FRANCHISE TERRITORIES: A COMMUNITY STANDARD

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INTRODUCTION

A. Encroachment and Opinion Surveys

This Article considers franchise encroachment and the attitudes of potential business owners toward such an intrusion on their markets. Encroachment, long the most debated subject in franchise law, entails the franchisor's placement, near one of its existing franchisees, of a new franchised or franchisor-owned outlet.[1] Often, the franchisee objects, and sometimes a lawsuit or arbitration commences. The focus for many disputes is the aggrieved franchisee's expectations, whether those expectations are based in contract terms or more general concepts of fairness.[2] At its core, the merits of a franchisee's argument may rest on the legitimacy—the reasonableness—of its expectation of market sanctity: that even though the franchisor granted the franchisee *no* express, territorial exclusivity, the franchisee nonetheless justly anticipated that its business would not, and could not, be subject to certain franchisor-orchestrated incursion.

Clouding the evaluation process is a problem of timing. Determining whether there was an unjustified encroachment entails reviewing what the franchising parties knew and said when entering a contract, but—as is typical of litigation—that process occurs in hindsight. The franchisees' complaint concerns, inter alia, what they must have expected, given the written agreement and the nature of the franchise system generally. In a sense, the court is asked to look retrospectively at what the parties believed, without any direct proof of what those beliefs were. However, surveys of budding businesspersons can equip adjudicators and policymakers with a sense of what franchisees may feel about territorial rights

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1. Robert W. Emerson, *Franchise Encroachment*, 47 AM. BUS. L.J. 191, 193 (2010).

2. *Id.* at 236–37.

before they commit to a franchise contract. It is true that a franchise contract's overt terms will trump any mere franchisee beliefs, and it is also manifest that surveys only show what prospective franchisees may assume collectively (not what an individual franchisee believes). Still, surveys of business students and business owners may reveal the community's overall understanding of what is or is not fair and reasonable in the world of franchise markets. Surveys may provide a more reliable sense of what society's standards should be than the ex-post assertions of the parties themselves.

B. The Growth and Maturing of Franchising

Whatever rift there may be between big business and small enterprises,[3] perhaps the most popular method for small business to tap into the big business market has been through franchising.[4]

Franchising is a business relationship based on contract law in which a franchised business grants a franchisee the right to use its trademarks and proprietary information in exchange for royalties.[5] It is, in many ways, a modern, purely private enterprise extension of what had long been a mixed, public *and* private, arrangement.[6]

Franchising has enjoyed immense popularity in many industries[7] because it can serve big and small businesses so well. Operating a franchise enables small retail outlets to compete with large distribution firms. This method of running a business lets the

3. *See, e.g.*, Carl Delfeld, *Make Hay with Multinationals*, FORBES, Oct. 4, 2007, http://www.forbes.com/personalfinance/2007/10/04/multinationals-global-growth-pf-etf-in_cd_1004etfbriefing_inl.html (describing the competitive advantage corporations gain by expanding into emerging markets).

4. For some accounts of franchising history, see HAROLD BROWN ET AL., FRANCHISING: REALITIES AND REMEDIES §§ 1.01[1]–[2] (rev. ed. 2009); STAN LUXENBERG, ROADSIDE EMPIRES: HOW THE CHAINS FRANCHISED AMERICA 1–11 (1985); RAYMOND MUNNA, FRANCHISE SELECTION: SEPARATING FACT FROM FICTION 28–30 (1987); COLEMAN ROSENFIELD, THE LAW OF FRANCHISING §§ 1–8 (1970); Robert W. Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1506–09 (1990).

5. For an extensive treatment of how franchising is defined, see Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905, 908 n.l (1994); Emerson, *supra* note 4, at 1506 n.l, 1508–09.

6. In the nineteenth century, a franchise was always understood to be "a grant to the private sector, out of the inexhaustible reservoir of state power" and "a freedom, a release from restraint." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 121–22 (3d ed. 2005). However, it now usually means, in the business context, a licensing and contractual relationship between two parties, both of whom are private. *See* Emerson, *supra* note 4, at 1508.

7. *See* RIEVA LESONSKY & MARIA ANTON-CONLEY, ENTREPRENEUR MAGAZINE'S ULTIMATE BOOK OF FRANCHISES 12 (2004) (noting that the franchise format exists in over fifty different industries); Christopher Swann, *Opportunity Knocks for Large and Small*, FIN. TIMES (London), June 16, 2004, at 33 (noting that the success of franchising has led to growth domestically as well as internationally in different industries).

franchisor establish a uniform distribution network without building its own retail outlets. Indeed, franchising helps new competitors enter the market and thus increases interbrand competition.[8] A franchised network of businesses allows the franchisor to acquire local expertise and rapidly penetrate local markets while permitting the franchisee to latch onto the national name recognition, marketing, and goodwill of a larger business.[9] By owning a franchise, as opposed to starting a small business, franchisees substantially reduce the risk incurred by building an enterprise from the ground up, while gaining crucial experience in their field through the assistance provided to them by the franchisor.[10]

C. Encroachment

Almost any litany of so-called abuses by franchisors prominently features encroachment,[11] the phenomenon that occurs when the franchisor authorizes a new franchise or establishes a company-owned unit in an existing franchise's market area.[12]

8. *See* Comm'n of the European Cmtys., *Fifteenth Report on Competition Policy*, ¶¶ 24–25, Comp. Rep. E.C. 1985 (July 1986).

9. *See* NORMAN D. AXELRAD & LEWIS G. RUDNICK, FRANCHISING: A PLANNING AND SALES COMPLIANCE GUIDE 7–11 (1987) (stating the many benefits and drawbacks of franchising for the franchisor); ERWIN J. KEUP, FRANCHISE BIBLE: HOW TO BUY A FRANCHISE OR FRANCHISE YOUR OWN BUSINESS 56–58 (6th ed. 2007) (discussing the advantages and disadvantages of franchising to both the franchisor and the franchisee); LESONSKY & ANTON-CONLEY, *supra* note 7, at 12–14 (stating the advantages of a franchise from the franchisee's perspective); MUNNA, *supra* note 4, at 45–51 (describing the many advantages and disadvantages of franchising for the franchisee); ANDREW J. SHERMAN, FRANCHISING AND LICENSING 12 (3d ed. 2004) (giving reasons why franchisors choose franchising as a method of growth and distribution); CHARLES L. VAUGHN, FRANCHISING: ITS NATURE, SCOPE, ADVANTAGES, AND DEVELOPMENT 61–77 (2d rev. ed. 1979) (discussing the advantages and disadvantages of franchising for both franchisors and franchisees); Frank J. Cavico, *The Covenant of Good Faith and Fair Dealing in the Franchise Business Relationship*, 6 BARRY L. REV. 61, 63–64 (2006) (defining the franchise relationship); John Stanworth & James Curran, *Colas, Burgers, Shakes, and Shirkers: Towards a Socialized Model of Franchising in the Market Economy*, *in* FRANCHISING: AN INTERNATIONAL PERSPECTIVE 28–33 (Frank Hoy & John Stanworth eds., 2003) (analyzing the different reasons businesses and individuals choose to enter the franchise relationship); Melissa Ann Gauthier, Note, *The SJC and Dunkin' Donuts: Squeezing the Filling out of the Small Franchisee*, 41 NEW ENG. L. REV. 757, 761–72 (2007) (defining the franchise agreement and its benefits).

10. Franchisees receive training, financial assistance, and business expertise in exchange for an upfront fee and a percentage of gross income. *See* Emerson, *supra* note 4, at 1506 n.1, 1508–09.

11. *See, e.g.*, ROBERT L. PURVIN, JR., THE FRANCHISE FRAUD 129 (1994) ("To most franchisee victims of established franchise systems, encroachment represents a major manifestation of The Franchise Fraud.").

12. For more on encroachment, see Emerson, *supra* note 1, at 193. For a perspective from a time when encroachment clashes first became prominent, see Harold Brown, *The 20-Year Agreement*, N.Y. L.J., Oct. 22, 1992, at 3, 28. In

Indeed, franchisees have long considered encroachment their "number one problem."[13] For many franchisees and their advocates, encroachment has been *the* domestic franchising problem of the past decade; and it remains, for many franchisees in particular and for numerous franchised systems as a whole, *the* issue most in need of a just resolution.[14] As they have expanded, numerous franchise systems have suffered significant controversies involving encroachment,[15] and quarrels over territory remain a potential problem for almost any franchisor-franchisee relationship.[16] The absence of cogent, routinely employed legal standards may simply increase the transaction costs associated with franchising.

When a franchised business is in the early stages of development, the interests of franchisor and franchisee are well-aligned; both seek to enter new markets and benefit from a share of

1992, Brown, one of the earliest, most highly regarded advocates for franchisee rights, noted a New York state legislative proposal to enact the "ten percent rule," which restricts encroachment having a probable effect of ten percent or more on the gross sales of an existing franchisee. *See generally* Harold Brown, *Prohibitions Against Bad Faith*, N.Y. L.J., May 28, 1992, at 3. The proposed statute would have codified this compromise, allowing the franchisor to proceed over the franchisee's objection if the franchisor would guarantee to pay the franchisee "any excess excursion on gross sales over the 10 percent for the next 24 months." *Id.* at 7. Brown opined that such a compromise may unduly favor the franchisor. *Id.* The proposal was not enacted, and the momentum to protect franchisees in the aftermath of the pro-franchisee, anti-encroachment holding in *Scheck v. Burger King Corp.*, 756 F. Supp. 543, 549 (S.D. Fla. 1991), died with the holding in *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1317 (11th Cir. 1999).

13. According to the president of the American Franchisee Association, encroachment has long been a huge problem for franchisees. Richard Gibson, *Court Decides Franchisees Get Elbow Room*, WALL ST. J., Aug. 14, 1996, at Bl; *see also* Andrew R. Friedman, *The New UFOC: A Franchisee's Perspective*, *in* PRACTICAL ASPECTS OF FRANCHISE REPRESENTATION 6.1, 6.8 (Fla. Bar ed. 1996) ("One of the most litigated areas of franchise law today is the issue of encroachment.").

14. The Federal Trade Commission ("FTC"), in revising its franchising rule, noted that numerous commentators advocated for FTC regulation of encroaching franchisors. *See* Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,444, 15,447 & n.38, 15,451, 15,453, 15,473 n.294, 15,491–93, 15,491 nn.490–92, 15,493 nn.511–12 (Mar. 30, 2007) (to be codified at 16 C.F.R. pts. 436–437).

15. In the fast-food market alone, examples of such systems include Burger King and Subway. *See* Emerson, *supra* note 1, at 245–49 (discussing several Burger King cases); Rupert M. Barkoff & Mark A. Giresi, *Burger King's Collaborative Solution to Encroachment*, FRANCHISING BUS. & L. ALERT, Mar. 1996, at 1; Richard Behar, *Why Subway Is 'The Biggest Problem in Franchising'*, FORTUNE, Mar. 16, 1998, at 126, 128. Sometimes, the only long-term solution appears to be a system-wide agreement between the franchisor and all its franchisees. *See* Emerson, *supra* note 1, at 245–49, 276–77 (discussing three franchise systems—Blimpie International, Burger King, and Dunkin' Donuts).

16. *See generally* Emerson, *supra* note 1 (discussing the prevalence of encroachment issues in franchise systems).

the profits. As the markets mature, however, the interests of franchisors and franchisees diverge. Franchisors gain the capital needed to open more of their own stores, or to sell to new franchisees, in the most profitable markets.[17] Moreover, franchisors may decide that they no longer need the franchisees[18] and thus attempt to convert stores to corporate control.[19] The idea is that a maturing business finds it easier to acquire the resources it needs to expand and, therefore, will over time seek to buy back franchised units and grow by creating company-owned units.[20] So arises the issue of alleged market incursion and supposed cannibalization of the franchisees' sales—a predicament starting in the 1970s and becoming increasingly prominent in recent years.[21] Although sales

17. In Kevin Adler, *Managing Franchise System Growth from the Start*, 11 FRANCHISING BUS. & L. ALERT, Aug. 2005, at 1, 3, the origins of territorial exclusivity and subsequent encroachment are discussed:

> New franchisors often make the mistake of giving early franchisees territories that are too large, and this comes back to haunt them in later years. Either they believe that they can only attract high-quality franchisees by offering large territories and generous terms, or they believe that "that perpetual growth of their franchise will make everyone happy," said [Bojangles' Restaurants' executive vice president and general counsel Eric M.] Newman. "But sometimes the early structure can be the seed of problems later on. It's easy to give away territory when you're an emerging system with room to grow, but hard to break it later."

