the franchisor. What is the significance of the franchisor's control? Should the franchisor exert too much control over the daily operations of its franchisee, it may be held vicariously liable for the negligence of the franchisee or the franchisee's employees,[42] or become subject to regulations of the Fair Labor Standards Act.[43] In contrast, if the franchisor fails to regulate its franchisee sufficiently, the franchisor risks violating widely mandated federal regulations and damaging the reputation of its business.[44] Finding the proper balance in regulating the franchisor-franchisee relationship is crucial to a franchisor's interests in limiting liability.

While the franchising format has become a popular way for firms to expand their business, more regulations or clearer standards in case law are needed to police those that choose to franchise. As of late, trademark liability and deep linking have become serious concerns for many businesses organized via a franchise format.[45] These issues will only

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38. *Id.*

39. Joan M. Heminway, Jason I. Epstein & W. Edward Ramage, *Acquisition Licenses in Tennessee: An Annotated Model Tennessee Acquisition License Agreement*, 8 TENN. J. BUS. L. 359, 359–60 (2007) (explaining that the licensor-licensee relationship tends to focus on the protection and use of the trademark).

40. *See* William L. Killion, *The Modern Myth of the Vulnerable Franchisee: The Case for A More Balanced View of the Franchisor-Franchisee Relationship*, 28 FRANCHISE L.J. 23, 27–28 (2008) (summarizing state laws and regulations governing franchise relationships); *see also* Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 191 (2010); Peter C. Lagarias & Robert S. Boulter, *The Modern Reality of the Controlling Franchisor: The Case for More, Not Less, Franchisee Protections*, 29 FRANCHISE L.J. 139, 143 (2010). A key, exemplary difference between the two formats involves operating manuals: licensing features no manuals (or, at least, nothing elaborate), while franchising relationships typically feature detailed operating manuals. *See* Robert W. Emerson, *Franchising Lessons in the Age of Incivility: Operations Manuals and Trade Secrets*, 29 TEX. INTELL. PROP. L.J. 305, 307–08 (2021) (describing "the nucleus of a franchise"—the operations manual).

41. *See* Uri Benoliel & Jenny Buchan, *Franchisees' Optimism Bias and the Inefficiency of the FTC Franchise Rule*, 13 DEPAUL BUS. & COM. L.J. 411, 412 (2015) (describing the increasing amount of state franchisee protection).

42. Jennifer Arlen & W. Bentley MacLeod, *Beyond Master-Servant: A Critique of Vicarious Liability*, *in* EXPLORING TORT LAW 15 (Stuart Madden ed., Camb. Univ. Press 2005) (discussing how vicarious liability can discourage a principal from asserting control over a franchisee); *see also* Heather Carson Perkins, Sarah J. Yatchak & Gordon M. Hadfield, *Franchisor Liability for Acts of the Franchisee*, 29 FRANCHISE L.J. 174 (2010) (containing an overview of judicial trends in holding a franchisor vicariously liable based upon its level of control of the franchisee).

43. 29 C.F.R. § 779.230(a) (2021). Extensive control by the franchisor over the franchisee's operations risks formation of a large enterprise subject to the Fair Labor Standards Act of 1938. 29 U.S.C. §§ 201–19 (2018).

44. *See* Commercial Practices, 16 C.F.R. § 436.1 (2007). The code requires that the franchisor have the authority to exert a significant degree of control over the franchisee's operation; thus, if the franchisor is unable to regulate the franchisee, he may be found in violation of § 436.1(h)(2).

45. *See infra* Parts II and III.B (discussing trademark liability and deep linking in the context of franchises).

become more prevalent as courts increasingly must judge business practices arising from a growing, often even exclusive, consumer reliance on the internet for making purchasing decisions.[46] Courts may try to tackle the emerging issues by applying older laws and principles which were established before the advent of the internet, let alone web-based marketing and the accompanying concepts, such as virtual stores, digital footprints, and social media.[47] Older legal approaches have been modernized as balancing tests to apply to new internet-based issues,[48] though these legal tests are typically vulnerable to subjective and inconsistent application. For instance, the first laws giving copyright protection to the telecommunications industry were created before the emergence of the new age of modern technology.[49] When using outdated rules to develop more updated approaches to the constant growth of this technology, the balancing approach helps legislators determine what legal rights exist and what should be protected.[50]

We see that franchisors are typically engaged in a difficult dance—trying to monitor their franchisees, even compelling behavior from them, but without actual policy controlling them.[51] This dichotomous approach, seemingly hands-off but nevertheless controlling through contractual terms, has led to novel issues in franchise law, including how and when a parent corporation should be held liable for the actions of its offspring. This Article explores these new issues in franchise law, as well as alternative approaches

46. In addition, franchise law may also need to be evaluated against the law governing other networking arrangements, such as partnerships. For example, one potential similarity between franchises and partnerships involves the agreements used by these business entities. A partnership agreement generally outlines who is a general or limited partner and the percentage of profits due to each partner, much like a franchise agreement, which generally outlines the roles of each party and licensing fees, royalties, and profits due. Osmond Vitez, *Franchise Vs. Partnership*, CHRON, http://smallbusiness.chron.com/franchise-vs-partnership-615.html [https://perma.cc/8V3F-CHST]. Because of the similarities between franchises and partnerships, we should hold fast to the traditional concepts of partnership vicarious liability, with little reason to distinguish franchisors and not grant them a corresponding liability for the negligence of their franchisees. The risk of such liability may motivate franchisors to police more actively the actions of their franchisees. However, court holdings and commentary sometimes reflect the belief that holding franchisors liable is not the best way to deter a franchisee's negligence.

47. *See* Intermatic Inc. v. Toeppen, 947 F. Supp. 1227, 1228 (N.D. Ill. 1996) (stating that although the internet "is a new medium, courts must still apply traditional trademark law, while also considering the policy implications"); Tan Pham, *Been Deep Linked? Apparent Authority Might Link You to Liability*, 2004 B.C. INTELL. PROP. & TECH. F. (June 8, 2004), http://bciptf.org/2004/06/pham/ [https://perma.cc/HU5N-79JN] (recommending the use of existing law to handle new legal issues arising in the age of the internet).

48. *See* Abdouch v. Lopez, 829 N.W. 2d 662, 672 (Neb. 2013) (examining personal jurisdiction over defendants in internet sales cases). The *Abdouch* Court noted that a "sliding scale" test, which analyzes the extent of interactivity of a defendant's website, can be used to determine whether a defendant has minimum contacts with a foreign jurisdiction. *Id.* at 672–73. This was an extension of the test for minimum contacts developed in *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), in response to emerging issues with the internet.

49. *See generally* Leo L. Linck, *Copyright Law Applied to Radio Broadcasting*, 19 NOTRE DAME L. REV. 13 (1943) (discussing how broadcasting was subject to copyright law before 1943); Susan C. Portin, Comment, *Pay TV—Piracy and the Law: It's Time to Clear Up the Confusion*, 33 EMORY L.J. 825, 826 (1984) (arguing that laws should be interpreted narrowly to avoid confusion with outdated laws and emerging technologies).

50. Portin, *supra* note 49, at 857.

51. *See* 62B AM. JUR. 2D *Private Franchise Contracts* § 294 (2020) (commenting "courts are generally mindful that a franchisor does have a legitimate interest in retaining some degree of control in order to protect the integrity of its marks"); *see also* Kennedy v. W. Sizzlin Corp., 857 So. 2d 71, 77 (Ala. 2003) (stating that the right to supervise an alleged agent to determine if that person conforms to the performance required by a contract with the alleged principal does not, by itself, establish control).

to current law.

II. TRADEMARKS

Trademarks are at the heart of how 21st-century franchise networks present themselves. That is especially the case given the internet's instant, all-encompassing, and ever-present communications.[52] Indeed, during the rise of the internet in the late 1990s, trademark disputes were the most commonly adjudicated internet-related civil lawsuits in the country.[53] Franchisors, their lawyers, and the lawmakers who evaluate franchising and franchise disputes must all struggle to accommodate a world in which effective but fair mass marketing, heightened expectations about ethical employment practices, and an open yet responsible (e.g., protective of privacy) internet all resonate.

Trademark owners are generally not liable for wrongful acts committed by businesses under their trademarks.[54] However, some experts believe that trademark owners, including franchisors, should be at least indirectly liable and, in certain instances, directly liable.[55] Furthermore, basic licensing law requires licensors, including franchisors, to oversee their licensee's (i.e., their franchisee's) use of the trademark.[56] Without such quality control, the licensor can lose its trademark rights[57] because of the risk of deception and fraud on the public.[58]

A. Trademarks and Agency

One could broaden potential liability for trademark owners to include those who "authorize franchisees, subsidiaries, affiliates, and other licensees to use the owners' trademarks to identify themselves or their products to customers."[59] Rather than an all-encompassing liability approach to trademark owners,[60] it may be more politically

52. *See* Corby C. Anderson & Ted P. Pearce, *The Antitrust Risks of Information Sharing*, 23 FRANCHISE L.J. 17, 18 (2003) (commenting that the internet has revolutionized information sharing among franchisees as franchisors establish "intranet forums that allow franchisees to discuss sales and marketing technologies, automation, and proprietary accounting systems, as well as vendor relationships").

53. IAN C. BALLON, E-COMMERCE AND INTERNET LAW: TREATISE WITH FORMS § 6.01 (2d ed.) Westlaw (database updated Apr. 2020).

54. Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1102 (2002).

55. *See generally* Jay Hewitt, *Franchisor Direct Liability*, 30 FRANCHISE L.J. 35 (2010) (discussing, inter alia, plaintiffs' tactics in pleading franchisor control to support allegations of both vicarious and direct franchisor liability); Grueneberg & Solish, *supra* note 7, at 15 (stating franchisors are not liable for direct liability if they do not control the day-to-day operations of the franchised location); *see also* 65A C.J.S. *Negligence* § 450 (2012) (describing a franchisor's potential liability under negligence or vicarious liability theories for a plaintiff's injury on the franchisee's premises).

56. Michelle S. Friedman, Note, *Naked Trademark Licenses in Business Format Franchising: The Quality Control Requirement and the Role of Local Culture*, 10 J. TECH. L. & POL'Y 353, 359 (2005). Of course, while a franchise relationship involves a license, there are many more controls. *See supra* notes 37–40 and accompanying text.

57. Friedman, *supra* note 56, at 359.

58. *See* AmCan Enters., Inc. v. Renzi, 32 F.3d 233, 235 (7th Cir. 1994) (furnishing an example of the risk of fraud to the public).

59. LoPucki, *supra* note 54, at 1103. It can be argued that this approach is broad and rather draconian especially in the context of manufacturers and product liability.

60. When one says that franchisors should always be liable for the actions of their franchisees while the

palatable (easier to persuade policymakers)[61] if one extends liability only in those limited instances where the harm that a consumer incurred related to use of the trademark itself,[62] not the actions of all franchisees or licensees. Otherwise, the line between franchises and other types of business ventures would be blurred. At the same time, a licensor or franchisor may be in a better position to mitigate the risk of bad franchisees and prevent possible harm to consumers.

The franchisor or licensor has a unique interest in protecting its brand and must take precautions in monitoring the use of its marks. If that is so, then the franchisor, most especially, should not be able to blindly license franchisees and then claim innocence for what those franchisees have wrought.[63] Professor Lynn LoPucki suggests that trademark owners "should be jointly and severally obligated for the licensees' liabilities to those customers" because these liabilities generally arise through a contractual relationship.[64] This argument is furthered by the notion that private franchise agreements have underlying themes of unequal bargaining power in favor of the franchisor.[65] Consequently, many courts continue to apply traditional, actual agency law concepts when it comes to franchising, even though this employer-employee relationship is not necessarily accurate in the franchising context.[66]

For example, in one case, a court held that there was no vicarious liability placed on a restaurant franchisor when security lapses led to the sexual assault of a franchisee

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franchisees take action under the franchisor trademark, that is effectively saying that franchisors should always be liable for their franchisees' actions. That is because a franchisee has to use the franchisor's trademark to operate the franchise.

61. It does not seem viable to hold franchisors vicariously liable for every harm that befalls a licensee. Trends might point to adopting a modified control test, in which liability can be attributed to the franchisor if it had specific control over the specific means that caused the harm. *See infra* Part I (discussing liability for franchisors).

62. For example, this harm could arise in the context of an apparent agency, including the consumer's alleged detrimental reliance on the franchisee's display of the franchisor's trademark as an indication that the customer was dealing directly with the franchisor itself. *See, e.g.*, Cefaratti v. Aranow, 141 A.3d 752, 766–67 & n.26 (Conn. 2016) (providing an extensive analysis of case law that falls on one of the two sides of this debate, i.e., whether the plaintiff is required to show detrimental reliance on a tort claim); RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. e (AM. L. INST. 2012) (declaring that reliance by the injured person is not a separate element in proving apparent authority or in establishing vicarious liability); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 65 (AM. L. INST. 2012) (declaring same); Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1251–52 (11th Cir. 2014) ("[T]he doctrine[s] of apparent agency . . . [and] vicarious liability . . . require[] finding three essential elements . . . which [includes the plaintiff's belief in the alleged agent] induces the plaintiff's detrimental, justifiable reliance upon the appearance of agency.")

63. *But see* Estate of Miller v. Thrifty Rent-A-Car Sys., Inc., 637 F. Supp. 2d 1029, 1039 (M.D. Fla. 2009) (limiting liability for franchisors by presuming that members of the public understand that a franchise agreement does not grant agency).

64. *Id.*

65. Nagrampa v. Mail Coups, Inc., 469 F.3d 1257, 1282 (9th Cir. 2006); *see also* Johnston v. Fairway Divorce Franchising, Inc., No. EDCV 12-00952, 2012 WL 12891392, at *3–4 (C.D. Cal. July 27, 2012); Too Tall, Inc. v. Sara Lee Bakery Grp., No. 08-191, 2008 WL 11322951, at *3 (D.N.M. July 17, 2008) (detailing cases where franchise agreements provided by a franchise contained unfavorable terms for franchisees).

66. *See* Perkins et al., *supra* note 42, at 174–75 (detailing actual agency in circumstances concerning franchise liability); *see, e.g.*, Drexel v. Union Prescription Ctrs., Inc., 428 F. Supp. 663, 666 (E.D. Pa. 1977) (holding that a franchisor may be held vicariously liable for the acts of its franchisee where an agency relationship is established), *rev'd*, 582 F.2d 781 (3d Cir. 1978).

employee.[67] The franchisee employee invoked New York law and sued the franchisor under a vicarious liability theory and direct negligence.[68] Since there was no evidence that the franchisor exercised actual control over the security measures implemented by the franchisee, the issue was whether recommendations by the franchisor to the franchisee for security measures rendered the franchisor liable under New York law.[69] The court found that absent actual control by the franchisor over security measures utilized by the franchisee, no liability attaches to said franchisor.[70] U.S. District Court Judge Allyne R. Ross referenced the franchise agreement to buttress this point.[71] While this is but one example of where a court has used the instrumentality theory[72] when assessing vicarious liability for a franchisor, it is also an indication that courts may be moving towards a vicarious liability model as opposed to the traditional, actual agency model.[73] The court analyzed several cases from jurisdictions apart from New York where the courts utilized a vicarious liability framework.[74] In those cases, the question of liability turned on whether the franchisor exercised direct control over the franchisee generally, and in particular, whether the franchisor exercised direct control over the instrumentality at issue.[75] These courts drew distinctions between franchisors making recommendations to franchisees versus requiring them to implement certain security protocols.[76] So, only when a franchisor "controls the security decisions made by the franchisee" does it become vicariously liable for the negligence of its franchisee.[77]

Furthermore, franchisors and trademark licensors-owners are protected by the entity structures separating franchisors from franchisees or trademark owners from trademark holders.[78] The business format of franchises places the franchisee in the position to address

67. Wu v. Dunkin' Donuts, Inc., 105 F. Supp. 2d 83, 84 (E.D.N.Y. 2000), *aff'd*, 4 F. App'x 82 (2d Cir. 2001).

68. *Id.*

69. *Id.* at 85.

70. *Id.* at 90–94.

71. *Id.* at 90 (stating, inter alia, "[t]he franchise agreement entered into by Dunkin' Donuts and [the franchisee] . . . specifically provides that . . . the franchisee[] is an independent contractor rather than an agent, employee, servant, joint venturer, or other legal representative" of the franchisor, Dunkin' Donuts).

72. Patterson v. Domino's Pizza, LLC, 333 P.3d 723, 735, 739 (Cal. 2014). The "instrumentality" test focuses on whether the franchisor controls, or has the right to control, "the daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm . . . ." Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 340 (Wis. 2004).

73. Perkins et al., *supra* note 42, at 174. In their article, Perkins and her co-authors do not address liability or mention agency except to state that franchisees (and apparently all people) are overly optimistic. This undue optimism may be a reason franchisees and others who enter agreements fail to thoroughly review and read their contracts. Benoliel & Buchan, *supra* note 41, at 420. For a survey of franchisees and an analysis of cognitive biases in making decisions related to franchising, see generally Robert W. Emerson & Steven A. Hollis, *Bound by Bias? Franchisees' Cognitive Biases*, 13 OHIO ST. BUS. L.J. 1 (2019).

74. *See* Robert W. Emerson, *An International Model for Vicarious Liability in Franchising*, 50 VAND. J. TRANSNAT'L L. 245, 271–90 (2017) (discussing various approaches that the European Union and many nations have employed when analyzing possible cases of franchisor vicarious liability for a franchisee's actions or inaction).

75. *Wu*, 105 F. Supp. at 88–90.

76. *Id.* at 89.

77. *Id.* at 88–90.

78. *See* Cynthia M. Klaus, *Personal Liability of Franchisor Executives and Employees Under State Franchise Laws*, 29 FRANCHISE L.J. 99, 99 (2009) (noting that franchisors and trademark owners are protected

customer concerns directly in its capacity as an individual business owner, whereas the franchisor reaps the benefits of expanding its brand through the franchisee[79] (though this could be countered by the fact that the franchisee capitalizes on the use of the franchisor's goodwill, business model, product, and reputation). Professor LoPucki posits that the franchisor-franchisee relationship is "invisible to contracting customers and should therefore be considered irrelevant."[80] This view is evidenced by a 2016 survey conducted at the University of Florida, where most respondents either agreed or strongly agreed that a franchisee licensed to use a trademark should only sell products associated with that trademark.[81] This implies that customers see little if any room for a franchisee to distinguish itself from the franchisor, let alone understand the liability implications of such an identical relationship. The majority of respondents answered similarly when the same survey was conducted in 1992, 2000, and 2008, indicating little change in public perception of franchises and lending to the imperceptible franchisor-franchisee relationship.[82]

Additionally, one could contend that, since trademark owners (franchisors) are in a better position to evaluate their licensees' financial responsibility than are customers, trademark owners should accept liability for the actions of those licensees.[83] Consumers rarely research whether a company is operated by the principal or a franchisee, looking at brand uniformity and standardization to believe that the unit selling the product or service is owned by the franchisor rather than independently operated.[84] Also, a franchisor's right to inspect its franchisee's business sometimes comes with a stipulation that the franchisor can mandate changes if what is being inspected does not measure up to the franchisor's standard.[85] At least one court found that the right to inspect, together with the contractual

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by entity structures separating franchisors and franchisees); LoPucki, *supra* note 54, at 1103. *See* William L. Killion, *Franchisor Vicarious Liability – The Proverbial Assault on the Citadel*, 24 FRANCHISE L.J. 162, 166 (2005) (stating vicarious liability premised upon the existence of a master/servant relationship is conceptually difficult to adapt to the franchising context).

79. *See* Lads Trucking Co. v. Sears, Roebuck & Co., 666 F. Supp. 1418, 1420 (C.D. Cal. 1987) (holding the elements needed to establish a franchise were absent).

80. LoPucki, *supra* note 54, at 1104 (footnote omitted). One could argue that means trademark holders should not be held liable to third parties—that if it is an invisible relationship, customers would not be under the assumption that whatever product/service they are using has been overseen by the actual trademark holder. On the other hand, the surveys show that what is invisible to the customer often is that the franchisee is, in fact, distinct from the actual franchisor or trademark holder. So that would constitute a wash. *But see* Estate of Miller v. Thrifty Rent-A-Car Sys., Inc., 637 F. Supp. 2d 1029, 1039 (M.D. Fla. 2009) (granting a presumption that the public at large understands that franchisees are not controlled by [agents of] franchisors).

81. *See infra* App., Question 9.

82. *Id.*

83. LoPucki, *supra* note 54, at 1104. See Robert W. Emerson, *Franchisor's Liability When Franchisees are Apparent Agents: An Empirical and Policy Analysis of "Common Knowledge" About Franchising*, 20 HOFSTRA L. REV. 609, 628 n.59 (1992) (noting "the typical franchisor is better able than most franchisees to bear the cost of consumer injuries"); Joseph H. King, Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees, 62 WASH. & LEE L. REV. 417, 449–50 (2005) (explaining how representing conduct by franchisor creates an impression of a sound, reputable franchise business).

