Minimizing Vicarious Liability of Franchisors for Acts of Their Franchisees

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I. Introduction

Since 1984, one-third of all retail sales have been made by franchised businesses.[1] As franchising's importance in the United States economy is being recognized by plaintiffs' lawyers, courts have been increasingly willing to extend liability to franchisors for acts committed by their franchisees. However, vicarious liability of franchisors is not a *per se* rule in franchise law as yet. Franchisors can reduce the risk of being held liable for franchisees' acts by careful drafting (and redrafting, if necessary) of their franchise agreements, offering circulars, and operating manuals.

This article discusses the theories that courts use to impose upon franchisors liability for damages caused by their franchisees' acts. The article also discusses the conflict between the most important of these theories (i.e., actual agency) and the federal Lanham Act, which appears at first to require franchisors to take action that will result in vicarious liability. The article concludes with recommended drafting methods and other techniques for franchisors to reduce vicarious liability exposure.

II. Vicarious Liability Theories

A. *Agency*

To minimize vicarious liability risks, drafters must understand the roots of, and theories that courts use to impose, such liability. The main basis to impose liability upon franchisors for acts of franchisees is agency law.[2] Agencies are normally consensual relationships. Their important characteristics are highlighted by comparison to independent contractor relationships.[3] Most important is that in an agency one person agrees to act for and under another's direction and control.[4] In an independent contractor relationship, one party may retain some control over the other, but the control is limited to the results or quality of the work, and not the means of accomplishing the results.[5] The agent's actions bind and impose liability on the principal.[6] Courts use either of two agency theories, actual agency or apparent agency, to impose vicarious liability.

B. *Actual Agency*

A franchisor, like any principal, is liable for acts of a franchisee who is an actual agent.[7] Whether an actual agency exists depends on the parties' intent. Contractual declarations of the nature of the relationship are relevant[8] but do not bind a court. Rather, intention is a fact question determined from the writing and accompanying circumstances.[9]

The franchisor's right to control the franchisee's activities is the most important factor to determine if an actual agency exists.[10] However, in nearly every franchise the franchisor has a right to exercise some degree of control over the franchisee. To come within the Federal Trade Commission's definition of a franchisor, there must be authority to exert significant control over, or at least provide assistance in, the franchisee's operation.[11] Inherent in this conception of franchising is that the franchisor will exert control over or assist the franchisee.[12]

Most discussions of this topic assert that the important factor is the amount of control that the parties agree upon.[13] The control required for a franchise to exist is not inherently sufficient to establish an actual agency. Otherwise, such an agency would be a *per se* rule in every franchise relationship, and courts would never need to consider whether a franchisor, as defined by the FTC Rule, is also the principal of a putative franchisee-agent. Rather, as discussed below, this issue has been raised in numerous cases. Some franchises have been found to be agencies while others have been found not to be.[14]

The relevant control to determine if an actual agency exists is control over the time, manner, method, and details of the agent's work.[15] For example, control over hiring, firing of employees, and/or the manner in which the franchisee maintains bank accounts is a right to control details of operations.[16] Contrarily, the right to specify standards of appearance, and quality of equipment, is a right to control results.[17]

In a seminal case on vicarious liability of franchisors,[18] a dance school franchisee received from a student prepay-

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ments for dance lessons. The franchisee failed to furnish the lessons. The student succeeded in recovering the prepayments from the franchisor by establishing that the franchisee was an agent of the franchisor. The court stated that if one party has the right to exercise complete control over the operation of the other, an agency exists. Since such extensive control was present an agency existed, and the principal could therefore be held vicariously liable.