18. Conversely, franchisees may be the ones who no longer see the franchise system as essential to their survival. Having acquired greater resources—more capital, a larger customer base, and better-trained employees—these franchisees, yearning for greener pastures, eagerly seek independence from the franchisor:

> The franchisee whose hard work has enabled him to carve out a niche of profitability comes to regard the payment of franchise fees [e.g., royalties] as restricting that profitability. The franchisee who has learned a system and has reaped its benefits wonders if his new-found knowledge of the trade could enable him to prosper to a greater degree as an independent. Status, success, name, and product all seem brighter to an independent businessman or as franchisee under different terms.

McAlpine v. AAMCO Automatic Transmissions, Inc., 461 F. Supp. 1232, 1239 (E.D. Mich. 1978).

19. *See id.*

20. Luis M. de Castro et al., *Towards a Networks Perspective of Franchising Chains*, http://impgroup.org/uploads/papers/4679.pdf (last visited Sept. 10, 2010) (listing a number of studies and noting that while most empirical works support the "buy back" theory, other studies find a tendency against it; concluding that the tendency toward a higher percentage of company-owned units or of franchised units may depend on a long historical analysis and on the particular factors relevant for an industry or for a company within an industry).

21. Initially, in the 1970s, and continuing since, the franchisor's taking direct control of its franchisees ("cannibalization") took place in the gasoline service station industry. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 766–67 (118th ed. 1998) (noting a decline of more than seven percent in the number of gasoline service stations

cannibalism is not an unequivocally proven practice, many franchisee advocates see nefarious motives, not just changed circumstances:

> [A] common abuse occurs when a franchisor intentionally exploits its franchise network to pave the way for company-owned offices. Typically, the franchisor encourages investors to open several units knowing some will succeed and some will fail. The franchisor actually hopes the franchisee will be overextended and will give up the good units in order to escape the failed ones. Effectively, the franchisor retains the successful offices and abandons the losers—all with the franchisee's capital at risk.[22]

Another way that franchisors may attempt to capitalize on the most profitable markets is by increasing the number of stores in a geographic area. Such expansion reduces the existing franchisees' share of the local trade: "the ultimate insult to franchisees who have worked hard to develop their markets[,] . . . encroachment

from 1990 to 1995, and a decrease of over twelve percent from 1987 to 1992); Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 196 (2004) (noting that Krispy Kreme publicly cannibalized franchisees as part of a strategy to achieve "critical mass").

22. PURVIN, *supra* note 11, at 15–16. Franchisor aggrandizement has long been a theory. *See* Alfred R. Oxenfeldt & Anthony O. Kelly, *Will Successful Franchise Systems Ultimately Become Wholly-Owned Chains?*, 44 J. RETAILING 69 (1969) (setting forth the theory that, during its early stages, a firm may intensively use franchising to expand, but that it will have a relatively higher proportion of company-owned outlets during its maturity and will even try to convert its chains to a completely company-owned system). But the notion that franchisors eventually do, in fact, tend to buy back their franchises, or that they even want to do so, has not been proven. *See* K.H. Padmanabhan, *Channel Control: Do Successful Franchise Systems Ultimately Become Wholly-Owned Chains?*, 3 J. MIDWEST MKTG. 17 (1988) (reporting that the percentage of long-term contracts awarded to franchisees has generally decreased at the economy-wide level). *But see* Francine Lafontaine & Kathryn L. Shaw, *Targeting Managerial Control: Evidence from Franchising*, 36 RAND J. ECON. 131, 146–48 (2005) (finding that while the percentage of company-owned units varies considerably from system to system, once a franchisor has been in business for eight or more years and has at least fifteen outlets, its percentage of company-owned outlets versus franchised units tends to remain stable—averaging about fifteen percent company-owned and eighty-five percent franchisee-owned and not rising or falling based on levels of business experience, learning, or success); Francine Lafontaine & Patrick J. Kaufmann, *The Evolution of Ownership Patterns in Franchise Systems*, 70 J. RETAILING 97 (1994) (reporting survey data from 130 franchisors which indicated that complete ownership of all outlets was not desired by any of the respondents). In France, the evidence also indicates that within established franchised systems the level of company-owned and franchisee-owned units stays about the same over time. *See* Thierry Pénard et al., *Dual Distribution and Royalty Rates in Franchised Rates in Franchised Chains: An Empirical Exploration Using French Data*, 10 J. MKTG. CHANNELS 5, 10 (2003).

exemplifies franchisor cannibalization; it represents the franchisor eating its young, its loyal warriors who have worked hard to establish the franchisor's beachhead and are now denied the fruits of their labors."[23]

Regardless of war motifs and man-eating analogies, the major reason that encroachment constitutes a bone of contention between franchisees and franchisors is the simple difference between net profits and gross sales. Franchisees seek to make their individual units as profitable as possible, but franchisors profit from the licensing of the trademark and the collection of royalties across the franchised system.[24] When a market reaches the saturation point, those two goals begin to conflict, with franchisors making money—a percentage of gross franchise revenue—regardless of how profitable the individual franchise is.[25] Just as franchisees feel wronged by franchisor expansion that could reduce the sales at existing units, franchisors often battle proposed legislation they contend unfairly impinges upon contractual freedom.[26] The differences are exacerbated when franchisors do not see saturated markets, but eye territories with growing populations and, in some instances, franchisees who even sell competing products.[27]

23. PURVIN, *supra* note 11, at 129.

24. W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 3:23 (2009) ("The continuing royalty or franchise payment is usually expressed as a percentage of the gross sales or revenues of the franchisee. . . . Many franchisors also set a minimum dollar royalty, payable whether or not there are sales."). Indeed, in some industries franchise royalties evidently are perhaps *universally* pegged at a percentage of gross sales. *See* Emerson, *supra* note 5, at 955 & n.256 (reporting that 100% of 100 surveyed fast-food, restaurant, and ice-cream-parlor franchise agreements dated from February 1991 to January 1993 required the franchisee to pay royalties, at a median percentage of 5% of gross sales, with 12% setting a specific minimal royalties amount—a median of $500 monthly). The author has conducted a study of 100 fast-food, restaurant, and ice-cream-parlor franchise agreements dated from August 2005 to April 2007 and has found, again, almost absolute uniformity (99%) in mandating a royalties payment based on gross sales, at a median percentage of 5% (data on file with author); none of these current contracts set a specific minimal royalties amount. *See* Robert W. Emerson, Franchise Phrasing: Strong Words, but Weak Faith (Feb. 22, 2010) (unpublished manuscript) (on file with author).

25. Inasmuch as the franchisee is more interested in his or her net profits, a conflict is always present or at least strongly possible. For general information on the economics of franchisor opportunism and sales maximization, see ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING § 8.2.2.5 (2005).

26. Franchisors feel constrained by what they consider unduly protective sentiments reflected in legislation protecting or expanding franchisees' territories beyond express contract terms. *See* Emerson, *supra* note 1, at 204 & n.61.

27. An example of such a franchisee would be "dual" car dealers (who sell, say, both Honda and Ford vehicles). The tying of the franchise itself to the products sold at that franchised business is an ongoing issue. *See, e.g.*, Robert W. Emerson, *Franchising and Consumers' Beliefs about "Tied" Products: The Death Knell for* Krehl*?,* 45 U. FLA. L. REV. 163, 188–97 (1993) (criticizing a

I. TERRITORIES

The number and size of a franchised system's geographic territories are finite. A franchisee may feel that she has a claim to some exclusive territory into which the franchisor, either directly or through another franchisee, has made inroads. Moreover, one territory that conceivably knows no bounds, the Internet, allows franchisors to reach customers without the franchisee.

A. Explicit Exclusivity

Despite the loosening of antitrust restrictions,[28] allocation of exclusive territories has declined.[29] New franchisors increasingly understand the risk of boxing themselves in by granting franchise territories. Instead, an opposite trend has developed. By the early 1990s, the percentage of American franchise agreements explicitly providing that there is no exclusive franchisee territory rose (according to one survey) to one-quarter of all franchise contracts and then, in a current survey, up to 32%.[30] Internationally, the

court-created distinction, for antitrust tying purposes, between distribution and business format franchises on the basis of consumers' supposed beliefs about the products sold at those franchises).

28. Until the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), exclusive territories granted from franchisor to franchisee risked a court finding that they were illegal per se under the antitrust laws. *See, e.g.*, United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967). In *Continental T.V.*, discarding the per se rule adopted in *Arnold, Schwinn & Co.* for retail market restrictions in favor of the rule of reason, the Court recognized that "[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." *Cont'l T.V., Inc.*, 433 U.S. at 51–52.

29. *See* Emerson, *supra* note 5, at 968 (describing two surveys of franchise agreements, one in 1971 and the other twenty-two years later, which show that the number of contracts granting exclusive territories for franchisees went from sixty percent in 1971 to only forty-six percent in 1993). *But see* IFA EDUC. FOUND., INC., THE PROFILE OF FRANCHISING, VOLUME I: A STATISTICAL PROFILE OF THE UNIFORM FRANCHISE OFFERING CIRCULAR (UFOC) DATA 72–73 (1998) (examining Uniform Franchise Offering Circular ("UFOC") statements for 1156 franchise systems filed during 1996 and finding that 73% of them grant some form of exclusive territory, as described geographically, in miles, by population, or by number of vehicles). For the fields specifically studied in the surveys referenced in Emerson, *supra* note 4—restaurants and fast-food outlets—almost 300 UFOC statements (ninety-nine for restaurants and 197 for fast-food establishments) reflected grants of exclusivity at a much higher rate (80% for restaurants and 69% for fast-food units) than found in the two earlier surveys. *Id.* at 107; *see also* BLAIR & LAFONTAINE, *supra* note 25, at 223. While the number of exclusive territories has risen, according to the author's study of 100 fast-food, restaurant, and ice-cream-parlor franchise agreements dated from August 2005 to April 2007 (finding that 60% granted exclusive territory to the franchisee), the numbers expressly without exclusive territory have also risen—to 32%. *See* Emerson, *supra* note 24.

30. *See* Emerson, *supra* note 5, at 969 (1993 figures); Emerson, *supra* note 24 (2008 figures).

trend may be the same. For example, even France—the European nation with the most developed franchise systems as well as a history of protecting distributors, sales representatives, and franchisees[31]—will not award franchisees an implied territory. Ordinarily, a French court will not enforce any exclusivity zone unless it is expressly noted with contractually fixed limits.[32] A franchisee with "*exclusivité territoriale*" has no actionable claim when another franchisee establishes itself just outside the edge of his territory.[33]

In the United States, if a franchisee's exclusive territorial rights are violated, it not only has contractual remedies, but also, in some states, statutory rights against the offending franchisor.[34] These statutes prohibit the encroachment on exclusive territories by either a new franchisee or by a franchisor-owned unit. Although there is little case law on these statutes, certainly a franchisee should be able to obtain an injunction against any franchisor that violates an exclusivity clause.[35] Moreover, the statutes may cover

31. The *Loi Doubin*, Law No. 89-1008 of Dec. 31, 1989, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 2, 1990, and its implementing decree, Decree No. 91-337 of Apr. 4, 1991, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 6, 1990, is integrated into the French *Code de Commerce*, in Article L. 330-3. This law applies to trademark licensing but certainly includes franchising within its scope. It requires that, at least twenty days before the signature of a franchise contract, the franchisor must give to the prospective franchisee the proposed contract and information on a number of subjects, such as the nature of the franchised activity; the history (age and experience) of the undertaking; the amount of capital needed as well as the bank contacts; the prospects for development of the market; the size of the network of operators (franchisees) as well as information on franchisees or other related companies that ceased to be part of the network in the preceding year (including details about why they were terminated or otherwise no longer part of the network); the term (length in time) of the franchise; and the conditions of renewal, cancellation and assignment of the contract, and the scope of any exclusive rights. *See* Law No. 89-1008 of Dec. 31, 1989, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 2, 1990.

32. Cour d'appel [CA] [regional court of appeal] Paris, Sept. 21, 2005, Juris-Data no. 2005-293492. For more on the French law, as well as comparisons to American territorial exclusivity, see Robert W. Emerson, *Franchise Contracts and Territoriality: A French Comparison*, 3 ENTREPRENEURIAL BUS. L.J. 315, 336–41 (2009).

33. Cour de cassation [Cass. Com.] [highest court of ordinary jurisdiction] Apr. 6, 1999, pourvoi no. 96-18332 (holding that "the contract terms granting to a [retail outlet] franchisee exclusivity on a delineated zone, and not forbidding the establishment of another retail outlet, one outside of the zone in the city, even if at the zone's limit," were respected when the franchisor opened that nearby outlet (translation by author)).