84. *See* King, *supra* note 83, at 479–80 (recommending that franchisees communicate their independence to customers).

85. *See* Toppel v. Marriott Int'l, Inc., No. 03 Civ 3042, 2008 WL 2854302, at *25 (S.D.N.Y. July 22, 2008) (explaining that "to inspect the franchisee's premises and require upgrades to ensure compliance with their 'system,' Defendants here may inspect the Hotel and require it to cure any noncompliance with the Marriott System").

obligation to maintain standards, could be sufficient to show that franchisors should bear liability.[86] Franchisors have more economic freedom that also protects their workers and as well as those that make investments in their company.[87] In contrast, the franchisee usually has fewer resources and is at a comparative disadvantage for a plethora of reasons.[88] Liability may be attributed to the franchisor who is aware of, but fails to investigate, the serious financial problems of a franchisee.[89] Arguing for liability under the theory that the franchisors are better situated financially may create a basis for extended liability.[90] In addition, franchisees are less inclined to join associations.[91] Many franchisors, especially the big name brands, have full-time government affairs officers,[92] while franchisees seldom have such extensive information or lobbying campaigns.[93] This, of course, presumes that liability is based on one's capacity to compensate the injured, as opposed to how connected one is to the cause of injury in the first place. Under the former

86. *Id.* at 31 (noting that while control of day-to-day operations is important to imposing liability, vicarious liability may be imposed when the franchisor' exerts control over the instrumentalities at issue).

87. *See* Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 121 (2004) (noting that "franchisors are able to achieve freedom from statutes which would otherwise protect workers and investors").

88. *Id.* It has been argued that collective action with franchisee associations is needed in order to correct the franchisor-franchisee relationship disparity. This requires enough leading franchisees to form a sustainable association that has enough members to influence the franchisor. Collective associations may ensure fairness and protect newcomers in franchises. *See* Robert W. Emerson & Uri Benoliel, *Can Franchisee Associations Serve as a Substitute for Franchisee Protection Laws?*, 118 PENN ST. L. REV. 99, 103 (2013).

89. *See* Dwight Golann, Carol K. Dietz, Susan Papenek McHugh & Susan M. Roberts, *In Search of Deeper Pockets: Theories of Extended Liabilities*, 71 MASS. L. REV. 114, 126 (1986) (explaining that "[l]iability has been asserted, for example, in cases in which a franchisor failed to terminate a financially troubled franchisee which later went out of business without honoring consumer Contracts . . .").

90. *Id.* (noting that this theory of liability stems from direct negligence by the franchisor rather than establishing fault through vicarious liability). Also, note that a principal may risk liability for its agent's misrepresentations "upon matters which the principal might reasonably expect would be the subject of representations, provided the other party has no notice that the representations are unauthorized." RESTATEMENT (SECOND) OF AGENCY § 258 (AM. L. INST. 1958).

91. Emerson & Benoliel, *supra* note 88, at 104 (noting, "franchisees have little incentive to join and actively participate in an independent franchisee association"). Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1528 (1990). It seems franchise associations are often born out of discontent with a franchisor or FAC, which in turn supports the assumption that franchisors see associations as hostile entities. *See* Roger Schmidt, Sr. & Harris J. Chernow, ABA 32ND FORUM ON FRANCHISING: MANAGING THE ORGANIZATION OF A FRANCHISE ASSOCIATION 1 (2009), https://www.americanbar.org/content/dam/aba/events/franchising/2009/w13.pdf [https://perma.cc/RJ79-HXHJ] (discussing the relationship between a franchisee association and franchisor); Joseph Schumacher, William Darrin & Lawrence Cohen, *Effective Relationships with Franchisee Associations—Legal and Practical Aspects* (May 2001), https://www.wiggin.com/wp-content/uploads/2019/09/effective-relationships-with-franchisee-associations.pdf [https://perma.cc/6A49-Z6AS] (reviewing issues related to franchisee association formations).

92. *Id.*

93. The lack of franchisee protective legislation stems from "the lack of an effective organized voice of franchisees to lobby for such laws." Robert L. Purvin, Jr., *Can Franchise Associations Serve as a Substitute for Franchisee Protection Laws?*, AM. ASS'N FRANCHISEES & DEALERS (Dec. 11, 2013), https://www.aafd.org/can-franchisee-associations-serve-as-a-substitute-for-franchisee-protection-laws/ [https://perma.cc/HX22-RZRN]. The International Franchise Association advocates for the collective rights of franchisees but may fall short in lobbying for high standards and implementing sound strategies. *See Franchise Advocacy*, INT'L FRANCHISE ASS'N, https://www.franchise.org/advocacy [https://perma.cc/F8VC-Y5ZD] (last visited Apr. 2, 2022) (promoting measures that may not be adequate to ensure the future of franchising).

premise, franchisor liability would almost always be implicated.[94]

As discussed previously, the first of three basic elements in a franchise is the franchisee's acquiring an association with—effectively, the licensing of—a trademark from the franchisor.[95] The second element is an ongoing fee payment by the franchisee.[96] Should the amount of the ongoing fee payment be taken into the analysis of liability by the franchisor?[97] Do the ongoing fees cover only access to the trademark (perhaps even to compensate the franchisor for its goodwill),[98] the franchisor's role in overseeing the franchisee, or any possible future liability? Customs should allow a franchisor to include in the ongoing fees items such as an assistance fee for the franchisor's help in making the franchise successful and legal fees for a possible future lawsuit against the franchisor.[99] Analogous to this are the fees that a college student often must pay, such as for athletic facilities, regardless of whether the student actually uses whatever the fees covered (e.g., the facilities). When the college charges such fees, the college does not ask whether the student plans on using the gym equipment.[100] Related to the franchisor-franchisee relationship, even though a franchisor does not know if a plaintiff will drag it into any future litigation, the franchisor should be allowed to plan for these events by imposing such a fee.[101]

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94. The latter theory would require a more intricate analysis of the franchise agreement as it applies to the circumstances leading to the injury. Franchisor liability may or may not be implicated under this approach, and attributing liability would be more closely aligned with ordinary tort and contract law than agency law. As a refresher, the three elements needed to show a franchise relationship are 1) substantial association with a trademark, 2) ongoing fee payments by the franchise, and 3) some form of community of interest or a prescribed marketing plan from the franchisor. *See* Grueneberg & Solish, *supra* note 7, at 11 (detailing the requirements for a franchise relationship).

95. *Supra* notes 7, 8–10 and accompanying text (discussing the franchise network's association with the franchisor trademark and the contractual arrangement between franchisor and franchisee, with the trademark being a significant part of the consideration from franchisor to franchisee).

96. *Id.*

97. "The key [to determining the franchise fee requirement] is not to whom the prospective franchisee pays the fee, but whether the fee's payment is a condition to enter the business." Howard Yale Lederman, *What Makes a Franchise? The Franchise Fee*, 87 MICH. B.J. 23, 25 (2008) (emphasis omitted).

98. *See* Robert W. Emerson, *Thanks for the Memories: Compensating Franchisee Goodwill After Franchise Termination*, 20 U. PENN. J. BUS. L. 286, 288–89 n.9 (2017) (citing Christopher P. Bussert & Linda K. Stevens, Trademark Law Fundamentals and Related Franchising Issues, in FUNDAMENTALS OF FRANCHISING 1, 6 (Rupert M. Barkoff et al. eds., 4th ed. 2015)) (explaining that the concept of trademark law is meant to protect goodwill); Robert W. Emerson, *Franchise Goodwill: Take a Sad Song and Make It Better*, 46 U. MICH. J.L. REFORM 349, 406–15 (2013) (proposing a standard for quickly and fairly deciding the ownership of franchise goodwill).

99. *See* Steven E. Kushner & Thomas G. Lewin, *Franchise Agreement from the Perspective of the Franchisor*, 31 ST. LOUIS B.J. 23, 25 (1985) (calling for franchisors to charge a royalty/service fee that compensates the franchisor for services during the franchise agreement and for use of the franchisor's trademark).

100. In 2014, students at 32 universities were required to pay a combined $125.5 million in athletic fees, even though many did not wish to, or simply could not, partake of this aspect of university life. Will Hobson & Steven Rich, *Why Students Foot the Bill for College Sports, and How Some are Fighting Back*, WASH. POST (Nov. 30, 2015), https://www.washingtonpost.com/sports/why-students-foot-the-bill-for-college-sports-and-how-some-are-fighting-back/2015/11/30/7ca47476-8d3e-11e5-ae1f-af46b7df8483_story.html [https://perma.cc/XH8L-DN2D]. Consider the rationale behind insurance. The franchisee pays a relatively small sum to the franchisor to avoid paying a much larger sum in the event that a lawsuit is brought against the franchise.

101. *See* Steinberg & Lescatre, *supra* note 87, at 248 (considering the cost plus overhead fee that franchisors charge franchisees after initiating litigation).

The issue of liability demands further review of franchising's first element, substantial association with a trademark, and its third element, community interest or marketing plan.[102] A substantial association with a trademark could add to the confusion about whom a customer believes should be held accountable for a business. The franchisee identifies itself under the franchisor's trademark to its customers, causing a larger sense of liability on the franchisor.[103] The franchisor is allowing the franchisee to become the representative of the franchisor.[104] In relation to community property, the level of control the franchisor has over its trademark may play a role, and the franchisor specifically explaining the use of its trademark in the marketing plan could clear up confusion. The right to use the franchisor's mark does not mean that the franchisee is required to hold himself as an authorized representative of the franchisor.[105] Additionally, the level of dependence a franchisee has on a franchisor could result in higher fee payments. Presumably, franchisors would recognize how much they need to oversee their franchisees if they had to furnish ongoing assistance by providing employee training and helping to build and operate the franchisees' business.[106]

While such a claim may appear sweeping, when viewed in the light of the apparent authority doctrine and the concept of free-riding, it is much more reasonable to hold a franchisor vicariously liable than to allow consumers to be harmed. The apparent principal holds out an agent to third parties as capable of providing a product or service, and the third party relies on the principal's representation.[107] In the context of a franchise relationship, the franchisor is "holding out" to consumers that the franchisee in question can provide a safe and predictable experience. When consumers rely on this representation, likely created through experiences at other franchise locations as well as advertising, the consumer may be harmed by a franchisee failing to adhere to the franchisor's standards.

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102. W. MICHAEL GARNER, 1 FRANCHISE & DISTRIBUTION LAW & PRACTICE § 5:7 (2021).

103. *Id.*

104. *Id.*

105. *Id.* There is a current circuit split on vicarious liability and imposing certain performance standards on independent contractors. The Fourth and Ninth Circuits have assessed vicarious liability under traditional common law agency theories. In contrast, the Seventh Circuit has determined that a seller may be held vicariously liable whenever its contracts impose performance standards on independent marketers. *Compare* Garnett v. Remedi Seniorcare of Va., LLC, 892 F.3d 140, 145 (4th Cir. 2018), *and* M.J. *ex rel.* Beebe v. United States, 721 F.3d 1079, 1084–85 (9th Cir. 2013), *with* United States v. Dish Network, L.L.C., 954 F.3d 970, 978 (7th Cir. 2020), *cert dismissed*, No. 20-743 (Jan. 7, 2021), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-743.html [https://perma.cc/7QTG-686W].

106. *See* MATTHEW J. KREUTZER, AVOIDING COMMON FRANCHISING PITFALLS FOR FRANCHISEES (West Prac. L. 2020) (discussing disputes and liabilities in franchise arrangements). *See* Robert W. Emerson, *Franchise Savoir Faire*, 90 TUL. L. REV. 589, 599 n.53 (2016) (concluding that both European and U.S. legislatures and courts tend to react favorably toward requests to protect "franchise know-how," which is "a subject closely related to trade secrets"); Emerson, *supra* note 98, at 318 (referring to German requirements that a franchisor furnishes know-how to franchisees); Emerson, *Franchise Savoir Faire*, *supra*, at 619 (stating that a franchisor's failure to provide know-how to a franchisee "is a sufficient cause to void the contract"). It could be argued that U.S. franchisors have not only legal protections for their know-how but also obligations similar to those found in many other nations. *See id.* (arguing that the savoir-faire found in many nations' franchise jurisprudence sometimes has been, and certainly should be, applied either overtly or at least in its effects via U.S. franchise cases and legislation).

107. Jones v. Federated Fin. Rsrv. Corp., 144 F.3d 961, 965 (6th Cir. 1998). For a franchise-oriented definition, see King, *supra* note 83, at 439 (providing a franchise-oriented definition).

The failing franchisee is an example of a free-rider.[108] While the cost of discovering every instance of a free-riding franchisee may not be cost-effective, the alternative is to place the risk on consumers.[109] The latter seems unfair to consumers, and the law really should account for the dynamic nature of franchising. Indeed, companies periodically change their suppliers and the supplies themselves in order to reduce costs while simultaneously trying to improve the quality of the products or services they provide to their consumers.[110]

Such reliance is reasonable from the consumer's perspective. According to the survey results represented below, 78% of the surveyed franchise websites did not distinguish ownership between the various franchise units.[111] Such reliance is also prevalent among consumers. Roughly 58% of survey takers believed that all Baskin Robbins ice cream was made and distributed by the franchisor.[112] Additionally, 56% of respondents agreed that the McDonald's franchisor made or obtained all cooking equipment, napkins, trays, and other supplies for each of its franchisees.[113] In other words, most consumers believed that they were going to receive the same product at one Baskin Robbins or McDonald's franchise that they would have received at another location.[114]

1. Dealing with Problematic Franchisees

Overall, the franchisor is better positioned than the consumer to detect harmful and free-riding franchisees.[115] First, the franchisor is a party to the franchise agreement and

108. Alan J. Meese, Antitrust Balancing in a (Near) Coasean World: The Case of Franchising Tying Contracts, 95 MICH. L. REV. 111, 118 (1996) (discussing free-riding in the franchise context); Robert W. Emerson, *The Faithless Franchisor: Rethinking Good Faith in Franchising*, 24 U. PENN. J. BUS. L. ___ (2022) (at text accompanying notes 247–253, "Franchisees engaged in free riding can be viewed as breaching the 'covenant of good faith and fair dealing.' A franchisee might free ride by lowering its cost and the quality of its goods or services. Franchisors can admonish this behavior by threatening to bring tort damages. . . . A franchisee may decide to free ride because that would allow it to keep charging the same prices as the other franchisees while lowering the quality of its products or services. The free-riding franchisee makes a quick and large profit but causes long-term damage to the goodwill of the overarching franchise . . . . Generally, free-riding by one franchisee weakens the potential power of the franchise group as a whole.").

109. Sometimes the purchasing power in the local market of franchisees gives them the ability to command lower prices. However, such concern over pricing policies may lead to changes in the supply chain resulting in lower quality of products, as well as secondary-line and tertiary-line effects. *See* Games People Play, Inc. v. Nike, Inc., No. 14-CV-321, 2015 WL 13657672, at *4 (E.D. Tex. Feb. 13, 2015) (referencing Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006)); Water Craft Mgmt., LLC v. Mercury Marine, 457 F.3d 484, 487 (5th Cir. 2006).

110. *See By Rethinking Packaging, a Company Reduces Production Costs while Enhancing Brand*, MCKINSEY & CO., https://www.mckinsey.com/business-functions/operations/how-we-help-clients/reduce-packaging-costs [https://perma.cc/785U-F8G7] (last visited Apr. 2, 2022) (stating that in Europe, "[b]y analyzing the labeling, use of recycled materials and the shape of the bottle, a consumer goods company reduced the cost of shampoo packaging while maintaining the brand image").

111. *See infra* App., Website Surv., Question 16.

112. *See infra* App., Public Surv., Question 5 (57.9% of all survey respondents).

113. In the year 2000, the percentage was even higher, 66.3%. *See* App., *infra*, Public Surv., at Question 8.

114. *See infra* App., Public Surv., Question 5.

115. *See* Brian B. Schnell & Ronald K. Gardner, Jr., *Battle Over the Franchisor Business Judgment Rule and the Path to Peace*, 35 FRANCHISE L.J. 167, 177 (2015) (indicating that because the franchisor generally controls the marketing strategy of the franchise network, the franchisor may be the best situated to control for free-riding).

sets a majority of the standards to which the franchisee must adhere.[116] It is already common practice for a franchisor to inspect the franchisee to ensure the standards are followed.[117] On the other hand, consumers lack this inspection authority and can only learn of the quality by engaging in the service or purchasing the product.

Second, the franchisor's ability to detect free-riding franchisees is greater with the development of information technology.[118] Through websites such as ConsumerAffairs.com, TripAdvisor.com, Google.com, and other online reviewers, franchisors can look for "flags" that justify an inspection of the franchisee.[119] Furthermore, some franchisors have created special web pages dedicated to allowing consumers to provide quality reviews of the franchisee.[120]

Third, the franchisor has experience dealing directly with the franchisee. The two parties were likely engaged in discussions, even if the franchisor is not likely to negotiate franchise terms.[121] Conversely, the consumer is not likely to have engaged with the franchisee professionally prior to entering the franchise unit. Most consumers' interactions with franchisees occur through the marketplace, inspecting and perhaps purchasing goods, investigating and deciding about services, and otherwise making choices without necessarily understanding much, if anything, about the entity from which they make purchases.

Finally, the discussion returns to the requirements of a franchise, specifically, the payment of a fee.[122] The fees likely vary between different franchises, but there is evidence that the length of a franchise contract correlates with the amount of investment a franchisee makes.[123] Some portion of these fees may be used by the franchisor to lower the risk of a

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116. Kerry Pipes, *The Franchise Agreement*, FRANCHISING.COM, https://www.franchising.com/guides/the_franchise_agreement.html [https://perma.cc/C9ZP-H75T] (last visited Apr. 2, 2022).

117. Bright v. Sandstone Hosp., LLC, 755 S.E.2d 899, 903 (Ga. Ct. App. 2014) (citing a provision that notified franchisee of quality assurance inspection program); Nears v. Holiday Hosp. Franchising, Inc., 295 S.W.3d 787, 796 (Tex. Ct. App. 2009) (stating that inspections related to franchise standards and not employment do not create a substantial control); Kerl v. Rasmussen, 672 N.W.2d 71, 78 (Wis. Ct. App. 2003) (noting that the franchisor had a right to inspect the franchisee's operations); Scott A. Shane, *Making New Franchise Systems Work*, 19 STRATEGIC MGMT. J. 697, 699 (1998) ("Franchisors minimize [free-riding] by . . . auditing franchised units to ensure their compliance . . . .").

118. Consumers are increasingly able to get more information online and can rely on this data when making decisions. *See infra* App., Public Surv., Question 12 (94.4% of franchise websites surveyed mentioned trademark of the franchise network). Surely, if consumers have that ability to learn about franchise systems, then the franchisors themselves have a heightened capacity to find information online and otherwise.

119. Just by searching for "McDonald's reviews," various reviews based on franchise locations were provided through an online search engine. *See McDonald's Reviews*, CONSUMERAFFAIRS, https://www.consumeraffairs.com/food/mcd.html [https://perma.cc/SWS4-3M8J] (providing reviews for the fast-food chain, McDonald's).

120. *Restaurant Feedback*, MCDONALD'S, https://www.mcdonalds.com/us/en-us/contact-us/restaurant-feedback.html [https://perma.cc/CN2W-P49N]; *see also infra* App., Website Surv., Question 14 (90.8% of company websites offering instructions or assistance to view specific franchisee locations).

121. GARNER, *supra* note 102, § 2:14.

122. *See* Grueneberg & Solish, *supra* note 7, at 11 (mentioning the fee arrangement within franchises).

123. James A. Brickley, Sanjog Misra & R. Lawrence Van Horn, *Contract Duration: Evidence from Franchising*, 49 J.L. & ECON. 173, 184 (2006) ("Firms from the food service industry, which have relatively high levels of investment . . . have the highest mean contract duration."); *see also id.* at 194 (including contract duration and amount of investment as relevant factors).

franchise.[124] With the assistance of royalty fees, the franchisor is in a position to deal with free-riding.[125]

Considering the four previous factors, there is policy support to push for the franchisor to bear the risk of franchisee negligence rather than the consumer.[126] However, such a blind assumption may not necessarily be fair and would stunt the growth of franchises.[127]

For this new or expansive franchise tort, the foundation of the claim could rest on two out of three of the elements of a franchise relationship: substantial association with a trademark and some form of community of interest or a prescribed marketing plan from the franchisor.[128]

One necessary element is an inspection of the community of interest/prescribed marketing plan/substantial control standards. Case law already supports franchisor liability if there is an excessive control exerted over the franchisee's day-to-day operations,[129] so a discussion of the other standards is more beneficial.

