Mark, Copyright Licensing Update

The 1980s bring new problems to trademark and copyright licensors in the U.S. as legal challenges gain momentum

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ABSTRACT

U.S. trademark and copyright licensors face new problems in the 1980s. Licensors can expect an increased number of determined thrusts by injured parties to impose liability upon them for the conduct and operations of their licensees, particularly where the conduct and operations are associated with the rendering of services as contrasted with the sale of licensor's trademarked products. The new Federal Trade Commission (FTC) Disclosure Rule in the United States will have a decided impact upon the granting of franchises. The 1976 United States Copyright Act affects individual author's ownership of a copyright where any rights have been granted under a copyright and ownership rights where an exclusive license has been granted.

INTRODUCTION

In the United States, thousands of licensees[1] (franchisees) operate under trademarks owned by another (licensers or franchisors). The products and services associated with the licensed trademark are nationally advertised to attract trade to the business operated by each of these licensees. Many licensees are, however, relatively small, frequently under-capitalized and often inadequately insured. As a consequence, the licensee is frequently unable to respond in damages to claims asserted against it by its customers and third parties.[2]

In the past decade, various states of the United States sought to eliminate certain problems associated with the sale of franchises by requiring the disclosure of certain information to the prospective franchisee. During the 1970s, 17 states,[3] either by the enactment of a general franchise statute or by decision, required both the prior disclosure to the prospective franchisee and registration with a state agency of a franchise statement. Five additional states[4] required prior disclosure only. The FTC, after studying this matter for many years, finally adopted and put into effect a rule relating to disclosure requirements and prohibitions concerning franchising.[5] This rule became effective on October 21, 1979.

The 1976 Copyright Act,[6] which likewise was the subject of years of study and discussion, went into effect on January 1, 1978. It constitutes a substantial codification and revision of the copyright law. Two provisions of this law have particular affect upon the granting of licenses, i.e. subjecting the individual author to loss of his rights by operation of law where any rights have been granted under the copyright[7] and affecting ownership where an exclusive license is granted[8] with respect to any one or more of five enumerated rights.[9]

PRODUCT AND SERVICE LIABILITY OF TRADEMARK LICENSORS & FRANCHISORS

Plaintiff Categories

The categories of plaintiffs who have or might assert claims against the franchisor and trademark licensor based upon the conduct and activities of the franchisee or trademark licensee include the licensee or franchisee, employees of the franchisee or licensee,[10] customers of the franchisee or licensee, members of the customer's family, governmental agencies such as tax authorities and those charged with the responsibility of enforcing franchise disclosure and registration requirements, and third parties (strangers). With respect to trademark licensing and franchising, this paper is directed to those plaintiffs comprising customers of the licensee or franchisee, members of the customer's family and third parties or strangers.

Theories of Liability

Trademark licensors and franchisors may be liable either directly or vicariously for the conduct and activities of their licensees and franchisees. Direct liability is based upon express or implied warranty, strict liability and negligence. Vicarious liability is based upon actual or apparent (ostensible) agency.

Product v. Service Liability

The doctrine of strict liability for supplying defective products has been extensively developed in American jurisprudence. The injured party may assert a claim against the seller,[11] the manufacturer,[12] the supplier of component parts,[13] bailors or lessors,[14] home builders,[15] lending institutions[16] who actively participate in the enterprise and have a right to control the enterprise, and franchisors[17] and trademark licensors[18] who constitute a link in or are an integral part of the

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marketing enterprise. Liability claims have been asserted against parties[19] who have certified or guaranteed the quality of products.

The imposition of liability upon franchisors and trademark licensors for services rendered by the franchisees and the trademark licensees while conferring a benefit[20] upon customers, maintaining the premises[21] used in the operation of business, and in performing other activities[22] has developed at a slower pace than that relating to strict liability for supplying defective products.

Product Liability - General

Recovery for injuries caused by a defective product may be had under the doctrine of strict liability, breach of an express or implied warranty and negligence. At least 38[22a] states of the United States have adopted Section 402a, Restatement (Second), Torts as a standard for establishing strict liability. Section 402a provides that "one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold". Section 402a is applicable even though the seller has exercised all possible care in the preparation and sale of his product, and the user or consumer had not bought the product from or entered into any contractual relation with the seller.

Product Liability—Link in or Integral Part of the Enterprise

Plaintiffs have sought to impose strict product liability upon trademark licensors and franchisors for defective products even though their involvement fell short of either manufacturing or selling the product.

In *Kasel v. Remington Arms Co.*,[23] the court extended the doctrine of strict liability upward[23a] from the manufacturer to the trademark licensor. The plaintiff had sued the trademark licensor in California for injuries caused by defective shotgun shells which he had purchased in Mexico from the Mexican trademark licensee and used while on a hunting trip in Mexico. Upon overturning a jury verdict for the trademark licensor, based upon an improper agency instruction given to the jury, the court held that a trademark licensor could be held strictly liable for product liability.[24] In acknowledging that this was the first case to apply such strict liability in tort upward to the franchisor or trademark licensor, the court stated:

> It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not defendant's legal relationship, such as agency, with the manufacturer or other entity involved in the manufacturing-marketing system) which calls for the imposition of strict liability.

In *City of Hartford v. Associated Construction Co.*,[25] the City of Hartford brought suit against the franchisor-trademark licensor of a compound used as an insulating base for built-up roofing systems which had been installed by the licensor's licensee. The licensor demurred on the ground that it failed to allege a necessary element of a claim for strict tort liability, namely, "that the defective product was expected to and did reach the plaintiff without substantial change in the condition in which it was sold". The licensor also contended that it furnished a product design which is not a "product" within the meaning of strict tort liability doctrine. In a well reasoned opinion in which the court denied the licensor's demurrer to the complaint, the court held that strict liability could be imposed upon the owner of a registered trademark for a defective product manufactured by the trademark licensor's licensee since the trademark licensor was a "link in the marketing enterprise which placed a defective product within the stream of commerce". In reaching this conclusion, the court took note of the part which the registered trademark played in this transaction.[26]

In *Connelly v. Uniroyal, Inc.*,[27] plaintiff sought to impose strict liability upon Uniroyal, the owner of a trademark, who permitted the tire manufacturer to use the trademark on tires. The trademark owner filed a motion for summary judgment. The facts disclosed that the trademark owner owned 95% of the outstanding shares of the tire manufacturer, had granted a nonexclusive trademark license to the tire manufacturer and provided certain detailed information as to the methods, processes and formulas used in the manufacture of tires and tubes.[28] Thus, the trademark owner was also the parent company for the tire manufacturer. The trial court denied the trademark owner's motion for summary judgment. The appellate court reversed the trial court's decision. On Uniroyal's appeal, the Supreme Court of Illinois reversed the appellate court's decision and affirmed the trial court's decision. The court relied upon Sections 400 and 402-(a), Restatement (Second), Torts, in holding that the trademark licensor, who was an integral part of the marketing enterprise and participated in the profits reaped by placing a defective product in the stream of commerce,[29] was vicariously liable for strict liability. The court opined that the trademark licensor need not have been a link in the chain of distribution where he has authorized the use of his trademark on a product that contained no indication that the product was manufactured by any other entity.[30]

In *Kosters v. Seven-Up Co.*,[31] plaintiff, who was blinded in one eye when a bottle of Seven-Up exploded after slipping out of its carton, sued the franchisor, Seven-Up Co., on five theories of liability including negligence and breach of implied warranty of fitness.[32] The jury found for plaintiff on all counts and the franchisor appealed contending that all of the theories were incorrect except negligence. The Sixth Circuit held that negligence and breach of warranty theories were properly submitted to the jury but ordered a new trial because of improper submission of the case to the jury on the other three theories of liability and the inability to determine which of the theories the jury had found for plaintiff.[33] In this case, the franchisor not only floated his franchisee and the bottles of his carbonated soft drink into the stream of commerce but also assumed and exercised a degree of control over the type, style, size and design of the carton in which its product was to be marketed. Thus, the franchisor's liability was based on its control and the public's assumption, induced by the franchisor's conduct, that it did in fact control and vouch for the product[34].