34. *See, e.g.*, HAW. REV. STAT. § 482E-(6)(2)(E) (2008); IND. CODE §§ 23-2-2.7-1(2), -2(4) (1999); IOWA CODE § 523H.6 (2007); WASH. REV. CODE § 19.100.180(2)(F) (1999); MINN. R. § 2860.4400(C) (2009).

35. *See, e.g.*, ICEE Distribs., Inc. v. J&J Snack Foods Corp., 325 F.3d 586, 589 (5th Cir. 2003) (affirming a district court's injunction against J&J from

encroachment *beyond* this most obvious violation of infringing upon exclusive territory provisions: Iowa's franchise statute specifically outlaws a sales-based level of encroachment,[36] while another state statute, that of Indiana, only obliquely refers to what might be deemed encroachment. Indiana's statute declares that "if no exclusive territory is designated," the franchisor is forbidden from "competing unfairly with the franchisee within a reasonable area."[37] As discussed below, what the parties reasonably believed, given their specific situation as well as the knowledge and expectations common to their industry, may constitute a community standard for deciding encroachment disputes.[38] Certainly, that general phrasing—*unfair competition* and *reasonable area*—provides the legislative legwork for a judge or arbitrator who wishes to infer, from factual circumstances and a pro-franchisee public policy, the existence of protected franchisee territories.[39]

In return for contractually guaranteed or judicially construed exclusivity, courts may be prepared to hold that the franchisee must undertake the activities constituting the basis for royalties to the franchisor. Otherwise, a franchisee may have garnered anticompetitive benefits effectively barring entrants into its market, or impeding competition from existing competitors, with little or no reciprocal advantages to the franchised system or consumers as a whole. For example, in a Scottish case, a judge was prepared to require that a manufacturing system's exclusive license come with the following implied term: that the licensee must, in fact, use the system (and thereby directly—not just coincidentally—cause the accrual of fees for the licensor).[40] This focus on reciprocity complements the author's three-part test, discussed below.[41] That is

selling ICEE squeeze tubes where another party had exclusive rights to distribute ICEEs in a cup); Gerard v. Almouli, 746 F.2d 936, 937 (2d Cir. 1984) (preliminary injunction against defendant's selling within the plaintiff's exclusive territory of North and South America); Gateway Equip. Corp. v. Caterpillar Paving Prods., Inc., No. 00 CV 0160A(F), 2000 U.S. Dist. Lexis 8567, at *2 (W.D.N.Y. 2000) (enjoining the franchisor from selling asphalt equipment to anyone other than the franchisee within the franchisee's exclusive territory); Uniroyal, Inc. v. Jetco Auto Serv., Inc., 461 F. Supp. 350, 352 (S.D.N.Y. 1978) (enforcing an agreement under which the manufacturer could not deliver tires to "any other retail or wholesale establishment" within a specified area).

36. In brief, during the first twelve months a new outlet is in operation, there must be an adverse impact of at least six percent on that existing franchisee's annual gross sales. *See* IOWA CODE § 526H.6(1)(b) (2007).

37. IND. CODE § 23-2-2.7-2(4) (1999).

38. *See infra* notes 97–108 and accompanying text.

39. *See infra* text accompanying notes 73–75 for a discussion of the author's three-part test for evaluating encroachment issues. The author's test focuses on contractually expressed terms, the knowledge of parties, and a community standard.

40. N. Am. & Cont'l Sales, Inc. v. Bepi (Elecs.) Ltd., [1982] S.L.T 47, 49 (Scot.).

41. *See infra* text accompanying notes 73–75.

because franchisee territorial exclusivity, especially if created judicially rather than by express contract terms, must comport with a community standard and the rightful expectations of the franchise parties. If a party is to have market rights based on industry norms, then the party should have an ancillary set of service or production duties. Indeed, an implied set of corresponding rights and duties is in keeping with typical franchise contract terms: franchisees usually must meet rather strict standards in order to fulfill their responsibilities as the party holding exclusive rights to a particular market.[42]

Having exclusive territories may promote a franchised system's goals, especially if the exclusivity is finely tuned with a franchisor reservation of rights or a stipulation of franchisee obligations. For example, there could be "take-backs" of territories from underperforming franchisees, according to clearly stated performance criteria. These brightly delineated territories and conspicuous duties could jointly satisfy franchisee demands and match industry "best practices."[43] Territorial demarcation also could provide a buffer zone between franchisees.[44] While that could

42. Often, franchisees must develop sales (i.e., they must meet certain sales or service quotas). *See* Stuart Hershman & Andrew A. Caffey, *Structuring a Unit Franchise Relationship*, *in* FUNDAMENTALS OF FRANCHISING 51, 63 (Rupert M. Barkoff & Andrew C. Selden eds., 3d ed. 2008) (stating that a franchisee's exclusive territory may hurt the franchisor's ability to achieve market penetration, but that a franchisor can minimize this risk by imposing performance obligations on the franchisee). A discussion of the economic principles is in BLAIR & LAFONTAINE, *supra* note 25, at 225 (noting that a franchisor's guarantee of exclusive territories must "be made contingent upon some objective measures of franchisee performance," such as sales volume and the development of new units). *See also* Donald P. Jaine & Stephen P. Catton, *New Zealand*, *in* 2 INTERNATIONAL FRANCHISING LAW § 6[6] (Dennis Campbell ed., 2005) (reporting that franchisee exclusivity can be lost for failure to meet sales quotas); Julian C.A. Voge, *Scotland*, *in* 2 INTERNATIONAL FRANCHISING LAW, *supra*, § 4[8] (noting that sensible criteria in a franchise contract can be invoked to show that the franchisee's territory is not being properly exploited, with some part of that territory thereby repatriated to the franchisor and licensed to another franchisee). Typically, if the franchisee fails to meet its sales quota or its minimal level of purchases from the franchisor, then the franchisee may be terminated and another franchisee appointed for that territory. *See* GARNER, *supra* note 24, § 3:30 n.3 (citing Richland Wholesale Liquors v. Glenmore Distilleries Co., 818 F.2d 312 (4th Cir. 1987) (providing an example of the common law principle that the franchisee's failure to achieve reasonable sales quotas will be upheld as good cause for termination)).

43. How much power may a group of franchisees have in setting and maintaining franchise territories for a particular franchise system? Information should be provided in the precontractual disclosures given to prospective franchisees. But note that there was no such requirement of disclosure under the UFOC or the FTC rule, at least until the latter's recent amendment. *See* 16 C.F.R. §§ 436–437 (2010); *supra* note 14; *infra* notes 62–63 and accompanying text.

44. Still, while having exclusive territories means that there is only one franchisee in a territory, it usually does *not* mean that other franchisees cannot

constitute a form of market division (a vertical restraint of trade) that violates antitrust laws,[45] this seems unlikely. Finally, each territory could serve as a type of marketing reference point to help identify specific customers that a franchisee may, or should, solicit. On the other hand, at least from the franchisee's perspective, an exclusive territory could be so small that it is counterproductive—setting the franchisee up for unrealistic expectations of sales and profits when, in fact, the area of exclusivity covers an insufficient customer base to generate the needed revenues for a successful franchised business.[46]

Practical issues remain. How can one define the territories and primary areas of responsibility with legally enforceable standards?[47] Are there any marketing strategies for implementing the territorial segmentation? Are the territories administratively feasible, both for franchisees and the franchisor? As the American Association of Franchisees and Dealers ("AAFD"), a franchisee advocacy organization, espouses in its *Franchisee Bill of Rights*, one of "the minimum requirements of a fair and equitable franchise system" (indeed, the first one the AAFD states) is "equity in the franchised business, including the right to meaningful market protection."[48] In its *Fair Franchising Standards*, the AAFD asserts that franchisees have "the right to *reasonable* market protection."[49] Among other

make sales in another franchisee's territory. (Depending on the exclusivity arrangement, the outside franchisee may have to pay a "commission" to the territorial franchisee.)

45. Section 1 of the Sherman Act, 15 U.S.C. § 1 (2006), provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

46. *See,* Ronald N. Rosenwasser, *Negotiating a Franchisee Agreement: Planning, Tactics and Terms*, *in* THE FLORIDA BAR, FRANCHISE LAW AND PRACTICE § 4.3 (2d ed. 1996) (recommending that prospective franchisees seek changes in proposed franchise agreements to protect, for the franchisees, an adequately sized exclusive territory; and also suggesting that the potential franchisee should seek information from the franchisor, real estate brokers, others knowledgeable about the area, and, especially, other franchisees).

47. For one particular type of franchise, automobile dealerships, many states have statutes that define territories—in practice leaving the parties with something that they can color in or label on a map. *See, e.g.*, ALA. CODE § 8-20-3 (2002); COLO. REV. STAT. § 12-6-102(4) (2009); CONN. GEN. STAT. § 42-133r(14) (2007); 815 ILL. COMP. STAT. 710/2(q) (2008); MASS. GEN. LAWS ch. 93B, § 1 (2005); TEX. OCC. CODE ANN. § 2301.652(b)(2) (2007); WIS. STAT. § 218.0101(30) (2009); *see also* Century Dodge, Inc. v. Chrysler Corp., 398 N.W.2d 1, 2–3 (Mich. Ct. App. 1986) (noting that under the Michigan Motor Vehicle Dealers Act a manufacturer cannot locate a new dealership within an existing dealer's "relevant market area," defined as a radius of six miles from the dealer's site, with determination of whether encroachment has occurred based on the facts of the case).

48. American Association of Franchisees and Dealers, Franchisee Bill of Rights, http://aafd.org/franchiseebillofrights.php (last visited Sept. 10, 2010).

49. AMERICAN ASSOCIATION OF FRANCHISEES AND DEALERS, FAIR FRANCHISING STANDARDS 7 (2007) (emphasis added), *available at*

things, that means the franchise agreement's initial term "should be of sufficient length for a franchisee to reasonably amortize the initial investment to achieve an adequate and fair return on investment."[50] Providing "multiple avenues" to the market, a fair franchise agreement would include a good-faith negotiated delineation of the franchisee's territorial rights, and the franchisor would have to "avoid adversely impacting the franchisee's market or cannibalizing the franchisee's sales."[51]

Even if it grants exclusive territories, the franchisor may retain for itself some major accounts (e.g., customers), other products and services besides those that are franchised, and the right to change the franchisee's territories. This last right may be exercised if, for example, a franchisee fails to meet sales requirements; the franchisor thus can respond by reducing or outright eliminating the franchisee's territorial prerogatives.[52] Conversely, if the franchisee's performance exceeds expectations, it may, if practical, be contractually entitled to an expanded territory.[53] Note that even if the franchisor granted the franchisee no express territorial exclusivity, the franchisee may anticipate that its business would not, and could not, be subject to certain franchisor-orchestrated incursion. Indeed, surveys of budding businesspersons[54] can help us to comprehend what the parties to a franchise relationship believe about territorial rights before they commit to a franchise contract.

Some territorial modifications, though, arise mainly, if not solely, from systemic concerns rather than problems with particular franchisees. For instance, the system's territorial configuration may change in response to the franchisor's sincere adoption of changes in its marketing plans. The major legal impediments to such an overall change are likely to be: (1) claims of franchisees based on the franchise contract or on common law rights, such as the right to not be defrauded; and (2) some states' statutory protections against franchise terminations or nonrenewals may make it extremely difficult for a franchisor to make alterations unless it is following an explicit provision in the franchise agreement.[55] A well-crafted

http://aafd.org/images/logo/Standards.pdf.

50. *Id.* at 13. According to the commentary to Standard 3.1, the market protection under 3.1 should be "[c]onsistent with Standard 5.1." *Id.* at 7.

51. *Id.*

52. *See supra* note 42 and accompanying text.

53. *See* Emerson, *supra* note 1, at 211.

54. *See infra* Appendix.

55. *See, e.g.*, Kealey Pharmacy v. Walgreen Co., 761 F.2d 345, 350 (7th Cir. 1985) (holding that the Wisconsin Fair Dealership Law, WIS. STAT. ANN. § 135.01–.07 (2009), requires more than an economically sensible reason for franchisors to terminate a franchise; it restricts the grounds for termination to definite, substantial breaches of contract); Conrad's Sentry, Inc. v. Supervalu, Inc., 357 F. Supp. 2d 1086, 1099 (W.D. Wis. 2005) (noting that it is critical for plaintiff-dealers to show an intent to terminate on the part of grantors to proceed under WIS. STAT. ANN. § 135.01); Morley-Murphy Co. v. Zenith Elecs.

agreement should specify not only grounds for change but also the methods by which territories will be modified.[56]

B. Contracts Denying Exclusivity

Increasingly, franchise agreements state that the franchisee has no exclusive territory.[57] Some courts even have held that a franchisor can establish new franchises in close proximity to preexisting franchises.[58] Other courts have ruled that the franchisor must have done more than decline to grant exclusivity in order to hold a definite right to "encroach"; the franchise contract must specifically state that the franchisor may put new units *anywhere.*[59] It can be fairly argued that even though the franchisor granted the franchisee no express, territorial privileges, the franchisee

Corp., 910 F. Supp. 450, 458 (W.D. Wis. 1996), *rev'd*, 142 F.3d 373 (7th Cir. 1998) (denying a dealer the right to terminate a dealership solely to improve the dealer's economic performance and continue marketing in the dealer's former area).

