

Franchising of Intellectual Property in India

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ABSTRACT

This research paper talks about the concept of Franchising and the types of franchising agreements. Franchising and intellectual property are related as it is the intellectual property of a person such as patents, trademarks or copyrights that is the subject matter of a franchisee agreement. The paper discusses the various definitions of franchising that are prevalent over the world before getting into the various types of it such as Invention Licensing Agreement, Trademark Licensing Agreement, Character Merchandising Agreement and Dealer / Distributor / Marketing arrangements. Since the commencement of globalization, franchising has played an important role in benefitting the world. In India, franchising is governed by the business and commercial laws and there is no specific set of laws for the same which. The conclusion talks about the need of a specific set of laws in order to govern franchising more efficiently as there are many bodies, national as well as international who have been expanding their business by the means of franchising.

Keywords

Agreement, Franchising, Intellectual Property, Law.

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Introduction

From the seemingly innocent shape of a pen to the structure of a famous building, from the markings found on the wrapper of a chocolate to the internationally recognized five-ring Olympics logo, the law of intellectual property gives value to a lot of things present around us. The intellectual property law also creates and protects the rights in books, movies, drama, music, pictures, the electronic information sources that we use, and even the scientific breakthroughs that a scientist achieves. In terms of concept and form, these representations of the human mind are turned into private property and then are covered by law under the intellectual property system. Such property types are described and distinguished by various fields such as copyright, patents, labels, service mark and designs.

The vast field of modern Intellectual Property law is filled to the brim with something for every discipline: enough to intrigue the philosopher, student of ethics, scientist, politician, artist, entertainer, writer, economist, and even the businessman. Intellectual property law's influence extends to every partition of the umbrella of society.

Looking through the eyes of a businessman, two categories of individuals can be said to exist with respect to a particular instance of a particular Intellectual Property. One, who is the creator or the owner of the intellectual property, and the other category consists of third parties, who might come into contact with the intellectual property either through usage or exploitation. The different forms of intellectual property have a tradable nature and licensing is one important way of trading in them whereby the owner grants rights to another to use that property while continuing to retain ownership over it.

Intellectual property is a negative right in the sense that it gives the owner a right to prohibit others from copying it without permission. It is the consent of the owner under specified circumstances not to exercise this negative right with respect to a third party which forms the basis of

intellectual property licensing. That means the owner (licensor) promises not to sue the particular third party (licensee) provided he exploits the property according to the terms of the license. In return for this promise by the licensor, the licensee usually promises to pay consideration to the licensor. So, a license allows the licensor to retain ownership of the property and at the same time to receive royalty income from it, in addition to the income from his own exploitation of it. Therefore licensing creates an income source, disseminates the intellectual property to varying classes of users and acts as a catalyst for further innovation and development.

Permitted use of an intellectual property is very crucial to be discussed here. The Trademarks Act, 1999 lays down the definition of Permitted use as follows:

"With regard to a registered trade mark, means the use of such the registered user of both the trade mark in consideration of products or services over which the trade mark persists registered again for moment; except for those registered users who comply with any requirements or restrictions within which registration is performed, to which the authorized user has to comply and in a signed agreement by the licensed proprietor and that complies with any terms or conditions that the registered user is liable to and subject to, and".

The above definition under the 1999 Act provides for permitted use by a registered user and one who is not a registered proprietor or a registered user but is one who uses the registered Mark for goods or services covered by the mark and used in the course or furtherance of business with the permission of the registered proprietor by written notice and in compliance with any conditions certain limitations within which the registered proprietor is already permitted to use another mark, and subject mostly to the terms & conditions of the application for registration.

Franchising

The definition of franchising has not been given by the Indian Law. But the term can be defined as follows:

“A license from the owner of a trademark or trade name permitting another to sell a product or service under that name or mark.”

There are two parties involved in a franchising agreement.

a) (a) The franchisor is the manager of the trademark or trade names, and the family member to whom the agreement applies lends a brand or name or other intellectual property.

b) The Franchisee, on the other hand, is the person who pays a price for the right to do business by the name of the franchisor's name or the system of his business.

Martin Mendleson, in his 'The Guide to Franchising' has given the following traits to franchising:

(a) An able to function shall be based on a franchise agreement

(b) A company system but rather format that is identifiable under a brand name should of been established.

(c) The franchisee invests significantly in original investment and usually owns the business.

(d) In order to ensure an effective adherence to the company system, the franchisor usually trains its franchisee.

(e) The franchisor continuously provides the franchisor for certain parts of the economy because once franchisee begins business.

(f) To order to maintain the reputation and brand identity of the franchisor, the franchisor also tracks business transactions periodically.

(g) The franchisee charges the franchisor some sort of payment for the rights and services given.

Franchising is a practice whereby two parties, the franchisor and the franchisee agree upon the use, by the franchisee, of the system developed by the franchisor in accordance with the prescription of the franchisor in exchange of some consideration.

According to International Franchise Association's definition of franchise:

“A franchise agreement is a business contract between franchisor and franchisee where the franchisor provides or is obligated to retain a strong involvement in the company's operations in areas such como expertise and training; where only a franchisee is operating in compliance with a common name, format and / or protocol whom the franchisee maintains and/or regulates.”