Product Liability—Vicarious

Section 402(a), by its own terms, applies to the seller of the product. As indicated above, even though a franchisor or trademark licensor, who merely permits the manufacturer to use his mark on the product but otherwise is not involved in the marketing of the trademarked product, is not literally a "seller",[35] the courts have held the franchisor vicariously liable for strict liability under Section 400, Restatement (Second), Tort which provides:

> One who puts out as his own product a chattel manufactured by another and subject to the same liability as though he were his manufacturer.

In *Wojcuik v. United States Rubber Co.*,[36] the plaintiffs, husband and wife, sought damages for personal injuries incurred when their automobile overturned due to a defective tire purchased two weeks previously. The plaintiffs sued the tire retailer (a Phillips Petroleum service station owner and operator), the tire manufacturer (U.S. Rubber Co.) and Phillips Petroleum whose name and trademark appeared on the tire. The plaintiffs' claims against Phillips were based on strict liability, breach of express and implied warranties and apparent agency. Phillips contended there was no privity of contract between Phillips and the plaintiff since the tire that was sold was not "inherently dangerous" and filed a motion for summary judgment to dismiss both the complaint and the cross-complaint of the service station owner and operator. This motion was denied. On appeal, the court, in upholding the trial court's denial of Phillips' motion for summary judgment relied upon Section 400, Restatement (Second), Torts in holding it was a question of fact whether Phillips was vicariously liable for strict liability under Section 402(a), Restatement (Second), Torts.

In *Forry v. Gulf Oil Corp.*,[37] the employee of the service station operator was injured while inflating a new tire. The employee sued the station operator, the tire manufacturer (B.F. Goodrich) and Gulf whose trademark was embossed on the tire casing. Although the trial court was upheld in granting a compulsory nonsuit as to all three defendants,[38] the court stated that if the plaintiff could have shown the tire was defective when it left the tire manufacturer's hands, the tire manufacturer could have been vicariously liable, under Section 400, Restatement (Second), Torts, for strict liability under Section 402(a), Restatement (Second), Torts.

In *Carter v. Joseph Bancroft & Sons Co.*,[39] plaintiff, a purchaser of a dress which caught fire causing her injury, sued the owner of the trademark BAN-LON. The dress, when purchased, had a label affixed thereto which bore the trademark BAN-LON and described the qualities of BAN-LON products.[40] On the reverse side of the label was a brief identification of the manufacturer. The trademark owner sought to escape strict liability under Section 402(a) on the basis that it was not a "seller". The court, however, held that the trademark owner was vicariously liable for strict liability under Sections 400 and 402(a), Restatement (Second), Torts, and, thus, denied defendant's motion for judgment notwithstanding the verdict.

Service Liability

Injured parties have sought to hold the trademark licensor or franchisor liable for injuries incurred in connection with services rendered by the franchisee or trademark licensee where such services did not directly relate to any product of the franchisor or trademark licensor or bearing the mark or name of the franchisor or trademark licensor. An analysis of these cases indicates that injured parties have sought to impose liability upon a franchisor or trademark licensor for services which fall into one of three categories, i.e. (i) services associated with the rendering of benefits[41] to customers and prospective customers in accordance with the franchised or licensed business, (ii) services rendered in connection with maintaining the premises[42] in a suitable or safe condition, and (iii) all other services and activities.[43]

In each of the cases reviewed involving injuries resulting from services rendered by the licensee or franchisee where the injured party sought to impose liability upon the franchisor or trademark licensor, each of the plaintiffs relied upon the concept of apparent agency; some relied additionally upon the concept of actual agency and a few relied upon breach of expressed or implied warranties.

The concept of apparent agency depends on manifestations by the alleged principal to a third person, and a reasonable belief by the third person that the alleged agent is authorized to bind the principal. The manifestations of the principal may be made directly to the third person, or may be made to the community, by signs or advertising.[44] In order for the third person to recover from the principal, he must have relied on the indicia of authority originated by the principal and such reliance must have been reasonable under the circumstances.[45]

Control Factors

In such cases, the plaintiff will want to show the extent and degree of control retained by the trademark licensor or franchisor. These factors include the licensee's use of a common identification and appearance of the business, a common color scheme, uniforms, operating manuals, a complete absence of identification of the licensee, national advertising by the licensor that induces or attracts trade to the licensee's business, a requirement that the licensor's image be promoted by the licensee's advertising, licensee's advertising must be first approved by the licensor, the right to inspect licensees premises and business operations, licensor's control of the hours of operation, licensor's control of the accounting and record procedures used by licensee, a requirement to made reports, a requirement of maintaining cleanliness, a right to inspect, and the unilateral right to terminate the agreement for any breaches of the agreement by the licensee. The licensor, in order to avoid the doctrine of apparent agency, will want to show that the licensee is free to handle other products, determines his own methods of doing business, is unrestricted with respect to merchandising policies, controls his own hours of operation, and hires and fires his own personnel.

In two cases in which plaintiffs were unsuccessful in attempting to impose liability upon the trademark licensor for damages incurred as the result of the licensee's rendering of services to confer a benefit upon his customers, one case turned upon the plaintiff's inability to raise the necessary inference that the trademark licensor either have the right to control or exercise the right to control the conduct of the licensee. In this case,[46] plaintiff had sued the service station operator and the trademark licensor for damages to plaintiff's automobile where the service station operator improperly installed an oil filter gasket. In addition to plaintiff's inability to show actual or apparent agency, the court held there was no negligence on the part of the trademark licensor since the delegation of this particular type of duty to the service station operator was not "inherently dangerous" in itself.[47] In the second case,[48] the plaintiff was unsuccessful in showing either actual or apparent agency or the element of reliance. In this case, the plaintiff sought damages for injuries occurring when the service station operator apparently poured gasoline into the radiator on his car.