56. The contract also should directly address nontraditional methods of marketing and distribution—possible encroachment via dual-branding and Internet sales, for example. *See* Emerson, *supra* note 1, at 216–17, 223.

57. *See, e.g.*, Emerson, *supra* note 5, at 969 (noting an apparent increase since 1971 in the percentage of franchise contracts expressly stating that the franchisee has no exclusive territory). That number has risen even more from 1993 to 2008. Emerson, *supra* note 24.

58. *See, e.g.*, Orlando Plaza Suite Hotel, Ltd. v. Embassy Suites, Inc., [1993] Bus. Franchise Guide (CCH) ¶ 10,457 (M.D. Fla. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1994).

59. Rado-Mat Holdings, U.S., Inc. v. Holiday Inns Franchising, Inc., [1991] Bus. Franchise Guide (CCH) ¶ 9975 (N.Y. Sup. Ct. 1991) (analyzing a licensing agreement that expressly reserved to the franchisor the right to license any business activity at any location and holding that the franchisee could not preclude the franchisor from placing a new unit in close proximity to the franchisee); *see also* Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 484 (5th Cir. 1984) (upholding a summary judgment for the franchisor, which had opened a competing hotel near the plaintiff-franchisee's hotel in downtown New Orleans because the franchise contract expressly reserved to the franchisor the right to construct and operate other Holiday Inn hotels at any place "other than on the site licensed" to the franchisee); Cohn v. Taco Bell Corp., No. 92 C 5852, 1994 WL 13769, at *4 (N.D. Ill. Jan. 14, 1994) (finding unassailable the franchise contract's clause stating that the franchisor, "in its sole and absolute discretion, has the right to grant other licenses . . . both within and outside the restaurant trading area"); Sparks Tune-Up Ctrs., Inc. v. White, [1989] Bus. Franchise Guide (CCH) ¶ 9411 (E.D. Pa. 1989) (upholding a similar contractual provision with the same result as in *Rado-Mat Holdings*); Patel v. Dunkin' Donuts of America, 496 N.E.2d 1159, 1159 (Ill. App. Ct. 1986) (reviewing a franchise agreement that stated, "DUNKIN' DONUTS, in its sole discretion, has the right to operate or franchise other DUNKIN' DONUTS SHOPS under, and to grant other licenses in, and to, any or all of the PROPRIETARY MARKS, in each case on such terms and conditions as DUNKIN' DONUTS deems acceptable"). The *Patel* court held that the agreement's grant to the franchisor of absolute discretion to locate new outlets barred the franchisee's suit based on an implied covenant of good faith. *Id.* at 1161.

understandably expects market sanctity, whether based in contract terms or more general concepts of fairness. Indeed, a central point of this Article is that surveys of budding businesspersons can help us to know what franchisees (and even franchisors) may feel about territorial rights before they commit to a franchise contract. That is important because a community's knowledge and ideals may, far better than after-the-fact, self-serving declarations of the parties, reflect the world in which contracting parties operated (and thus offer us insights on what their expectations would, and should, have been).[60]

Seemingly in recognition of these franchisee expectations, state laws, as well as the FTC rule, mandate disclosure on territorial protection.[61] The FTC rule (as amended in 2007)[62] requires a strong warning to potential franchisees not set to receive territorial protection: "You will not receive an exclusive territory. You may face competition from other franchisees, from outlets that we own, or from other channels of distribution or competitive brands that we control."[63] The flurry of information is meant to encourage franchising operational freedom and to ensure that franchise agreements really are bargained for in open markets where both

60. *See infra* Appendix.

61. *See, e.g.*, HAW. REV. STAT. § 482E-3 (2005) (requiring a "statement as to whether franchisees or subfranchisors receive an exclusive area or territory"); IND. CODE § 23-2-2.5-10(s) (2005) (mandating a "statement as to whether franchisees are granted an area or territory within which the franchisor agrees not to operate or grant additional franchises for the operation of the franchise business or in which the franchisor will operate or grant franchises for the operation of no more than a specified number of additional franchise businesses"). The FTC rule can be found at 16 C.F.R. § 436.5 (2010).

62. Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,444 (Mar. 30, 2007) (to be codified at 16 C.F.R. pts. 436–437).

63. 16 C.F.R. § 436.5(*l*)(c)(5)(i). Under its Item 12 ("Territory") and Item 12 Instructions, the rule requires that a prospective franchisor disclose to potential franchisees whether the franchisee has an exclusive territory and, if so, a description of the territory (e.g., a specified radius or population). *Id.* § 436.5(*l*)(2), (5). The franchisor has to describe any restrictions on franchisees from soliciting or accepting orders outside of their defined territories; any restrictions (e.g., required compensation) that the franchisor must pay for soliciting or accepting orders inside the franchisee's defined territory; and any franchisee options, rights of first refusal, or similar rights to acquire additional franchises within the territory or contiguous territories. *Id.* § 436.5(*l*)(4), (6). The franchisor additionally needs to disclose whether: (a) it or an affiliate had established or might establish a franchisor-owned outlet, another franchisee, or other channels of distribution that might also use the franchisor's trademark or sell or lease products or services similar to those offered by the franchisee; (b) the franchise was granted for a specific location or for a location to be approved by the franchisor; (c) the franchised business's relocation or establishment of additional business outlets under the franchise required the approval of the franchisor; and (d) continuation of the franchisee's area or territorial exclusivity depended on achievement of a particular sales volume, market penetration, or other contingency, and under what circumstances the franchisor may alter the area or territorial exclusivity. *Id.* § 436.5(*l*)(1)–(6).

sides comprehend key issues such as territorial rights. Even pro-franchisor conservatives may agree that, to keep franchise discord under control and to rein in calls for substantive regulation, the government has a role to play in preventing, from the outset, franchise encroachment problems by: (1) requiring franchisors to disclose sufficient information such that potential franchisees are fully apprised of their overall duties, contractual limitations, and territorial rights;[64] and (2) boosting law enforcement, e.g., allocating sufficient resources to the FTC to investigate allegedly inadequate disclosures and to remedy the resulting problems.

Still, while the disclosure procedure is courtesy of a national administrative regulation, in substantive franchise law, including contracts law and encroachment, federalism reigns. Commentators have repeatedly tried, without success, to bring a well-ordered scheme to the varying interpretations of what sort of implied covenant may be encompassed within the state law of franchisor-franchisee relationships.[65] For example, as many as eight distinct, current approaches in the law have been identified as standards used for fashioning the law on covenants of good faith and fair dealing.[66] Faced with such a morass, some commentators have ventured forth with additional proposed principles,[67] while others have retreated to strict contract law interpretations,[68] and this author even devised a scheme whereby three different standards

64. This idea is discussed in Emerson, *supra* note 1, at 289.

65. In applying the implied covenant, there are only broad principles which are inconsistently applied. *See* Rupert M. Barkoff, Partner, Kilpatrick & Cody & W. Michael Garner, Partner, Schnader, Harrison, Segal & Lewis, Encroachment: The Thorn in Every Successful Franchisor's Side, Address at the A.B.A. Forum on Franchising (Oct. 20, 1993), *in* FRANCHISING ROUNDUP, Oct. 1993, at 22–23.

66. *See* Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 HASTINGS L.J. 585, 590–600 (1996). Courts examining conduct challenged as violative of the covenant may use one or more of these eight approaches: (1) the Excluder Approach, keeping out conduct in bad faith; (2) the Foregone Opportunity Approach; (3) the Reasonable Expectations Approach; (4) the Justice Approach; (5) the Purpose Approach; (6) the *Restatement (Second) of Contracts*' covenant of good faith; (7) the Anticipated Contract Benefits Approach; and (8) the U.C.C.'s duty of good faith found in U.C.C. § 1-203. *See* Emerson, *supra* note 1, at 237–39.

67. *See, e.g.*, Diamond & Foss, *supra* note 66, at 600–24 (proposing an elaborate series of approaches for variously defined violations of the covenant involving commercial unreasonableness and for other such violations involving dishonesty).

68. *See, e.g.*, Kathryn Lea Harman, Comment, *The Good Faith Gamble in Franchise Agreements: Does Your Implied Covenant Trump My Express Term?*, 28 CUMB. L. REV. 473, 522 (1998) (concluding that the courts' invocation of the covenant of good faith and fair dealing should be limited to cases in which a party acted maliciously or tried to cheat the other party and arguing that otherwise, "courts should try to stay out of the franchise relationship and ensure that both parties perform contractual obligations").

might be used for different parts of the same franchise contract.[69] Also, concerning key issues in franchising, particular guidelines have been recommended, such as for noncompete covenants,[70] franchisee associations,[71] or legal representation.[72] This Article continues along those lines, with a three-step program suggested for correcting the inefficiencies, and overhauling the injustices, of a slanted, often opaque structure for interpreting and applying the law of franchise encroachment. My three-part test for deciding what territorial rights, if any, are accorded to the franchisee or franchisor is as follows:

1) Per the case law, if the express provisions of the franchise contract are clear, and not unconscionable or otherwise violative of public policy, then the parties are bound by what is stated therein.[73]

2) If part one, above, does not apply (i.e., if territorial provisions are missing, imprecise, incomplete, unconscionable, or against public policy), then the agreement's written terms may be supplemented with evidence of what the parties themselves knew or believed when entering the contract.[74]

3) As further aid to judicial interpretation under part two, above (construing contract terms when there are no pertinent express provisions or when those provisions are unclear or unfair), courts should look to a community standard for guidance as to what the parties must have reasonably expected—what likely guided the parties in their approach to entering and executing the franchise agreement.[75]

The survey evidence to support this third step is outlined below. In the end, however, the substantive law of franchising remains, for the most part, simple contract law.

II. FAIRNESS

Regardless of what is written in the contract, some parties—i.e., franchisees—demand "fairness."[76] Franchisee advocates have

69. *See generally* Emerson, *supra* note 5 (discussing a three-tiered set of standards—fiduciary, "good cause," and the common law (arm's length) contract approaches—to use in interpreting franchise contract clauses and then analyzing the standards advanced by courts and commentators).

70. Robert W. Emerson, *Franchising Covenants Against Competition*, 80 IOWA L. REV. 1049, 1103 (1995).

71. Emerson, *supra* note 4, at 1558.

72. Robert W. Emerson, Franchisees Without Counsel: Presumed Competent (Apr. 27, 2010) (unpublished manuscript) (on file with author).

73. The contract terms, though, are often unclear. Hence, the parties often must deal with situations in which parts two or three would give assistance.

74. This approach is a familiar one for analysis of franchise arrangements and, indeed, of contracts generally.

75. And that is where surveys of businesspeople and prospective businesspeople—e.g., business students—come in handy. This topic is discussed *infra* Part III.

76. This runs counter, though, to another basic concept—that one should

evoked animal behavior to argue, it seems, that franchisors violate norms of conduct that even lower primates understand and obey.[77] That is because, if the contract itself is deemed to permit an encroachment, then no law outside that contract can mount a successful attack: "[T]he implied covenant of good faith and fair dealing [will] not preclude the most savage encroachment."[78] The voluble Tina Perazzini, an executive at Subway during the 1990s, so vividly validated franchisees' fears by proclaiming what had passed for company policy on encroachment: "We put [new outlets] up any f—ing place we could."[79] Many franchisees, not just at Subway, five years later would say that they had been on the receiving end of egregious acts by expansion-minded franchisors. A survey of 1000 randomly selected responses, out of 10,800 franchisees (excluding McDonald's and Pizza Hut franchisees), indicated that 24% of the franchisees had been "threatened, encroached upon or coerced into unwanted expansion by their franchisor"; among sandwich-shop franchisees, the figure rose to 58%.[80]

So what should be done? Many people, both lawyers and nonlawyers, would strongly agree with franchisors that any franchisee concerns over encroachment must be dealt with in the written instrument signed by the parties—the franchise contract—not through laws imposed by legislation or adjudication.[81] This would be an example of the first of three principles that could be used in addressing this issue.[82] For instance, one respondent to this

abide by that to which he has agreed. The maxims for upholding a contract are found in philosophy, religion, and the literary classics. *See, e.g.*, MIGUEL DE CERVANTES, DON QUIXOTE 674 (Peter Motteux trans., Random House 1930) (1605) ("[A]n honest Man's Word is as good as his Bond.").