As noted above, community of interest can be interpreted as the benefit and goodwill the franchisor receives from the franchisee's actions.[130] If the court can determine how much the franchisor has benefited from the franchisee's actions, it may be more equitable to hold the franchisor liable for the franchisee's actions.[131] For example, if a franchisee has made a positive impact in its locality and developed a tremendous amount of goodwill, the

124. Shane, *supra* note 117 (attributing monitoring costs to royalty payments). *But see* Brickley et al., *supra* note 123, at 178 (hypothesizing that the correlation pertains to the franchisee's desire to see a return).

125. For example, the franchisor could offer fee reductions (or increases) to induce the franchisee to operate a higher-quality establishment. *See* Robert W. Emerson & Charlie C. Carrington, *Devising a Royalty Structure That Fairly Compensates a Franchisee for its Contribution to Franchise Goodwill*, 14 VA. L. & BUS. REV. 279 (2020) (providing potential inducement strategies).

126. Consider the free-riding franchisee that provides sub-par quality goods to consumers. The consumer will have less incentive to return after receiving the low-quality product, and the franchisor's trademark value is diminished. *See* James Brickley & Frederick Dark, *The Choice of Organizational Form: The Case of Franchising*, *in* FRANCHISING: AN INTERNATIONAL PERSPECTIVE 66 (Frank Hoy & John Stanworth eds., 2003) (discussing the value of franchising).

127. This may be an ex-ante view, in which the focus should be on the franchisee's role in brand building. If a brand is being disparaged in public, franchisees will not do their part in recruiting new franchisees, making it impossible to grow. Nick Powills, *Five Bad Practices That Can Kill Franchise Growth*, FORBES (Dec. 30, 2019, 7:00 AM), https://www.forbes.com/sites/forbesagencycouncil/2019/12/30/five-bad-practices-that-can-kill-franchise-growth/#1003b8a8e60b [https://perma.cc/7TG2-NYJB].

128. If one of the statutory requirements is missing, then the relationship would not be defined as franchisee-franchisor, but the franchisor may be subject to liability. In misclassification lawsuits, the outlook for franchise and nonfranchise companies is similar. Rochelle B. Spandorf, *Who's the Boss*, L.A. LAW., Mar. 2011, at 22, https://www.dwt.com/insights/2011/03/whos-the-boss-los-angeles-lawyer-magazine [https://perma.cc/8SCM-4WJ5].

129. Allen v. Choice Hotels Int'l, 942 So. 2d 817, 821 (Miss. Ct. App. 2006) (stating that "one who controls, or has the right to control, the work of another may be liable as the master of that party"); Bartholomew v. Burger King Corp., 15 F. Supp. 3d 1043, 1048 (D. Haw. 2014) (noting that apparent agency and daily operation control can lead to franchisor liability).

130. Beilowitz v. Gen. Motors Co., 233 F. Supp. 2d 631, 639 (D.N.J. 2002) (stating that franchise-specific investments can include intangible assets such as goodwill).

131. Liability under a community of interest approach does not rest on the amount of control exercised by the franchisor, rather, is focused on the purported independence of the parties and any shared financial goals shared by the business. EMILY DECKER, MARAL KILEJIAN & DANELL OLSON CARON, BASICS TRACK – WHAT IS A FRANCHISE? (May 2011).

franchisor has benefited without having to compensate the franchisee.[132] If that same franchisee caused damages and was unable to adequately compensate the harmed third party, the remaining burden should be placed on the franchisor. Conversely, if the franchisee has not created any benefit for the franchisor, the equity of holding the franchisor liable diminishes.

This presents a quandary. The theory seems to suggest that if a franchisee were to negatively impact the community or not create any goodwill, the franchisor would owe nothing if a third party is injured. When this occurs, the franchisor's duty to inspect and control its franchisee should apply. It is illogical to allow a franchisor's reckless licensing of its trademarks and name without bearing some kind of liability.[133] Therefore, a poorly performing or socially-negative franchise should also require a franchisor to assist in compensating injured third parties. Ultimately, the franchisor holds liability regardless, just under different lines of reasoning: either that it should accept negatives along with the positive brand imaging that a quality franchise provides, or be punished for not selecting a responsible franchisee.

When evaluating the prescribed marketing plan, a similar analysis should be applied. However, it may increase in difficulty given the subjective nature of determining whether a plan is present.[134] It is further complicated because analysis looks at how the franchisor acts to assist the franchisee in succeeding.[135]

With the franchisor's assistance and, perhaps, a resulting franchisee success, the franchisor's exercise of substantial control over franchisee operations may serve to establish franchisor liability.[136] Of course, the lawsuit's focus tends to be on control, not assistance. Consider *Bartholomew v. Burger King Corporation*, where the plaintiff sued a franchisor, franchisee, and hamburger patty supplier after sustaining injuries from eating a Triple Whopper sandwich at a Burger King franchise.[137] The plaintiff alleged "negligent infliction of emotional distress; negligent training retention, supervision, and/or hiring; statutory tort under Hawaii Revised Statutes . . .; strict products liability; breach of implied warranty; and failure to warn."[138] The franchisor filed a motion for summary judgment stating that a franchisor cannot be liable for the actions of a franchisee when the franchisor does not possess sufficient control of the franchise location.[139] The court looked to other jurisdictions for franchisor liability because Hawaii has limited case law on the issue.[140] The court denied the motion for summary judgment because it found there was a genuine issue of material fact regarding the franchisor's control and whether there was a justifiable reliance upon an apparent agency relationship between the franchisor and franchisee.[141]

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132. Instructional Sys., Inc. v. Comput. Curriculum Corp., 614 A.2d 124, 142–43 (N.J. 1992).

133. *Cf.* RESTATEMENT (SECOND) OF TORTS § 411 (AM. L. INST. 1965) (stating that employers, not typically liable for a contractor's actions, would be held liable if accidents arose from their negligence in *choosing* a contractor).

134. Spandorf, *supra* note 13, at 37.

135. Grueneberg & Solish, *supra* note 7.

136. *See* Bartholomew v. Burger King Corp., 15 F. Supp. 3d 1043, 1048 (D. Haw. 2014).

137. *Id.* at 1045.

138. *Id.* at 1046.

139. *Id.*

140. *Id.* at 1048.

141. *Bartholomew*, 15 F. Supp. 3d at 1049–51. Similarly, in K.B. v. Inter-Continental Hotels Corp., No. 19-CV-1213, 2020 WL 8674188, at *6 (D.N.H. Sept. 28, 2020), the court noted that New Hampshire law "requires

Furthermore, the franchisor should not be punished for assisting its franchisees in succeeding. Thus, to resolve such a situation where the jurisdiction adopts a marketing plan, the court must balance the extent of control with the desire not to discourage franchisors from assisting franchisees.[142] Conveying its knowledge, experience, and advice should not mean, *ipso facto*, control.

A more exact method of limiting franchisor liability is to compare the market value of the franchisor's intellectual property and the total amount of payments the franchisees make. The difference[143] is then divided by the total amount of the franchisees' payments.[144] This percentage would determine the amount of the damages the franchisor would be liable for in the event of consumer injury.

Unfortunately, it is unclear how a franchisee's payments would change if such a formula were adopted. A franchisee's payment to the franchisor could be based on the percentage of gross revenue produced from the franchisee's overall sales.[145] The FTC's Franchise Rule allows state-imposed fees for franchisees but regulates unfairness by requiring disclosures and explanations of unreasonable fees.[146] Most likely, the franchisee bears the economic effects of the increased regulatory costs.[147] The situation, as a result,

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the franchisor to retain control over the specific instrumentality that caused the harm." The plaintiff had been trafficked for sex at multiple hotels, including the defendant hotel. She sued only franchisors or corporate entities that had licensed the hotel brand names, and the court held that the plaintiff met her burden for alleging a plausible claim for vicarious liability based on an actual agency relationship between the franchisors and hotel properties. *Id. But see* Czach v. Intercontinental Hotels Grp. Res., L.L.C., No. DLB-20-125, 2020 WL 6150961, at *11 (D. Md. Oct. 20, 2020) (the plaintiff was assaulted at the franchisee's hotel; but, having found no evidence of an actual or apparent agency relationship between the defendant franchisor and the franchised hotel, the court granted the franchisor's motion for a summary judgment dismissing the plaintiff's premises liability lawsuit).

142. *See* Eddy Goldberg, *Stop the Bleeding: What Franchisors Can Do to Help Struggling Franchisees*, FRANCHISING.COM (Sept. 7, 2010), https://www.franchising.com/articles/stop_the_bleeding_what_franchisors_can_do_to_help_struggling_franchisees.html [https://perma.cc/CJK4-XCXX] (arguing that some franchisors might take the risk of exerting control in order to protect its royalty stream, brand reputation, and network as a whole).

143. The difference between the two values represents the cushion that the franchisor includes to pass along to shareholders or whoever receives compensation from the franchisor. Using the cushion will hopefully not harm the franchisor to the point where franchising is no longer profitable. It would also encourage the franchisor to take more affirmative steps to ensure that its franchisees are compliant.

144. For example, if a franchisor's intellectual property has a market valuation of $100 million and its franchisees have paid a total of $80 million in fees, the franchisor would be 25% liable (e.g., [($100,000,000 - $80,000,000) ÷ $80,000,000] × 100%).

145. Kragnes v. City of Des Moines, 810 N.W.2d 492, 515–16 (Iowa 2012).

146. 16 C.F.R. § 436 (2018); *see generally* Robert W. Emerson, *Transparency in Franchising*, 2021 COLUM. BUS. L. REV. 172 (2021) (discussing the effectiveness and limitations of the franchising disclosure regime).

147. Michael Seid, *How To Determine Your Franchise Royalty Fee Structure*, BALANCE SMALL BUS., https://www.thebalancesmb.com/franchise-royalty-payments-the-basics-1350437 [https://perma.cc/93RY-EX4Q] (last updated May 11, 2019) (stating one of the purposes of the initial franchise fee is to cover the franchisor's expenses related to starting the franchise location, getting the location successfully running, and providing continued support to the franchisee). The FTC's objective in interpreting the term "required payment" (the second requirement of a franchise) is to capture all sources of revenue that the franchisee must pay to the franchisor or its affiliate for the right to associate with the franchisor and market its goods or services. *See* Lawrence G. Jameson, III, *Where Did That Franchise Come From?*, S.C. LAW., July 2016, at 32, 34 (2016), https://mydigitalpublication.com/publication/?i=321579&article_id=2534292&view=articleBrowser&ver=html5 [https://perma.cc/69XK-T83Z]. *But see* Alan J. Shaeffer, *Brand Licensing Programs: Exemptions—A Silver Lining in a Regulatory Cloud*, BUS. L. TODAY, Mar./Apr. 2010, at 41 (noting that even if an FTC Rule exemption

is aggravated because of the vastly inferior bargaining power the franchisee has compared to the franchisor.[148]

2. Joint and Several Liability for Licensees and the Licensor

To demonstrate why the trademark owner should be held jointly and severally liable in addition to its licensees, consider *Mobil Oil Corporation v. Bransford*.[149] In this case, the Florida Supreme Court held that the mere use of trademarks did not constitute the substantial control required to meet the test for apparent agency theory.[150] Accordingly, in more recent decisions, courts have used the Restatement test, which was the same standard used in *Mobil*, in order to determine if a franchisor may be held vicariously liable under an actual agency theory.[151] The relevant inquiry under the Restatement (Second) of Agency is whether the franchisor controls or has the right to control the franchise's day-to-day operations.[152] In *Allen v. Greenville Hotel Partners, Inc.*, the court held that the franchisor could not be held vicariously liable under a theory of actual authority because the franchisor did not control the hotel's daily operations or hotel security and life safety systems.[153] In contrast, the court in *Brown v. Zaveri* found a franchisor liable for the discriminatory acts of its franchisee against a patron because the franchisor controlled the franchisee's business in virtually every way.[154]

Still, most customers lack the leverage to force disclosure of a non-public franchisee's

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to a franchise relationship applies, there may still be required disclosures if the licensee operates within a registration state).

148. Emerson & Benoliel, *supra* note 88, at 105 (providing an analysis of the bargaining equality between franchisor and franchisee). Of course, when a tortious injury arises out of franchise operations under the franchisee, franchisors and franchisees are both sued. Franchisors bear high administrative costs, regardless of whether they prevail on the vicarious liability claim. King, *supra* note 83, at 479–80.

149. Mobil Oil Corp. v. Bransford, 648 So. 2d 119, 120 (Fla. 1995). In *Mobil*, "the plaintiff—a college student majoring in music—entered a Mobil Mini Mart gas station where a station employee beat him so severely that he ended up with three metal plates in his head. The employee had a history of assaulting customers. Mobil Oil Corporation, the owner of the Mobil trademarks, owned the station. Trademarked Mobil products were sold from the station. Mobil trademarks and logos were used throughout the premises. Employees were required to wear Mobil uniforms, and the employee who beat the plaintiff was wearing a Mobil hat during the incident." LoPucki, *supra* note 54, at 1101 (footnotes omitted) (citing *Mobil*, 648 So. 2d at 120).

150. LoPucki, *supra* note 54, at 1109 (citing *Mobil*, 648 So. 2d at 120). This is likely the case because the franchisee's use of the owner's marks would not create a cause of action for a plaintiff to detrimentally rely on the use of the mark or the representation. A plaintiff would still use that product or service, regardless of whether the franchisor or franchisee was operating the mark. *See* Phillips v. Rest. Mgmt., L.P., 552 S.E.2d 686, 695 (N.C. Ct. App. 2001); Cash v. Six Continents Hotels, No. Civ.A. 03-3611, 2004 WL 339660, at *3 (E.D. Pa. Feb. 19, 2004); Wood v. Shell Oil Co., 495 So. 2d 1034, 1039 (Ala. 1986).

151. Perkins et al., *supra* note 42, at 174.

152. RESTATEMENT (SECOND) OF AGENCY § 220 (AM. L. INST. 1958)*; see also* Dunn v. McDonald's Corp., No. 3:10–0055, 2010 WL 2696508, at *3 (M.D. Tenn. July 7, 2010) (prevailing on a motion for summary judgment where a franchisor showed that it did not own or conduct day-to-day operations at a franchise restaurant, it did not maintain the property on which it was located or sell or supply products to the restaurant, and it did not operate any business that sold or supplied products to the restaurant).

153. Allen v. Greenville Hotel Partners, Inc., 409 F. Supp. 2d 672, 678–80 (D.S.C. 2006), *appeal dismissed*, 2007 WL 1075142 (D. S.C. 2007), *and aff'd sub nom.* Allen v. Choice Hotels Int'l, Inc., 276 F. App'x 339 (4th Cir. 2008).

154. Brown v. Zaveri, 164 F. Supp. 2d 1354, 1359 (S.D. Fla. 2001).

financial strength,[155] and, of those people who do, most have not engaged in transactions that would make that kind of analysis feasible or cost-effective.[156] As a consequence, this problem comes to the surface: financially irresponsible franchisees may compete on a seemingly level playing field, under the guise of a trademark, with those franchisees who are financially responsible.[157] These irresponsible franchisees may thus abuse the franchise business model by reaping all the benefits without assuming any risk.[158] A response, however, would be that the franchisor has complete control in vetting and choosing a franchisee.

Certainly, financial responsibility, at least in this approach, is a key factor to consider. The logical conclusion, then, would be that any franchisor which allows financially irresponsible franchisees to operate thereby assumes the risk of liability that the irresponsible franchisees bring with them. Therefore, the franchisor would be liable for the acts committed by its franchisee and would arguably "set the stage" for its own liability. But is this really fair?

3. Social Insurance: Balancing Consumer Expectations

Judge Guido Calabresi, a senior judge on the Court of Appeals for the Second Circuit, has suggested that it would be "fairer, and more honest" to protect customers openly through "social insurance and taxation" instead of employing a "haphazard system of enterprise liability" and keeping franchisors guessing as to their potential liability.[159] Thus, having customers vote on who should effectively foot the bill in the franchise context would be a more equitable solution than plainly attributing potential liability to franchisors.[160] But is it truly equitable to shift liability away from a party who may actually be at fault and allow the victim to proactively choose his culprit? Also, unless through a clear and early outcome (long before a particular incident occurs), a vote on liability is not the fair approach to setting absolute, albeit sometimes arbitrary, standards that a franchisor can use to anticipate and plan for potential liability from its franchisees' acts and omissions.

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155. LoPucki, *supra* note 54, at 1113. If a franchisor has deep pockets, some people think that the franchisor should be held liable. King, *supra* note 83, at 478–79. This could lead to a slippery slope: potential claimants proceeding from simply thinking franchisors *should be* liable to making claims against a franchisor based primarily on the franchisor's actual or presumed high level of assets, not so much on the franchisor's actual liability under the law (i.e., a standard focused on the franchisor's degree of actual or apparent control over the franchisee, or any other factors).

156. LoPucki, *supra* note 54, at 1113. But do we really want customers to know the financial strength of a particular entity before it would naturally come up in litigation or after an injury? Knowing an entity's financial strength may incentivize customers to plot injuries and seek damages. If customers did not know, would that change their behavior or decision to file a lawsuit?

157. This dynamic incentivizes franchisees to externalize the costs of liability. *Id.* As the franchisor can access the financial information about its franchisees, it ordinarily should be in a better position to handle any liability.

158. Another example of the free-riding concept is discussed in *supra* notes 108–110 and the accompanying text.

159. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 528 (1961) ("[O]ne might [] wonder whether it would not be fairer, and more honest, to do this bit of Robin-Hooding openly through social insurance and taxation. These systems seem more likely than a haphazard system of enterprise liability to work fairly and consistently—and make those whom the voters wants [sic] to have pay, in fact pay.").

160. *Id.*

Customer leverage for the disclosure of franchisee financial strength presents another issue of public policy.[161] Do we really want to live in a society where customers know the financial strength of a particular entity before it becomes relevant (i.e., in litigation or after injury)? Customers typically do not know who has the deep pockets until it is relevant, which is usually in the ordinary course of litigation rather than the ordinary course of business. Knowing an entity's financial strength prior to a lawsuit may incentivize customers to plot injuries and seek damages.

Because consumers play such an important role in the economy as a whole, businesses and the economy at large would suffer gravely if customers only supported businesses that are adequately supporting themselves.[162] Most significantly, the franchise business model would vanish along with the last dollar of the last standing franchisor.[163] It seems, then, not only better suited, but most appropriate, for the franchisor to know the financial position of a franchisee beforehand.[164] This serves as a loss prevention strategy because the franchisor can choose responsible franchisees, monitor them routinely, and ensure that they obtain sufficient insurances to lessen liability resulting from negligent employees.[165]

This is not to say that the public should be left in the dark, but that ordinary people—usually novices to owning and running a business—should not, as they enter a business relationship, be assumed to have the same level of knowledge as the franchisor. Smaller businesses do not have the same resources readily available (in comparison to larger, thriving businesses), and that leaves their customers at higher risk.[166] On the other hand, the more support a small business has, the more the business would be able to support itself in an efficient manner and provide more advanced security for itself and its customers.[167]

Placing the onus on franchisors to vet franchisees presumes that liability is more aligned with deep pockets than it is with fault, which is most common in instances of apparent authority. To successfully establish apparent authority, however, there must be

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161. Commentators may argue that forced franchisor disclosures actually hinder investment and reduce real efficiency. While information on a firm's short-term earnings can be disclosed, tangible information such as human capital and consumer satisfaction is hard to come by and may reflect investment costs to enter the market for a franchisee. *See generally* Alex Edmans, Mirko Stanislav Heinle & Chong Huang, *The Real Costs of Financial Efficiency When Some Information Is Soft* (Eur. Corp. Governance Inst., Working Paper No. 380/2013, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316194 [https://perma.cc/ZF3A-8387] (discussing access to information and the relevant associated costs).

162. *See, e.g.*, Sarah Kellogg, *Congress Takes on Telecom*, WASH. LAW., Feb. 2006, at 23, 27 (noting the benefits in having competition in franchising, yielding benefits in price and nonprice competition).

163. King, *supra* note 83, at 478–79.

164. *See* Daniel Ellades & Caitlin Conklin, *Friendly Foreclosure: A Non-Bankruptcy Alternative to Resolution of Franchise Defaults*, N.J. LAW., Feb. 2019, at 18 (establishing the importance of a franchisor sufficiently vetting a potential franchisee with the risk of a franchisee's default harming the public perception of the franchisor's brand).

165. Brett A. Brosseit, Note, *Buyers, Beware: The Florida Supreme Court's Abrogation of the Apparent Authority Doctrine Leaves Plaintiffs Holding the Tab for Torts of Franchisees*—Mobil Oil Corp. v. Bransford, 23 FLA. ST. U. L. REV. 837, 854 (1996).