In *Gizzi v. Texaco*,[49] plaintiffs sustained personal injuries when a van in which they were riding crashed because of defective brakes. The van had been purchased by one of the plaintiffs from a Texaco station operator who had installed and tested the brake system. Plaintiffs contended that Texaco was liable on the grounds that it had clothed the station operator with apparent authority to make such repairs and sell the vehicle on its behalf and plaintiffs had relied upon such representations and had reasonably assumed that Texaco would be responsible for any defects.[50] In reversing a directed verdict, the court noted that Texaco's national advertising "Trust your car to the man who wears the star" had for its purpose to convey the impression that Texaco dealers are skilled in automotive servicing as well as to promote Texaco products, 30% of the Texaco dealers in the country engage in the selling of used cars and this activity was known to and acquiesced in by Texaco.

In *Chevron Oil Co. v. Sutton*[51], the plaintiff brought an action for wrongful death of his wife who died from injuries sustained in a car accident when a wheel of the car repaired by a service station employee came off the vehicle. Plaintiff had sued the employee, the service station operator and Chevron Oil Co. After reviewing the degree of control that Chevron exercised over service stations of this type and specifically noting that Chevron knew of and had allowed the service station operator to repair automobiles, Chevron advertised in the telephone directory that its stations performed auto repairs and its repairmen were skilled and Chevron had not put the public on notice that the service station did not have the authority to make such repairs, the court concluded there was a question of fact whether Chevron had clothed the service station operator with apparent authority[52] and, thus, reversed the granting of summary judgment in favor of Chevron.

In *Johnston v. American Oil Co.*[53], plaintiff's decedent was fatally injured when he and two companions drove into the service station, "razzed" the service station owner, was refused service by the service station owner, exited from the automobile and demanded the service station owner sell gasoline to him and (where both he and the service station operator were carrying firearms) was subsequently shot and killed by the service station operator. The Court, in reversing a motion for summary judgment in favor of the American Oil Co. took note of the advertising done by American Oil to promote its products, i.e. "As you travel ask us" and "You expect more from Standard and you get it". The court concluded that there were sufficient facts alleged to raise the question of fact whether an agency existed between the service station operator and American Oil.

Franchise Cases

In two franchise cases, the trial court had granted motions for summary judgment in favor of the franchisors on the issue of agency or apparent agency. Both of these cases were, however, reversed on appeal. In *Billops v. Magness Construction Co.*[54], plaintiff sued the franchisor, Hilton Hotels, for damages incurred as a result of the Hilton's wrongful attempt by Hilton's franchisee to extort funds in addition to those previously paid by plaintiffs for the use of one of the franchisee's ballrooms. In concluding that an issue of fact existed with respect to the question of actual and apparent agency, the court took special note of the fact that the franchisor's logo and sign were required to be displayed to the exclusion of all other logos and signs, the franchise agreement forbade the mention of any name other than Hilton to the customers of the franchisee and there was no reasonable basis upon which an ordinary person would have any reason to know that he or she was dealing with anyone other than the franchisor. In the other franchise case, *Drexel v. Union Prescription Centers, Inc.*[55], plaintiff sought to recover for a wrongful death resulting from the franchisee's improper refilling of a prescription[56]. After reviewing the franchise agreement[57], the court concluded there was a question of fact regarding the existence of apparent agency. The franchise agreement required the franchisee to promote the franchisor's image, obtain prior approval for any advertising, gave the franchisor the right to inspect the premises, required extensive accounting and record keeping and making of reports, required the franchisee to acknowledge that franchisor's distinguishing characteristics had acquired a secondary meaning which indicates that franchisee's business was operated by or with the approval of franchisor, and permitted the franchisor the right to terminate unilaterally for breaches by the franchisee.

Most of the cases seek to impose liability upon the trademark licensor or franchisor for injuries incurred as the result of the condition in which the premises were maintained relied upon the concept of apparent agency. However, two such cases relied upon breach of an express or implied warranty; also, the landlord-invitee doctrine was a factor in two of the cases.

In *Edwards v. Gulf Oil Corp*[58], plaintiff sought to recover damages from Gulf for the death of her infant son who fell into boiling tar on the station premises. In reversing the granting of a non-suit to Gulf on the basis that there was sufficient evidence authorizing the jury to find that the service station operator was an agent of Gulf, the court took note of the fact that Gulf printed comic papers to be given to children, the service station operator had invited the children to come to the station to get the comic papers, and Gulf was the prime tenant of the premises.

In *Clark v. Texaco, Inc.*,[59] plaintiff sought damages for injuries sustained when bitten by the dog owned by service station operator. The trial court's granting of Texaco's motion for summary judgment was reversed on appeal. The court noted that the dog had a history of attacking customers but no precautions had been taken to insure their protection, Texaco was the landlord for the service station operator, and Texaco had conducted national advertising under the slogan "You can trust your car to the man who wears the star". The court thus concluded that there was an issue of fact as to whether or not the service station operator was an apparent agent of Texaco or Texaco, as a landlord, was so involved with the solicitation of business invitees to the leased premises that it became liable to those invitees who responded to its efforts.

In *Singleton v. International Dairy Queen, Inc.*,[60] plaintiff brought suit against the franchisor for injuries incurred by his child when she fell through the glass door of a franchised ice cream store. After reviewing in detail the many provisions of the franchise agreement and concluding that "the very life blood of the agent is in the hands of the franchisor",[61] the court concluded there was a question of fact with respect to apparent agency and, thus, denied Dairy Queen's motion for summary judgment.

Safety of Premises

Three other cases are of interest with respect to the existing conditions or safety of the premises. In *Apple vs. Standard Oil, Division of American Oil Co.*,[62] plaintiff, a six-year-old child passenger in his father's automobile, was denied recovery from Standard Oil as a result of being bitten by a dog owned by the service station operator since the father was unable to show that he had stopped at the service station in reliance upon any advertisements or holding out by Standard Oil.[63] In *Huffman v. Gulf Oil Corp.*,[64] plaintiff was denied recovery from Gulf for injuries to her daughter who was bitten by a dog owned by the service station operator. However, the dog was chained on adjacent property from which the service station operator, without knowledge of Gulf, conducted a separate business. In *Murphy v. Holiday Inns, Inc.*,[65] a motel guest was denied recovery against the franchisor for injuries incurred when she slipped and fell on the premises operated by the franchisee. In this particular case, plaintiff's attempt to show actual agency[66] was limited to the introduction of the franchise agreement. After reviewing the franchise agreement, the court noted that the franchisor had no right to control daily maintenance of the premises, or control current business expenditures, was unable to fix customer rates or demand a share of the profits, could not hire or fire employees of the franchisee, could not determine the employee wages or working conditions, could not set standards for employees' fields or productivity or supervise employee work routine or discipline employees for nonfeasance or misfeasance. The court affirmed the trial court's dismissal of the complaint.

Other Activities

In addition to damages incurred as the result of licensees or franchisees rendering services for the purpose of conferring benefits on their customers or for failing to keep the premises in a safe condition, plaintiffs have also sought to sue franchisors and trademark licensors for injuries resulting from other activities of the franchisee and licensee. In *McLaughlin v. Chicken Delight, Inc.*,[67] plaintiff sought recovery against the franchisor for death which occurred when the vehicle being used to deliver food prepared by the franchisee struck and killed plaintiff's decedent. The vehicle was owned by the franchisee, was driven by an employee of the franchise who was acting within the scope of his employment with the franchisee, and contained no markings or signs on it. Since plaintiff was unable to show the franchisee was an agent of the franchisor, judgment for the defendant was upheld on appeal.