77. Steinberg & Lescatre, *supra* note 21, at 130 & n.116 (proceeding from chimpanzees to franchisees: (a) referring to an Emory University study in which primates demonstrated a sense of fair play, with apes refusing to cooperate with other apes that behaved unfairly; (b) turning to humans and concluding that injustice is such a basic, overriding notion for people that it overcomes higher-level brain functions and leads some angry franchisees, distressed by perceived unfair treatment, to try to "bring down the house," i.e., the franchisor; and (c) contending that simple concerns over fairness have sparked the encroachment decisions favoring franchisees—"notwithstanding an explicit reservation of the right to encroach, some jurists (and many nonlawyers) are offended by egregious unfairness of franchisors").

78. *Id.* at 184.

79. Behar, *supra* note 15, at 126.

80. Richard Martin, *Poll: Franchisees' Low Grades for Franchisors Even Lower Among Sandwich Shop Operators,* REST. NEWS, Aug. 18, 2003, at 3, 8.

81. *See* Emerson, *supra* note 1, at 227–28. There is, however, a history of rather one-sided, pro-franchisor agreements, acceded to by comparatively ignorant, inexperienced franchisees who are often not even represented by counsel. Emerson, *supra* note 72.

82. See the three-part test outlined *supra* notes 73–75 and accompanying text.

author's survey,[83] someone who had worked for franchisors and franchisees and had also been a franchisee, answered every question on a five-point continuum with the extreme answers of "Strongly Disagree (1)" or "Strongly Agree (5)" and then commented about all the survey questions asking what the law should be. This respondent wrote, "The franchise agreement should cover all this—tough luck to the franchisee—[she should] never sign a [contract] that does not grant exclusive territory."[84] Symptomatic of a disposition to not look beyond the literal wording of an agreement, nor to question the terms in that written text, is the layperson's tendency to resign himself to whatever is in the document, no matter how unfair it may seem. "I signed it, so I must live with it," is the reasoning.[85] People thereby abide injustices, small and large, and lawmakers understand that, without countermeasures, businesses drafting consumer or franchise contracts may thus be

83. *See infra* Appendix.

84. Survey Responses (Spring 2000) (on file with author). These views were also expressed succinctly by a survey respondent who answered "Strongly Disagree" or "Strongly Agree" to the first twenty questions and wrote on the top of the survey, "All items on this survey should be part of the franchise agreement, *NOT* laws." *Id.*

85. Research shows that, indeed, the less powerful a person, the more likely he is to feel constrained from taking action to redress injustices. *See generally* Patricia Ewick & Susan S. Silbey, *Common Knowledge and Ideological Critique: The Significance of Knowing that the "Haves" Come Out Ahead*, 33 LAW & SOC'Y REV. 1025 (1999) (examining cognitive perceptions ordinary Americans have about law); Morris Zelditch, Jr. & Joan Butler Ford, *Uncertainty, Potential Power, and Nondecisions,* 57 SOC. PSYCHOL. Q. 64 (1994) (finding that existence of a power structure prevents or delays people from seeking redress for inequities). Specifically, for alleged adhesion contracts:

> Where employment is regarded as an exchange of obligations as well as rewards, as imbued with a substantive, moral relationship—what industrial relations scholars often refer to as a "social contract" or a "relational exchange"—actors are more likely to regard the form-adhesive agreements as enforceable (low malleable consent). Essentially, when actors view form-adhesive agreements as unenforceable, there is less expressed trust in the employment relationship. These results seem to hold across diverse populations, from low level employees of a national company to MBA students at an elite business school. MBA students, who enjoy less dependent employment constraints (for example, more job opportunities and less dependencies), voice less respect for the enforceability of the contracts they sign.

Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 390 (2008) (footnote call numbers omitted); *see also id.* at 381 ("Preliminary evidence suggests that less educated, lower skilled and lower paid subjects with greater employment dependency are more likely to feel bound by the terms of form-adhesive agreements that restrict their resort to law than more educated, higher skilled, and higher paid subjects with less employment dependency."). Presumably, this reasoning also would apply to the range of powerful, or not so powerful, parties involved in franchising.

encouraged to place in the agreement provisions so onerous as to violate public policy. The *in terrorem* effect may more than compensate for the rare instances in which someone actually challenges the unfair clauses.[86]

The inability of most franchisees to fight for themselves has led to (1) the growth of franchisee associations[87] and (2) the adoption of a private franchise agreement certification process.[88] In 1996, the AAFD introduced its Fair Franchising Seal program.[89] In 2006, the AAFD began offering a new certification for startup companies interested in meeting high standards for franchised enterprises: the "Accredited Contract."[90] Surely these developments demonstrate

86. Emerson, *supra* note 70, at 1057. When a franchisor drafts an overbroad covenant for its franchisees to sign, the franchisor can rely upon the covenant's *in terrorem* effect to restrain all, or almost all, persons most upset, ultimately, with their "bargain." These franchisees simply respect their contractual duties, no matter how burdensome and, as it may have turned out in the event of a legal challenge, no matter how unenforceable. *Id.*; *see also* Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 682 (1960).

87. Franchisees increasingly form associations that bargain on their behalf and provide them with more leverage against a franchisor. One prominent example has been discussed by the general counsel for the 7-Eleven chain. *See* Michael R. Davis, *How 7-Eleven Developed a New System-Wide Franchise Agreement*, FRANCHISING BUS. & L. ALERT, July 2005, at 1; Michael R. Davis, *How 7-Eleven Developed a New System-Wide Franchise Agreement: Process and Results*, FRANCHISING BUS. & L. ALERT, Sept. 2005, at 1; Michael R. Davis, *7-Eleven's Development of a New Franchise Agreement: Critique of the Efforts and Results – Recommendations*, FRANCHISING BUS. & L. ALERT, Oct. 2005, at 1; *see also* Douglas MacMillan, *Franchise Owners Go to Court*, BUS. WEEK, Jan. 29, 2007, http://www.businessweek.com/smallbiz/content/jan2007/sb20070129_887153_page_2.htm; Janet Sparks, *New Coalition of Franchisee Associations Formed*, Jan. 28, 2008, http://www.bluemaumau.org/5103/new_coalition_franchisee_associations_formed. As discussed in Emerson, *supra* note 1, at 289–90, "[F]ranchisors' and franchisees' goals can be reached via their recognition and strong exercise of freedoms to associate and to make contracts. Together, the franchise parties can reach their own modus vivendi, [through anticipation of and negotiation over] predictable problems found in their relationship, such as territorial exclusivity and encroachment."

88. Emerson, *supra* note 1, at 276.

89. *See* American Association of Franchisees and Dealers, Fair Franchising Seal Recipients, http://www.aafd.org/accreditedzor2test.php (last visited Sept. 10, 2010). As of May 2009, the AAFD had "graded more than 60 franchise agreements, and [was] about to publish [its] comparative data so the marketplace [would] be able to appreciate that there are vast contractual differences (as well as business model distinctions) among franchise offerings." Bob Purvin, *The AAFD's Focus on Fair Franchising*, http://www.bluemaumau.org/aafds_focus_fair_franchising (May 9, 2009).

90. American Association of Franchisees and Dealers, The Dawn of Franchise System Accreditation, http://www.aafd.org/accreditedfranchisors.php (last visited Sept. 10, 2010); *see also supra* notes 48–51 and accompanying text. The equivalent of a "Good Housekeeping Seal of Approval" has been proposed for best practices concerning consumer contracts. *See* Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and*

how necessary it is for most franchisees to have assistance when forming their contract, not just the aid of counsel[91] but also the incorporation into the contract of tried-and-true principles protecting the essence of what it is to own a franchise, including the core concept of "territory"—a market for the franchise's goods or services.

Meantime, in the law of contracts generally, the battle over implied terms continues. In 1983, Professor Todd Rakoff revisited the arguments made by a number of earlier scholars to argue for the weaker party's protection, whether via implied terms favoring that party or by imposition of procedural unconscionability to restrain the dominant party.[92] Rakoff still thinks he got it "right."[93]

> The burden should be put on drafting firms to show their form terms were worth judicial enforcement rather than on adherents to the forms to show the terms were unconscionable; and if this burden were not met, the courts should apply the general, legally implied default terms instead of the drafter's terms.[94]

At a minimum, we might consider which terms were actually bargained over, or at least considered, by both parties.

> Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more[:] blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.[95]

The goal is to make the contract conform not with an unread, little understood, almost endless form, but instead have it meet the nondrafting party's (the consumer's, the franchisee's) expectations.[96]

Conventional Contract Law, 42 U. MICH. J.L. REFORM 747, 750 (2009).

91. Emerson, *supra* note 72.

92. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1280 (1983).

93. *See* Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1235 (2006).

94. *Id.*

95. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

96. *See* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 223–34 (2005) (proposing a deeper and more situationally focused analysis of bargaining power and its effects on the transaction); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943) (proposing that the standard contract be ignored and the consumer's reasonable expectations be given effect instead); Arthur Allen Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 131–47 (1970) (proposing

Reviewing courts can even look at a party's relationship-specific investment ("RSI") in the relationship (e.g., the franchise) and apply legal concepts such as good faith and fair dealing as well as default rules for contractual gap-filling and interpretation.[97] Default rules, though, can be unduly "sticky."[98] This approach to incomplete contracts can be broader than merely filling incomplete contracts with "good faith" terms and notions as to performance. Courts can assure themselves they have more to go on than simply buyer's or seller's remorse, or 20-20 hindsight, or other after-the-fact regrets or desires for a do-over. That is because they have a complainant—a contracting party who made a significant RSI. Likewise, the use of survey evidence can ensure that any default rules or presumptions are at least based on empirical evidence of the community's values, not mere conjecture by judges or a rigid interpretation of contractual boilerplate.[99]

Other scholars have emphasized the role that good faith can and should play in maintaining franchise investments.[100] Perhaps RSI is a stronger foundation than good faith. Nonetheless, there may be interplay between the two. The implied good faith standards can encourage RSI by the franchisee.[101] Whenever one or both contracting parties have made an RSI, analysis of that investment can be "critical to any interpretation, gap-filling, or good faith inquiry, no matter the contractual context."[102]

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that standard contracts be thought of as things rather than agreements); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 544–47 (1971) (making the same proposal as Kessler, while also demonstrating that the consumer's reasonable expectations, under the circumstances, *are* the contract).

97. Scott Baker & Kimberly D. Krawiec, *Incomplete Contracts in a Complete Contract World*, 33 FLA. ST. U. L. REV. 725, 728 (2006).

98. The default rules (for example, to determine what rights against encroachment might exist, in the absence of any contractual specificity to the contrary) may discourage parties from fashioning their own provisions.

> It is sometimes cheap and desirable to offer terms that differ from the default rules or the standard terms used in the market. But the proposal of new and otherwise unfamiliar terms may also raise suspicions and scare away potential counterparties. Default rules and the standard boilerplate terms may stick more than we think, and more than they should.

Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 682 (2006).

99. *See supra* notes 73–75 and accompanying text for the three-part test; *see also infra* Appendix .

100. *See, e.g.*, Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990) (proposing a relational approach to interpreting franchise contracts grounded in the doctrine of good faith).

101. *Id.* at 984–87. Certainly, the reverse is true. With RSI, parties may in good faith rely on the underlying contract and their expectation of fair dealing by their counterparts.

102. Baker & Krawiec, *supra* note 97, at 729 n.10.

A pragmatic concern remains, however. What are the franchisors really thinking when they enter into and then maintain, usually over the course of years, a complex business relationship? More precisely, to put it in black-letter contract law, what did the parties say or do when forming their contract, and how might their thinking about franchising territoriality[103]—even just that informed by the community's values—be reflected in the franchise agreement? This approach reflects the second part of the three-part test (set forth previously[104]) employed by courts to solve conflicts over encroachment, attempting to gauge the expectations of the parties at the time of the contract.[105] Unfortunately, this standard creates another problem that was previously mentioned in this Article—the problem of timing.[106]

The surveys conducted for this Article may provide us with some guidance about what a potential franchisee knows, believes, and hopes, and thus these polls encompass the third and final standard in trying to resolve this issue. We cannot revisit every single contractual party's precontractual manifestations of expectation; nor would we want to do so. We can, however, use the survey information to provide some idea of the business culture from which the budding franchisee springs.[107] That, in turn, allows us to glean information about what a franchisee reasonably thought and expected,[108] regardless of contractual boilerplate, and therefore this expectation may be found in the franchise contract.