166. Loren F. Selznick & Carolyn LaMacchia, *Cybersecurity Liability: How Technically Savvy Can We Expect Small Business Owners to Be?*, 13 J. BUS. & TECH. L. 217, 218–19 (2018). For instance, small businesses are more vulnerable to cyberattacks and security risks because small businesses do not have the high revenue streams thriving businesses have from which funds can be directed to security infrastructure. *Id.*

167. *Id.*

some reliance *and* change in the customer's position.[168] In the franchising context, apparent authority would be created through reliance on the franchisor's trademark and the affirmative decision to visit the franchise because the customer believes the franchisor is in control of that location and the franchisee is a suitable representative of the franchisor.[169] Do customers actually make such an inquiry before visiting a franchise? Do they ever consider ownership prior to visiting a store?[170]

Survey results indicate that customers often believe, rightly or wrongly, that a franchisor is in control of the production and distribution of products sold by the franchisee.[171] However, in certain cases, such as in the hotel context, customers seem more reluctant to attribute control to a franchisor.[172] The key difference seems to be whether the franchisee's products are offered under the trademarks of the franchisor. For example, survey respondents are more likely to believe that Shell controls the production and distribution of the gasoline offered by its franchisees rather than the proposition that Shell controls the various goods offered inside a gas station.[173] Still, it can be difficult to prove that a customer affirmatively decided some cases in reliance on apparent authority.

However, the most readily accessible and obvious information available to customers is a trademark or brand name.[174] It is, after all, the franchisor trademark and product that franchisees rely on to attract customers. In fact, courts formulated the principle that trademarks constituted symbols of commercial "goodwill" because of their function of informing the public.[175] The relationship between a franchisor and franchisee confers upon the franchisee the right to use the franchisor's goodwill in its endeavors.[176] Franchisors benefit from customers' decisions to purchase based on the trademark but are usually protected from liability based on entity structure (especially insofar as the franchisor lacks the direct control over the franchisee that would induce liability).[177] There is a fine line to tread, however. For instance, if franchisors were to be held liable merely because a franchisee is using its trademark, emblem, or name to advertise the franchisee's business, the floodgates of litigation might open.[178] As noted above, such a form of liability would

168. *See* D.L.S. v. Maybin, 121 P.3d 1210, 1213 (Wash. Ct. App. 2005) (establishing reliance and change as requirements); *see also* Espinosa v. Accor N. Am., Inc. 174 So. 3d 123, 130 (La. Ct. App. 2015) (establishing reliance and change as requirements).

169. GARNER, *supra* note 102, § 9:44.

170. Brosseit, *supra* note 165, at 838–39; *see also supra* notes 111–114 and accompanying text.

171. *See infra* App., Pub. Surv., Questions 1–2, 8 (revealing customer beliefs).

172. *See infra* App., Pub. Surv., Question 12.

173. *Compare infra* App., Pub. Surv., Question 3, *with infra* App., Pub. Surv., Question 4.

174. Brosseit, *supra* note 165.

175. Irene Calboli, The Sunset of "Quality Control" in Modern Trademark Licensing, 57 AM. U. L. REV. 341, 358 (2007).

176. Scott v. Snelling & Snelling, Inc., 732 F. Supp. 1034, 1041 (N.D. Cal. 1990).

177. *See, e.g.*, RICHARD RAYSMAN, EDWARD A. PISACRETA & KENNETH A. ADLER, INTELLECTUAL PROPERTY LICENSING: FORMS AND ANALYSIS § 4.08(2) (1999) (explaining licensing's advantages for trademark licensors, including brand awareness and increased market presence); JOHN W. SCHLICHER, LICENSING INTELLECTUAL PROPERTY: LEGAL, BUSINESS, AND MARKET DYNAMICS 30–38 (1996) (detailing some key economic and legal factors affecting the profitability of trademark licensing).

178. *See, e.g.*, Raines v. Shoney's, Inc., 909 F. Supp. 1070, 1078 (E.D. Tenn. 1995) (holding that the protection of the trademark and service mark is the necessary duty of the franchisor), *appeal denied*, 916 F. Supp. 719 (E.D. Tenn. 1996); Kennedy v. W. Sizzlin Corp., 857 So. 2d 71, 77 (Ala. 2003) (holding that the retained right to supervise the alleged agent to determine if that person conforms to the performance required by a contract

mark the end of the franchise. It would also contradict the franchise business format since there needs to be some kind of association with a trademark. On the other hand, it does seem unfair for franchisors to benefit from the use of their trademarks without suffering liability for the actions of franchisees.[179] Perhaps there is some sort of middle ground that can be reached to reconcile these two competing theories.[180]

4. "Strict" Franchisor Liability

While there are franchisors that choose to take responsibility for the acts of their franchisees,[181] those franchisors face the difficulty of competition with other franchisors that ignore the plight of their ultimate customers.[182] Furthermore, customers rarely know the difference between those franchisors who take responsibility and those who evade it until they have a complaint.[183] Thus, the greater control a franchisor exhibits in response to customer complaints, the more control the franchisor has over the franchisee, and the more likely the franchisor will be held liable for other events in which they choose not to intervene.[184] This results in an incentive for all franchisors to adopt entity structures and policies to minimize potential liability for acts of franchisees.[185]

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with the asserted principal does not, itself, establish control); Anderson v. Turton Dev., Inc., 483 S.E.2d 597, 600–01 (Ga. Ct. App. 1997) (holding that the franchisor has an interest in safeguarding the uniformity, value, and integrity of the franchise system).

179. *See* Lagarias & Boulter, *supra* note 40, at 146 (discussing the need for franchisees to be afforded more protections by law due to the one-sided nature of franchise agreements and advocating for the expansion of the limited statutes providing protection for franchisees).

180. *See* David J. Franklyn, *Toward A Coherent Theory of Strict Tort Liability for Trademark Licensors*, 72 S. CAL. L. REV. 1, 42–58 (1998) (advocating a middle ground where a licensor is presumed not liable but held liable when it exerts a certain level of control over the use of the trademark, similar to a corporate veil piercing analysis)*; see also* Jennifer Rudis Deschamp, Comment, *Has the Law of Products Liability Spoiled the True Purpose of Trademark Licensing? Analyzing the Responsibility of a Trademark Licensor for Defective Products Bearing its Mark*, 25 ST. LOUIS U. PUB. L. REV. 247, 247–57, 268–74 (2006) (advocating the view that product trademarks are quality indicators and that trademark sellers should be more involved with developing and controlling their trademarked products and assume responsibility for the injuries their products cause).

181. *See* Liebeck v. McDonald's Rests., P.T.S., Inc., No. CV-93-02419, 1994 WL 16777704 at *1 (D.N.M. Nov. 28, 1994). Famously known as the "hot coffee" lawsuit, where McDonald's settled the suit with Ms. Stella Liebeck for an undisclosed amount after Liebeck suffered injuries caused by a franchisee's service of hot coffee. Allison Torres Burtka, *Liebeck v. McDonald's: The Hot Coffee Case*, AM. MUSEUM TORT L., https://www.tortmuseum.org/liebeck-v-mcdonalds/ [https://perma.cc/XHL2-GKX5] (last visited Apr. 2, 2022). While a settlement is not a perfect proxy for taking responsibility, it does serve as an example of voluntarily accepting monetary responsibility for the harm caused by a franchisee's actions.

182. LoPucki, *supra* note 54, at 1113. *See* Jonathan E. Schulz, *You Can't Have Your Cake and Eat It Too: The Standards for Establishing Apparent Agency*, 60 S.C. L. REV. 999, 1005 (2009) (footnote omitted) ("[F]ranchisors usually contractually obligate franchisees to "join in the franchisor's efforts to 'fool the customer' . . . [and] maintain the illusion that the business consists of uniform, wholly integrated outlets when . . . the 'chain' actually consists of separate, independent businesses.").

183. Schulz, *supra* note 182, at 1009 (stating, "consumers generally do not understand franchising"); *id.* at 1005 (footnote omitted) (quoting Emerson, *supra* note 83, at 660) ("[M]ost [people cannot] recognize the . . . existence of a franchise in the very circumstances where courts have found 'common knowledge' about independent dealers or trademark licensees.").

184. Nears v. Holiday Hospitality Franchising, Inc., 295 S.W.3d 787, 794–97 (Tex. Ct. App. 2009) (discussing the issue of franchisor control in a hotel context).

185. *Id.; see also* Klaus, *supra* note 78, at 99 (noting that several states have enacted legislation to combat perceived abuses of franchisors attempting to evade liability).

To rectify the situation, Professor LoPucki proposes to "impose liability on the entity that owns the trademark under which the goods or services are sold."[186] The proposed "trademark owner liability rule" would impose the franchisee's liability on the trademark owner, giving the injured party the chance to recover losses from a party with deeper pockets and theoretically improving the level of care and oversight of the trademark owner.[187] In addition, others have suggested imposing direct or vicarious liability on franchisors as a way to balance the supposed power relationship that develops from what some have described as adhesion contracts between franchisors and franchisees.[188]

For example, the proposed rule would remove most of the franchisee's risk for manufactured defective products, as well as the consumer risk of franchise insolvency. Consequently, the risk would fall into the hands of trademark owners who are in a better position than are consumers to investigate and analyze the solvency of licensees,[189] and in a better position than franchisees to cover liability arising out of a business format the franchisor owns. While this seems like a heavy burden, it could attract more franchisees to contract with a particular franchisor that eliminates most of the risk of litigation.[190]

As a result, holding trademark owners liable for the actions of their licensees will create a greater incentive to impose cost-effective measures to reduce injuries.[191] This may result in increased costs to customers as they are forced to bear the weight of the franchisor's increased costs through higher prices. However, the reduction of liability by

186. LoPucki, *supra* note 54, at 1113 (citing Stephen L. Carter, *The Trouble with Trademark*, 99 YALE L.J. 759 (1990)); Michael R. Flynn, Note, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 97 (1993) (footnote omitted) (commenting "franchisors could avoid some accidents by more carefully selecting and monitoring their franchisees").

187. Deschamp, *supra* note 180, at 273; LoPucki, *supra* note 54, at 1114; *see also* Emerson, *supra* note 83, at 628 n.59 (citation omitted) (noting "the typical franchisor is better able than most franchisees to bear the cost of consumer injuries.").

188. Adhesion contracts are contracts drafted by a party with stronger perceived power (the franchisor) and agreed to by the party in a weaker perceived position with less bargaining power (the franchisee). *Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019). These arrangements deprive franchisees of control over their entity, therefore creating the appropriate conditions for the controlling franchisor to assume direct or vicarious liability. The rationale for placing liability on the franchisor is that it created the conditions leading to the third party's damages. *See* Lagarias & Boulter, *supra* note 40, at 146; *see, e.g.*, Luso Fuel Inc. v. BP Prods. N. Am., Inc., No. 08-CV-3947, 2009 WL 1873583, at *3 (D.N.J. June 29, 2009) (citing Westfield Ctr. Serv., Inc. v. Cities Serv. Oil Co., 432 A.2d 48, 54 (N.J. 1981)); Goldwell of N.J., Inc. v. KPSS, Inc., 622 F. Supp. 2d 168, 184, 191 (D.N.J. 2009); Mustang Mktg., Inc. v. Chevron Prods., Co., 406 F.3d 600, 607 (Cal. Ct. App. 2005) (all noting the franchisor's superior bargaining position in comparison to the franchisee's).

189. Emerson, *supra* note 83, at 636–37; *see also* LoPucki, *supra* note 54, at 1115. Vicarious copyright infringement may offer guidance for these trademark arguments. This infringement arises "when a defendant has (a) the right and ability to control the infringing conduct and (b) a direct financial interest in the infringing conduct." R. Bruce Rich & David Ho, *Sound Policy and Practice in Applying Doctrines of Secondary Liability Under U.S. Copyright and Trademark Law to Online Trading Platforms: A Case Study*, 32 INTELL. PROP. & TECH. L.J. 1, 5 (2020) (citing Perfect 10, Inc. v. Visa Int'l Serv., Ass'n, 494 F.3d 788, 802 (9th Cir. 2007)).

190. The risk of litigation has been recognized as a disincentive to contract in other areas of law. For example, the risk of litigation over title to real estate can be grounds for making the title unmarketable. *See, e.g.*, Stewart Title Guar. Co. v. Greenlands Realty, LLC, 58 F. Supp. 2d 360 (D.N.J. 1999). Note also that customers seem to be in a much better position to analyze the fiscal responsibility and reputation of larger trademark owners than they are for smaller licensees. LoPucki, *supra* note 54, at 1116 n.89.

191. LoPucki, *supra* note 54, at 1117; *see also* King, *supra* note 83, at 470–71 (noting franchisors' ability to adopt safety-oriented requirements in the franchise agreement; franchisors' safety training programs; and franchisors' ability to monitor and sanction franchisees who fail to meet safety regulations).

instilling more cost-effective measures to reduce injuries to customers is well worth the potential resistance.[192] Ultimately, the creation of social insurance could lead to the reduction of injuries, resulting in a net social gain.[193] Again, looking at this approach from a franchisor's perspective, commentators have suggested that one of the best ways franchisors can protect their businesses and trademarks is through the drafting of proper, thorough franchise agreements.[194] Of course, this mostly benefits the franchisors as they are usually the entities with the brand, mark, or emblem and hence have the ability to impose such conditions on franchisees. Nevertheless, a covenant of good faith and fair dealing may be expressly[195] or impliedly[196] provided in a franchise agreement in order to promote a more expedient business relationship between the parties.

The liability should be curtailed in the event of trademark infringement and "knockoff goods." Courts should consider the financial resources of a franchisor and the location of the infringement. Similar to the issues of personal jurisdiction, it would be unreasonable to expect small franchises to police infringement on the other side of the globe. Moreover, a developing franchise may not have the ability to survey infringement in the same manner as a more established franchise. The same approach should be considered in the virtual marketplace. If infringers are utilizing online marketplaces to sell a franchise's goods or services without authorization, the burden is on the franchisor and not the third party.[197]

It is not unheard of for a franchisee to continue using the franchisor's intellectual property after the franchise relationship has ended.[198] Moreover, a franchisor has the right to prevent the unauthorized use of its trademark.[199] The franchisor must satisfy four requirements for a preliminary injunction: (1) there exists a substantial likelihood that the claim will prevail; (2) substantial threat that the franchisor will suffer irreparable harm if the injunction is denied; (3) the proposed harm is greater on the franchisor than the franchisee; and (4) granting the injunction will not undermine the public interest.[200] Once a court determines these factors are present, the franchisor can prevent a franchisee from continuing to use the franchise's image after the franchise agreement has expired.

Thus, when the franchise agreement expires, the franchisor has the ability to prevent

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192. LoPucki, *supra* note 54, at 1117–18. While there is a moral incentive behind stricter regulations, the main incentive is economic: avoiding injuries altogether means saving money for all parties involved.

193. *Id.* However, in trademark cases, franchisor liability requires a close relationship and profit-sharing between the direct infringer (franchisee) and the accused secondary infringer (franchisor). Absent a direct financial interest and close relationship, trademark vicarious liability may not be imposed. MICHAEL J. MCCUE, LEWIS ROCA, SECONDARY LIABILITY FOR TRADEMARK AND COPYRIGHT INFRINGEMENT 3 (2012), https://www.lewisroca.com/assets/htmldocuments/M.%20McCue%20Utah%20Cyber%20Symposium%20SECONDARY%20LIABILITY%20Sept%2023.pdf [https://perma.cc/669Q-DMU7].

194. Perkins et al., *supra* note 42, at 182.

195. Petro Franchise Sys., L.L.C. v. All Am. Props., Inc., 607 F. Supp. 2d 781, 792–93 (W.D. Tex. 2009).

196. Jimmy John's Franchise, L.L.C. v. Kelsey, 549 F. Supp. 2d 1034, 1038–39 (C.D. Ill. 2008).

197. Tiffany (NJ) Inc. v. eBay, Inc., 600 F.3d 93, 107 (2d Cir. 2010) (holding that the burden to monitor was on the plaintiff, not the defendant who owned the online marketplace). It is worth noting that in physical marketplaces, the burden may be placed on the third party to prevent the unauthorized sale of copyrighted goods.

198. *See, e.g.*, TGI Friday's Inc. v. Great Nw. Rests., Inc., 652 F. Supp. 2d 763, 766–67 (N.D. Tex. 2009) ("Defendants concede that they did not cease using TGIF's marks on receipt of the termination letters, and that they continue to use the marks and hold their restaurants out as TGI Friday's locations.").

199. S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 375 (3d Cir. 1992).

200. *TGI Friday's Inc.*, 652 F. Supp. 2d at 767; 7-Eleven, Inc. v. Grewal, 60 F. Supp. 3d 272, 279 (D. Mass. 2014).

the unauthorized use of its trademark. When considering whether to hold a franchisor liable, courts should determine if the amount of time between the end of the agreement and the injury was enough time for a franchisor to act. If a franchisor is aware that an agreement has expired but has not ensured the franchisee has ceased operating under the trademark, the franchisor should be liable.[201]

The foundation for this belief relies on apparent and lingering authority. Apparent authority has been discussed at length,[202] so the discussion will focus on the idea of lingering authority. While the concept is mainly used in partnership law, it can serve as a method to extend franchisor liability.[203] Lingering authority occurs when third parties reasonably assume that an agent's authority still exists at the time of interaction.[204] In partnership law, lingering authority is created when a partner is disassociated from the partnership, but third parties are not notified.[205] Without notification, the disassociated partner still retains the lingering authority to bind the partnership, thus leading to liability.[206] A method to end the lingering authority is to provide actual notice to third parties that the relationship has been terminated.[207] Note that actual notice goes beyond simply posting in publicly distributed material.[208] In this same vein, franchisees that retain their lingering authority should bind the franchisor as well. The burden should not be placed on the consumer or third party that receives no actual or constructive notice.

While the cost of providing actual notice to third parties that the franchise relationship has been terminated may not be negligible, it is undoubtedly less than the cost of litigation. Franchisors or other parties sometimes post notices in printed newspapers and online newspapers.[209] Another possible method is the use of social media.[210] According to the Website Survey, roughly 50% of the franchisors' Facebook pages assist users in finding

201. *See* RESTATEMENT (THIRD) OF AGENCY § 3.11 cmt. c (AM. L. INST. 2006) ("An agent's apparent authority may survive or linger after the termination of actual authority because apparent authority is present when a third party reasonably believes that the agent is authorized to take action and the belief is traceable to a manifestation made by the principal.").

202. *See supra* notes 168–180 and accompanying text.

203. By no means should this be viewed as advocacy for changing a franchise relationship into a partnership.

204. Smith v. Mallick, 514 F.3d 48, 51 (D.C. Cir. 2008).

205. 5 MATTHEW G. DORÉ, IOWA PRACTICE SERIES: BUSINESS ORGANIZATIONS ch. 8, § 8:5 (2021–2022 ed.); *see also* MICHAEL PAUL THOMAS, ZAIDA ANGULO MCGHEE, AARON H. REISNER, BRIAN D. KAHN & STACY L. LA SCALA, CALIFORNIA CIVIL PRACTICE: TORTS ch. 33, § 33:42 (2021).

206. John W. Larson, *Florida's New Partnership Law: The Revised Uniform Partnership Act and Limited Liability Partnerships*, 23 FLA. ST. U. L. REV. 201, 236–37 (1995).

207. EMERSON, *supra* note 9, at 312. As stated in the Restatement (Third) of Agency, "it is reasonable for third parties to assume that an agent's actual authority is a continuing or ongoing condition, unless and until a third party *has notice of circumstances* that make it unreasonable so to assume." RESTATEMENT (THIRD) OF AGENCY § 3.11 cmt. c (AM. L. INST. 2006). Indeed, this authority—formerly actual authority that now lingers as apparent authority—continues to bind an alleged principal because that apparent principal gave no notice to the third party, who thus reasonably believes the former agent remains an agent. *Id.* at § 3.11 illus. 1.

208. EMERSON, *supra* note 9, at 312.

209. *See, e.g.*, Judith A. Powell & Lauren Sullins Ralls, *Best Practices for Internet Marketing and Advertising*, 29 FRANCHISE L.J. 231, 234 (2010) (calling for a uniform template provided by franchisors to franchisees for advertising and promotional content).

210. Chirag Kulkarni, *How Franchisees Can Build an Effective Social Media Marketing Strategy*, ENTREPRENEUR (Sept. 29, 2017), https://www.entrepreneur.com/article/298216 [https://perma.cc/K65W-3T9H] (noting the importance of balancing franchise autonomy with franchisor flexibility in communicating effective marketing strategies).

franchise locations.[211] Using other internet resources, franchisors could provide broad notice in addition to creating site-specific notice.[212]

B. Disclaimers

It has been argued that trademark owners should not be permitted to disclaim liability.[213] The use of a trademark would fall within the third element of a franchise, as the franchisor maintains control over the use of the trademark and the marketing plan for the franchisee.[214] Since the franchisor maintains control over the trademark, this may position the franchisor to assume some of the blame, especially since it benefits from the franchisee's use of the mark. The trademark license that authorizes the use of the mark "is a core aspect of a franchise agreement."[215] However, most customers do not know the difference between a licensee and a trademark owner; they simply recognize that a trademark is on display.[216] The trademark is used as a source identifier. Thus, it simply provides a measure of comfort to consumers who trust that source and expect a certain quality from the source.