In *Buchanan v. Canada Dry Corp.*,[68] the parents of decedent who was killed when his car was struck by a beverage truck brought suit against the franchisee and the franchisor. The trial court granted the franchisor's motion for summary judgment. In reviewing the facts of the case, the appeal court took note that the truck carried numerous Canada Dry insignias but no franchisee markings, the driver's uniform displayed only a Canada Dry insignia, there was no listing in the telephone directory for the franchisee but there was a listing for the franchisor (at franchisee's address), franchisee's telephone was answered "Canada Dry", two prominant signs on the franchisee's building read "Canada Dry" and only a small sign indicated the name of the franchisee. In view of the facts that there remained a genuine question of fact as to whether or not the franchisee was the franchisor's alter ego, the appeal court reversed the trial court's granting of the motion for summary judgment.

In *Beckham v. Exxon Corp.*[69], the plaintiff sought to hold Exxon Corp. liable for wrongful death arising out of an automobile collision between plaintiff's automobile and a wrecker driven by an employee of the service station operator. The service station operator testified he was not required to follow certain instructions which he had to follow when he was an employee of Exxon, although the service station was inspected periodically and he was furnished a report of the inspection he was not required to comply with the recommendations made by Exxon, he set his own prices at the service station and he was the "boss" at the service station[70]. The court also noted that the sales agreement between the service station operator and Exxon did not prohibit the service station operator from selling products other than those manufactured or furnished by Exxon. In view of these circumstances, the court affirmed the granting of a motion for summary judgment in favor of Exxon.

Product Certification

Plaintiffs have struggled in their attempts to impose product liability upon the owners of certification marks and guarantee or approval seals. Generally, where liability has been imposed, negligence standards, not strict liability standards, have been applied.

In *Hempstead v. General Fire Extinguisher Corporation*[71], the plaintiff, an employee of the owner of an apartment building, was injured when the fire extinguisher exploded while he was assisting in extinguishing a fire in the apartment building. Plaintiff brought suit against the manufacturer of the fire extinguisher and Underwriters Laboratories. Plaintiff sought to hold Underwriters liable on three theories, i.e. negligence in approving the design of the fire extinguisher which was inherently dangerous, negligence in allowing the manufacturer to affix Underwriters' certification label to the fire extinguisher which incorrectly stated that it had been inspected and tested for 500 psi, and misrepresentation by Underwriters as to its testing and inspection of the fire extinguisher. Underwriters sought to avoid the imposition of such liability on the basis of lack of privity. The court, in denying Underwriters' motion for summary judgment, relied upon Section 324a, Restatement (Second), Torts[72] in holding that the complaint stated a good cause of action against Underwriters and that it was unnecessary to show any privity between plaintiff and Underwriters. The court also noted that Underwriters' approval of the design had "obviously increased the risk of harm to plaintiff".

In *Hanberry v. Hearst Corp.*[73], plaintiff brought suit against a retailer of shoes, the importer and distributor of said shoes and Hearst, the owner of the "Good Housekeeping's Consumers' Guarantee Seal". In referring to this seal, Hearst had publicly stated: "This is Good Housekeeping's Consumers' Guarantee. We satisfy ourselves that products advertised in Good Housekeeping are good ones and that the advertising claims made for them in our magazine are truthful."

The seal itself contained the promise, "If the product or performance is defective, Good Housekeeping guarantees replacement or refund to consumer". In the complaint, plaintiff alleged that Hearst was not just a publisher of a magazine which accepted and published advertisements from manufacturers and retailers of consumer products; it enhanced the value of its magazine as an advertising medium, to compete more favorably in the advertising market, by offering to those whose products meet such standards as it may impose and who choose to purchase said services. Hearst filed a general demurrer which was granted. On appeal, the court reversed the trial court's dismissal of the suit and held that Hearst, having voluntarily involved itself into the marketing process by loaning its reputation to promote and induce the sale of a given product, had a duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who rely on its endorsement are not unreasonably exposed to the risk of harm[74].

In *Benco Plastics, Inc. v. Westinghouse Electric Corp.*,[75] the plaintiff sued the manufacturer of outdoor lights and Underwriters Laboratories. Plaintiff claimed that Underwriters had misrepresented the quality and character of the product when it listed and made the representation that the outdoor lights were suitable for outdoor use.[76] Upon trial of the matter, the court distinguished the holdings in the *Hanberry* and *Hempstead* cases, *supra*, both of which involved physical injury to an ultimate consumer, and held on the basis of public policy Underwriters was not liable under the facts of this case.[77]

Statutory Trend

There are two reasons for imposing strict liability upon the trademark licensor and the franchisor. One is to provide an incentive[78] to these parties to improve the quality of the products being sold to the public and to reduce the risk of injury from use thereof. Another reason is to pass to the party best able to allocate[79] the costs of compensating for injuries resulting from the sale of defective products.

Within the last three years, three states have enacted laws requiring franchisors to indemnify their franchisees against product liability claims arising out of defects in merchandise, service systems, procedures or methods prescribed or furnished by the franchisor and sold or performed by the franchisee.[80] In 1977, Colorado enacted a law[81] which (a) created a new statute of limitations applicable to all actions for personal injury, death or property damage, other than those governed by Section 2-725 of the U.C.C., against a manufacturer or seller of an allegedly defective product (from six years to three years),[82] (b) prohibits the commencement or maintenance of strict liability actions against all but the manufacturer of the alleged defective product or the part thereof claimed to be defective, (c) changed the evidentiary rules regarding the admissability, in product liability actions, of the evidence relating to post-accident modifications to a product, and (d) created forth rebuttable presumptions which are applicable in all product liability actions.

It appears that the foregoing trend will continue and that franchisors and trademark licensors can expect to bear an increasing share of the cost involved for injuries resulting from the operation of their franchisees and their trademark licensees.

ENDORSEMENTS

Copyrighted Material

The use of copyrighted material on products such as the use of copyrighted characters on T-shirts and articles of clothing, has for its purpose to enhance or induce the sale of the articles upon which the copyrighted material is imprinted. Although no cases have been found on this point, the copyright licensor should consider the possibility that such use of his copyrighted material may function in much the same manner as a trademark, i.e. clothe the product with the goodwill of the copyrighted material and serve as a badge of quality to the consumer. It is understood that most copyright licensors do not attempt to establish any standards of quality control for the product upon which their copyrighted material is to be imprinted. Where the copyrighted material does, in fact, clothe the material with the goodwill of the copyrighted work, induces the customer to purchase same and the copyright licensor benefits from royalties received, there appears to be no more compelling reason for protecting the copyright licensor from product liability than there is for protecting the trademark licensor from product liability. The foregoing particularly applies in those circumstances where two-dimensional copyrighted characters, such as those from the Star Wars movie are licensed for reproduction in three-dimensional form. The copyright licensor should be concerned with the type of material used, the finish used thereon and the risk of injury occurring from such use. Thus, the copyright licensor may find himself in a "Catch 22" situation, i.e. condemned if he doesn't control the quality of the goods and equally condemned if he does.