III. THE SURVEYS

Survey specialists from the University of Florida conducted surveys from December 1999 through April 2000 and from February

103. One must consider the world of work—the society of those who have become franchisees or are potential franchisees.

104. *Supra* notes 73–75 and accompanying text.

105. *See supra* text accompanying note 74 (recommending that courts supplement imprecise or incomplete franchise agreements with what the parties themselves knew); *see also* Emerson, *supra* note 1, at 237–38 (noting that courts, when evaluating alleged violations of the franchising covenant of good faith and fair dealing, look at foregone opportunities and reasonable expectations).

106. *Supra* pp. 779–80.

107. It may be especially helpful that the surveys are of existing businesspersons (current small business owners or managers) or—even more important for establishing the knowledge and attitudes of future franchisees—are of people studying business and thus presumably far more likely to become involved in franchising as a franchisor or franchisee than the average person. Indeed, the surveys of the undergraduate business students and the MBA students both reflect that a very large percentage of the respondents thought they would become franchisees or some other type of business owners. *See infra* Appendix Question 23 (showing that about half the respondents thought they would own a business, such as a franchise, and another quarter of the respondents did not dismiss the possibility—i.e., they were "uncertain").

108. It also provides information about what the franchisee manifested in his interactions with the franchisor.

to March 2008. The population sampled for these surveys was that of undergraduate and graduate students in the Warrington College of Business Administration at the University of Florida. In addition, the survey instrument was also administered in the spring of 2000 to fifty-six owners and managers of small retail businesses in Alachua County, Florida.[109]

The surveyed respondents were either in an undergraduate Legal Environment of Business course or enrolled in a Masters of Business Administration ("MBA") graduate courses. Of the 102 graduate students surveyed, all of whom were working toward an MBA, 5% said that they were or had been a franchisee and another 11% were or had been a nonfranchised business owner; 28% stated that they had worked for a franchisor, a franchisee, or both.[110] Among the undergraduate respondents, approximately 85% of whom were business majors, 5% of the 2008 respondents stated that they or someone in their immediate family were or had been a franchisee; 6% were or had been a nonfranchised business owner; and, altogether, 47% of these students stated that they had worked for a franchisor (4%), a franchisee (32%), or both (11%).[111] When asked to choose among several answers as to the likelihood of their owning a business or purchasing a franchise, 7% of the undergraduate respondents in 2008 said they either already had done so or expected to do so within two years, 12% chose "within five years," 32.5% picked "sometime after five years," and only 21.5% responded "never."[112]

All surveys—whether in 2000 or 2008 and whether completed by graduate students, business owners, or undergraduates—contained the same twenty-three questions. This survey (the wording and the results) is in the Appendix.

In a short introduction to the survey, respondents were given a simple definition of a franchise. Then, they were instructed to suppose that "Great Business" was a franchisor and that "Terry" was a franchisee who owned the only Great Business outlet in Cobb County. Respondents were further asked to assume that most of

109. The undergraduate students were upper-level students, with a median age of twenty-one; the MBA students' median age was close to age thirty. Presumably, the business owners and managers were, on average, even older.

110. That information was provided in response to additional questions at the end of the survey of the MBA students. This information was not solicited of the undergraduate sample in 2000.

111. Interestingly, the trend was definitely toward increasing involvement in the ownership of business, franchised or otherwise. Compared to the 2000 respondents, the 2008 respondents had an increase in students or immediate family member ownership of a franchisor (from 3.4% to 5.2%) or of a franchisee (from 10.0% to 15.5%), and, by percentage, twice as many 2008 students had owned their own nonfranchised business (6.2%) as had students in the 2000 sample (3.1%).

112. *Infra* Appendix Question 23. Over a quarter of those sampled (27%) were uncertain.

Terry's customers come from Cobb County.[113]

In Questions 1 through 20, respondents were given several hypothetical situations concerning the responsibilities of the franchisor to the franchisee and about the extent to which the law and contract language play a role in these responsibilities. The survey directs respondents to indicate whether they (5) strongly agreed, (4) agreed, (3) felt uncertain, (2) disagreed, or (1) strongly disagreed with several statements concerning these situations.[114]

First, let us explore some of the broad results of the surveys. Among the different sample groups, the Alachua County, Florida business owners/managers tended to be the most pro-franchisor; however, their overall response totals were not significantly different from those of the MBA students. The undergraduate population was most likely to err on the side of the franchisee, with the students in 2000 often distinctly even more pro-franchisee than the undergraduates in 2008.[115] As one example, consider the first question in the survey. When asked to evaluate the assertion that the law should grant a franchisee the sole right to own or operate all of the franchise outlets within a given territory, a higher percentage of students in the 2008 survey were uncertain or disagreed with this assertion as compared to the 2000 survey. In 2000, 54% of the students did not agree (replied that they disagreed, strongly disagreed, or were uncertain) whereas 73% of the students in 2008 replied in a similar manner. This was accompanied by a statistically significant decrease in the percentage of students who replied in the affirmative. In 2000, 27% of the students replied either "agree" or "strongly agree," while only 11% of students in 2008 responded similarly. The students' pro-franchisor views became more pronounced in the recent survey.[116] Explanations for

113. *Infra* Appendix Introduction.

114. *Infra* Appendix Introduction.

115. An analysis of statistically significant differences between the 2000 and 2008 undergraduates' responses was undertaken for each question and answered in the survey. All of these differences are significant at a significance level of alpha=0.005. The test conducted was the *Z*-test for Differences in Two Proportions. This test compares two proportions for statistically significant differences at a particular significance level. The output of the test is a *p*-value, which is the probability of obtaining a result at least as extreme as the one actually observed. Thus, for this test, the probability of observing differences as extreme as the ones actually observed is equal to or less than 0.5 percent. If the *p*-value calculated is less than the significance level, then it is reasonable to conclude that there is a statistically significant difference between the two proportions.

116. Percentages for respondents from each group are provided in the Appendix. The 2008 sample always had average answers that were more pro-franchisor than for the 2000 sample (except for Question 12, where the difference between the average values is merely 0.01–3.10 or 3.11 on a 1.00 to 5.00 scale). In brief, the increase in pro-franchisor views were statistically significant for many of the answers—to Questions 1, 2, 3 (only for the "Strongly Agree" answer), 4 (only for the "Uncertainty" answer), 5, 6, 7 (only for the

this shift are unclear. Examination of the demographics for factors that might indicate a "bleeding heart" predisposition toward the franchisee or a "cold-hearted" calculation favoring the franchisor—e.g., party affiliation or income levels—showed no significant difference in those percentages from the 2000 survey to the 2008 survey.[117] However, there was a large increase in the percentage of student respondents who, either personally or via an immediate family member, had been a franchisor or a franchisee, or, personally, had owned a nonfranchised business.[118]

Before the responses to each question are examined in detail, it should be noted that some adjustments have been made in this discussion (but not the Appendix) in order to aid the reader's understanding of the results. First, the proportion of respondents who selected the responses of "strongly agree" and "agree" for each section occasionally has been combined into one percentage for purposes of this review.[119] Thus, unless otherwise stated, all future textual references to a percentage that "agree" (or similar) refer to the combination of these percentages (for both "agree" and "strongly agree"). Second, the same method was used for those who chose "strongly disagree" and "disagree" (combining the two figures for the discussion, but keeping them separate in the Appendix). Third, unless a survey year is designated (2000 or 2008), the two undergraduate student sets are combined into one statistical set of percentages.[120] Fourth, and finally, some results may not add up to exactly 100% because of rounding[121] and, sometimes, because a certain number of respondents did not answer that survey question. This number of nonrespondents, reported as a percentage in the Appendix, always was minimal, if it even existed.[122] To view more specific statistical data, please refer to the Appendix.

A. Survey Responses: What the Law Should Be

Questions 1 through 5 gauged the respondents' opinions on a number of statements regarding the initial supposition concerning Terry and Great Business. Question 1 asked respondents whether "The law should grant to Terry the sole right to own or operate in

"Strongly Agree" answer), 10, 13, 14, 17, 18, 19, 20 (only for the "Disagree" or "Strongly Disagree" answer), 21, and 22. Further information on statistically significant differences, or the lack thereof, between the 2000 undergraduate respondents and the 2008 group are on file with the author.

117. Demographic data are on file with the author.

118. *See supra* note 111 and accompanying text.

119. In the Appendix, *infra*, those figures are kept distinct.

120. In the Appendix, the figures are presented both separately for 2000 and for 2008, and then combined.

121. The rounding is to whole percentages in the textual discussion, but to a tenth of a percent in the Appendix, *infra*.

122. *See, e.g.*, *infra* Appendix Question 1 ("no answer").

Cobb County any other Great Business outlets."[123] Among respondents in the undergraduate course, who tended throughout the survey to have the most pro-franchisee outlooks, 60% disagreed or strongly disagreed with this statement, while only 19% agreed or strongly agreed.[124] The rest (21%) marked uncertain, with a small percentage (under 1%) failing to respond. An even greater percentage of Alachua County business owners/managers disagreed that the law should grant Terry territorial rights, with 71% disagreeing or strongly disagreeing. Only 14% agreed with the statement, and another 14% were uncertain.[125] Eighty percent of MBA students disagreed with the statement, 15% percent agreed, and 3% were uncertain.[126] These responses suggest current and future businesspeople do not expect the law to grant any outright territorial rights to a new franchisee.[127]

Though only a small percentage agreed that Great Business should be completely prohibited by law from encroaching upon Terry's territory, much larger proportions in all three samples (undergraduates, MBA students, and business owners/managers) believed that Great Business may have some responsibility for Terry's welfare. For example, 59% of business owners, 48% of undergraduates, and 64% of MBA students agreed that Great Business should be allowed to open up new outlets in Cobb County *only if* a market study proved it would do little or no harm to Terry's business.[128] Furthermore, 57% of businesspeople, 52% of undergraduates, and 53% of MBA students agreed that Great Business should be required to offer Terry the option to buy any store that Great Business wants to open near Terry's current outlet.[129] About one-quarter of each sample disagreed or strongly disagreed.[130]

A majority of respondents in all three samples *disagreed* with

123. *Infra* Appendix Question 1.
124. *Infra* Appendix Question 1.
125. *Infra* Appendix Question 1.
126. *Infra* Appendix Question 1.
127. The closer survey respondents likely were to actually running a business—for example, either now as business managers or in the future as MBA graduates—the more likely they were to adopt a constricted view of franchisee territorial rights. One gets only what the written agreement expressly provides, many such respondents might state.
128. *Infra* Appendix Question 2. In addition, 37.5% of business owners, 32.6% of undergraduates, and 25.5% of graduate students disagreed with Question 2, while 3.6%, 19.0%, and 7.8% marked uncertain, respectively. A small percentage of undergraduates (0.12%) and 2.94% of MBAs failed to respond.
129. *Infra* Appendix Question 3.
130. *Infra* Appendix Question 3. Twenty-five percent of business owners, 26.5% of undergraduate respondents, and 28.5% of graduate students disagreed with Question 3, and 17.9%, 21.0%, and 16.7% were uncertain, respectively. The remainder failed to respond.

the statement that "if someone else opens a new Great Business outlet and Terry loses sales to this new outlet, Great Business should have to reimburse Terry for those lost sales."[131] Less than 20% of each group marked "agree" or "strongly agree."[132] This trend continues throughout the survey; there was little support for the concept that a franchisor owes a responsibility of reimbursement for perceived losses. However, all samples did respond more favorably to the offering of investment opportunities to combat cannibalized sales.[133]

Question 5 asked respondents to evaluate this statement:

> The law should assume that a drop in Terry's sales stems from the opening of that new outlet. In other words, for Great Business to avoid having to pay for Terry's lost sales, Great Business should have to show that Terry's sales dropped for some reason other than the opening of that new outlet.[134]

The responses to this question among different samples differed significantly. Among business owners/managers, 59% disagreed or strongly disagreed with the statement, with 21% agreeing or strongly agreeing and 20% uncertain. Only 47% of MBA respondents disagreed with the statement, while one-third agreed and 17% were uncertain. Among undergraduate respondents, however, only 35% disagreed, and 37% of undergraduate respondents actually agreed the law should require proof from the franchisor that a drop in the franchisee's sales was not related to encroachment. This was the only sample in which a plurality of respondents agreed or strongly agreed that there should be a burden of proof on the franchisor to show loss of sales came from other sources.[135] Clearly, this is a matter at least subject to debate, and one could contend that—if a franchisee has endured a market intrusion from an intranetwork competitor (another franchisee or a franchisor-owned unit), and if the franchisee has also experienced a drop in sales—it is equitable to place the onus on the franchisor to at least try to explain why the two events, territorial incursion and sales diminution, are actually unrelated.