The franchisor's argument emphasized that the franchise agreement contained a trademark license. The franchisor argued that when such a license is present, controls are essential to protect the trademark. The court did not dispute this proposition. Rather, it found that controls retained by

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the franchisor extended beyond those necessary to protect its trademark. This conclusion followed from the court's finding that controls extended to day-to-day details of the franchisee's operation. The franchisor had the right to:

- control employment of all employees whether or not their duties related to dance instruction;
- fix tuition rates;
- choose the bank to handle financing for students;
- designate the dance school location, layout, and decor;
- make refunds to students and charge them to the franchisee;
- settle claims against the franchisee arising from operation of the dance school, and reimburse itself from funds regularly deposited with the franchisor by the franchisee;
- control advertising by the franchisee as all advertising had to be submitted and approved before use;
- exercise control over the franchisee's operation pursuant to requirements that the franchisee adhere to policies of the franchisor and provisions that failure to comply would be grounds for immediate termination;
- require the franchisee to honor unused lessons purchased from other franchisees, at rates specified by the franchisor; and
- require the franchisee regularly to submit lists of students' names, addresses, fees, and other similar information.

The distinction between an actual agency and an independent contractor relationship in the franchise context is highlighted by comparing *Nichols v. Arthur Murray* to *Drexel v. Union Prescription Centers.*[19] In that case, a pharmacy franchisee negligently filled a prescription. The plaintiff tried to recover from the franchisor on the ground that the franchisee was its agent. In attempting to establish the presence of controls sufficient for an actual agency to exist, the plaintiff noted that under the franchise agreement:

- the franchisee was required to use the franchisor's service marks and to use advertising material designated by the franchisor;
- the franchisor approved locations;
- the franchisee had to adhere to the franchisor's service, appearance, and quality standards;
- the franchisor reserved the right periodically to inspect the franchisee's operation;
- the franchisor designated the minimum number of operating hours required of the franchisee;
- the franchisee was required to adhere to certain inventory requirements;
- the franchisor was to provide management and marketing advice; and
- the franchisor could terminate the agreement if the franchisee did not comply with the agreement's provisions.[20]

The court determined that these provisions were merely tools for the franchisor to protect its reputation and goodwill. These provisions did not give the franchisor control over the manner in which the franchisee performed its daily business chores. The franchisor was concerned not with means of the franchisee's business, but with results.[21]

Reservations of controls as a means to protect reputation and meaning of trademarks are thus important tools to franchisors. These can provide a basis to retain control over some aspects of the franchisee's operations without being subject to vicarious liability.

C. *Implications of the Lanham Act and the Related Company Doctrine*

Central to most franchise systems is a trademark or service mark. Public recognition of the franchisor's trademark leads to patronage of franchisees and enables the franchise system to flourish. The trademark or service mark becomes associated with the quality of the product or service offered by the franchise.[22]

Historically, trademarks designated source alone.[23] Because this was the sole function of a trademark, a trademark owner could not license the use of the mark to any other person since a license would mean that the mark was being used by someone other than the source of the mark.[24]

This theory gave way to the current view that trademarks identify the quality of a product.[25] The federal Lanham Act,[26] which regulates trademarks, now permits a trademark owner to license the use of a mark provided that the licensee is a "related company." However, for a trademark licensee to be a related company the licensor must exercise control over its use of the mark. Thus, the Lanham Act requires a trademark licensor to exercise certain control over its licensees

or otherwise to suffer cancellation of its trademark rights.[27]

The licensor must actually exercise the control required by the Lanham Act. It is not sufficient to merely recite a right to control in the trademark license.[28] The amount of control required varies.[29] The amount of control needed for Lanham Act purposes does not result in agency. Controls exercised under the Lanham Act do not create an agency relationship.[30]

D. *The Conflict Posed by Agency Law and the Lanham Act*

The combined effect of agency law and the Lanham Act is that franchisors face the problem of exercising sufficient control over franchisees to protect their trademarks and service marks, while limiting the control that they reserve in order to avoid vicarious liability for franchisees' acts.[31] Meanwhile, limiting controls can result in a franchisor being directly negligent for failure to take actions to protect foreseeable plaintiffs.