1. Expectations From Franchisee Display of the Franchisor's Trademarks

This trust of a source and expectation of quality, both due to a trademark, are exemplified in the 2016 University of Florida survey. There, 76.6% of 517 respondents believed that franchises licensed to use a specific trademark should sell only those products associated with that trademark.[217] This seems to show that over three-quarters of the respondents expect to only see franchisor products or services within a franchisee establishment, tying the two (franchisor and franchisee) together as one sole entity. In addition, the majority of respondents believed that Baskin Robbins franchises purchase ice cream made and distributed by Baskin Robbins.[218] In reality, each store makes or purchases ice cream from various suppliers.[219]

Further examples of this misunderstanding arise in the context of whether

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211. *See infra* App., Website Surv., Question 20.

212. Franchisors could also add a contract provision specifically permitting them to remove trademarked material from a franchisee's location/website upon the expiration of the franchise agreement or to post a notice of such at the location/website.

213. LoPucki, *supra* note 54, at 1119; *see also* Branning v. Romeo's Pizza, Inc., No. 1:19 CV 2092, 2020 WL 3275716, at *2–4 (N.D. Ohio Apr. 6, 2020) (noting that a joint employment disclaimer within a franchise agreement and operations manual does not mean there is not joint employer liability).

214. *See* Peter C. Lagarias & Edward Kushell, *Fair Franchise Agreements from the Franchise Perspective*, 33 FRANCHISE L.J. 3, 11 (2013) (noting that the Lanham Act requires the franchisor to police unauthorized use of its trademark or risk abandonment).

215. *Id.* (footnote omitted) (arguing that at the heart of every franchise agreement to operate a business is the identifying trademark).

216. *See* August Storck K.G. v. Nabisco, Inc., 59 F.3d 616, 619 (7th Cir. 1995) (noting that "few consumers will read" a disclaimer); *see also* Robert W. Emerson & Jason R. Parnell, *Franchise Hostages: Fast Food, God, and Politics*, 29 J.L. & POL. 353, 360 (2015) (noting that conflict over a trademark can enter the public sphere with controversial political statements by a franchisor and the harm it brings to brand reputation).

217. *See infra* App., Pub. Surv., Question 9.

218. *See infra* App., Pub. Surv., Question 5.

219. *See* Keating v. Baskin-Robbins USA Co., No. 99-CV-148, 2001 WL 407017, at *4–5 (E.D.N.C. Mar. 27, 2001).

McDonald's food products are actually made and circulated by McDonald's.[220] In a franchise relationship, the franchisor generates a profit when the franchisor receives franchising fees from the franchisee. Therefore, it is rather odd to allow trademark owners to disclaim liability should anything happen, as (1) consumers are relying on the trademark itself, and (2) the franchisor is gaining a profit from the relationship between the franchisor and the franchisee.

This survey data indicates that customers do not perceive much latitude between the licensee and the trademark owner.[221] It also illustrates how the public has very little knowledge as to what a trademark symbolizes. This is alarming because much of trademark common law is based upon providing protections for trademarks due to the public's reliance upon them.[222] Thus, it is unlikely that the average customer could adequately comprehend the meaning of a liability disclaimer by the trademark owner.[223] Even assuming that the customer understood the trademark owner's disclaimer and was fully aware of the entity on whose liability the consumer could rely, this should not justify such disclaimers.[224] When injured, the customer is probably already on the licensee's property and is unlikely to be able to ascertain the value of the licensee's liability.[225]

Second, a franchisor liability discussion should consider what the consumer or third party relied upon.[226] Did the third party rely on the fact that the product or service is of a uniform quality? Or rather, did the third party believe the presence of the trademark means that the service or good is endorsed by the trademark owner? In the case of a disclaimer, if the third party believed that the trademark, or in our case the franchise mark, serves as an endorsement,[227] how is it possible to disclaim one's endorsement? In that instance, a

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220. *See infra* App., Pub. Surv., Question 1.

221. *See* Deschamp, *supra* note 180, at 274 ("The customer has no idea what type of deal the licensor and [licensee] have struck when he or she makes a purchase.").

222. *See* McDonald's Corp. v. Robertson, 147 F.3d 1301, 1310 (11th Cir. 1998) (noting that because customers believe the products purchased at a McDonald's franchise location are sanctioned by the McDonald's Corporation, the sale of an inferior product by a franchisee will result in harm to the reputation of the McDonald's brand as a whole).

223. *See, e.g.*, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 467 (Cal. 1944) (Traynor, J., concurring) (finding "[t]he consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks"); Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1733–34 (2003) (footnote omitted) (noting "the history of products liability jurisprudence is littered with eloquent paeans to the consumer, whose acquisitive habits are seen as representing the driving force behind the success of modern capitalism, but whose haplessness and gullibility are seen to require constant safeguarding by the courts").

224. LoPucki, *supra* note 54, at 1120; *see also* Scheman-Gonzalez v. Saber Mfg. Co., 816 So. 2d 1133, 1139 (Fla. Dist. Ct. App. 2002) (citation omitted) (noting that an appropriate warning should "cause a reasonable man to exercise for his own safety caution commensurate with the potential danger [and] . . . contain some wording directed to the significant dangers arising from failure to use the product in the prescribed manner").

225. LoPucki, *supra* note 54, at 1120 ("Customers would be forced to choose among offers of liability without sufficient facts, which would continue the system and market failures that currently exist.").

226. *See* Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, 435 (2010) (arguing that consumer protection is just as important when dealing with trademark owners and their own unique interests); *see also* GARNER, *supra* note 102, § 9:44 (citing Salazar v. McDonald's Corp., No. 14-cv-02096, 2016 WL 4394165, at *13 (N.D. Cal. 2016)) (stating that disclaimers on the franchisor's website did not defeat the reasonableness of the employee's belief), *aff'd*, 944 F.3d 1024 (9th Cir. 2019).

227. As discussed above, there is a benefit to allowing some regional diversity in order for a franchisee to

disclaimer should not be valid. A disclaimer is a statement that one is not responsible or involved or has no knowledge of something.[228] An endorsement is the act of approving something openly.[229]

Third, disclaimers conflict with a trademark's inherent message of source uniformity. Thus, trademark owners' disclaimers are unlikely to communicate effectively to customers that they are not dealing with the trademark owner but rather the licensee.[230] That is, when a system's trademarks are more prominent than its disclaimers, those disclaimers "[(1)] would be inherently ambiguous because they would conflict with the assuring message of the trademarks, [(2)] they would lack the redundancy in the use that is typical of trademarks, and [(3)] they would lack the[trademarks'] emotional impact."[231] To be effective, a disclaimer must fly in the face of the third element of a franchise, or at least the manifestation thereof, which is substantial control and a prescribed market plan.[232]

Under those two standards, the franchisor is obliged to create strong similarity, if not uniformity, in how its franchisees operate and how they *appear* to operate.[233] If a franchisor issues a disclaimer, that would be acting against its interest in uniformity. Further issues may arise because a franchisor must have the ability to "exert a significant degree of control over the franchisee's method of operation."[234] In the event the liability is created by the method of operation, the franchisor would be responsible for creating a situation but then denying its liability.[235]

Fourth, disclaimers of vicarious trademark owner liability could be accomplished less ambiguously by disclaiming the underlying direct liability.[236] Manufacturers, sellers, and

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cater to its locality. A disclaimer against franchise uniformity would be acceptable in such an instance.

228. *Disclaimer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

229. *See Endorsement*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/endorsing [https://perma.cc/GCF6-EQTQ]. The belief that something reaches a uniform quality requires a more situational-driven analysis. For example, what is the standard deviation for what uniform is? Would a sandwich from a fast-food franchise be uniform if the sandwich was the same, but the provided condiments varied? In such an event, a disclaimer would not be so ridiculous. It is hard to promise uniformity, especially as a franchise expands across vast regions.

230. *See* Jacob Jacoby & Maureen Morrin, *"Not Manufactured or Authorized by. . ." Recent Federal Cases Involving Trademark Disclaimers*, 17 J. PUB. POL'Y & MKTG. 97, 104 (1998) (noting that despite empirical evidence showing that trademark disclaimers are typically ineffective, "the federal courts often order trademark disclaimers as a remedy in infringement cases"); *see also* Mitchell E. Radin, *Disclaimers as a Remedy for Trademark Infringement: Inadequacies and Alternatives*, 76 TRADEMARK REP. 59, 61 (1986) (asserting that disclaimers of association do not alleviate likelihood of confusion and are "difficult to frame and implement").

231. LoPucki, *supra* note 54, at 1120 (then citing the limited empirical evidence—specifically Emerson, *supra* note 83, at 656—for the proposition that "such disclaimers would not communicate effectively").

232. A community of interest standard focuses on the interdependence of a relationship. For the purpose of disclaiming, the problem should be viewed as the franchisor dedicating resources to produce a uniform image and then attempting to disassociate the franchisee from the network. It is worth noting that the community of interest also raises an issue against a disclaimer, similar to an argument above. If the franchisor is able to receive the benefit of a franchisee's actions, it should not be able to disclaim liability.

233. OLSON, *supra* note 15, § 21:65 (2017).

234. 16 C.F.R. § 436.1(h)(2) (2022).

235. This presents the situation of "have your cake and eat it, too." *See* Letter from Thomas, Duke Norfolk, to Thomas Cromwell (Mar. 14, 1538), *in* 1 LETTERS AND PAPERS, FOREIGN AND DOMESTIC, HENRY VIII, Pt. 1, at 189 Relief 504 (HM Stationery Off. 1892), https://www.british-history.ac.uk/letters-papers-hen8/vol13/no1/pp176-192 [https://perma.cc/5AEP-MXNF].

236. LoPucki, *supra* note 54, at 1121. When viewing the franchise agreement or contract signed between

franchisees should continue to disclaim direct liability, which makes a franchisor directly liable and means that no *vicarious* liability need be attributed to the franchisor.[237]

2. Meeting Standards in Order to Issue a Disclaimer or Otherwise Avoid Liability

One could argue that, regardless of whether a user or purchaser is a consumer or a businessperson, a trademark owner dealing with that user or purchaser should only be able to disclaim its own liability if the trademark owner meets certain basic standards, such as adequate disclosures of its financials and entity structure.[238] This is because the purchase price at issue (the cost of the good or service) is often outweighed by the cost of investigating and analyzing a seller's liability risk.[239] However, where a transaction may be of a high enough value to justify the cost of investigating the seller's entity structure, it has been suggested that a trademark owner should only be allowed to disclaim liability if that owner discloses to the customer the information necessary to understand and appraise the owner's business structure.[240] Further, considering that only a minority of the top 250 franchises provide information on their website, a plausible argument distinguishes ownership among different stores.[241] This is not the case for the average customer, however.[242]

Alternatively, in some instances, the trademark owner should not be held liable for

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parties, it is crucial that the actions of the agent are imputed to the principal. A disclaimer in a contract does not provide a defense for a principal to avoid liability for the actions of an agent in the scope of the principal's activities. United States v. Dish Network, L.L.C., 954 F.3d 970, 978 (7th Cir. 2020), *cert. dismissed*, 141 S.Ct. 729 (2021), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-743.html [https://perma.cc/C2XJ-KRCJ]. The franchisor erroneously believed it could disclaim liability by contract. *See id.*

237. LoPucki, *supra* note 54, at 1121 (citing U.C.C. § 2-316 (2001)). U.C.C. § 2-316(2) notes, "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous[]"; *see also* Calboli, *supra* note 175, at 405–06 (footnote omitted) (stating "courts have looked at disclaimers with diffidence . . . these actions can serve as evidence that licensors and licensees adopted adequate means to inform, and did not intend to mislead, consumers").

238. LoPucki, *supra* note 54, at 1122 (commenting "business-customers are no better situated than consumer-customers to evaluate the entity structures of their sellers[]"); *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. 709, 717–20 (2014) (survey evidence that would-be franchisees frequently fail to hire lawyers that can adequately advise them about their prospective purchase).

239. LoPucki, *supra* note 54, at 1122. *But see* Craig J. Knobbe, *Hidden Franchises*, 45 COLO. LAW. 25, 27 (2016) (noting that the FTC, as a matter of public policy, confirmed that trademark controls designed to protect the trademark under state or federal law do not meet the control or assistance element of vicarious liability).

240. *See* LoPucki, *supra* note 54, at 1122 (noting that liability favors both customers and third parties injured by the products or services sold under the trademark). An interesting study on this revealed that consumers generally do not impute responsibility based solely on association. Trademark owners experienced negative publicity "when participants were led to believe that the host knew of and condoned the partner's behavior." Nicole L. Votolato & H. Rao Unnava, *Spillover of Negative Information on Brand Alliances*, 16 J. CONSUMER PSYCH. 196, 201 (2006).

241. *See infra* App., Question 16.

242. "It is reasonable for a consumer to assume that the Baskin-Robbins ice cream cone they have today in Denver will be similar to the one they had last week in Seattle, and that if it isn't, it is the national company, not the Denver producer, who is ultimately to blame." Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 428 (2010).

the actions of others, such as supplier-customers. Those customers who are also suppliers to other firms are likely to have access to the business credit reporting systems used to gauge the creditworthiness of their own customers.[243] Thus, these supplier-customers are better situated to evaluate the entity structures of their business partners and, in turn, are able to rely less on the reputation of a trademark owner.[244]

Similarly, employees are often in a unique position to assess their employer's entity structure.[245] While the average customer is not as accustomed to a business entity's structure, as survey results in the Appendix demonstrate,[246] employees "have sufficient incentives to investigate the entity structure and creditworthiness of their employers" since they extend credit to their employers.[247] Moreover, since the employee is inside the employer's business, the employee has more access to information than the general customer.[248] Nonetheless, trademark owner liability may be appropriate in some employee-customer situations since "many employees lack the sophistication necessary to understand the precariousness of their positions as creditors and the significance of the facts they discover."[249]

Lastly, regulators and judges can limit the trademark owners' liability when non-licensees use the trademark.[250] While it is true that trademark owners are in a position to monitor and restrict the use of their trademarks with licensees, it would be impractical for owners to track the use of trademarked products by non-licensees.[251] Trademark owners should thus be cautious in their dealings so as not to create an implied license that could make them even more vulnerable to claims of liability.[252] In summation, when it is impractical for a trademark owner to monitor the use of its products by non-licensees, trademark owner liability should be limited to defects in the products themselves.[253]

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243. LoPucki, *supra* note 54, at 1124.

244. *Id.* These supplier-customers are so uniquely situated that the core supply arrangement of a franchisee must follow and has little capacity to influence the franchise network's supply arrangements. Kerry Miles, *Understanding Supply Chains for Franchisees*, FRANCHISEED (Feb. 7, 2018), https://www.franchise-ed.org.au/franchisor/understanding-supply-chains-for-franchisees/ [https://perma.cc/XJX7-PHNP].

245. LoPucki, *supra* note 54, at 1124.

246. *See infra* App.

247. LoPucki, *supra* note 54, at 1124. As it has been eloquently stated, in the labor market, employers are purchasers, and employees are sellers of labor. Catherine E. Shaefer, *Disagreeing Over Agreements: A Cross-Sectional Analysis of No-Poaching Agreements in the Franchise Sector*, 87 FORDHAM L. REV. 2285, 2290 (2019).

248. LoPucki, *supra* note 54, at 1124; *see also* Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 435 (2011) (assessing the role that an original set of employees who produced a product at the time of the customer's first encounter know the product the best along with the original manufacturer).

249. LoPucki, *supra* note 54, at 1124–25 (footnote omitted).

250. *Id.* at 1126; *see also* Calboli, *supra* note 175, at 406 (arguing that it is not always the case that a trademark licensor's failure to control its licensee triggers consumer deception).

251. *Id.* This was previously discussed concerning knockoffs. *See supra* note 197 and accompanying text. "This quality control requirement over the nature and quality of the product on which the trademark is used forms the basis for finding trademark licensors liable for injuries to third parties who use a product bearing the trademark licensor's trademark." Melissa Evans Buss, *Products Liability and Intellectual Property Licensors*, 27 WM. MITCHELL L. REV. 299, 306 (2000).

252. McCoy v. Mitsuboshi Cutlery, Inc., 67 F.3d 917, 922 (Fed. Cir. 1995); *cf.* Robert A. Matthews, Jr., *Licensee's Unclean Hands*, *in* 2 ANNOTATED PATENT DIGEST § 11:29 (asserting that an implied license defense may be negated if the purported licensee had unclean hands, which could include deliberate copying).

253. *McCoy*, 67 F.3d at 923 (noting that the law may create an implied license to enforce the contractual obligations of the patent holder and recognize legal rights of aggrieved parties); *see also* Robert A. Matthews Jr.,

3. A Presumption of Non-Liability

Acknowledging Professor LoPucki's potential answer to trademark liability, Professor David J. Franklyn proposes an alternate solution to the problem of trademark owners and franchisors taking refuge in entity structures that allow them to evade responsibility through contracts with licensees and franchisees.[254] Professor Franklyn asserts that licensor liability law should afford trademark licensors, like corporate investors,[255] an initial presumption of non-liability.[256] While a step in the right direction, a better approach would be to place the burden on the licensor to establish it should not be liable—i.e., there would be a rebuttable presumption of franchisor liability.

In the corporate context, veil piercing liability concerns two separate legal entities,[257] but in the franchise framework, there is only one franchise. Since liability may arise from the trademark license that the franchisor issued to the franchisee, the presumption of liability may be appropriate because of the trademark owner's control over the mark and the franchisee's operating under the mark (the franchisee's contract-based use of the mark).

Is it fair to place the burden on the consumer to rebut the non-liability presumption and prove control by the trademark licensor? Many consumers remain confused about the franchisee-franchisor relationship, as this Article's surveys show.[258] The franchisor should have to prove it does not directly control the franchisee or the information the public receives about the franchisee. Often it is quite difficult for a consumer to tell if a particular business is indeed a franchise or is owned by a national chain (a franchisor).[259]

The Lanham Act implicitly recognizes this potential problem of customer confusion. In the franchising context, the franchisor must exercise control over the nature and quality of trademarked goods and services, and its failure to do so could result in a loss of

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Implied License Arising from Patentee's Conduct, *in* 2 ANNOTATED PATENT DIGEST § 11:22 (stating that, similarly to an express license, an implied license provides a complete defense to an intellectual property infringement charge).

254. *See* David J. Franklyn, *Toward a Coherent Theory of Strict Tort Liability for Trademark Licensors*, 72 S. CAL. L. REV. 1, 48, 66 (1998) (proposing a framework that would sidestep prominent liability issues). These contracts may offer the licensor greater protection, as shifts in the judiciary have applied equitable principles in order to protect licensors and licensing contracts regardless of lack of quality control. Creative Gifts, Inc. v. UFO, 235 F.3d 540, 548 (10th Cir. 2000).

255. Generally, investors in the corporate context have limited liability to stimulate investment and economic growth. *See generally* Philip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 576 (1986) (discussing history and purpose of limited liability). Accordingly, this presumption of limited liability reduces an investor's liability to the amount of its own investment in the enterprise. 18 AM. JUR. 2D *Corporations* § 717, Westlaw (Nov. 2020).

256. *See* Franklyn, *supra* note 254, at 66 (proposing an initial presumption of nonliability). There is considerable traction as well for arguments that trademark licenses should be de facto automatically valid, regardless of the trademark owner's actual control when product quality stays the same or if variations in quality have occurred. Calboli, *supra* note 175, at 396.

257. For example, a parent corporation and its subsidiary, or a corporation and one or more of its shareholders. *See* 18 AM. JUR. 2D *Corporations* § 61, Westlaw (database updated Nov. 2021).

258. *See infra* App., Pub. Surv., Questions 1–12.

