

The Five Things I Hate Most About Distribution Agreements



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One: Oral Agreements

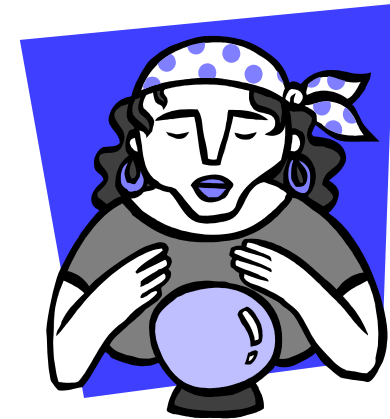
- If you have a dealer or distributor, you have a “contract” whether or not it is in writing.





Two: Inelastic Agreements

- **Failure to write the contract to anticipate the possibility of:**
 - **Competitive changes**
 - **Economic changes**
 - **New distribution channels**
 - **Demographic shifts**
 - **Political changes**
 - **Development of new products**
 - **Modification of existing products**
 - **M&A and other internal changes**





Examples

- **M has sold only to retailers and now wants to launch online sales direct to consumers.**
- **National accounts insist on uniform price and single invoice for product sales to all of their outlets.**
- **M acquires new brand and wants to roll-up two distribution networks into one.**
- **Demographic shifts increase demand above load that original distributor can handle.**

Three: Exclusivity and Trade Channels Not Defined

- **Can you appoint more than one dealer to service the same territory?**
- **May your dealer represent competitive products at the same time that it sells your products?**
- **Rights to online, mail order and remote distribution**
- **Pros vs. cons**



Compare Carvel ...

- “So long as Licensee complies with all of the terms of this Agreement, Carvel agrees not to establish or license another person to establish a Carvel Store within ¼ mile from Franchisee’s Carvel Store.”

[Carvel Corp. v. Baker, 79 F. Supp. 2d 53 \(D. Conn. 1997\)](#) – Held: Carvel had no right to sell Carvel cakes and deserts to supermarkets in franchisee’s territory.





...with Häagen-Dazs

- **“Franchisor may distribute products identified by the Häagen-Dazs trademarks not only through Häagen-Dazs shoppes but through any other distribution method which may from time to time be established.”**

Rosenberg v. Pillsbury Company, 718 F. Supp. 1146, 1157 (S.D.N.Y. 1989) – Held: No breach of franchise agreement or implied covenant of good faith when Häagen-Dazs sold directly to supermarkets in franchisee’s territory despite impact of pint sales on franchisee’s store sales.

Four: Unrealistic Restrictive Covenants

- **Courts will protect against wrongful use of IP**
- **However, not everything disclosed in confidence is protectible**
- **Network membership may not justify a broad noncompete. Consider:**
 - **In-term vs. post-term**
 - **Geographic scope**
 - **Activities scope**
 - **Duration of restraint**