The lesson for drafters from the Lanham Act and the cases described above is that to reduce the risk of vicarious liability, the franchise agreement should be stripped of provisions reserving control over the means by which the franchisee operates. Controls should be limited to those necessary to preserve the goodwill associated with the franchisor's trademarks and service marks. Regulatory provisions governing the franchisee's business need not be duplicated as the franchisee must comply with all applicable laws.

E. *Apparent Agency*

Even if a franchise relationship is not an actual agency, a franchisor can still be vicariously liable for a franchisee's acts. This occurs when intentional action or negligence leads innocent third parties to believe that someone is another person's agent, even if the parties did not intend to establish an agency.[32] If the third party relies on this belief, to his or her detriment, an "apparent agency" exists.[33]

Mere acquiescence to conduct that could lead a third party to believe that a franchisee is the franchisor's agent can result in vicarious liability.[34] The plaintiff's belief may result from a variety of indicia, including advertising, signs, the manner in which telephones are answered, or representations made by the franchisee.[35]

A leading case involving apparent agency in the franchise context is *Kuchta v. Allied Builders Corp.* In *Kuchta*, a married couple signed a contract with a building company franchisee to add a room to their home. The franchisee built the room. Because of building code and zoning violations and structural flaws that were the franchisee's fault, the homeowners had to demolish the addition and restore their property.

The court held that the following evidence, presented by the plaintiffs, enabled the jury to find that an apparent agency existed:

- The couple had originally called the franchisor for help. The franchisor had referred them to its franchisee, identifying the franchisee as its "branch office."
- Both the franchisor and the franchisee answered their telephone in the same manner.
- Both the franchisor and the franchisee did business under the same name.
- The couple's check for the contract price was endorsed and deposited to an account bearing the same name as the franchisor's name.
- The name of the contractor on the building contract was the same as the franchisor's name.
- Both offices used common yellow pages and newspaper advertising.
- Telephone calls to the main office resulted in quick responses from the franchisee.
- The franchisee represented that the company had been in business for fifty years. This was the length of time that the franchisor had been in business.

These practices could lead an unsuspecting plaintiff to believe that the franchisee and franchisor were merely branches of one company.

The *Kuchta* case is an example in which a franchisor actively participated in conduct that led to finding an apparent agency. However, in other cases, courts have found apparent agencies to exist based on substantially less evidence. For example, in *City of Delta Junction v. Mack Trucks, Inc.* the court held that a jury could find an apparent agency based only on a dealer's use, albeit somewhat extensive, of the Mack name without any notice of independent ownership of its dealership.[36]

To reduce the risk of vicarious liability, the franchise agreement should be stripped of provisions reserving control over the means by which the franchisee operates. Controls should be limited to those necessary to preserve the goodwill associated with the franchisor's trademarks and service marks.

III. Other Potential Bases for Secondary Liability

Additional theories have been used or suggested as bases for franchisor liability for acts of franchisees. In drafting the franchise documents, the franchisor should be aware of these theories as well.

A. *Direct Negligence, Breach of Warranty and Product Liability*

Injuries that plaintiffs suffer through dealings with franchisees often result in direct actions against the franchisor. Direct negligence suits involve claims that the franchisor

breached a duty owed directly to the plaintiff. These actions are often joined with vicarious liability claims. The risk of defeat in such action can also be reduced by planning and drafting.

In an instructive case, a New York court held that evidence would support holding a franchisor directly liable for direct negligence for failure to train, supervise, or control the franchisee.[37] In this case, a young employee of an automobile rental franchisee violated policy by driving a rental vehicle. While doing so, he was involved in a tragic accident.

In another case, a trial court had held that the franchisor could be liable for negligence for failing to terminate a dealer in financial difficulty. The manufacturer knew of the dealer's financial problems yet continued to let it sell BMW cars.