259. *See infra* App., Website Surv., Questions 15–16. While only 8.4% of the surveyed franchise system websites provide the user with instructions or assistance in finding a franchise location, only 16.4% of those websites provide any information that distinguishes franchisee or company-owned stores/units within that franchise network. *Id.*

trademark rights for the franchisor.[260] This creates competing interests for the franchisor between maintaining control over the trademark to retain trademark rights and giving the franchisee sufficient independence to avoid liability for actions of the franchisee.[261]

This presumption of limited liability is not without exceptions, however, and can be disregarded when necessary as a matter of equity.[262] The decision-making process may borrow from the analytical structure of corporate veil piercing law,[263] and it qualifies this presumption of limited liability with a collection of "piercing" tests.[264] Specifically, Professor Franklyn suggests that an initial presumption of licensor non-liability should be disregarded in cases where the trademark licensor "held itself out as an entity that made or vouched for the safety of the licensed goods."[265] This type of behavior is the exact factor courts look for in determining whether to apply the "piercing" doctrine to partnerships and limited liability companies.[266] This parallels the corporate structure, in which "shareholders may be held vicariously liable for the torts of their corporations if they 'hold themselves out' as guarantors of the corporation's debts or lead third parties to believe that they are dealing with the shareholders as individuals rather than as a corporation."[267] If a corporation cannot hide behind the veil for one of its subsidiary "shell" corporations, should franchisors really be able to hide behind the veil of licensing for a "shell" franchisee? While franchisees have independent licensees and employment, often the vast majority of the business operation is controlled by the franchisor and outlined in the lengthy franchisor-written franchise agreement.[268] Arguably, the very nature of the franchised

260. GARNER, *supra* note 102, § 9:43 (describing the important role that franchisors' licensing of their trademarks to franchisees plays in courts' decisions about potential franchisor liability to third parties; concluding, "the franchisor must balance two competing considerations: control over the mark sufficient to retain its rights in the mark, and independence of the franchisee so as to avoid liability for its actions").

261. *Id.*

262. 18 AM. JUR. 2D *Corporations* § 721, Westlaw (database updated Nov. 2021).

263. 18 AM. JUR. 2D *Corporations* § 48, Westlaw (database updated Nov. 2021) (commenting that "[t]he doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation").

264. Franklyn, *supra* note 254, at 66; *see also* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991) (discussing the "piercing" doctrine and its application).

265. Franklyn, *supra* note 254, at 66. Franklyn also suggests that the initial presumption of licensor non-liability should be disregarded in cases where the "trademark licensor: (1) operated as the functional equivalent of a manufacturer; (2) controlled the area of its licensee's operations that gave rise to the plaintiff's injury; (3) knowingly or recklessly contracted with a licensee who could not meet reasonably foreseeable product liability risks . . . or (5) contracted with a foreign licensee who is not subject to personal jurisdiction in the states where the licensed goods are sold." *Id.*; *see* Diamond Chem. Co. v. Atofina Chems., Inc., 268 F. Supp. 2d 1, 8 (D.D.C. 2003) (where the plaintiff argued that a merger resulted in "joint use of trademarks, and a common marketing image," which were factors in favor of piercing the corporate veil).

266. Merkel Assocs., Inc. v. Bellofram Corp., 437 F. Supp. 612, 617 (W.D.N.Y. 1977). The wrongful conduct of the primary stockholder could not pierce the corporate veil because of insufficient evidence showing that he acted as an "agent" for the corporation. *Id.* at 618.

267. Franklyn, *supra* note 254, at 60 (footnote omitted); *see also In re* Hillsborough Holdings Corp., 166 B.R. 461, 469–70 (Bankr. M.D. Fla. 1994) (opining that corporate veil doctrine should not protect shareholders who held themselves out to the marketplace).

268. *See* 16 C.F.R. § 436.1(h) (2018); David L. Steinberg & Moe Shrikian, *The Accidental Franchise*, 93 MICH. B.J. 26, 27 (2014); *see also* Robert W. Emerson, *Franchises as Moral Rights*, 14 WAKE FOREST J. BUS. & INTELL. PROP. L. 540, 558 (2014) ("[F]ranchisors often use operations manuals, contractual collective action clauses, reviews when deciding for or against renewal, and compliance audits so that, among other things, they

enterprise often shields the franchisor behind the veil of its franchise network structure while the franchisor simultaneously reaps benefits from that very structure.[269]

One interpretation of veil piercing applies "when there exists such unity between the corporation and the individual that the corporation ceases to be separate and when holding only the corporation liable would promote injustice."[270] Similar to general liability, the party seeking to pierce the veil can do so by demonstrating that the franchisor and franchisee are separated in name only, with the franchisee being the alter ego of the franchisor.[271] In the franchisor context, such a cessation of separate existence can be demonstrated with one of the three standards from the third factor. [272]

4. The Apparent Manufacturer Doctrine

Some courts have employed the apparent manufacturer doctrine to impose strict liability on trademark licensors.[273] The doctrine, as set forth in Section 400 of the Restatement (Second) of Torts, provides that "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were a manufacturer."[274] Nonetheless, despite the broad language of this section, most courts have opted for a narrow application of the doctrine.[275] Additionally, some courts have shown reluctance to apply strict liability to trademark licensors unless the trademark owner exhibits significant control or involvement in the process by which a product reaches consumers.[276] Such involvement is a necessary component of a franchise. However, courts

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can 'exercise nearly total discretion over the franchisee.").

269. The franchisor usually benefits at the inception of the franchise agreement, as new franchisees regularly lack business experience and a relatively easy to control by the franchisor. *See* Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting the Debate over Franchise Relationship Laws*, 76 ALB. L. REV. 193, 206 (2013) (detailing franchisors' preference for inexperienced franchisees).

270. Elizabeth S. Miller, *Are There Limits on Limited Liability? Owner Liability Protection and Piercing the Veil of Texas Business Entities*, 43 TEX. J. BUS. L. 405, 406–07 (2009) (footnote omitted) (citation omitted). *See also* Christopher W. Peterson, *Piercing the Corporate Veil by Tort Creditors*, 13 J. BUS. & TECH. L. 63, 91 (2017) (enumerating methods to pierce the corporate veil).

271. Most cases involving piercing the corporate veil involve alter ego. Miller, *supra* note 270, at 406. "The Supreme Court has stated that the evidence may include 'the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, the amount of financial interest, ownership and control the individual maintains over the corporation, and whether the corporation has been used for personal purposes.'" *Id.* at 407 (citing to Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 228 (Tex. 1990)).

272. *Id.* at 432 (noting that the burden is on the claimant); *see id.* at 432–34 (listing the standards compatible with the franchise context as a unity of interest between the manager (franchisor) and the LLC (franchise); the franchisor is the sole manager of the franchise; the franchisor exercises control over the business; the franchise is undercapitalized); *see also id.* at 412 (articulating the eight factors that some courts consider when applying the "business enterprise" theory).

273. Franklyn, *supra* note 254, at 66; *see also* Lou v. Otis Elevator Co., 933 N.E.2d 140, 581 (Mass. App. Ct. 2010) (holding that a "trademark licensor who participates substantially in the design, manufacture, or distribution of the licensee's products may be held liable as an apparent manufacture").

274. Franklyn, *supra* note 254, at 60 (quoting RESTATEMENT (SECOND) OF TORTS § 400 (AM. L. INST. 1965)).

275. *Id.*

276. *See, e.g.*, Torres v. Goodyear Tire & Rubber Co., 786 P.2d 939, 946–47 (Ariz. 1990) (holding that the reservation of a right to control and significant involvement in the business of a licensee were sufficient to apply "enterprise" products liability to trademark licensors); Connelly v. Uniroyal, Inc., 389 N.E.2d 155, 163 (1979), *cert. denied & appeal dismissed*, 444 U.S. 1060 (1980); Torres v. Goodyear Tire & Rubber Co., Inc., 867 F.2d

hold that the franchisor's intervention in the day-to-day operations will assign liability to the franchisor.[277] Thus, the strict liability is not an offense to the franchise "industry." Indeed, for this strict liability to apply, courts reviewing a franchisor's prescribed marketing plan must find that the franchisor exhibited some control over the franchisee with respect to the franchisee's location, advertisement, supplies, processes, and more.[278]

Recall that, of a franchise's three elements, a prescribed marketing plan or a community of interest is the third requirement.[279] If liability were to arise because of a franchisor-required process, strict liability would also be equitable.[280] The issue becomes less clear when considering the community of interest because of the mutuality element of this standard. However, as noted in *Instructional Systems, Incorporated v. Computer Curriculum Corporation*,[281] the community of interest also involves "substantial investment in goods or skill[s]" that are "of minimal utility outside of the franchise."[282] The franchisee's reliance on the franchisor's processes, which are not necessarily useful outside of the franchise, is sufficient to create strict liability.

Further, courts tend to apply the doctrine only to house-branding retail sellers.[283] For example, in *Torres v. Goodyear Tire & Rubber Co., Incorporated* (*Torres I*),[284] the U.S. Court of Appeals for the Tenth Circuit explained that "[t]he cases which apply the apparent manufacturer doctrine demonstrate that section 400 applies only where a retailer or distributor has held itself out to the public as the manufacturer of a product."[285] The Restatement (Third) of Torts also reflects this judicial trend.[286]

However, despite this trend being rooted in the historical origins of the apparent

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1234, 1238 (9th Cir. 1989); Combs v. Int'l Ins. Co., 354 F.3d 568, 577 (6th Cir. 2004); Watson v. Dillon Cos., 797 F. Supp. 2d 1138, 1162 (D. Colo. 2011); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 14 cmt. d (AM. L. INST. 1998).

277. *See* Billops v. Magness Constr. Co., 391 A.2d 196, 198 (Del. 1978) (suggesting that required reporting procedures are indicative of control over daily operations); People v. JTH Tax, Inc., 151 Cal. Rptr. 3d 728, 747 (Cal. Ct. App. 2013) (holding that a franchisor can be held vicariously liable where the manual included detailed controls over franchisee operations).

278. David W. Oppenheim & Felicia A. Nadborny, *Vicarious Liability Update*, 8 INT'L J. FRANCHISING L. 39, 44 (2010) (noting that franchisor liability may be imposed if a franchisor exercises "too much control over the daily operations of the franchise").

279. Grueneberg & Solish, *supra* note 7, at 11–12.

280. *See, e.g.*, Jay Hewitt, *Franchisor Direct Liability*, 30 FRANCHISE L.J. 35, 35 (2010) (stating that under a vicarious liability theory "the plaintiff alleges that the negligent franchisee is the innocent franchisor's agent").

281. Instructional Sys., Inc. v. Comput. Curriculum Corp., 614 A.2d 124, 142 (N.J. 1992).

282. *Id.* at 142.

283. *Id.*

284. Torres v. Goodyear Tire & Rubber Co. (Torres I), 867 F.2d 1234, 1236 (9th Cir. 1989).

285. *Id.* at 1236; *see* Yoder v. Honeywell, Inc., 104 F.3d 1215, 1222–24 (10th Cir. 1997), *certifying questions to* 786 P.2d 939 (Ariz. 1990) (en banc); *see also* Affiliated FM Ins. V. Trane Co., 831 F.2d 153, 155 (7th Cir. 1987) (holding Section 400 does not apply to a parent-corporation licensor because a defective product was distributed by parent's subsidiary); Nelson v. Int'l Paint Co., 734 F.2d 1084, 1088 (5th Cir. 1984) (finding under Texas law that Section 400 is inapplicable to a trademark licensor who does not manufacture or market the defective product).

286. Franklyn, *supra* note 254, at 61; *see* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 14 cmt. d. (1998) ("[T]his Section does not, by its terms, apply to the owner of a trademark who licenses a manufacturer to place the licensor's trademark or logo on the manufacturer's product and distribute it as though manufactured by the licensor. In such a case, even if purchasers of the product might assume that the trademark owner was the manufacturer, the licensor does not 'sell or distribute as its own product manufactured by another.'").

manufacturer doctrine, commentators have posited that it is inconsistent with the doctrine's underlying purpose and logic.[287] To be clear, "[t]he doctrine is premised on the simple notion that one who holds himself out as a manufacturer should be estopped from denying that one is, in fact, a manufacturer."[288] We may therefore infer that the doctrine should apply not only to "house-labeling" sellers but also to trademark licensors who put their names on products, thereby inducing consumers to make purchases based on the mistaken belief that the trademark licensor actually made the products or vouched for their safety.[289] Accordingly, the doctrine should not apply in most licensing situations where the consumer realizes the identity of the actual manufacturer, such as where the product packaging explicitly identifies the actual manufacturer.[290] Rather, in such situations, the consumer relies on the reputation of the actual manufacturer when making a purchase; and, therefore, the consumer did not purchase the good because the consumer believed the trademark owner made or vouched for the product's safety.[291] This theory largely corresponds to the position that trademark owners should not be held liable in supplier-customer situations.[292]

5. Trademark-Based Liability and Disclaimers

Ultimately, the proposed solutions to trademark-based liability and to any disclaimers thereof are couched in the premise that most consumers lack knowledge and understanding of the franchising and licensing entity structures.[293] The author's own surveys, conducted in 1992, 2000, 2008, and 2016, show that the professors' notions of consumer naïveté have merit.[294] As stated above, the surveys indicate that over this twenty-four-year span, a large majority of the sample population continued to believe the franchisor made and distributed the food products at distribution-oriented franchises such as McDonald's and Baskin-Robbins.[295] With respect to Baskin-Robbins, the results show that during the past twenty-

287. Franklyn, *supra* note 254, at 61.

288. *Id.* (footnote omitted).

289. *Id.* at 8; *see* Brandimarti v. Caterpillar Tractor Co., 527 A.2d 134, 139–40 (Pa. Super. Ct. 1987) (holding a licensor/parent corporation strictly liable under the apparent manufacturer doctrine for personal injuries caused by a defective forklift manufactured by parent corporation's wholly-owned subsidiary). Under initial court proceedings, there was fear that consumers would assume that "licensed goods were manufactured by the licensor—the trademark owner—and not by the licensee. Consumers could thus be defrauded into buying inferior goods." David J. Franklyn, *Owning Words in Cyberspace: The Accidental Trademark Regime*, 2001 WIS. L. REV. 1251, 1274 (2001).

290. Franklyn, *supra* note 254, at 62.

291. *Id.*; *see* Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367, 396 (1999) (arguing that, if courts prohibit unauthorized goods, "consumers will come to expect licensing as the norm.").

292. *See* LoPucki, *supra* note 54, at 1124 (arguing that trademark owners should not be liable in supplier-customer situations because suppliers and employees are better situated than customers and have more access to market information, making them less likely to rely on the reputation of the trademark owner).

293. This calls into question the role of trademark law in the lives of consumers. It has been contended that "the primary role of trademark law is to guarantee consumers and the market, and not the business per se, to facilitate a solution in this area." Irene Calboli, *The Case for a Limited Protection of Trademark Merchandising*, 2011 U. ILL. L. REV. 865, 903 (2011). Educating consumers may present a possible solution.

294. Survey specialists from the University of Florida conducted a public survey examining common franchise and licensing policies. The survey's objectives included determining: (1) consumer perceptions about trademarks and products and (2) consumer distinctions between business format and product distribution franchises. *See infra* App.

295. *See id.* for a more in-depth analysis of the survey's findings. *See supra* note 294 and accompanying

four years, there has been a slight increase in consumers' beliefs, erroneous though they are, that the ice cream is made and distributed by Baskin-Robbins.[296] Similarly, with respect to McDonald's, the study indicates that during the past decade, there has been an increase in the number of consumers who wrongly believe McDonald's hamburgers are actually made and distributed by McDonald's.[297]

The results unequivocally show that most people remain unapprised about the relationship between a franchisor and a franchisee[298] and the implications of such a relationship. Additionally, over the past eight years, there has been a significant decrease in respondents' beliefs that Baskin-Robbins may purchase milk from grocery stores rather than using Baskin-Robbins' brand milk.[299] According to these results, not only do consumers have difficulty in distinguishing between a franchisor and a franchisee, but they also discourage the individual franchisee's discretion over the basic ingredients in favor of a more predictable end product. Indeed, the results tend to indicate a strong consumer preference for uniformity across franchisees, calling, in effect, for franchisor control and, in the event of a mishap, franchisor as well as franchisee liability.

As evidenced by the study, this trend is not limited to distribution franchises where the products are goods intended for retail purchase by consumers. In fact, consumers also lack an understanding of the relationship in service-type franchises.[300] The survey demonstrated a similar lack of public knowledge on the roles of franchisors and franchisees

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text; *see also supra* Part III; *infra* App., Pub. Surv., Questions 1 & 5.

296. *See infra* App., Question 5; Jon Chesto, *Here's Why Baskin-Robbins Ice Cream is Coming to a Supermarket Near You*, BOS. BUS. J. (Feb. 16, 2014, 1:33 PM), http://www.bizjournals.com/boston/blog/mass_roundup/2014/02/baskin-robbins-hits-the-supermarket.html [https://perma.cc/8V6W-H3LT] (stating, "Baskin-Robbins used to make its own ice cream, but all of the manufacturing operations for North American shops have since been outsourced . . .").

297. *See infra* App., Pub. Surv., Question 1; Joel Makower, *Exclusive: Inside McDonald's Quest for Sustainable Beef*, GREENBIZ (Jan. 7, 2014), https://www.greenbiz.com/article/exclusive-inside-mcdonalds-quest-sustainable-beef [https://perma.cc/UTT7-B3UZ] (noting that McDonald's "uses a small group of strategic suppliers that make up a significant part of its business—about 20 companies comprise two-thirds of its annual spend[ing]").

298. Since 1993, approximately 5% fewer respondents believed that each individual store made or purchased its own products. *See generally infra* App.

299. *See infra* App., Pub. Surv., Question 10. There was a 16.7% drop in the people who strongly agreed or agreed with this statement in the last 8 years and a 7.2% increase in the strongly disagree or disagree category. *Id.*

300. The survey focused on (1) Holiday Inn, Inc., which provides a hotel service, coupled with product use and (2) McDonald's Corp., which provides food products coupled with service. *See, e.g.*, *infra* App., Pub. Surv., Questions 1–2, 8–9 & 12.

regarding Shell gasoline stations,[301] Supercuts Hair Salons,[302] and Diet Centers.[303] Essentially, this Article's survey results lend support to the suppositions underlying the commentary arguing for trademark-based vicarious liability; that is, the majority of consumers do not distinguish between licensing and manufacturing.[304] In fact, the results suggest that consumers are no more sophisticated now than they were back in 1992.[305] when majority of the sample population erroneously believed that, for all stores, food products are made and distributed by the franchisor.[306] In conclusion, while there may be different methods of spreading blame, licensors and franchisors that trade off of the public's ignorance should not be permitted to evade responsibility through licensing and franchising agreements.

III. TECHNOLOGY IN FRANCHISE LAW

A. Website and Social Media Usage

Another developing theory in franchisor vicarious liability has come about with the advent of social media and the internet. The franchise agreement should include a provision on franchisor/franchisee website usage.[307] There are three ways that this can be handled; (1) the franchisor can control 100% of the website, (2) the franchisor and franchisee share the responsibility of the website, or (3) the franchisor operates a website, and the franchisee operates a separate website.[308] Following this idea, the franchisor should also include a provision in the franchise agreement about email address usage.[309]

When determining whether a franchisor has control over the franchisee, it may be helpful to look to the franchisee's website or social media page. Determining who owns the website may help provide insight into who owns the goodwill and work product of the

301. The Shell results have a contrasting result from the rest of the examples. A vast majority of the respondents do not believe that Shell manufactures its own gasoline and sells non-shell products. *See infra* App., Pub. Surv., Question 3. This could arise because of the nature of gasoline. Most consumers believe that gasoline is gasoline. It is much harder to distinguish between "brands." In the event this is a false belief, such a result supports consumer naïveté but does not support failing to distinguish between licensing and manufacturing. However, it may support consumers' willingness to distinguish between licensing and manufacturing in areas that are less intimate to them. As a result, consumers are less likely to sue under the banner of apparent authority. Unlike a burger's distinct features, in which a consumer would be able to notice a difference, gasoline may be indistinguishable; thus, consumers did not believe that Shell produced their own gasoline.

302. *About Supercuts*, SUPERCUTS, https://www.supercuts.com/about-supercuts.html [https://perma.cc/Z73Q-9W9N] (last visited Apr. 3, 2022) ("Supercuts also offers professional haircare products at affordable prices. Our product lines include Paul Mitchell, Biolage, Redken, American Crew, Nioxin, and more.")

303. *See infra* App., Pub. Surv., Questions 3–4, 6–7, & 11 (demonstrating a lack of familiarity with the franchisor/franchisee dynamic for these businesses).

304. See *infra* App.

305. See *infra* App.

306. *See generally id.*; Robert W. Emerson, *Franchising and Consumers' Beliefs About "Tied" Products: The Death Knell for Krehl?*, 45 FLA. L. REV. 163, 198–200 (1993) (showing results of a public survey with twelve questions about products and sales for various franchise networks and franchised outlets).

307. GARNER, *supra* note 102, § 3:12.

308. *Id.*

309. *Id.*

franchise network.[310] As set forth herein, in 2016, the Author performed a survey of the websites of the top 250 franchise systems in the United States. Generally, many franchise websites have links or tabs that mention that the franchisor or trademark is part of a franchise network.[311] In fact, only 13 of the top 250 franchise brands in the United States fail to mention the franchise network's trademark on their website.[312] However, this prevalence rate becomes less meaningful when considering that approximately 72.5% of these franchisor websites only mentioned the trademark or franchise network at the bottom of the web page, decreasing the likelihood that the consumers view such information.