Endorser Liability

Two years ago the FTC reached an agreement with entertainer Pat Boone whereby Pat Boone would be held personally liable for advertisement claims made about a product he endorsed[83]. Recently, liability was imposed upon actor Karl Mauldin who was sued on the grounds that the services offered by American Express were not as depicted in the advertisement in which Karl Mauldin had appeared[84].

FTC Endorsement Guides

Recently, the FTC adopted a set of guides concerning the use of endorsements and testimonials in advertising[85]. Although these guidelines do not carry the force of law, both the endorser and the advertiser should realize that a violation thereof may result in the FTC filing a complaint against them.

The term "endorsement" as used in the guides, means any advertising message which consumers are likely to believe reflects the opinions, beliefs, findings or experience of a party other than the sponsoring advertiser. The term "expert" is an individual, group or institution possessing (as the result of experience, study or training) knowledge of a particular subject which is superior to that generally acquired by ordinary individuals.

These guidelines restrict advertisers to the use of the honest views of the endorsers, requires the advertisers to be able to substantiate the endorser's claims prior to the use thereof, requires the disclosure of the financial arrangements existing with the endorser if such could affect the credibility of the endorsement and imposes upon the endorser the obligation to use the product endorsed and to provide any deception with respect to the content of his endorsement.

FRANCHISE DISCLOSURE RULE

Franchise Defined

Although the trademark is the cornerstone of every franchise, every trademark license does not constitute a franchise. The term "franchise", as used in the FTC rule, means any continuing commercial relationship created by any arrangement whereby:

(1) (a) a person (franchisee) offers, sells or distributes to another goods, commodities or services which are:

(i) identified by franchisor's mark, name or commercial symbol

or

directly or indirectly required or suggested to meet quality standards prescribed by the franchisor where the franchisee operates under franchisor's mark, name or commercial symbol,

and

(ii) the franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation

or

the franchisor gives significant assistance to the franchisee in the franchisee's method of operation

and

(iii) the franchisee pays directly or indirectly to the franchisor the total sum of $1,000 at any time prior to or within six months of commencement of operation of the franchisee's business.

or

(2) (a) a person (franchisee) offers, sells or distributed to another goods, commodities or services which are:

(i) supplied by the franchisor

or

supplied by a third person whom the franchisee is directly or indirectly required to do business with by the franchisor

or

supplied by a third person with whom the franchisee is directly or indirectly suggested to do business with by the franchisor whereas such third person is affiliated with the franchisor

and

(b) the franchisor

(i) secures for the franchisee retail outlets or accounts for the goods, commodities or services

or

secures for the franchisee locations or sites for vending machines, rack displays, or any other product sales displays used by the franchisee in the offering, sale or distribution of goods, commodities or services

or

provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites or locations referred to above

and

(c) the franchisee pays directly or indirectly to the franchisor the total sum of $1,000 at any time prior to or within six months of commencement of operation of the franchisee's business.[86]

The provisions of the FTC rules do not apply to a franchise which is a fractional franchise, leased departments within stores and oral agreements.[87] In addition, the term "franchise" expressly excludes employer-employee relationships, cooperative associations, relations with a testing or certification laboratory and a single license arrangement.[88]

Numerous states have adopted franchise investment laws which require the franchisee to disclose and/or register with a state official a franchise disclosure statement.[89] One of the first states to require disclosure and registration was California.[90] The California statute defines a "franchise" as meaning a contract or agreement, either express or implied, whether oral or written by which (a) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by franchisor, (b) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's mark, name or commercial symbol, and (c) the franchisee is required to pay, directly or indirectly, a franchise fee.[91] Many other states define "franchise" similarly. Two states, Florida and Virginia, define a franchise without regard to the payment of a franchise fee.[92]

Franchise Disclosure Requirements

The FTC disclosure rule specifies 20 categories of information which must be disclosed to the prospective franchisee. The various states having franchise investment laws have adopted the Uniform Franchise Offering Circular (UFOC) which specifies 23 categories of information which must be disclosed. The UFOC was prepared and approved for use by the Midwest Securities Commissioners Association on Uniform Franchise Regulation.

FTC v. UFOC Disclosure Statement

The FTC, in recently published guidelines, has announced it will permit the use of a UFOC "in lieu of the disclosure requirements set forth in Section 436.1-(a) to (3) of the rule, to satisfy the rule's disclosure requirement". The FTC specifies, however, that one format or the other must be used in its entirety. Some advantages and disadvantages of each format are as follows:

Advantage/Disadvantage	FTC	UFOC
No. of states in which it can be used.	At least 37.	Already accepted in all disclosure states and may be used in all 50 states.
Information required.	Less than in UFOC.	Requires more extensive information than FTC.
Audited statements.	Up to 3 years to provide.	Required.

Penalties for Violations

The FTC Rule provides it will be an unfair or deceptive act or practice for any franchisor to fail to furnish any prospective franchisee certain prescribed information at the time for making the disclosure or the first "personal meeting".[93] Parties operating in violation of the FTC rule can be fined up to $10,000 for each violation and a civil action brought by the FTC.[94]

California provides that any person who wilfully violates any provision of the California Franchise Investment Law can be fined not more than $10,000 and/or imprisoned for up to one year.[95] Additionally, any person offering or selling a franchise in violation of the California Franchise Investment Law shall be liable to the franchisee for damages caused and if the violation was willful, the franchisee may also sue for recision.[96]

COPYRIGHT LICENSES

Involuntary Transfers

The 1976 Copyright Act protects the author's ownership right in a copyright from involuntary seizure, expropriation, transfer or exercise by another of the exclusive rights of ownership in the copyright where the author has not previously voluntarily transferred any of his rights in the copyright.[97] The intent of the statute is to entitle the author to continue to exercise all rights under the 1976 Copyright Act while precluding any governmental body or organization from enforcing or exercising any such rights. Foreign authors are also protected against laws and decrees purporting to divest them of their rights under the 1976 Copyright statute.[98] Consequently, the author-owner of a copyright can continue to enjoy all rights afforded to him under the 1976 statutes so long as he is not granted any rights thereunder.

Transfer of Copyright Ownership

The 1976 Copyright Act provides that a "transfer of copyright ownership" is an assignment, mortgage, exclusive license or other conveyance, alienation or hypothecation of a copyright or of any of the exclusive rights comprised in the copyright whether or not it is limited in time or place of effect but excluding nonexclusive licenses.[99] The act also states that a copyright owner includes the owner of any one of the exclusive rights comprised in a copyright.[100] Thus, the owner of a copyright who has granted exclusive rights to a third party must be concerned with a number of problems:

1. Does the granting of an exclusive license of one of the rights create an entirely new copyright or is it but a part of the original copyright?[101]

2. If the exclusive licensee fails to use the proper copyright notice on each copy, is there a loss of right with respect to the subject matter of the exclusive license or does the entire copyright fall into the public domain?[102]

3. If the exclusive licensee uses his own name in the copyright notice rather than the name of the entire copyright owner (or the assignee thereof), does the copyright pass into the public domain?[103]

Thus, even though the 1976 Copyright Act provides for a divisibility of rights in the copyright, it creates problems for the owner of the remaining rights which were not subject of the exclusive license. It is believed that a proper balancing of rights in this area would permit the owner of the exclusive rights to enforce his rights in court but he should not have the concurrent right to destroy the entire copyright.