The court held that the franchisor's sponsorship, management, and control of the distribution system made the franchisor a supplier for purposes of tort liability since it had been made aware of the product and had been given the opportunity to assess the risks involved.

An officer of the dealer embezzled money without delivering cars.[38] On appeal, however, the court held that the manufacturer could not have foreseen the dealer's criminal conduct and therefore could not have been negligent.

An interesting recent direct negligence case occurred in Canada and arose from a franchisor's central dispatch system.[39] In that case a franchisor operated a central dispatch system for its taxicab franchisees. A customer was hurt when exiting from a taxi that had been dispatched by the franchisor and bore its trademark. The plaintiff sued the franchisor for breach of warranty and negligence.

The court held that when the customer phoned the franchisor's dispatcher to request a taxi, and the franchisor accepted the order, a contract was made between the parties. The franchisor promised to send the cab and the customer promised to pay. The fact that the franchisor dispatched an independently owned taxi in place of its own did not alter the contract.

In a recent case, a franchisor designated the soft drink display rack to be used in franchisees' convenience stores.[40] The rack was furnished not by the franchisor, but by an independent entity: the soft drink supplier. The plaintiff died from injuries suffered when a soft drink can fell from the rack and hit him. The court found the franchisor directly liable to the deceased's estate for failure to use due care in selecting and inspecting the rack.

In a case with analogous facts, the court explained its similar holding further.[41] A 7-Up bottle had fallen from a carrying carton that was designed to grip the bottle by its neck. The bottle exploded and a piece of glass injured the plaintiff's eye. An agreement between the trademark licensor and the bottler provided that the licensor approve the type and design of cases, bottles, and crowns used for the product. The licensor had approved the carton involved in this case. The plaintiff therefore sued for breach of warranty. The court held that the franchisor's sponsorship, management, and control of the distribution system, and its consent to use the carrying carton, made the franchisor a supplier for purposes of tort liability since it had been made aware of the product and had been given the opportunity to assess the risks involved. It could therefore be liable on a product liability theory.[42]

The court added that liability was based on the franchisor's control, and the public's assumption, induced by the franchisor's conduct, that the franchisor does control and vouch for the product.

In each of these cases, a court held that a franchisor could be directly liable to a third-party customer of a franchisee. Because the licensor controlled the quality of the product or service, and benefitted from the trademark license, it could be held liable for injuries and damages caused by the products or by the franchisee. The licensor could also be liable for failing to exercise adequate control.

IV. Drafting and Other Techniques to Minimize the Risk of Vicarious or Other Secondary Liability

A. *Drafting Considerations*

In a vicarious liability claim that is based on agency, a court will determine whether an agency exists as a matter of law only if there is no factual dispute.[43] However, factual disputes are common in these cases. Thus, whether an agency exists in any case is normally a fact question that will reach a jury.[44]

Drafters can take steps to reduce the control elements that will lead a court or trier of fact to find that an agency exists. An important task for the drafter is to minimize the number and kind of provisions in the franchise agreement that authorize the franchisor to control means of operating the franchise. Reducing authority to exercise control, however, does not require the franchisor to sacrifice the standards of its system.

Many standards that franchisors impose in franchise agreements and operating manuals are parallel to standards imposed by local laws, or by the rules of trade associations or professional societies. For example, while operating manuals often contain standards for constructing premises to operate the franchise, the same result can often be accomplished by merely requiring the franchisee to construct the premises in accordance with local building code requirements. For restaurants and fast food franchises, standards

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of cleanliness and customer service can be accomplished by requiring the franchisee to comply with local health regulations or to join a local restaurant trade association. These trade associations typically have codes of ethics and operational standards that members must honor.

Controls designed merely to protect trademark reputation will normally not be a basis for vicarious liability. The product provided to the customer may be the most important element in trademark protection. Therefore, the franchise agreement should, to the extent possible, be result-oriented, and not means-oriented. For example, the franchisee should normally retain control over selection of location and hiring and firing employees, especially employees who will have no contact with customers.