When consumers view the franchisor webpage as a whole, this reduced visibility, much like "fine print" in contract forms or conditions found on the back of tickets, may leave these consumers with misleading expectations about the person from whom they would actually be buying goods or services. In fact, the real concern with "fine print" on the back of tickets is unconscionability and the fact that consumers do not realize they agree to the printed terms in the first place. In this context, the consumer would not realize that the business is part of a franchise, thereby concealing a franchisor and abrogating any claims of apparent authority. The "fine print" pseudo-contracts on tickets are enforceable if the purchaser signs or otherwise manifests assent to its terms and has reason to believe that such tickets ordinarily contain such contractual terms.[313] As applied to franchise websites, a consumer would likely be presumed to know a particular business is part of a franchise by similarly satisfying these conditions.

In these cases, trademark recognition dominates the consumer's awareness and understanding of the franchised business. Additionally, only 40 of the top 250 franchise brands failed to indicate on their website that they operate through franchises (i.e., by including information relating to owning or operating a franchise location on the website).[314] A majority of the franchisor websites that provide information regarding owning or operating a franchise location merely include a brief description (i.e., "Open a Franchise," "Franchise Opportunities," etc.), which must be selected for the user to obtain more franchising information. However, a few franchisors include more descriptive information that clearly differentiates between the franchisor and franchisees—the website for the franchise system Elements Massage states, "[e]ach Elements Massage™ studio is independently owned and operated."[315]

On social media, there can also be ambiguity about who is actually controlling the website and the trademark. In some instances, the franchisor did not independently operate its own Facebook page, although local franchisees did maintain Facebook pages. This setup further decreases the probability that the consumer will differentiate between the franchisor and the local franchisee. Additionally, even when the franchisor does maintain its own Facebook page, only 27 of the 250 top franchises have mentions of "trademark" or

310. Emerson, *supra* note 268, at 569–70.

311. *See infra* App. (including the Author's Survey of the Websites of the Top 250 Franchise Systems).

312. *See infra* App., Question 13.

313. *See* RESTATEMENT (SECOND) OF AGENCY § 211 (AM. L. INST. 1981) (laying out the generally required elements for the enforcement of similar pseudo-contracts).

314. *See infra* App., Website Surv., Question 14.

315. *Find a Location*, ELEMENTS MASSAGE, https://elementsmassage.com/massage-places-near-me [https://perma.cc/CY9X-7JKE].

"copyright" on their Facebook pages.[316]

Two hundred twenty-seven (over 90%) of those franchises have location tabs on their websites to help customers locate a franchisee in their area.[317] For example, Pure Barre has a Locations tab, Own a Studio tab, and Find a Studio link on top of the home page.[318] Once the visitor to a website clicks on a location, the visitor is directed to that location's direct website, where there are biographies of the owners as well as workout schedules for that particular studio location. In addition, each Pure Barre Studio has its own Facebook and Instagram page, which is administered by the particular studio owner.[319] This system of using one single, central website that leads to separate franchisee websites is the best way to avoid disputes regarding rights to the site after termination, trademark misuse, and inconsistent brand positioning.[320] However, less than 10% of the top 250 franchises explicitly identify the specific owner or operator of the franchise location.[321] In the social media context, 128 of those franchises have location tabs on their Facebook pages to assist customers in locating a franchisee in their area—a low volume compared to the 227 franchises that contain this information on their websites.[322]

Another method for identifying a franchise system is for the franchisor to differentiate between franchise-owned units and franchisee locations.[323] While most franchisors identify on their website that their brand is a franchise system, only 42 of the top 250 franchises distinguish franchise ownership from company-owned units.[324] Surprisingly, 67 of the franchises distinguished between company-owned units and franchise units on their Facebook pages—a higher rate of differentiation than found on franchisor websites.

A franchisor's identification of which entity employs employees or workers may also provide insight into whether the franchisor has control over the franchise system. Only 45 of the top 250 U.S. franchise systems mention "employees" or "workers" on their home page.[325] Only seven of these franchise systems indicate on the franchisor's website that the individual franchisee employs the employees, although 14 of the franchisors indirectly reference that employees are hired by an independent employer distinct from the franchisor. Comparatively, 52 franchise systems mention "employees" or "workers" on their Facebook page, with 13 of the franchises mentioning that the individual franchisee

316. *See infra* App., Website Surv., Question 18 (providing results of the top franchises' Facebook pages).

317. *Infra* App., Website Surv., Question 15.

318. PURE BARRE, www.purebarre.com [https://perma.cc/3G6G-XX2Q].

319. *See, e.g.*, FACEBOOK – PURE BARRE, https://www.facebook.com/purebarregainesville/?fref=ts [https://perma.cc/ZSU7-QY84] (providing a platform for Pure Barre studio to connect with customers).

320. Powell & Ralls, *supra* note 209, at 233.

321. *See infra* App., Website Surv., Question 16.

322. *See infra* App., Website Surv., Questions 15 & 20.

323. Newk's Eatery has franchise options, as seen on the eatery's website by a small link at the bottom of the webpage. NEWK'S EATERY, https://newks.com/ [https://perma.cc/T893-6ZHQ]. It should be noted that on the bottom of the eatery's website, it is copyrighted under Newk's Franchise, LLC, but there is no mention on the company's website that some locations are franchises and some are corporate stores. *Id.* In Gainesville, Florida, a local paper wrote a story about the local Newk's Eatery finally opening, revealing that the location would become a corporate store because the franchisee was unable to organize. Emily Mavrakis, *Newk's Eatery to Open Jan. 13*, GAINESVILLE SUN (Dec. 10, 2019, 11:13 AM), https://www.gainesville.com/news/20191210/newks-eatery-to-open-jan-13 [https://perma.cc/9YYZ-WUMR].

324. *See infra* App., Website Surv., Question 16.

325. *See infra* App., Website Surv., Question 17.

employs the employees.[326]

Franchisors may open themselves up to liability when they require that their franchisees use specific email addresses or social media platforms;[327] such liability could arise from the content posted by the franchisees and their employees. For this reason, some franchisors prohibit franchisees from operating their own website or Facebook page altogether.[328] If a court decides that the franchisor is controlling the franchisee's daily operations by dictating its social media use, the franchisor will be liable for all activity occurring on those sites. Franchisors have several avenues available to shield themselves from liability for the content posted by their franchisees on social media, including disclaiming the obligation to monitor the social media activity of their franchisees and providing clear guidelines in their franchise policies as to the rights created by the email or social media accounts in order to delineate the applicable responsibilities. Although this disclaimer may help the franchisor avoid liability in the eyes of the court, this still does not address the issue of customers mistakenly seeing an email as being from someone working directly with the trademark owner or franchisor, as opposed to just the franchisee. This ambiguity can lead customers astray if they want to try to hold the franchisor liable, especially when the franchisee runs the website, or even result in violations of federal regulation.[329]

It is also important to consider whether franchisors take advantage of Facebook's "direct" access to potential consumers to delineate or further delineate the setup of their franchise system. Only 113 of the top 250 franchisors frequently responded to questions, posts, or comments on their Facebook page, with only approximately 30% of the franchisors mentioning "local" units or stores very often or often in their responses and less than 10% of franchisors mentioning "franchisee" or "locally owned units" often or very often in their responses.

B. Deep Linking

Increasingly, the visits to a franchisor or one of its franchisees are entirely virtual, with an online experience that may not indicate who actually owns or operates the services

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326. *See infra* App., Website Surv., Question 19.

327. These requirements demonstrate a stronger control the franchisor exerts over the franchisee. With enhanced control, the likelihood of franchisor liability also increases. Secondly, when considering the consumer's perspective, such uniformity creates the reliance effect as well as the appearance of the various locations being a part of one company.

328. IRENE BRUCE HOLLOWAY ET AL., UNDERSTANDING FRANCHISE LAW (2013). From the franchisor's perspective, this strategy (e.g., prohibiting franchisees from operating social media channels that use the franchisor's trademark) is effective in limiting the franchisor's risk, as well as allowing the franchise's online presence to speak with one corporate/business entity voice. *See Legal Problems for Franchisors in Social Media*, HILFER L. (Apr. 4, 2016), https://kbhilferlaw.com/legal-problems-franchisors-social-media/ [https://perma.cc/5NMY-XESW] (discussing the legal strategy of centralizing brand social media accounts).

329. 16 C.F.R. § 436.9 (2007). The code states it is an unfair or deceptive act or practice and, therefore, a violation of Section 5 of the Federal Trade Commission Act if a franchisor misrepresents that any person is a franchisee of the franchisor. *Id.* § 436.9(b)(1). For guidance on how franchisors can avoid running afoul of disclosure regulations in online advertisements, *see* FED. TRADE COMM'N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING 2–21 (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf [https://perma.cc/Q9F2-B2PU].

or products being marketed.[330] That is especially true with deep linking,[331] which defeats a website's intended method of navigation.[332] Through this process, web surfers often fail to realize that when they leave the website of one owner and surf to the website of another owner,[333] website visitors thereby enter a website through a backdoor rather than the website's home page, and, therefore, miss the disclosures, usage terms and conditions, disclaimers, and related information.[334] As each web page can be separately addressed and thus reached independently, the trademark (franchise element one)[335] and copyright indicia of the home page are typically missing unless each page contains a trademark and copyright notice.[336] Linked websites may be required to pay a monthly fee in order to keep the link to the separate website active (franchise element two).[337] Despite the seemingly nefarious aspect behind deep linking, it has generally been held to be a legal and acceptable practice.[338] The websites can be connected through a form of a community of interest or a prescribed marketing plan from the original website (the third and final element of the franchise[339]). The main website may have some form of control over the other websites that are linked to the main website. If the websites are linked together and can fool a person into believing that they are on the same website the whole time, there is probably a shared theme.[340]

Could franchisors that link directly to franchisee order or application pages be liable

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330. *See infra* App., Website Surv., Question 18.

331. A deep link is a method that allows internet users to bypass a website's homepage to a specific page within the website. Brian D. Wassom, Note, *Copyright Implications of "Unconventional Linking" on the World Wide Web: Framing, Deep Linking, and Inlining*, 49 CASE W. RES. L. REV. 181, 192 (1998).

332. *Id.* An example of how this defeat is accomplished is where one website, selling various products, links directly to another website's order form instead of to the second site's homepage. *Id.* at 192 n.65 (referencing this example as involved in Ticketmaster's online order form). Although not impermissible, questions exist as to whether and to what extent the second site's navigational structure may be bypassed.

333. Pham, *supra* note 47. Other concerns stem from important disclosures and website-use agreements that visitors have to go through when visiting a home page but get redirected due to deep linking. Lee Plave & Inna Tsimerman, *Franchising: Data Protection and E-Commerce Issues in the United States*, 4 INT'L J. FRANCHISING L. 3, 7 (2006).

334. MAHMOOD A. KHAN, RESTAURANT FRANCHISING: CONCEPTS, REGULATIONS AND PRACTICES 521 (3d ed. 2014).

335. Spandorf, *supra* note 128 (noting that franchises are creatures of statute and that the first element of the traditional franchise is a trademark license).

336. *Id.*

337. *Id.* The second element is a payment of a fee to the brand owner for the right to use or associate with the trademark. *See* Nicos L. Tsilas, *Minimizing Potential Liability Associated with Linking and Framing on the World Wide Web*, 8 COMMLAW CONSPECTUS 85, 88–89 (2000) ("[W]ebsite operators often pay to be placed in a search engine's database or purchase premier placements in a search engine's results.").

338. Andrew L. Dahm, Note, *Database Protection v. Deep Linking*, 82 TEX. L. REV. 1053, 1053 (2004). Courts are frequently split on the issue of deep linking and will depend on the specific facts in question. *See* Ticketmaster Corp. v. Microsoft Corp., No. 97-3055 DDP, (C.D. Cal. Apr. 28, 1997) (settling where Microsoft wrongfully linked users to the internal pages within Ticketmaster's website); *cf.* Ticketmaster Corp. v. Tickets.com, Inc., No. CV 99-7654, 2000 U.S. Dist. LEXIS 12987 (C.D. Cal. 2000) (declining to find improper deep linking with Tickets.com linking to the ticket-purchasing pages of Ticketmaster), *aff'd*, 248 F.3d 1173 (9th Cir. 2001).

339. Spandorf, *supra* note 128 (explaining that the third element is the prescribed marketing plan or community interest).

340. "[The] fact that work is commercial will be harmful to the deep linker because it will appear that the deep linker is attempting to steal the target website's customers and market[s]." Dahm, *supra* note 338, at 1078.

for orders or applications by nature of bypassing key navigational pages from the franchisee?[341] Should consumers who purchase products from distributors and resellers who deep link to a manufacturer or seller of the products be able to hold the manufacturer or seller responsible for warranty claims?[342] Ultimately, the owners of deep-linked websites could face liability under an agency theory of apparent authority.[343]

If apparent authority applies, the principal is liable for the agent's tort or breach of duty because of the principal's manifestation of authority to the third party.[344] Even going so far as to disclaim an agency relationship in the franchise agreement would not take a franchisor out of the scope of apparent authority.[345] Thus, even if the principal and agent do not intend to form an agency, courts may still recognize an implied agency relationship.[346] In the deep linking context, all that is required for apparent authority is for the third-party consumer to reasonably believe that the deep linker has the authority to act on behalf of the website owner and that the belief is traceable to the website owner's manifestation.[347]

The requirement of "manifestation" from the principal remains an unsettled area of agency law.[348] Regarding deep linking, if the use of a deep link "falsely suggests sponsorship, affiliation, or endorsement[,]" it could be a violation of the Lanham Act.[349] One can argue that if the internet is a "free-for-all," where website owners cannot control who visits their website, then it becomes less reasonable for the website owners to be held liable, as they "cannot make manifestations 'to the world.'"[350] On the other hand, "if a website is perceived more as controlled property (such as a store), then apparent authority

341. Such a situation requires a balancing act. As noted, the prescribed marketing plan and the substantial control tests require the franchisor to maintain control of operations or marketing. If the franchisee's online presence is considered part of "operations," the franchisor must exert some sort of control or guidance over the system. However, the control will increase the reasonability of the third party's assumption that the franchisor and franchisee are the same. The situation is then aggravated because the franchisor's disclaimers and explanations of separate ownership are avoided.

342. *See* Pham, *supra* note 47 (discussing liability in the context of apparent authority).

343. *Id.* at 7.

344. *See id.* at Part II; *see also* Valdes v. Century 21 Real Est., L.L.C., No. 19-05411, 2019 WL 5388162, at *4 (D.N.J. Oct. 22, 2019) (holding that the plaintiff had pled enough facts to withstand a motion to dismiss for a claim of vicarious liability under the actual authority theory because the plaintiff alleged that the franchisor was heavily involved in the franchisee's employees' unsolicited calls, instructed the franchisee's employees on what to say during the phone calls and how often to call, and gave the employees access to lead lists and auto-dialers); *see also* Hayhurst v. Keller Williams Realty, Inc., No. 19CV657, 2020 WL 4208046, at *6–8, *11 (M.D.N.C. July 22, 2020) (denying a motion to dismiss a suit against franchisor based on apparent authority for franchisor control through practices like the franchise training programs).

345. Drummond v. Hilton Hotel Corp., 501 F. Supp. 29, 31 (E.D. Pa. 1980).

346. Pham, *supra* note 47; *see also* Alexander Weaver, *Aggravated with Aggregators: Can International Copyright Law Help Save the Newsroom*, 26 EMORY INT'L L. REV. 1161, 1998 (noting that content owners may give an implied license unless active preventive measures are taken).

347. *See* Pham, *supra* note 47.

348. *Id.*

349. BALLON, *supra* note 53, § 9.03[1].

350. Pham, *supra* note 47 (citing RESTATEMENT (SECOND) OF AGENCY §27 cmt. b (AM. L. INST. 2012)). There is further argument that deep linking is actually beneficial, as the more sites that contain links to yours, the more potential traffic for you. Joseph A. Tontodonato, Comment, *Deep-Linking: Sure You Can Exploit My Trademark, Weaken Its Strength, and Make Yourself Money While Doing It*, 22 T. JEFFERSON L. REV. 201, 203 (2000).

becomes more plausible" because "[t]he principal is more in control to make manifestations to third parties."[351]

The website-as-a-franchise-store motif is true to a jurisprudential lineage in which apparent authority arose in physical, not virtual, stores. In *Hoddeson v. Koos Brothers*,[352] for instance, the Superior Court of New Jersey found a furniture store liable under the doctrine of apparent authority after a man, unaffiliated with the furniture store, approached a customer inside the store, offered her assistance, and ultimately collected a check for furniture that the unsuspecting customer never received.[353] Although the furniture store made no affirmative statement or representation that suggested to the customer that the fraudulent salesman possessed the authority to sell furniture, the court nonetheless concluded that the store "owed a duty of care 'to protect the customer from loss occasioned by the deceptions of an apparent salesman.'"[354]

One year later, the *Hoddeson* opinion was reinforced in the Restatement (Second) of Agency, "a principal can create apparent authority when he intends 'to cause the third person to believe that the agent is authorized to act for him, or he *should realize* that his conduct is likely to create such a belief.'"[355] Accordingly, if a website is perceived as controlled property, such as a store, then a website owner may have a duty to protect unsuspecting customers from "apparent salesmen" by "polic[ing] its website and mak[ing] sure that no fraudulent party is appearing as the website owner's agent."[356] If it fails to do so, then the website owner may be held liable to the customer under the doctrine of apparent authority.

Companies should police how their trademarks are exhibited, with franchisors actively pursuing investigations for trademark infringement in order to thwart liability. They can do so most commonly through cease-and-desist letters or filing a formal lawsuit.[357] As the law currently stands, a trademark owner escapes liability when a business displays the trademark, despite customer expectations that the trademark owner should be held liable.[358] However, a trademark owner should use cease-and-desist letters to enforce the trademark because trademark owners have an obligation to enforce the trademark.[359]

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351. Pham, *supra* note 47 (citing RESTATEMENT (SECOND) OF AGENCY §27 cmt. b (AM. L. INST. 2012)).

352. Hoddeson v. Koos Bros., 135 A.2d 702, 706 (N.J. Super. Ct. App. Div. 1957). Later cases have also echoed holding an apparent principal liable. The general rule of law is that the "appearance of authority must be shown to have been created by the manifestations of the alleged principal, and not alone and solely by proof of those of the supposed agent." Blaisdell Lumber Co. v. Horton, 575 A.2d 1386, 1388 (N.J. Super. Ct. App. Div. 1990) (citation omitted).

353. Pham, *supra* note 47 (citing *Hoddeson*, 135 A.3d at 703–04).

354. *Id*. (citing *Hoddeson*, 135 A.3d at 707).

355. Pham, *supra* note 47 (emphasis added). In the context of the Internet and deep linking, companies may have a duty to protect consumers from loss occasioned by the deceptions of an apparent salesman, imposing an active duty on a website owner to police its own website. *See* Hard Rock Café Licensing Corp. v. Concession Servs., Inc., 955 F.2d 1143, 1147–50 (7th Cir. 1992) (alluding that companies police their trademark depending on how much it is worth to the trademark owner).

356. Pham, *supra* note 47.

357. BALLON, *supra* note 53, § 6.18; *see also* Regina Shaffer-Goldman, Note, *Cease-and-Desist: Tarnishment's Blunt Sword in Its Battle Against the Unseemly, the Unwholesome, and the Unsavory*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1241, 1293 (2010) (noting that the cease-and-desist letter is "quicker and cheaper than filing a trademark suit" and is often more efficacious).

358. *See* Pham, *supra* note 47.

359. *Trademark Cease and Desist Letters — The Complete Guide*, COHEN LEGAL,

If the trademark owner does not enforce the trademark, then the trademark may lose its distinctiveness, leading to a loss of the trademark.[360] As such, Pham argues that trademark owners may lack a sense of urgency to protect customers without the threat of liability looming overhead.[361]

Although most current deep linking cases do not create apparent authority, Pham expects this to change as more websites evolve into "virtual stores" with limited access and secured server transactions.[362] Ultimately, companies that transact business via virtual stores and fail to police their websites for fraudulent parties should not escape liability when unsuspecting consumers rely on these "fraudulent salesmen."[363] Pham posits that the development of "controlled property" in the form of virtual stores could eventually "stretch the envelope of apparent authority" to include deep linking.[364]

Courts may seek guidance in the field of online trademark infringement. For example, in *Rescuecom Corporation v. Google, Incorporated*,[365] Rescuecom alleged that Google was using and profiting from its trademark through the use of internet links.[366] The claim further stated that Google allowed Rescuecom's competitors to use its trademarks, which caused customer confusion.[367] The customers could believe there was a connection between the plaintiff and its competitors because the competitor's advertisements appeared when customers searched for the plaintiff's name.[368] If the plaintiff could show Google's use "is likely to cause confusion, or to cause mistake . . . ." it would show that Google violated the Lanham Act.[369] In the context of franchise-deep linking, applying the same likelihood-of-confusion standard is useful when determining a franchisor's liability. If the franchisor links third parties to various franchisees without distinguishing between ownership, third parties may become confused and assume unitary ownership. The assumption of same ownership is the foundation of franchisor liability.