CONCLUSION

In the United States, the courts have fashioned a remedy for parties who have been injured as a result of the manufacture and sale of defective products. With the passage of time, the courts have recognized that the injured parties should be able to recover not only from the seller but also the manufacturer without the necessity of any privity and have logically extended this doctrine to cover those who are a link in or an integral part of the marketing enterprise. Thus, at the present time, the courts have no difficulty imposing strict product liability upon franchisors and trademark licensors even though neither was directly involved in the manufacture or sale of the defective products. Moreover, a trend has been established which is likely to continue whereby the legislatures of the states will shift the liability away from the retailer and wholesaler toward the manufacturer or such party that has the overall responsibility for the entire enterprise.[104] Thus, there does not appear to be any serious obstacle confronting an injured party's maintaining a product liability suit against franchisors, trademark licensors and endorsers who are involved in the marketing enterprise.

An injured party faces some serious obstacles in attempting to impose liability upon a franchisor or trademark licensor for injuries and damages incurred as a result of services rendered by the franchisee or trademark licensee in the operation of its business. Quite simply, it must be recognized that a substantial difference exists between enterprises such as Sears, Roebuck & Co. or J.C. Penney and McDonald's or Holiday Inn. The degree of control which the president of Sears, Roebuck & Co. or J.C. Penney has over its store managers and other employees is complete with respect to the operation of the enterprise. However, the president of McDonald's or Holiday Inn does not have anywhere near the same degree of control over its franchisees.

Additionally, the courts, and now the legislatures, have precluded the franchisor from exercising the same degree of control over the franchisee. This absence of control has presented the greatest obstacle to an injured party seeking to impose liability upon the franchisor for the conduct of its franchisee.

Thus, although the franchisor is in the best position to allocate the risk of injury which might be experienced by a customer of the franchisee, he is unable to impose the same degree of incentives (penalties) (as the president of Sears, Roebuck & Co. or J.C. Penney can impose) upon the franchisee to maximize the safe operations of its franchisees. This does not mean, however, that the franchisor can ignore entirely his obligation to the consuming public and others who might be injured as a result of the franchisee's conduct. After all, it is the franchisor who selects and sets up in business the franchisee. In doing this, the franchisor can initially establish the financial net worth that each franchisee must possess.

Insurance

Additionally, the franchisor can reasonably request that the franchisee insure itself (and the franchisor) against certain liabilities. When it is considered that such insurance has for its primary purpose to protect members of the public and a secondary purpose to protect the franchisee and the franchisor, the courts and the legislatures should encourage franchise agreements to include such provisions and should not view this as being a factor tending to establish either actual or apparent agency.

Another provision which the franchisor should favorably consider is that of having the franchisee indemnify the franchisor. Such a provision provides indirect protection to the public since it imposes an incentive upon the franchisee to conduct its business in such a manner that he does not have to pay any money to the franchisor under the indemnity provision. This most often occurs where a customer or other member of the public doesn't become injured by the franchisee's operations and, thus, has no occasion to assert a claim against the franchisor for the conduct of its franchisee.

Franchising has become quite complicated and is now relatively an expensive form of doing business. Nevertheless, the franchisor must recognize the many requirements which must be met in order to establish and maintain a franchising system. The franchisor thus must chart his course between Scylla and Charybdis if he is to franchise successfully. The difficulties are great and the rewards can be satisfying; however, the requirements must be met if the franchisor is to avoid "no-fault" franchising.

The copyright owner must exercise a great deal of care in granting licenses under his copyright. In view of the numerous provisions contained in the 1976 Copyright Act, it is to be anticipated that pitfalls of which the copyright owner has no knowledge may be encountered. Since the consequences of the granting of any such rights can be devastating, a copyright owner must appreciate the risk involved in granting licenses under his copyright.

NOTES

1. Since the trademark is the cornerstone of the franchise, this includes franchisees who operate under marks, names and logos of franchisors.
2. Injured parties often sue the trademark licensor (franchisor) because the licensee does not have adequate resources to pay for the damages involved. Sometimes, the injured party sues only the licensor to gain a tactical advantage, i.e. a "David and Goliath" match up, or for jurisdictional reasons.
3. California, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, New Hampshire, North Dakota, Oklahoma, Rhode Island, South Dakota, Virginia, Washington and Wisconsin. In Georgia, the term "investment contract" has been interpreted to include franchises; in Oklahoma, a franchise is a security where the franchisee does not participate in management decisions.
4. Idaho, Nebraska, North Carolina, Ohio and Oregon.
5. 16 C.F.R. 436.2(a).
6. 17 U.S.C. 101 *et seq.*
7. 17 U.S.C. 201(e).
8. 17 U.S.C. 101.
9. Copyright owners have the exclusive right to reproduce copies of the copyrighted work, prepare derivative works, distribute copies, perform the copyrighted work publicly and display the copyrighted work publicly. 17 U.S.C. 106.
10. Policy conflicts arise where the party sued by the employee files a third party complaint against the employer. If the employee is precluded by workmen's compensation statutes from suing the employer, should the original defendant in any such suit be entitled to recover his damages from the employer? See *Penker Construction Co. v. Finley*, 485 S.W.2d 244 (Ct App Ky 1972) [employer held liable to party from whom employer had rented equipment based upon an indemnity provision in the equipment rental contract]; *Ruvolo v. United States Steel Corp.*, 354 A.2d 685, 139 N.J. Super. 578 (Super. Ct. 1976) [employer not held liable on third party complaint filed by manufacturer under employer's implied indemnification undertaking where employer was not found solely negligent and manufacturer was found to be negligent for failing to affix suitable notice on machine].
11. *Forry v. Gulf Oil Corporation*, 237 A.2d 593, 428 Pa. 334 (1968); *Wojcuik v. United States Rubber Co.*, 108 N.W.2d 149, 13 Wis.2d 173 (1961).
12. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).
13. *Tromza v. Tecumseh Products Co.*, 378 F.2d 601 (3d Cir. 1967); *Penker Construction Co. v. Finley*, 485 S.W.2d 244 (Ct App Ky 1972). But see *Goldberg v. Kollsman Industrial Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 892, 191 N.E.2d 81 (1963).
14. *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965).
15. *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972).
16. *Connor v. Great West Savings and Loan Assoc.*, 73 Cal. Rptr. 369 447 P.2d 609 (1969).
17. *Kosters v. Seven-Up Co.*, 595 F.2d 347 (6th Cir. 1979); *City of Hartford v. Assoc. Construction Co.*, 384 A.2d 390, 34 Conn. Sup. 204 (Supr. Ct. Conn. 1978).
18. *Carter v. Jos. Bancroft & Sons Co.*, 360 F. Supp 1103 (E.D. Pa. 1973); *Moody v. Sears, Roebuck & Co.*, 324 F. Supp 844 (S.D. Ga. 1971); *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155, 75 Ill. 2d 393 (1979); *Dudley Sports Co. v. Schmitt*, 279 N.E. 2d 266 (Ct. App. Ind. 1972); *Kasel v. Remington Arms Co.*, 101 Cal. Rep. 314 (Dist. Ct. App. 1972).
19. *Benco Plastics, Inc. v. Westinghouse Electric Corp.*, 387 F.Supp. 772 (E.D. Tenn. 1974); *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (Ct. App. 1969); *Hempstead v. General Fire Extinguisher Corporation*, 260 F.Supp. 109 (D. Del. 1967); *Van Winkle v. American Steam-Boiler Ins. Co.*, 52 NJL 240, 19 A 472 (1890).
20. *Drexel v. Union Prescription Center, Inc.* 582 F.2d 781 (3d Cir. 1978); *Gizzi v. Texaco, Inc.*, 437 F.2d 308 (3d Cir. 1971); *Billops v. Magness Construction Co.*, 391 A.2d 196 (Sup. Ct. 1978); *B. P. Oil Corp. v. Mabe*, 370 A.2d 554 (Ct. App Md. 1977); *Johnston v. American Oil Co.*, 51 Mich. App. 646, 215 N.W.2d 719 (Ct. App. Mich. 1974); *Chevron Oil Co. v. Sutton*, 85 N.M. 679, 515 P.2d 1283 (1973); *Coe v. Esau*, 377 P.2d 815 (Okla. 1963).
21. *Apple v. Standard Oil*, 307 F.Supp. 107 (N.D. Cal. 1969); *Murphy v. Holiday Inns, Inc.* 219 S.E.2d 874 (Sup. Ct. Va. 1975); *Huffman v. Gulf Oil Corp.*, 26 N.C. App. 376, 216 S.E. 2d 383 (Ct. App. 1975); *Singleton v. International Dairy*