Careful thought will reveal that many franchisors do not need authority to supervise or inspect the many aspects of the franchise that are not relevant to its reputation or to some other important aspect of the franchise. For example, in a franchise with a royalty that is a fixed monthly fee (rather than a percentage of revenues), there is little need for the franchisor to control bookkeeping methods or to inspect or audit the franchisee's books. The requirement that year-end financials be supplied is sufficient.

Franchisors should reconsider whether, and the extent to which, they need to designate the exact layout of the franchise location, the franchisee's operating hours, the equipment, the franchisee's menu, and other aspects of franchised locations that had previously been considered essential to enable the franchisor to control the quality of the service or product.[45] It may not be sufficient to require that the operation will be developed in accordance with the franchisor's current standards.

Parallel considerations affect preparation of the operating manual and other documents that are part of the franchise system. The operating manual should not contain unnecessary specifications for equipment, conduct, or layout. Unnecessary areas of inspection should not be provided for in inspection reports.

B. *Considerations in Addition to Drafting*

There are other steps that franchisors should take to reduce the risk of being vicariously liable for franchisees' acts. Even though the franchise documents do not reserve to the franchisor express rights to control, behavior by the franchisor may manifest an actual exercise of control so that an agency can be deemed to exist. Thus, the franchisor must, in practice, not exercise controls that would lead to the finding of an agency. Counsel must advise the franchisor accordingly.

Counsel should also advise the franchisor to take steps to reduce the risk of being liable under an ostensible agency theory. One method to reduce this risk is to require franchisees to display placards disclosing the independent ownership of their business. Some franchisors design their trademarks and service marks to include the statement "each location is independently owned and operated" as part of the mark. Some even include in their mark a place for the franchisee's name. The franchisee's phone should be answered with an identification of its independent ownership. All publications should reflect the franchisee as the owner and operator of the business. Forms, cards, letters, and all forms of communication should incorporate such a disclosure.

Another method is to encourage franchisees to adopt some methods of operation that distinguish themselves from all other franchisees. For example, McDonald's now allows franchisees some latitude to individualize their franchised locations.[46]

The franchisor entity should have a different name than the name of the franchise, and the franchisor should operate under its real name, and not under a fictitious name. This will help prevent the assertion of confusion based on the franchisee's use of the same name as the franchisor. The franchisee entity should be required to use a different name than the name of the franchise.

The franchise agreement should require, and counsel should advise, the franchisor to take action to assure that the franchisee provides notice of its independent ownership on stationery, business cards, checks, purchase orders, contracts, advertising, and other published material. If an important part of the franchised business involves contracts between the franchisee and consumers, standard form contracts should contain bold disclaimers notifying consumers that the franchisee is an independent entity. These disclaimers should also be placed directly above the signature lines.

Careful thought will reveal that many franchisors do not need authority to supervise or inspect the many aspects of the franchise that are not relevant to its reputation or to some other important aspect of the franchise.

An important action for franchisors to take, and for counsel to emphasize to franchisors, is that they should require and monitor franchisee insurance policies to assure that the franchisor is named as additional insured. Insurance should provide for notice to the franchisor of any material modification or of termination. Policies should be required to include contractual liability and advertising injury endorsements. In conjunction with this requirement, the franchisee should be required to indemnify, defend, and/or pay the cost of defense for the franchisor for any liability arising out

of the franchisee's operations. If a conflict exists between franchisor and franchisee, the agreement should provide for the right of the franchisor to select counsel at the franchisee's expense.

The contractual indemnity and defense provision can work together with the contractual liability endorsement to result in the franchisee's insurance policy covering the franchisor for many instances of potential vicarious liability.