For Questions 6 through 8, respondents were asked to suppose that instead of opening new outlets, the franchisor begins to "sell its services directly through catalogs, the Internet, department stores,

131. *Infra* Appendix Question 4.

132. *Infra* Appendix Question 4. Sixty-one percent of Alachua business owners, 63.0% of undergraduates, and 68.7% of MBA students disagreed with Question 4. Eighteen percent, 14.3%, and 12.8% agreed, respectively, and 21.4%, 22.6%, and 15.7% were uncertain, respectively. Minimal proportions failed to respond.

133. *Infra* Appendix Questions 3, 7.

134. *Infra* Appendix Question 5.

135. *Infra* Appendix Question 5. Nearly 28% of undergraduates were uncertain.

or other methods." Approximately 20% of respondents in each sample group agreed the law should prohibit Great Business from making such sales in Cobb County unless a market study shows it would do little or no harm to Terry's business.[136] It should be noted however that respondents in all three samples were two to three times as likely to agree with the necessity of a market study regarding new brick-and-mortar outlets in Cobb County.[137] This phenomenon shows that respondents are more inclined to consider the opening of actual outlets to be a form of territorial infringement than the sale of goods in catalogs and cyberspace. Presumably, that is the case because physical locations—stores, restaurants, offices, or other outlets—are more easily seen as competition for a franchisee's similar place, while sales off the Internet are only indirect competition with franchise sites; franchisees simply cannot contest such competition which is so much broader than "ordinary" *direct* competition. Indeed, if survey respondents (potential, future franchisees) cannot recognize the wrongfulness of this *indirect* competition, perhaps they cannot even detect such competition, let alone imagine what to do to forestall such competition.

Almost 54% of business owners/managers and 61% of both undergraduates and graduate students agreed that "Great Business should be required to give Terry an option to invest in and participate in [catalog, Internet, etc.] sales."[138] Question 3 asked the same type of question, but again in reference to new outlets in Cobb County (direct competition instead of Question 7's indirect competition). There is no substantial trend in the differences here except that there is a statistically significant higher degree of uncertainty in all three sample groups when the question was asked regarding actual outlets (i.e., about direct competition).[139] When

136. *Infra* Appendix Question 6. Among businesspeople, 67.9% disagreed with this statement, 10.7% were uncertain, and 21.4% agreed. Among undergraduates, 61.7% disagreed, 18.3% were uncertain, and 19.9% agreed. Among future MBAs, 69.6% disagreed with the statement, 5.9% were uncertain, and 22.6% agreed. Minimal proportions failed to respond.

137. *Infra* Appendix Question 2.

138. *Infra* Appendix Question 7. In the sample of business owners and managers, 33.9% disagreed or strongly disagreed with the need for an investment option, while just over half (53.6%) agreed or strongly agreed. Twelve percent of businesspeople were uncertain of their position. Only 20.7% of undergraduates disagreed with Question 7, while 60.5% agreed and 18.7% were uncertain. In the sample of MBA students, 27.5% disagreed, 9.8% were uncertain, and 60.8% agreed that Terry should be given the option to invest in direct sales.

139. This can be shown by computing a *Z*-test for Differences in Two Proportions, comparing the percentages of Question 3 versus Question 7 in each sample group. More information is on file with the author; the *Z*-test is described *supra* note 115. It should be noted that in the MBA sample, respondents were more likely to agree with Question 7 and disagree with Question 3. The same can be said for the undergraduate sample. However, in the sample of Alachua businesspeople, the trend is reversed, and respondents

asked if they agreed or disagreed that Great Business should be required to reimburse Terry for any sales he loses to the franchisor's catalog/Internet sales, only 11% of businesspeople, 15% of undergraduates, and 10% of MBA students agreed, while around a third of each sample group disagreed.[140]

Questions 9 through 11 dealt with contract wording, and thus will be discussed later with Questions 16 through 22, which deal with similar subject matter. Question 12 asked respondents whether they agree that "assum[ing] that Great Business wants the complete right to set up new outlets wherever it desires. . . . [it] should be required to guarantee a minimum sales level for its existing franchisees." Results tend to be quite divided on this issue. Among undergraduates, 39% agreed with the idea of a minimum sales guarantee, while 28% disagreed and one-third were uncertain. Among businesspeople, only 34% agreed with the statement, while nearly 47% disagreed and almost 20% remained uncertain. Among MBA students, 38% agreed, 40% disagreed, and 20% were uncertain.[141]

For Questions 13 through 15, respondents were asked to "[a]ssume that Terry and most of the other franchise owners have formed an association to represent their interests." Question 13 asked respondents to evaluate the statement that "Great Business should be *required to negotiate* with that association on issues that matter to the franchise owners, such as *exclusive territories*."[142] Only 38% of business owners/managers agreed with a negotiation requirement regarding exclusive territories.[143] In contrast, a slight majority of undergraduates agreed with the negotiation requirement with regard to territories (50.2%), while MBA student responses were in the middle (averaging in between the comparatively pro-franchisor business owners/managers and pro-franchisee undergraduate students), with 44% approving of the requirement to

are more likely to agree with Question 3.

140. *Infra* Appendix Question 8. Seventy percent of businesspeople marked disagree or strongly disagree. A relatively high amount of businesspeople (19.6%) marked uncertain for this question. Results were similar with undergraduate respondents; 62.1% disagreed or strongly disagreed, and 22.9% were uncertain. Among MBA respondents, 72.6% disagreed, and 15.7% were uncertain.

141. *Infra* Appendix Question 12. The undergraduate sample was the only test group wherein the plurality of respondents agreed or strongly agreed with this statement. This question has the highest percentage of "uncertain" responses of any test group/question combination, with over 32% of undergraduates unsure of their position.

142. *Infra* Appendix Question 13 (emphasis added).

143. *Infra* Appendix Question 13. In the sample of business owners, 53.6% disagreed, and 8.9% were uncertain. Only 23.8% of undergraduates disagreed or strongly disagreed, and about one-quarter of undergraduate respondents (25.9%) were uncertain. Among the MBA students, 39.3% disagreed or strongly disagreed with the proposition stated in Question 13 and 14.7% were uncertain.

negotiate regarding territories.[144] With the scenario tweaked,[145] just over half of undergraduates, about 45% of business owners, and around 38% of graduate students agreed that Great Business "should be *required to negotiate* with [the franchisees'] association" regarding a "*franchise owner's right to buy a potentially competing new outlet*."[146]

Question 15 again asked whether Great Business should be required to negotiate with a franchise association, this time in regard to "*paying franchise owners for sales lost to new outlets*."[147] Out of all three questions (Questions 13 through 15) regarding the franchise association, this one had the smallest number of respondents agreeing and the largest number disagreeing. Here, only 29% of business owners agreed to negotiation requirements, while 57% disagreed and 14% were uncertain. Among undergraduates, 34% agreed with this negotiation requirement, a third less than the percentages that agreed with the negotiation requirements on the subjects of exclusive territoriality and the right to buy competing outlets.[148] Thirty-seven percent disagreed with the requirement, and 29% were uncertain.[149] Among future MBAs, only 20% agreed with this requirement, while a majority (54%) disagreed and almost one-quarter were uncertain.[150] This question had the second-highest proportion of uncertain responses for undergraduates and the highest proportion for the MBA student sample.[151] Question 15 once again demonstrates that the idea that Great Business should be required to reimburse its franchisees for perceived losses is relatively unfavorable in each sample group.

144. *Infra* Appendix Question 13.

145. I.e., from required negotiations on exclusive territories (*infra* Appendix Question 13) to required negotiations about franchisee rights of first refusal for a new unit (*infra* Appendix Question 14).

146. *Infra* Appendix Question 14. Among undergraduates, 50.6% agreed or strongly agreed, 22.8% disagreed or strongly disagreed, and 26.5% were uncertain. Of the business-owner respondents, 44.7% agreed or strongly agreed with this requirement, while 51.8% disagreed or strongly disagreed with the requirement, and 3.6% were uncertain. Among MBA students, 38.3% agreed or strongly agreed with this requirement, while 41.2% disagreed or strongly disagreed, and 18.6% were uncertain.

147. *Infra* Appendix Question 15 (emphasis added).

148. *Infra* Appendix Question 15.

149. *Infra* Appendix Question 15.

150. *Infra* Appendix Question 15.

151. *Infra* Appendix Question 15. The only higher percentage of uncertainty (32.6%) was for Question 12, where the undergraduate respondents (by a slight plurality of 39.1%) felt that for Great Business to have an absolute right to encroach it "should be required to guarantee a minimal sales level for its existing franchisees." *Infra* Appendix Question 12 (showing 28.0% disagreeing with that requirement). Even for the questions asking respondents to interpret the meaning of franchise contract clauses that concerned territoriality (*infra* Appendix Questions 9–11 & 16–22), the level of uncertainty was lower.

B. Survey Responses: Interpreting Contract Clauses

The remainder of the questions in the survey dealt with how different contract clauses affect the perceived territorial rights of the franchisee, Terry. Questions 9 through 11 asked respondents to "[s]uppose that the franchise contract between Great Business and Terry says: '*This license does not grant to Terry* [the franchisee] *any market or territorial rights*.'"[152] Question 9 asked whether respondents agree or disagree that, given this clause, "Terry cannot keep other Great Business outlets from being opened in Cobb County." A total of 91% of the business owners and managers agreed or strongly agreed that such a contract would prevent Terry from stopping the opening of new Great Businesses in his county.[153] Though not as large as the proportion of businesspeople, the proportion of undergraduates who agreed with this statement was also very high at 75%.[154] Among future MBAs, 84% agreed with the statement.[155] Furthermore, 84% of business owners, 69% of undergraduates, and 79% of graduate students agreed or strongly agreed that the existence of this clause in a franchisee's contract would mean that "Great Business can open another outlet anywhere it wants, even just down the block from the one it sold to Terry."[156]

Question 11 asked respondents whether, given the contract clause above, "Great Business can open up another outlet anywhere it wants, including near Terry's outlet, if a market study shows that the new outlet would do little or no harm to Terry's business."[157] About two-thirds of each sample group agreed or strongly agreed with this statement.[158] This can be compared to Question 2, which asked a question about what *should be the law* pertaining to market studies and the franchisor's opening of new outlets in the presumed

152. *Infra* Appendix Question 9–11 (emphasis added).

153. *Infra* Appendix Question 9.

154. *Infra* Appendix Question 9.

155. *Infra* Appendix Question 9. Of MBA students, 8.8% disagreed and 3.9% remained uncertain. Only 5.4% of business owners disagreed with this statement, and 3.6% were uncertain. Among undergraduates, 12.6% disagreed that the wording of the contract prevented Terry from curbing the opening of new stores, while 12.2% were uncertain.

156. *Infra* Appendix Question 10. When given this wording, 83.9% of business owners and managers agreed or strongly agreed with the statement, while 12.5% disagreed or strongly disagreed, and 3.6% were uncertain. In the undergraduate sample, 16.8% disagreed with this statement, and 14.2% were uncertain. In the MBA student sample, only 8.8% disagreed. In fact, more MBA students were uncertain—9.8%.

157. *Infra* Appendix Question 11.

158. *Infra* Appendix Question 11. In the undergraduate survey, 62.5% either agreed or strongly agreed with Question 11, while 18.4% disagreed or strongly disagreed, and 19.1% were uncertain. In the MBA sample, exactly two-thirds agreed or strongly agreed, while 19.6% disagreed or strongly disagreed and 11.8% were uncertain. In the sample of Alachua business owners, 62.5% agreed or strongly agreed, while 26.8% disagreed or strongly disagreed, and 10.7% were uncertain.

absence of a contract clause denying to Terry any territorial rights.[159] For both questions, respondents considered a scenario in which franchisor expansion is accompanied by a market study. By reviewing the answers to both questions (Question 2 without the aforementioned clause and Question 11 with it), one sees that each sample group (undergraduates, businesspeople, and MBA students) was more likely to agree and less likely to disagree that Great Business is entitled to open new franchises when the facts indicate the presence of the aforesaid contractual disclaimer.[160]

The next set of questions gauged respondents' reactions to yet another variation of a contract clause stipulating Terry's franchise's territorial rights. For Questions 16 through 18, respondents were asked to assume that the contract between Great Business and Terry says, "Terry has absolutely *no* market or territorial rights." Over three-quarters of undergraduate students agreed that this wording indicates that "Terry cannot keep other Great Business outlets from being opened up in Cobb County."[161] More than 85% of both the MBA students and the Alachua business owners felt likewise.[162] Slightly smaller majorities in each sample group also believed that "Great Business owes no duty to Terry to try to prevent a loss of sales for Terry's outlet."[163] Similarly, 82% of

159. *See supra* text accompanying note 151.