Five: Accidental Franchises

SIGNIFICANT
ASSISTANCE/
CONTROL

or

TRADEMARK

+

MARKETING
PLAN

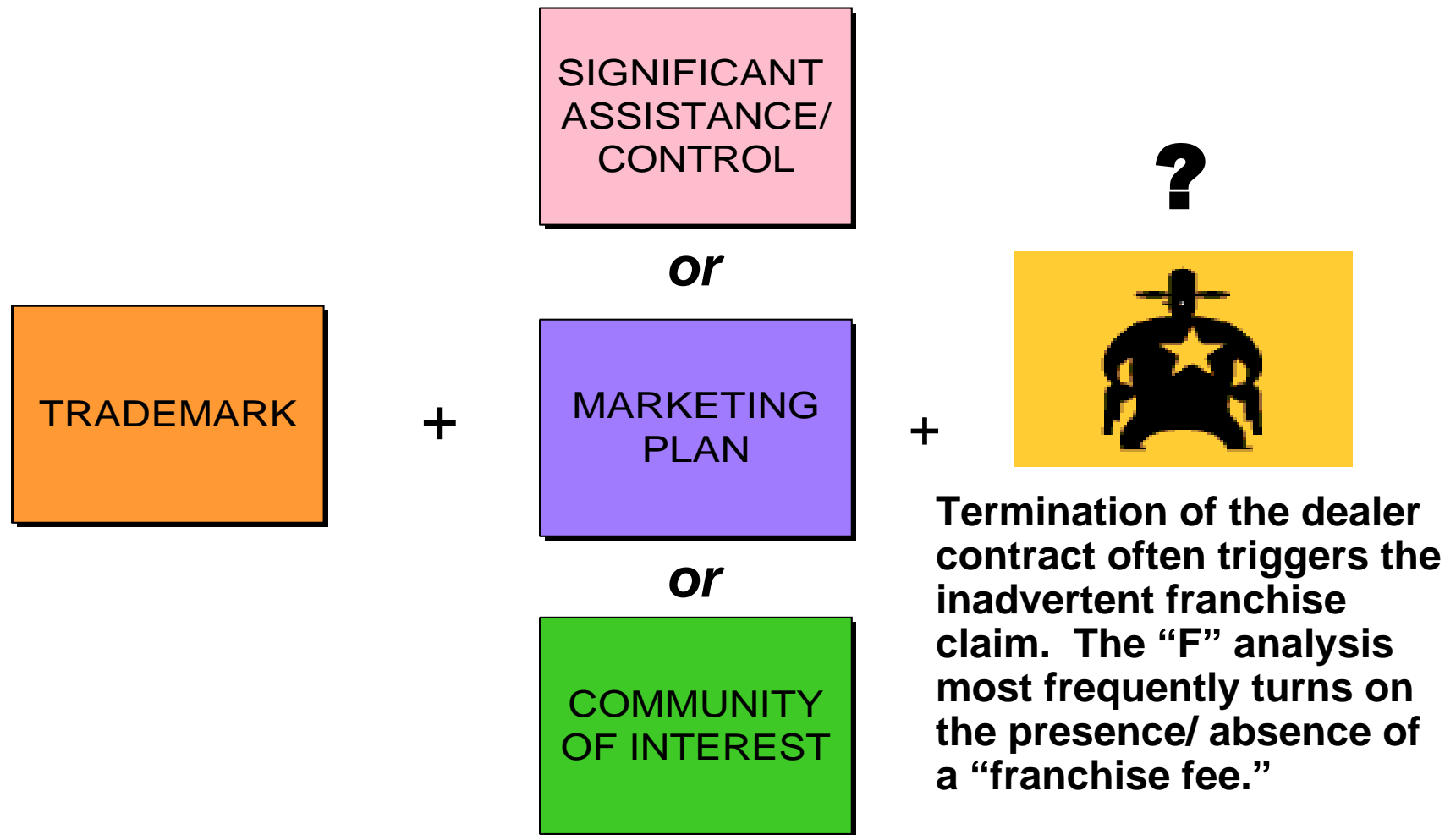
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REQUIRED
FEE

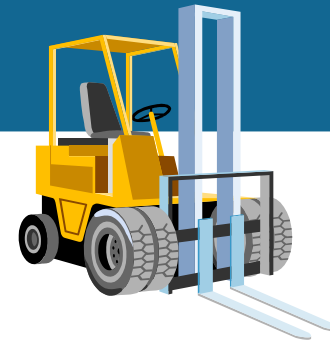
or

COMMUNITY
OF INTEREST

Avoiding An Accidental Franchise



The Lesson of To-Am



- “Legal terms often have specialized meanings that can surprise even a sophisticated party. ... Like many manufacturers, MCFA simply did not appreciate how vigorously Illinois law protects ‘franchisees.’”

[To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., 152 F.3d 658 \(7th Cir. Ill. 1998\)](#) – Held: Dealership was a franchise based on purchases of sales manuals over 8 years at \$50/each totaling \$1,600. Mitsubishi was liable for \$1.525M for wrongful termination without GC in violation of IL franchise statute.

Top 10 Excuses Why A Relationship Can't Be A Franchise



10. **“Everyone else in our industry does it this way!”**
9. **“We grant dealerships, not franchises!”**
8. **“We’ll just call it something else!”**
7. **“We’re partners, really!”**
6. **“We don’t tell them how to operate their business!”**

Top 10 Excuses Why A Relationship Can't Be A Franchise



5. **“They use their own trade name, not ours!”**
4. **“We cut them a good deal on the product they must buy from us!”**
3. **“They sell other products/services besides ours!”**
2. **“We never intended it to be a franchise!”**
1. **“We didn’t know about the law when we signed the contract!”**