Finally, a method that has been suggested, but has not achieved widespread use, is to create a litigation fund, analogous to the advertising fund present in most franchises. The litigation fund would exist to be used, at the franchisor's discretion, to finance defense of suits brought against the franchisor or any of its franchisees, including vicarious liability claims. Such a fund would be a benefit to the franchise system since it would result in spreading the cost of litigation arising from any one franchisee's operations among all franchisees. Through this method, the parties would also emphasize the importance of their controlling the cost of litigation and the importance of avoiding acts that create vicarious liability for the franchisor.

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V. Conclusion

To develop and maintain uniform systems, franchisors often reserve significant controls over their franchisees' operating methods. To exploit the goodwill associated with well-known trademarks and service marks, franchise systems typically employ common means of identification. These circumstances result in franchise relationships exhibiting important attributes historically found in actual and ostensible agencies. Historically, when such attributes were present, courts held the principals liable for acts of their agents.

In reliance on these agency theories, plaintiffs in search of deep-pocketed defendants increasingly name franchisors in lawsuits arising from franchised businesses. However, by drafting the documents that govern the franchise relationship, requiring the franchisees to publicize their own identities and monitoring insurance policies, franchisors can reduce the number of factors that will lead to being vicariously liable, and can minimize their exposure in case such liability occurs.

Footnotes

1. International Trade Administration, U.S. Dep't of Commerce, Franchising in the Economy 1983–1985 (1986).

2. *See* Wickham v. Southland Corp., 168 Cal. App. 3d 49, 213 Cal. Rptr. 825 (1985), and Nichols v. Arthur Murray, Inc., 248 Cal. App. 2d 610, 56 Cal. Rptr. 728 (1967). In *Wickham*, the court found that no actual agency existed, while the *Nichols* court found that an actual agency did exist.

3. *See, e.g.*, Drexel v. Union Prescription Centers, Inc., 428 F. Supp. 663, 666 (E.D. Pa. 1977). There are exceptions to the general rule that vicarious liability does not follow from independent contractor relationships. Examples include breaching the duty of care in selection of an independent contractor, *see* LOTTY & FRAMPTON, BASIC BUSINESS ASSOCIATIONS 123 (1963), and cases involving nondelegable duties and inherently dangerous activities. These kinds of cases can arise in the franchise context.

4. RESTATEMENT (SECOND) OF AGENCY § 1.

5. *Id.* at § 2(3). The *Restatement* contains several additional criteria to examine to determine if an agency or independent contractor relationship is present. These include such criteria as the degree of skill required, whether the person performing the task is in a distinct occupation, right to terminate the relationship at any time, and who furnishes or designates tools and equipment for the work. In any particular franchise, each of these factors militates differently. Although courts have tended to disregard all but the right to control in determining whether a franchise is an agency, counsel should consider the applicability of all these factors.

6. CAL. CIV. CODE § 2338 (West 1985). For a survey of scholarly discussions of the public policy reasons for imposing liability on principals for their agents' acts, *see* LOTTY & FRAMPTON, BASIC BUSINESS ASSOCIATIONS 77–92 (1963).

7. CAL. CIV. CODE § 2338. *See, e.g.*, Wood v. Holiday Inns, Inc., 508 F.2d 167 (5th Cir. 1975); *Nichols*, 248 Cal. App. 2d 610, 56 Cal. Rptr. 728.

8. *See* Drummond v. Hilton Hotel Corp., 501 F. Supp. 29 (E.D. Pa. 1980); *Wickham*, 168 Cal. App. 3d at 57, 213 Cal. Rptr. at 828.

9. *See Nichols, supra* note 2; Buchanan v. Canada Dry Corp., 138 Ga. App. 588, 226 S.E.2d 613 (1976); Chargois v. Trip-L-Quick, 441 So. 2d 45 (La. App. 1983).

