Franchise Goodwill: “Take a Sad Song and Make it Better”

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ABSTRACT

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Like a marriage, a franchise relationship can end poorly. This franchise “divorce” may produce long-term problems affecting the parties’ ability to conduct business. As in a dissolving marriage, the dispute often centers on ownership: who gets what? Singing the sad refrain of remorse, the franchisee or franchisor laments that she spent her blood, sweat, and tears building the business, only to have the other party claim title to what was built. At its core is a clash over goodwill; and the dispute frequently exposes glaring inconsistencies.

The franchisee-franchisor quarrel often features shifting assertions about the nature of the goodwill. Indeed, dueling franchisors and franchisees often switch arguments depending on the situation. That is, a party to a franchise contract – whether franchisor or franchisee – in one context will assert that the franchisee purchased specific rights, including goodwill, as part of a “franchise package.” However, in another circumstance, the same party will declare that goodwill is severable from both the trademark and the franchise and that therefore the franchisee, while buying a franchise, purchased no goodwill.

This paper analyzes franchise law cases from the perspectives of termination, non-renewal, trademark infringement, non-compete covenants, antitrust tying, and taxes to determine why franchisors and franchisees engage in such inconsistent reasoning and what the consequences are for franchising. In addressing the most contentious issues of franchising, the litigants’ and the courts’ adherence to a logical, systemic framework could improve the resolution process for individual cases, and clarify standards of practice for all franchising matters. A proposed standard could lessen the lamentations – the sad songs of franchising – by quickly and fairly resolving the ownership of goodwill.

KEYWORDS: goodwill, trademark, argument, termination, ownership