The European Commission defines franchising as:

“Factory or intellectual property protection package, which shall be used for re-selling goods or just for providing services to end users in respect of trademark, commercial and retail store architecture, utility models, design features, intellectual property rights, tell-how and patents.”

Francine Lafontaine and Roger D. Blair define franchising as:

“The contractual arrangement amongst two legally separate entities, in which a corporation, a franchisee, pays both other corporation, the franchisee, also for right to market the product and/or to use the manufacturing and design model of the franchisee at even a specific location for a specified time period.”

The proprietor of certain mathematical and other experts who have normally earned a reputation by use of a market or best tip (the franchiser) may, through with a franchise agreement, collaborate with some other company (franchisee) who carry expertise in his own or financial support to provide goods or services to customers directly. The franchisor means ensuring also that franchisor preserves the standard and other requirements with the use of the trade and service mark, by offering operational and managerial expertise, often including other requirements resulting, such as a uniform clothing for the trade.

From a legal standpoint, franchising relies on contract law and therefore, does not necessarily require any special regulatory or legislative structures in order to function and develop. Though the U.S has regulations in relation to franchising which give out protective measures for the franchisees in order to safeguard them from exploitation that they may have to face from the franchisors which generally are big corporations. In India, there is not a legislative code of conduct specifically designed for franchising. Since it is a contract, it is overseen by the Indian Contracts Act, 1872.

Intellectual Property lies at the front and centre of a franchising agreement and can be said to be the subject matter of that agreement as it is basically the intellectual property of the franchisor which is being licensed to the franchisee with certain terms and conditions. Franchising itself made trademark registration enforcement into a standard business activity and has contributed, as indications regarding product quality, to emergence of a new justification for trademarks. If trade secrets are included in a franchising agreement with trade marks, the franchisor is given greater scope to require the franchisor to consider buying his products from either the franchisor.

Franchising Agreements And Its Types

A franchise agreement is contracted to expand a business and promote it. In a franchise agreement, the franchisee acquires the identity of the franchisor thereby expanding the name being used. Some of the examples of a franchise would be an automobile dealership or a gas service station. Franchising called as the business format franchising has been prevalent in the recent times. In this type of franchising, the franchisee is required to adhere to strict guidelines and standards of operation relating to product development as well as marketing. Diners, gas stations and many other products for people and businesses are some of the examples of Business format franchising.

Some of the franchising agreements are as follows:

Licensing arrangement for the creation

this form of arrangement *is* required when the franchisor has made an invention which he wants to exploit to its full extent and thus he gets his invention patented first and then licenses the patent and design associated with that invention in order to expand the scope of his product or process.

Trademark Licensing Agreement:

This kind of agreement is entered into by the proprietor of a trademark in order to get his trademark to be used more

widely. This can be used for services or products alike such as Production, planning, commercialization, show of products and sale or, normally, should include requirements to retain the quality value of the goods with credibility of the company and its prestige.

Character Merchandising Accord:

A name that could be recognized as a sports individual or a film star or a fictional character can also be used in some items under this agreement. This agreement ensures that the reputation or copyright associated with such persons is not affected too much.

Dealer / Distributor / Marketing arrangements:

This kind of franchising agreement is the most common agreement. In this, a dealer or a distributor adopts the business system of the franchisor. Automobile dealerships are the most common example of these kind of agreements.

Conclusion

The franchisees in India are protected through the business and commercial laws but there has been felt a need of providing regulations and a proper legal framework to the arrangement of franchisees in India. The Franchisee Association of India was set up in 1999 as a positive step for consolidating the franchise industry in India. The Association is really the body that protects the majority among franchisors, franchisees, distributors, consultants and some others.

Many foreign brands, after the economic liberalization back in 1991, established their presence in the Indian market by the means of franchising. Many hospitality and service industries entered into franchising agreements for the purpose of establishing their names in India. Some instances of this are: Hertz, Avis but car hire program, the Radisson, Best Western but Standard Inns for hotels, the burger king, the papa johns, Thank goodness it is Friday (TGIF). Pizza Hut introduced its numerous outlets because since 1996 McDonald's has been open to customers.

Franchising is not only being used by the foreign companies to establish their presence but also being used by the Indian companies for the same. Some of the examples include MRF for automotive tires, NIIT for computer training schools and Apollo Hospitals for healthcare.

According to an estimate, the total franchising sales in India were said to be about US \$ 2 Billion along with a growth rate of about 40% per annum. It has been stated by some of the statics to be accounting for 4 % of the statics of India. The globalization and liberalization hit the India market and franchising has seemed to be a promising prospect since then.

The creation of an intellectual property, especially in the current day and age brings into picture a lot of possibilities for the property to be put into use and exploited to the best of its capability and the same is often not possible to be done by the creator of that property alone.

The vast marketization that it can be subjected to needs more than a few hands which brings into picture the provision of licensing the property in order to exploit it

collectively which would lead to greater profits to the parties. Franchising, which has been discussed in this article is one of the ways to go about it and has proved to have made great profits to the franchisors as well as the franchisees.

The growing practice of franchising has led to a growing need for a proper set of laws and code of conduct to be prescribed to the parties of a franchise in order to enable a friction free flow of the practice. Like the U.S, Indian legislature is required to form laws that would ensure that none of the parties undergo any kind of exploitation and prescriptions that would lead to the growth of these associations.

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