10. *See Wood*, 508 F.2d at 172; *Nichols*, 248 Cal. App. 2d at 610, 56 Cal. Rptr. at 728. *See, e.g.*, Salisbury v. Chapman Realty, Bus. Fran. Guide (CCH) ¶ 8205 (Ill. App. 1984); Slates v. International House of Pancakes, Inc., 90 Ill. App. 3d 716 (1980); Diaz v. GIMAC Marina, Inc., Bus. Fran. Guide (CCH) ¶ 7916 (N.Y. Sup. Ct. 1983); Hinton v. Western Casualty & Surety Co., 435 So. 2d 568 (La. App. 1983).

11. 16 C.F.R. § 436.2 (1986).

12. A similar view is inherent in state definitions of franchising, which typically contemplate that the franchisor will prescribe a marketing plan or system. *See, e.g.*, CAL. CORP. CODE § 31005 (West 1977 & Supp. 1986); N.Y. GEN. BUS. LAW § 681.3(a) (Consol. 1987).

13. *See* Murphy v. Holiday Inns, Inc., 216 Va. 490, 219 S.E.2d 874 (1975); Burlingham v. Gray, 22 Cal. 2d 87, 139 P.2d 9 (1943). Some courts hold that the relationship actually established by the parties, including controls actually exercised, is more important than the parties' original intentions. *See, e.g., Wickham*, 168 Cal. App. 3d at 49, 213 Cal. Rptr. at 825. Some courts discuss exercises of control while others discuss the right to exercise control. *See* LOTTY & FRAMPTON, *supra* note 3, at 115.

14. *Compare, e.g., Wickham*, 186 Cal. App. 3d 49, 213 Cal. Rptr. 825, *with Nichols*, 248 Cal. App. 2d 610, 56 Cal. Rptr. 728.

15. *See, e.g.*, Drexel v. Union Prescription Centers, Inc., 428 F. Supp. 663 (E.D. Pa. 1977); Watkins v. Mobil Oil, Bus. Fran. Guide (CCH) ¶ 8751 (S.C. App. 1986); *Murphy*, 216 Va. 490, 219 S.E.2d 874; McLaughlin v. Chicken Delight, Inc., 164 Conn. 317, 321 A.2d 456 (1973).

16. *Nichols*, 248 Cal. App. 2d at 610, 56 Cal. Rptr. at 728.

17. *Drexel*, 428 F. Supp. at 663; *Watkins*, Bus. Fran. Guide (CCH) ¶ 8751.

18. *Nichols*, 248 Cal. App. 2d at 610, 56 Cal. Rptr. at 728.

19. *Drexel*, 428 F. Supp. at 663.

20. *Id.*

21. *Id.* at 666.

22. Siegel v. Chicken Delight, Inc., 448 F.2d 171 (9th Cir. 1971).

23. *See, e.g.*, E.I. Du Pont De Nemours & Co. v. Celanese Corporation

of America, 167 F.2d 484, 488 (C.C.P.A. 1948).

24. MacMahan Pharmacal Co. v. Denver Chemical Manufacturing Co., 113 F.468 (8th Cir. 1901).

25. *See Siegel*, 448 F.2d at 171; Dawn Donut Co. v. Harts Food Stores, 267 F.2d 358 (2d Cir. 1959).

26. Act of July 5, 1946, ch. 540, 60 Stat. 427 (current version at 15 U.S.C. § 1051–1127 (Supp. II 1984).

27. *See Dawn Donut*, 267 F.2d 365. For example, failure to maintain quality control can result in a mark being held abandoned and thus not protectible. *See, e.g.*, 15 U.S.C. § 1127 (Supp. II 1984); Haymaker Sports, Inc. v. Turian, 581 F.2d 257 (C.C.P.A. 1978); Sheila's Shine Products v. Sheila Shine, Inc., 486 F.2d 114 (5th Cir. 1973); Midwest Fur Producers Ass'n v. Mutation Mink Breeders Ass'n, 127 F. Supp. 217 (W.D. Wis. 1955). Absence of reservation of rights in the contract does not mean that the license fails to comply with the Lanham Act. The licensor may have exercised control in spite of the absence of any express grant by licensees of the right to inspect and supervise. *Dawn Donut*, 267 F.2d at 368.