Another example of online apparent authority arose in *CSX Transportation, Incorporated. v. Recovery Express, Incorporated.*[370] The court considered whether an

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https://www.cohnlg.com/trademark-cease-and-desist-letters/ [https://perma.cc/SRB6-XQQW] (last visited Apr. 3, 2022).

360. *Id.*

361. Pham, *supra* note 47. It is noted that the one-sided nature of franchise agreements often leads to a lack of policing within a franchise network. Gordon Drakes, *To What Extent are Franchisors Obligated to Protect and Enhance Their Brand in the Face of Competition*, FIELDFISHER (Mar. 9, 2015), https://www.fieldfisher.com/en/services/franchising/franchise-commercial-law-blog/to-what-extent-are-franchisors-obliged-to-protect-and-enhance-their-brand-in-the-face-of-competition [https://perma.cc/BXU6-7W9H].

362. *See id.* at 5.

363. *See id.*; *see also* Jane C. Ginsburg & Luke Ali Budiardjo, Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives, 41 COLUM. J.L. & ARTS 153, 222 (2018) (arguing that plaintiffs would be able to establish that a defendant knew of specific, wrongful works because the defendant enabled the fraudulent use of the deep link).

364. *See* Pham, *supra* note 47 (including examples of deep linking).

365. Rescuecom Corp. v. Google Inc., 562 F.3d 123, 124 (2d Cir. 2009).

366. *Id.* at 126.

367. *Id.* at 127.

368. *Id.* at 131.

369. *Id.* at 128 (quoting 15 U.S.C. § 1114(1)(a)).

370. CSX Transp., Inc. v. Recovery Express, Inc., 415 F. Supp. 2d 6 (D. Mass. 2006).

email address with a party's domain could create apparent agency.[371] The plaintiff believed that he was dealing with someone authorized to act on the defendant's behalf because that individual was communicating with the defendant's name in his email address.[372] However, this was not the case, and the defendant claimed the individual never worked for it.[373] An important focus when determining apparent authority is the source of the "facts." The alleged principal must create the reliance.[374] The court held that reliance solely based on an email domain name is not sufficient to create apparent authority.[375]

More recently, apparent authority and implications of liability have been developed, calling for a defendant to do more than just use another's mark to violate the Lanham Act. In *Alzheimer's Foundation of America, Incorporated v. Alzheimer's Disease and Related Disorders Association, Incorporated*,[376] the court stated that the Alzheimer's Foundation of America's purchase of the Association's trademarks only violates the Lanham Act if advertisements online are likely to confuse consumers.[377] These rulings come as companies frequently purchase other companies' marks as search words and use these marks to draw contrast to their own.[378] The Court noted that a plaintiff does not need evidence of actual confusion to bring a likelihood of confusion action—just evidence of the likelihood of confusion.[379] Most importantly to the discussion of deep linking, the possibility of confusion can arise when "a consumer who searches for the plaintiff's website . . . and is directed instead to the defendant's site because of a similarity in the parties' website address."[380] The court held that the confusion must be significant and cause irreparable harm to the mark holder.[381]

Such a holding is to the benefit of franchisors. Transiting to deep linking and the franchise context, franchisors should not be held liable simply because of a shared website. On the other hand, if a franchisor provides information on the website to create reliance, a website may become sufficient. To bind the franchisor, the information must come from the franchisor. Additional information created by the franchisee is not of use to bind the franchisor under apparent authority in the virtual context. In terms of deep linking in the franchise world, who becomes liable when the information displayed on a website appears to be provided by a franchisor but is actually provided by a fraudulent source?[382] The

371. *Id.* at 7.

372. *Id.* at 8 (footnote omitted) (citation omitted) ("[Plaintiff] apparently based this belief on the E-mail's domain name – recoveryexpress.com – and the representations of [individual] to him both in the E-mail and in subsequent telephone conversations.").

373. *Id.*

374. *Id.*

375. *CSX Transp.*, 415 F. Supp. 2d at 11.

376. Alzheimer's Found. Am., Inc. v. Alzheimer's Disease & Related Disorders Ass'n, No. 10 Civ. 3314, 2015 WL 4033019, at *1 (S.D.N.Y. June 29, 2015).

377. *Id.* at *7.

378. *Id.*

379. *Id.* at *8.

380. *Id.* at *10 (citation omitted).

381. *Alzheimer's Found.*, 2015 WL 4033019, at *8–9.

382. Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 103 (2d Cir. 2010) (holding that a virtual marketplace will not be held liable for copyright infringement if the mark used accurately describes the genuine goods of the owner of the mark because use of the mark on its website does not suggest it affiliates itself with the owner of the mark). Trademark owners have the burden of policing illicit use of their marks when their products are sold in a virtual marketplace such as eBay. *Id.* at 102–03.

doctrine of nominative fair use permits "[a] defendant [to] use a plaintiff's trademark to identify the plaintiff's goods so long as there is no likelihood of confusion about the source of [the] defendant's product or the mark holder's sponsorship or affiliation."[383] Because franchise law is behind the constantly changing technology in modern society, common law suggests that laws in the virtual marketplace favor protections of content/product distributor websites over franchises who provide the content.[384]

Deep linking is increasingly important in the mobile world as the focus on apps gets stronger. This type of linking is used on mobile devices to take users from emails and websites and redirect them into apps.[385] Deep links are "simply a way to identify, address and transport users to specific content in apps."[386] Recently, Apple began to tap into this deep linking market with the release of a recent operating system, iOS13.[387] This OS allowed linking to content stored within an app as opposed to on the open web.[388] Interestingly, the use of deep linking within apps encroaches on search engines such as Google and Yahoo because there will be no need to use a search engine if in-app searching is accessible.[389] The possibility of confusion is increased by the fact that it is often the franchisor, not the franchisee, that owns the application that connects consumers with the franchisee.[390] As Apple continues to develop this deep linking from the web to apps and within apps, "if rolled out correctly, the new ecosystem has a possibility of not just creating real competition for Google as the dominant search for mobile, but it can also provide an entry point for Apple to power all search beyond a mobile device . . . ."[391]

The challenge for Apple and others looking to implement universal linking will be to develop support for "outbound links" that may currently support the current deep linking feature the OS offers.[392] If the app does not support the deep linking features, the search

383. *Id.* at 102 (quoting Merck & Co. v. Mediplan Health Consulting, Inc., 425 F. Supp. 2d 402, 413 (S.D.N.Y. 2006), *appeal denied*, 431 F. Supp. 2d 425 (S.D.N.Y. 2006)).

384. *See, e.g.*, *Tiffany (NJ) Inc.*, 600 F.3d at 103 (discussing the application of common law in a trademark dispute between an internet marketplace and a branded product).

385. Chris Maddern, *A Brief History of Deep Linking*, TECH CRUNCH (June 12, 2015, 2:00 PM), https://techcrunch.com/2015/06/12/a-brief-history-of-deep-linking/ [https://perma.cc/3HNQ-N4V2].

386. *Id.*

387. Note that the current Apple IOS 13.6 allows for developers to connect content deep inside apps using universal links: when a user taps a universal link, the system redirects them directly to the app without routing through the website. *See Allowing Apps and Websites to Link Your Content*, APPLE DEVELOPER, https://developer.apple.com/documentation/xcode/allowing_apps_and_websites_to_link_to_your_content [https://perma.cc/2P8X-8QTQ].

388. Note that Apple seems to be taking a step away from its deep linking potential. Alex Bauer, *WWDC 2017: What's Coming in iOS 11 for Deep Linking and App Discovery*, BRANCH (June 8, 2017), https://blog.branch.io/wwdc-2017-whats-coming-in-ios-11-for-deep-linking-and-app-discovery/ [https://perma.cc/PL8D-72PX].

389. Alex Lirtsman, *Is Deep Linking the New Marketing Battleground?*, MARKETING LAND (July 7, 2015, 12:23 PM), http://marketingland.com/deep-linking-new-digital-marketing-battleground-133755 [https://perma.cc/TRK3-W8X4].

390. The McDonald's app allows users to order from their phones and pick up from a local franchisee. *McDonald's on the App Store*, APPLE, https://apps.apple.com/us/app/mcdonalds/id922103212 [https://perma.cc/FDF8-GQV2]. The application is owned by McDonald's USA. *Id.* This is also true for the Dunkin Donuts app owned by Dunkin Donuts. *Dunkin' on the App Store*, APPLE, https://apps.apple.com/us/app/dunkin/id1056813463 [https://perma.cc/S9P7-8CMU].

391. Lirtsman, *supra* note 389.

392. Klint Finley, *Apple's iOS 9 Links Recall the Bad Old Days of Internet Explorer*, WIRED (March 23,

function will not operate properly and will not direct the user to the particular app or site.[393] The future of deep linking will depend on how it is further developed to link to all apps, not only those created and owned by Apple.

IV. PROPOSALS AND CONCLUSION

Franchisor liability remains an unsettled topic. While federal regulations, such as the Lanham Act, require the franchisor to exert control over its trademark in accordance with the franchise and other regulations, if the franchisor exerts too much control over the daily operations of its franchisees, then it may be held liable for the franchisees' torts or the torts of their employees. If the franchisor does not exert control over the trademark, the franchisor risks losing its right to the trademark.[394] To confuse the issue even more, the customer rarely knows the difference between a franchisor and franchisee.[395] As such, franchisors, in the trademark context, can reap the benefits of allowing franchisees to use the franchisor's trademarks while the franchisors evade liability by using licensing and franchising agreements. However, in most instances, a remedy currently exists where the franchisor includes disclaimers clearly delineating the product's origins. Including a disclaimer may inform the consumer as to the source of the product and therefore clarify any misconceptions the consumer had regarding the franchisor as the producer.[396]

The internet has also brought forth a newer issue of vicarious liability as a result of deep linking. As online stores and internet sales increase, courts may start applying a theory of apparent authority to the franchisee (and, conversely, the franchisor) when customers are defrauded or otherwise harmed (perhaps even through breach of contract) by third-party websites deep linked to franchisee websites. In order to avoid liability, franchisors, therefore, need to closely monitor the links to third-party websites that manifest on franchisee websites. This issue currently remains unsettled, but states, or even a new FTC standard, should impose a duty on franchisors to oversee any linking or other information on a franchisee's site. If one or more of its franchisees' sites, let alone the franchisor's own site, purports to provide assurances to the reader of that site,[397] then the franchisor should be held accountable for harm to a party that acted in reliance upon those assurances.

Certainly, the franchisor could file a cross-claim or otherwise seek reimbursement from the owners of the third-party website and perhaps from the franchisee. However, as

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2016, 10:00 AM), http://www.wired.com/2016/03/apple-ios-9s-universal-links-recall-the-bad-old-days-of-internet-explorer/ [https://perma.cc/N6MA-DV5B].

393. *Id.*

394. GARNER, *supra* note 102, § 9:43.

395. Certainly, that is shown in the survey responses in the Appendix of this Article, *infra*, and in other surveys. *See* Robert W. Emerson, *Franchisee Independence: Still Awaiting Customer Recognition*, 15 N.Y.U. J.L. & BUS. 287, 320–29 (2019) (presenting the other survey responses and the Author's subsequent conclusion that there is no public "common knowledge" regarding franchise characteristics and law); *see also* Emerson, *supra* note 83.

396. However, much social science indicates that consumers often fail to read, let alone understand or respond to warnings. Laura A. Heymann, *Reading the Product: Warnings, Disclaimers, and Literary Theory*, 22 YALE J.L. & HUMANS. 393, 399 (2010). Indeed, prospective franchisees themselves often fail to investigate thoroughly the franchise they ultimately purchase, and they frequently choose not to hire counsel for advice. Emerson, *supra* note 238, at 717–20.

397. Such promises may be express or implied, such as those that accompany the display of the franchise system's trademark.

is often found in these matters, the secondary liability of a party, such as a franchisor, may rightly ease the injured consumer's burden of obtaining compensation (the consumer can pursue the more easily located and able-to-pay franchisor). In turn, the franchisor has even more reason to pursue measures that would protect consumers—these potential plaintiffs—in the first place. A franchisor's strict overview of the use of trademarks, social media deep linking, and the like would be incentivized for the franchisor to avoid being held strictly liable to a franchisee's customer.

These issues of determining liability in the franchise context have become increasingly apparent in the areas of trademark liability (for torts and manufacturer defects) and deep linking. Courts are engaging in a juggling act between holding franchisors liable when they exert enough control to create an agency relationship and protecting the franchising industry when the customer's own knowledge comes into play. Thus, franchisors have an incentive to monitor the actions of their franchisees less, so as to avoid liability through agency law principles.

The present interpretative unrest over franchisor liability places franchisors and franchisees in a predicament. It is important for franchisors and franchisees to have accurate information regarding their rights and responsibilities to ensure they can comply as required by law. However, the unrest is not likely to be settled any time soon. One can only hope that certain policy changes balance the interests of the franchisor, the franchisee, and the customer. These policy changes need to be reflected in increased regulation and clearer standards in case law. The franchisors will need to modify their business activities and draft their agreements with more precision to accommodate the newer vicarious liability issues arising in, for example, both trademarks and social media deep linking. Concerns arise around who should make the efforts to address these issues and implement the new policy concerns: Federal legislation, State legislation, or advances in contract law?[398] Whoever takes the lead in this area will have to accommodate the needs for effective mass marking, heightened control over implementing ethical employment practices, and the monitoring of the internet and its effects on consumers. Any steps in this direction would decrease franchisors' needs to avoid liability because they would be able to protect their businesses more effectively by following clearer guidelines. Yet these changes will not occur until consumers, and society at large, demand that the franchise parties adhere to principles and practices compelling a strong presumption of franchisor accountability for a franchisee's conduct.

398. *See* Howard Yale Lederman, *Franchising and Franchise Law: An Introduction*, 92 MICH. B.J. 34, 36–37 (2013) (discussing the effects state laws and the Federal Trade Commission's regulations have on franchises); *see also* Emerson & Benoliel, *supra* note 88, at 108–28 (discussing potential changes to reflect the relationship concerns between franchisees and franchisors); Emerson & Benoliel, *supra* note 269, at 216 (concluding, "[t]he assumption that franchisees consider all relevant information before signing a franchise contract has little theoretical or empirical support in actual practice, and thus the door is open to reconsidering the adoption of franchise relationship laws" in order to provide genuine protection for vulnerable franchisees).

APPENDIX

Public Survey – Franchising and Trademarks

Results are given in chronological order, left to right, from 1992 to 2000 to 2008 to 2016: 1992 (590 respondents); 2000 (890 respondents); 2008 (517 respondents); 2016 (837 respondents). Responses are given in percentages, to the nearest 0.1% (or, for the 1 to 5 scale from Strongly Disagree to Strongly Agree—to the closest one-thousandth—e.g., 3.111).

1. Do you think that fast food products such as McDonald's hamburgers are made and distributed by McDonald's:

	1992	2000	2008	2016
For all stores	46.4	38.4	38.1	46.8
For most stores	21.5	9.1	11.0	19.7
For some stores	11.0	10.9	10.6	9.9
For none	17.3	17.1	13.4	18.3
No answer/ Don't Know	3.8	24.5	26.9	5.3

2. For respondents that said “None” in Question 1. Do you think that each individual franchisee that makes its own products is required to meet certain specifications:

	1992	2000	2008	2016
For all products	58.8	72.9	60.6	59.2
For just food items	33.3	17.2	22.7	14.0
For none	7.8	5.3	12.6	4.5
Don't Know	0.2	4.6	3.0	22.3

3. When you buy gas, for example, at a Shell service station, do you think you are buying:

	1992	2000	2008	2016
Shell gasoline made by Shell	39.8	25.9	28.7	19.0
Gasoline made by another company bought by a Shell store	56.4	56.5	56.1	75.2
No Answer/ Don't know	3.8	17.6	15.2	5.8

4. When you buy products other than gas at a Shell station, do you think you are buying:

	1992	2000	2008	2016
Products, in general, made and distributed by Shell	15.9	4.6	3.4	3.1
Products made by many other companies bought by a Shell store	81.5	81.5	85.3	94.3
No Answer/ Don't Know	2.6	13.8	11.3	2.6

5. Do you think products such as Baskin-Robbins ice cream are made and distributed by Baskin-Robbins:

	1992	2000	2008	2016
For all stores	43.1	52.4	47.4	57.9
For most stores	30.2	11.0	11.6	18.7
For some stores	11.7	10.1	11.4	9.1
For none*	11.4	9.0	11.8	9.3
No Answer/ Don't Know	3.5	17.5	17.7	5.0

6. Do you think a product such as Supercuts Hair Salon shampoo, which is actually used on customers, is made and distributed by Supercuts:

	1992	2000	2008	2016
For all salons	18.0	22.9	29.5	36.9
For most salons	15.3	7.3	5.9	14.0
For some salons	16.1	11.2	12.1	9.8
For none*	44.4	32.7	27.9	30.7
No Answer/ Don't Know	6.2	25.9	24.6	8.6

7. What do you most associate with Diet Center?

	1992	2000	2008	2016
Diet Center's diet food	37.6	17.3	20.8	17.8
Diet Center's diet pills	9.7	7.0	6.9	12.3
Diet Center's counseling	30.3	14.7	22.5	23.4
Other Answer	15.6	28.0	21.3	1.1

No Answer/ Don't Know	6.7	33.0	28.4	45.4

8–12. For each statement about franchises and their trademarks, please tell me whether you agree, disagree, or have no opinion. Or tell me whether you feel strongly either way. 1 to 5 scale, from Strongly Disagree (1), to Disagree (2), to No Opinion (3), to Agree (4), to Strongly Agree (5).

8. McDonald's Corporation makes or obtains all cooking equipment, napkins, trays, and the like for each McDonald's restaurant.

Strongly Agree or Agree	54.5	58.3	66.3	56.0
Strongly Disagree or Disagree	37.8	32.0	25.4	36.3

9. A franchise, for example McDonald's, licensed to use a specific trademark, for example the golden arches, should sell only those products that are associated with that trademark.

Strongly Agree or Agree	64.9	74.3	76.6	65.8
Strongly Disagree or Disagree	24.2	22.4	20.3	20.5

10. A business that buys a license, for example Baskin-Robbins, is free to use other products, such as Publix [a grocery store] milk instead of Baskin-Robbins' milk

Strongly Agree or Agree	53.2	57.4	58.4	41.7
Strongly Disagree or Disagree	37.1	34.2	35.5	42.7

11. A business should be able to buy a license, for example Shell gas, and buy from other suppliers, such as Windex-windshield wiper fluid instead of Shell wiper fluid.

Strongly Agree or Agree	56.6	77.4	79.9	65.1
Strongly Disagree or Disagree	33.6	18.3	15.5	21.1

12. Holiday Inn, Inc. makes or obtains all bed sheets, furniture, cleaning products, and the like used at each hotel.

Strongly Agree or Agree	28.1	45.2	47.5	37.7
Strongly Disagree or Disagree	64.2	44.0	41.9	49.5

Website Survey – Franchising and Trademarks

Franchise websites reviewed: Percentages based on total of 250 surveyed franchises (so percentages often come to slightly less than 100%)

13. Does the website mention the trademark of the franchise network?

Yes: 236 (94.4 %)
No: 13 (5.2 %)

14. Does the website identify or indicate that there are franchising opportunities (i.e., phrasing that persons can buy a “store,” “restaurant,” or “unit”)?

Yes: 204 (81.6 %)
No: 40 (16.0 %)

15. Does the website provide the user with instructions or assistance in finding a franchise location?

Yes: 227 (90.8 %)
No: 21 (8.4 %)

16. Does the website provide any information that distinguishes ownership among different stores (i.e., whether the store is franchised [franchise-owned] or company-owned; for example, store unit numbers are preceded with a "C" for company-owned units or "F" for franchisee-owned units?)

Yes: 41 (16.4 %)
No: 195 (78.0 %)

17. Does the website's home page mention "employees" or "workers?"

Yes: 45 (18.0 %)
No: 201 (80.4 %)

18. Does phrasing on the franchise's Facebook page mention the system's trademark or copyright?

Yes: 27 (10.8 %)
Not observed: 206 (82.4 %)

19. Do posts on the franchise's Facebook page mention its employees?

Yes: 52 (20.8 %)
No: 192 (76.8 %)

20. Does the Facebook page assist users in finding franchise locations?

Yes: 128 (51.2 %)
No: 114 (45.6 %)