Queen, Inc., 55 Mich. App. 100, 222 N.W.2d 52 (Ct. App. 1974); *Edwards v. Gulf Oil Corp.*, 69 Ga. App. 140, 24 S.E.2d 843 (Ct. App. 1943).

22. *Beckham v. Exxon Corp.*, 539 S.W.2d 217 (Ct. App. Tex. 1976); *Buchanan v. Canada Dry Corp.*, 138 Ga. App. 588, 226 S.E.2d Conn. 317, 321 A.2d 456 (1973).

22a. CCH, "Products Liability Reports", Section 4016.

23. 101 Cal. Rptr. 314 (Ct.App.Cal. 1952).

23a. See *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970) where the court held the franchisor did not have standing to sue manufacturers of non-alcoholic, carbonated drinks for an alleged anti-trust violation affecting franchisor's franchisees.

24. This case is of particular interest because of its holding on the conflict of laws issue. Defendant sought to have the court apply Mexican law because Mexico did not recognize the strict liability doctrine nor allow damages for pain and suffering. Since the plaintiff was a California domiciliary, California was the forum state, the defendant was subject to jurisdiction of the California court and there was no reason why California courts should not protect its citizens where the law of a foreign country did not provide adequate redress, the court applied California law. See also *Wojcuik v. United States Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149 (1961) [The issues of warranty were governed by Wisconsin law while the issues of negligence were governed by Indiana law].

25. 34 Conn. Sup. 204, 384 A.2d 390 (Super. Ct. 1978).

26. The court itemized the following characteristics of a trademark: (a) A registered trademark is constructive notice of claim of ownership thereto. (b) Registration of a trademark establishes the owner's exclusive right to use the registered mark in commerce on the goods specified in the registration. (c) A trademark identifies the source or origin of the goods. (d) A trademark brands the goods as genuine. (e) A trademark is a merchandising shortcut which induces a purchaser to select what he wants, or what he has been lead to believe he wants. (f) In commerce of goods, a registered trademark serves three functions — an indication of origin, a guaranty of quality and a medium of advertisement. (g) A trademark owner may extend the territory in which he has the right to exclusive use of his trademark through licenses subject to his control (h) Correlative to the right of an owner to license his trademark to others is his affirmative duty of himself and to the public to exercise control and restraint upon his licensee to prevent losing his property rights thereunder. (i) The use of a registered trademark by a related company does not affect the validity of such mark or its registration provided that it is not used in such a manner as to deceive the public.

27. 75 Ill. 2d 393, 389 N.E.2d 155 (1979).

28. *Id* at page 161.

29. *Id* at page 163.

30. The tire manufacturer's efforts to quash the service of summons on the basis that it, a Belgian company, had not exercised the privilege of conducting activities within the state was denied. The court held that where the foreign tire manufacturer introduced tires into the stream of commerce in obvious contemplation of their ultimate sale or use in other nations or states and tires came into the state on a regular basis and in substantial numbers, the foreign tire manufacturer was amenable to process of service within the state.

31. 595 F.2d 347 (6th Cir. 1979).

32. In addition to the two theories of negligence and breach of implied warranty of fitness, the trial court submitted the case to the jury on the doctrine of "inherently dangerous", "opportunity to change design" and contract.

33. The jury had returned a general verdict in favor of plaintiff.

34. Of interest to the practitioner is the attempt on the part of Seven-Up Co. to have its third party claim against the franchisee and the carton manufacturer tried at the same time by the same jury. The court upheld the trial court's severing for separate trial this claim due to the difficulties in instructing the jury.

35. *Carter v. Jos. Bancroft & Sons Co.*, 360 F.Supp. 1103 (E.D. Pa. 1973); *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968); *Wojcuik v. United States Rubber Co.*, 13 Wis.2d 173, 108 N.W.2d 149 (1961).

36. 13 Wis.2d 173, 108 N.W.2d 149 (1961).

37. 428 Pa. 334, 237 A.2d 593 (1968).

38. Plaintiff's theory of the case was that the accident arose from a combination of excessive force applied by the service station owner and the defective condition of the tire. Plaintiff did not contend that the defect in the tire alone caused the accident. Since plaintiff did not establish that the service station owner had applied excessive force in mounting the tire, there was no liability on the part of any of the defendants. In short, plaintiff failed to show that the alleged defect in the tire was the cause of his injury. *Id* at 599.

39. 360 F.Supp. 1103 (E.D. Pa. 1973).

40. The label read as follows:
Ban-Lon Fashion
This Ban-Lon fashion is beautifully different, outstandingly easy-care. You will find it wearable, versatile, packable. Its equal in performance is not to be found, because of the unique, exclusive crimp in the Textralized yarn from which it is made.
Ban-Lon is a trademark identifying garments, fabrics, and articles made according to specification and quality standards prescribed and controlled by Joseph Bancroft and Sons Co., a division of Indian Head, Inc.
Unauthorized use of this tag is prohibited....