28. Alligator Co. v. Robert Bruce, Inc., 176 F. Supp. 377 (E.D. Pa. 1959).

29. Edwin K. Williams & Co. v. Edwin K. Williams & Co.—East, 542 F.2d 1053 (9th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

30. *See, e.g.*, Oberlin v. American Corp., 596 F.2d 1322 (7th Cir. 1979); *Murphy*, 216 Va. at 490, 219 S.E.2d at 874.

31. *See* McMullan v. Georgia Girl Fashions, Bus. Fran. Guide (CCH) ¶ 8685 (Ga. App. 1986).

32. *See, e.g.*, CAL. CIV. CODE § 2317 (West 1985); Kuchta v. Allied Builders Corp., 21 Cal. App. 3d 541, 547, 98 Cal. Rptr. 588, 591; RESTATEMENT (SECOND) OF AGENCY § 8 (1958).

33. Watkins v. Mobil Oil, Bus. Fran. Guide (CCH) ¶ 8751 (S.C. App. 1986). This theory is sometimes called "ostensible agency" or "holding out." *See, e.g., Kuchta*, 21 Cal. App. 3d 541, 98 Cal. Rptr. 588. In practice, it is a form of "estoppel" by action or inaction on the part of the franchisor.

34. *See, e.g.*, City of Delta Junction v. Mack Trucks, Inc., 670 P.2d 1128 (Alaska 1983); *Kuchta*, 21 Cal. App. 3d 541, 98 Cal. Rptr. 588.

35. *See, e.g., Drexel*, 582 F.2d at 795; Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir.), *cert. denied*, 404 U.S. 829 (1971); Billops v. Magness Constr. Co., 391 A.2d 196, 197–98 (Del. 1978). However, mere use of trademarks, without more, is normally insufficient for a claim of apparent agency. Sydenham v. Santiago, Bus. Fran. Guide (CCH) ¶ 7594 (Fla. App. 1981); Orgeta v. General Motors Corp., Bus. Fran. Guide (CCH) ¶ 7593 (Fla. App. 1980).

36. *Delta Junction*, 670 P.2d at 1128.

37. O'Boyle v. Avis Rent A Car System, 78 A.D.2d 431, 435 N.Y.S.2d 296 (2d Dept. 1981).

38. Cullen v. BMW, 691 F.2d 1097 (2d Cir. 1982).

39. Fraser v. U-Need-A-Cab Limited, 50 Ont. 2d 281 (Ont. Can. 1985).

40. Papastathis v. The Southland Corp., Bus. Fran. Guide (CCH) ¶ 8591 (Az. App. 1986).

41. Kosters v. Seven Up Co., 595 F.2d 347 (6th Cir. 1979).

42. For a similar holding, *see* Harris v. Aluminum Co. of Am., 550 F. Supp. 1024 (1982).

43. *Wickham*, 168 Cal. App. 3d at 49, 213 Cal. Rptr. at 829.

44. *Id.* Occasionally, the question whether an agency was present rests solely upon written documents and is treated as a question of law for the court. *See, e.g., McMullan*, Bus. Fran. Guide (CCH) ¶ 8685.

45. Franchisors must be especially careful in this area since many of these characteristics and standards can be important parts of trademarks or trade secrets owned by the franchisor. The image, *modus operandi*, and other aspects of the system can be more important to the franchisor than the risk of vicarious liability. If so, then, it may be necessary to continue to impose detailed requirements on franchisees and take other precautions against vicarious liability exposure.

46. *See* L.A. Daily News, Feb. 23, 1986, Today Section, at 5. This article discusses a franchisee located in the business section of downtown Los Angeles, whose restaurant features lush greenery, live classical music during midday hours, and telephone jacks at each table so that busy customers can accept and make telephone calls during their fast food meals.