41. See note 20, *supra*.

42. See note 21, *supra*.

43. See note 22, *supra*.

44. Restatement (Second), Agency, Sections 8, 8(b) and 27 (1957).

45. *Id* at Section 267.

46. Coe v. Esau, 377 P.2d 815 (Okla. 1963).

47. *Id* at page 819.

48. B. P. Oil Corp. v. Mabe, 370 A.2d 554 (Ct. App. Md. 1977).

49. 437 F.2d 308 (3d Cir. 1971).

50. The plaintiffs also sought to recover damages based upon breach of warranty with respect to the sale of the van, breach of warranty with respect to the repairs which were made on the van before the sale and negligence in permitting an unqualified person to perform repairs at the Texaco service station. *Id* at page 311.

51. 85 N.M. 679, 515 P.2d 1283 (1973).

52. Plaintiff also sought to establish the existence of a master-servant relationship between the service station operator and Chevron.

53. 51 Mich. App. 646, 215 N.W..2d 719 (Ct. App. Mich. 1974).

54. 391 A.2d 196 (Sup. Ct. Del. 1978).

55. 582 F.2d 781 (3d Cir. 1978).

56. The druggist refilled the prescription with a blood thinner rather than a diuretic. As a consequence, the decedent sustained massive traumatic injuries. *Id* at page 783.

57. A complete copy of the franchise agreement has been appended to the opinion. *Id* at page 797.

58. 69 Ga. App. 140, 24 S.E.2d 843 (Ct. App. 1943).

59. 55 Mich. App. 100, 222 N.W.2d 52 (Ct. App. 1974).

60. 332 A.2d 160 (Super. Ct. Del. 1975).

61. ". . . when an entity can control the size, shape and appearance of its [franchisee's] establishment, impose the nationally known sign 'Dairy Queen' as the only sign for the premises, require all containers to show the name or the parent company, dictate portion control, the size and shape of containers, the uniforms of the employees, subject the [franchisee] to the obligation to obey subsequent rules and regulations, reserve the right to inspect the premises (the absence of affirmative remedial controls except termination in the event the inspection results are unsatisfactory proves nothing since what is the right to inspect without the right to remedy), name the suppliers and even dictate what else may be sold on the premises, there appears little else to establish agency . . ." *Id* at pages 162 and 163.

62. 307 F.Supp. 107 (N.D. Cal. 1969).

63. In this case, plaintiff's father had no contact with the defendant, he had a credit card of another company first issued 14 years earlier, the card itself showed that the sign of the issuing company was distinct from that of defendant, he had stopped at the station to purchase a fan belt, the only reason he selected that particular station was because it would honor his credit card, he had never been to the station before, and there was no evidence that the service station owner had obtained fan belts from the defendant.

64. 26 N.C. App. 376, 216 S.E.2d 383 (Ct. App. 1975).

65. 219 S.E.2d 874 (Sup. Ct. Va. 1975).

66. Although plaintiff's complaint included an allegation of apparent agency, when this was dismissed without objection by plaintiff and, on appeal, plaintiff assigned no error addressed to that theory, the court did not consider the theory of apparent agency.

67. 164 Conn. 317, 321 A.2d 456 (1973).

68. 138 Ga. App. 588, 226 S.E.2d 613 (Ct. App. 1976).

69. 539 S.W.2d 217 (Ct.App. Tex. 1976).

70. Apparently, Exxon's attorney was diligent in taking the testimony of the service station operator without delay. A question is raised as to whether or not the service station operator, at the time of giving his testimony, realized that he would be held solely liable if Exxon were dismissed from the suit.

71. 260 F.Supp. 109 (D.C. Del. 1967).

72. Section 324(a) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which each should recognize as necessary for the protection of a third party or his things, is subject to liability to the third person for physical harm resulting from his failing to exercise

reasonable care to product his undertaking, if
(a) his failure to exercise reasonable care increases the risk of such harm . . .

73. 276 Cal.App.2d 680, 81 Cal.Rptr. 519 (Ct.App. 1969).
74. The court relied upon Section 311, Restatement (2d), torts, which reads as follows:
    (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results.
    (a) to the other, or
    (b) to such third person as the actor should expect to be put in peril by the action taken.
    (2) Such negligence may consist of failure to exercise reasonable care
    (a) in ascertaining the accuracy of the information of the information, or
    (b) in the manner in which it is communicated.
75. 387 F.Supp. 772 (E.D. Tenn. 1974).
76. Plaintiff did not rely upon any theory of warranty law as set forth under the UCC. *Id* at page 774.
77. The court also pointed out that there was no indication plaintiff would be prejudice in dismissing underwriters from the case.
78. See *Hall v. E.I. duPont de Nemours and Co., Inc.*, 345 F.Supp. 353, 368 (E.D. N.Y. 1972).
79. *Ibid.*
80. Conn., Mass., Wisc., Glickman, Franchising, Section 4.06(3) (1979).
81. *Colo. Rev. Stat.*, Section 13-21-401 *et.seq.* (1977); Peck and Kennedy, "The Colorado Product Liability Act of 1977", The Colorado Lawyer (December, 1977).
82. *Colo. Rev. Stat.*, Section 13-80-127.5 (1977).
83. In re Cogga Mooga, Inc., File Number 722 3051, FTC (May, 1978).
84. *Arlie Jackson v. American Express Co., Inc.*, (Docket No. 0217798, Superior Court of Los Angeles County).
85. 16 C.F.R. Part 255.
86. 16 C.F.R. 436.2(a).
87. 16 C.F.R. 436.2(a) (3).
88. 16 C.F.R. 436.2(a) (4).
89. See notes 3 and 4, supra.
90. *Cal. Corp. Code*, Section 31,000 *et.seq.*
91. *Id* at Section 31005.
92. *Fla. Stat.*, Section 817.416(1) (1975) and *Va. Code*, Section 13.1-557 *et.seq.* (1978).
93. 16 C.F.R. 436.1(a).
94. 15 U.S.C. 45 (L) The FTC has gone on record that it believes a private party should be able to sue a franchisor who has violated the FTC disclosure rule.
95. *Cal. Corp. Code*, Section 31310.
96. *Id* at Section 31,301.
97. 17 U.S.C. 201.
98. One purpose of this provision was to prevent the possibility of a foreign government enforcing censorship in the United States of dissident authors by seizing the ownership of the
94. 15 U.S.C. 45 (L). The TCC has gone on record that it bethe United States.
98. Nimmer on Copyrights, Section 10.04 (1979).
99. 17 U.S.C. 101.
100. *Ibid.*
101. Nimmer's discussion of this problem indicate that a proper interpretation of the statute leads to the conclusion that a new copyright would not be created. 3 Nimmer on Copyrights, Section 10.02(c) (2).
102. Nimmer indicates that the entire copyright may fall into the public domain unless the license contains an appropriate condition requiring placement of notice on all published copies. *Id.*
103. Nimmer indicates that the exclusive licensee's use of his own name in the copyright notice should not invalidate the entire copyright. *Id.*
104. Connelly v. Uniroyal, Inc. 75 Ill.2d 393, 389 N.E.2d 155, 161 (1979).