160. The comparison of Question 2 statistics with those for Question 11 (where there is the disclaimer) are illuminating. With the disclaimer present: (1) business owners' level of agreement to adding new franchises went from 58.9% to 62.5% (including "strong" agreement, up from 10.7% to 26.8%); (2) MBA students' agreement level for adding new franchises rose from 63.7% to 66.1% (including "strong" agreement, which nearly doubled from 13.7% to 23.5%); and (3) undergraduates' agreeing to add new franchises increased from 48.3% to 62.5% (including "strong" agreement, going from 9.9% to 16.3%). The disclaimer is, ipso facto, linked to a decrease in respondents' disapproval of a franchisor's establishing new, perhaps competing franchises: (1) business owners' level of disagreement—expression of disapproval—for adding new franchises went from 37.5% to 26.8% (including strongly disagreeing, down from 19.6% to a mere 5.4%); (2) MBA students' disagreement about adding new franchises declined from 25.5% to 19.6% (with the entire decline coming from a steep drop in the level of intensity, as the percentage merely disagreeing remained at 16.7% but the percentage *strongly* disagreeing plummeted from 8.8% to just 2.9%); and (3) undergraduates' extent of disagreement with adding new franchises fell from 32.6% to 18.4% (including "strong" disagreement, tumbling from 6.7% to 3.5%).

161. *Infra* Appendix Question 16 (76.7% of the undergraduate student respondents).

162. *Infra* Appendix Question 16. Among undergraduates, 76.7% agreed, 11.6% disagreed, and 11.6% were uncertain. Among graduate students, 86.3% agreed or strongly agreed, only 9.8% disagreed or strongly disagreed, and 2.0% were uncertain. Among the business owners, 87.5% agreed or strongly agreed, 7.1% disagreed or strongly disagreed, and 5.4% were uncertain.

163. *Infra* Appendix Question 17. Among undergraduates, 67.0% agreed or strongly agreed, 16.0% disagreed or strongly disagreed, and 16.7% were uncertain. Among graduate students, 77.5% agreed or strongly agreed, 10.8%

business owners, 86% of graduate students, and 71% of undergraduates affirmed that "Great Business can open another outlet anywhere it wants, even just down the block from the one it sold to Terry."[164] The overwhelming majorities in all three sample groups suggest that there is certainly a trend toward affirming the significance of the contract between Terry and Great Business, even at a potential detriment to Terry's welfare.

For Questions 19 and 20, respondents were again asked to suppose a franchise contract between Terry and Great Business, this time stating "Great Business has the complete right to open up new outlets anywhere it wants." Over three-quarters of both the MBA and business-owner samples and two-thirds of the undergraduate sample agreed or strongly agreed the clause indicated "Great Business owes no duty to Terry to try to prevent a loss of sales for Terry's outlet."[165] These results were not significantly different from those of Question 17, which asked respondents to react to the identical conclusion as in Question 19, but with the premise, "Terry has absolutely no market or territorial rights."[166] Indeed, when comparing answers to Questions 17 and 19, the percentages for overall disagreement or for overall agreement with the premise is so close that it is only off by a few percentage points per group.[167] Furthermore, 84% of businesspeople, 74% of

disagreed or strongly disagreed, and 9.8% were uncertain. Among the business owners and managers, 80.3% agreed, 16.1% disagreed, and 3.6% were uncertain.

164. *Infra* Appendix Question 18. Among undergraduates, 71.1% agreed or strongly agreed, 13.0% disagreed or strongly disagreed, and 15.6% were uncertain. Among graduate students, 86.3% agreed or strongly disagreed, 5.9% disagreed (none strongly disagreed), and 5.9% were uncertain. Among the business owners/managers, 82.1% agreed or strongly agreed, 14.3% disagreed (none strongly disagreed), and 3.6% were uncertain.

165. *Infra* Appendix Question 19. Among undergraduates, 63.7% agreed or strongly agreed, 17.5% disagreed or strongly disagreed, and 18.8% were uncertain. Among MBA students, 75.5% agreed or strongly disagreed, 9.8% disagreed (and just 1.0% strongly disagreed), and 11.8% were uncertain. Among business owners and managers, 78.6% agreed or strongly agreed, 14.3% disagreed or strongly disagreed, and 7.1% were uncertain.

166. *Infra* Appendix Questions 17 & 19.

167. A table of percentages is revealing:

Respondents	Responses to Questions	Question 17	Question 19
Business Owners/Managers	Agreeing or Strongly Agreeing	80.3%	78.6%
Business Owners/Managers	Disagreeing or Strongly Disagreeing	16.1%	14.3%
Business Owners/Managers	Uncertain	3.6%	7.1%
Undergraduate Students	Agreeing or Strongly Agreeing	67.0%	63.7%
Undergraduate Students	Disagreeing or Strongly Disagreeing	16.0%	17.5%

undergraduates, and 81% of graduate students said, "This means that Great Business can open up another outlet anywhere it wants, even just down the block from the one it sold to Terry."[168]

From these results, it is difficult to determine what respondents considered to be the contract clause that most stringently indicated Terry's lack of territoriality. For this reason, Questions 21 and 22 are slightly different in format. They asked respondents to decide which contractual statement of those three previously mentioned in the survey is most favorable (Question 21) and which is least favorable (Question 22) to Terry.

Fifty percent of businesspeople, 39% of undergraduates, and 52% of future MBAs felt that the phrasing "[t]his license does *not* grant to Terry any market or territorial rights" was most favorable to Terry.[169] Only 5% of businesspeople, 10% of undergraduates, and 8% of MBA students chose the statement as being least favorable.[170] Twenty-five percent of undergraduates, 20% of future MBAs, and 12% of businesspeople felt that the phrasing "Great Business has the complete right to open up new outlets anywhere it wants" was most favorable, while 43% of businesspeople, 30% of undergraduates, and 38% of future MBAs felt that the phrasing was actually least favorable of the three.[171] Only 4% of businesspeople, 8% of undergraduates, and 4% of future MBAs felt that the clause, "Terry has absolutely no market or territorial rights," was most favorable.[172] Thirty-seven percent of business owners/managers, 49% of undergraduates, and 41% of MBA students thought that this statement was least favorable.[173] In addition, 32% of business owners, 28% of undergraduates, and 23% of MBA students were uncertain of which question was most favorable, while 13% of business owners and 11% each of undergraduates and MBA students were unsure which statement was least favorable.[174]

Undergraduate Students	Uncertain	16.7%	18.8%
MBA Students	Agreeing or Strongly Agreeing	77.5%	75.5%
MBA Students	Disagreeing or Strongly Disagreeing	10.8%	10.8%
MBA Students	Uncertain	9.8%	11.8%

168. *Infra* Appendix Question 20. Among undergraduates, 73.7% agreed or strongly agreed, 13.0% disagreed or strongly disagreed, and 13.2% were uncertain. Among graduate students, 81.4% agreed, 8.8% disagreed, and less than 7.0% were uncertain. Among Alachua businesspeople, 84.9% agreed, 9.0% disagreed, and 7.1% were uncertain.

169. *Infra* Appendix Question 21.

170. *Infra* Appendix Question 22.

171. *Infra* Appendix Questions 21–22.

172. *Infra* Appendix Question 21.

173. *Infra* Appendix Question 22.

174. *Infra* Appendix Questions 21–22.

IV. THREE PROPOSALS

Resolving franchise territorial disputes requires consideration of numerous issues. While franchisees sometimes need more legal protection than current case law or legislation has provided, longstanding principles of contract and tort law ordinarily *can* protect the parties to a franchise relationship. Bearing that in mind:

> Judges and legislators alike should avoid knee-jerk reactions to perceived inequities between franchisees and franchisors and instead educate themselves on the complex forces that drive the franchising system. The doctrines of good faith and fair dealing must be balanced with the concept of freedom of contract. Care must be taken to ensure that franchisee's rights are not broadened so much through legislation that the cost to the franchisor of licensing a new franchise becomes too great. The result may well be that franchises are ultimately priced out of the reach of small business, and more stores are opened in the future under corporate control. [175]

Still, to have qualms about government regulation should not, in the name of freedom of contract, signify acquiescence to everything franchisors seek. Black-letter contract law has its limits. For example, commentators long have noted the limitations in simply applying a literal interpretation of disclaimers.[176]

A. Freedom of Contract Is Limited by the Circumstances, Such as the Parties' Own Limitations

Empirical evidence indicates: (1) how little time and effort even experienced or highly intelligent readers spend trying to determine the meaning of legal warnings; and (2) admonished though they are, readers often misunderstand or outright fail to notice what they have been "told."[177] More specifically, turning to franchising, the

175. Emerson, *supra* note 1, at 288–89.

176. R. George Wright, *Your Mileage May Vary: A General Theory of Legal Disclaimers*, 7 PIERCE L. REV. 85, 93–94 (2008) ("It is true of disclaimers—at least as much as of texts in general—that the meaning for readers will depend upon the assumptions they bring to bear as individuals or as members of some interpreting group. These groups may well differ in social position, power, status, and interests. The meanings of texts will in this sense be social, and will reflect both the correspondence and the conflicts—overt and suppressed—of social group interests. Quite understandably, then, 'multiplicity and indeterminacy of interpretation' should often be expected.").

177. Mark A. deTurck, a communications professor at the State University of New York at Buffalo, has authored and coauthored numerous studies on the effectiveness of product warnings. *See, e.g.*, Mark. A deTurck & Gerald M. Goldhaber, *Effectiveness of Product Warning Labels: Effect of Consumer Information Processing Objectives*, J. CONSUMER AFF., Summer 1989, at 111. Generally, deTurck and others have noted how a number of factors (the warning message, the product user, the context in which the product is used)

surveys for this Article repeatedly show that even educated, business-oriented people typically cannot spot the nuances in significance and effect of differently worded contract clauses concerning territorial encroachment. For example, surveys in both 2000 and 2008 of undergraduate business students, graduate business students, and business owners all indicated that a large majority of each group recognized the following: that a contract avowing that the franchisee (a person named "Terry") "has absolutely *no* market or territorial rights" means (a) that Terry can*not* keep other outlets in the same system from being opened nearby, even just down the block, and (b) that, when adding new outlets near Terry's outlet, the franchisor owes Terry no duty to try to prevent a loss of sales for Terry's outlet.[178] Likewise, all surveyed groups strongly adhered to these same views—that the franchisor owed no duty to franchisee Terry to try to prevent a loss of Terry's sales and that the franchisor could open another outlet anywhere it wants, even just down the block from Terry's outlet—when a franchise contract provision says that the franchisor "has the complete right to open new outlets anywhere it wants."[179]

In general, the surveyed groups' perceptive interpretations of franchise contract wording vanished when they were asked to assess which of these three clauses would most likely favor the franchisor or the franchisee: (1) "this license does *not* grant to Terry [the franchisee] any market or territorial rights"; (2) "Terry has absolutely *no* market or territorial rights"; or (3) the franchisor "has the complete right to open new outlets anywhere it wants."

Only about 39% of the undergraduates and barely 52% of the graduate students, as well as 50% of the business owners, recognized that the most favorable wording for the franchisee was the first statement—"this license does *not* grant to Terry [the

ensure that exposure to a warning label or sign does not necessarily increase the product user's level of safety compliance. *See id.* This problem—that people do not read or understand warnings—is demonstrated by studies showing that warning labels are much more likely to be read if they are in that section of the papers accompanying a product devoted to directions for use (93%) rather than precautions (just 38%); and compliance with the warning was much higher (80%) for directions-for-use labels than for precautions labels (45%). J. Paul Frantz et al., *The Ability of Three Lay Groups To Judge Product Warning Effectiveness*, PROD. SAFETY & LIAB. REP., May 5, 1995, at 494–500.

178. *Infra* Appendix Questions 16–18, discussed *supra* notes 161–64 and accompanying text. The same sort of results were obtained for a slightly varying clause. *Infra* Appendix Questions 9–11, discussed *supra* notes 151–60 and accompanying text.

179. *Infra* Appendix Questions 19–20, discussed *supra* notes 165–68 and accompanying text. The undergraduate students agreed by a range of about 62% to 71% (65% to 77% for the 2008 survey), while the graduate students' affirmative responses ranged from about 75% to 81% and those of the business owners ranged from about 79% to 84%.

franchisee] any market or territorial rights."[180] This proviso simply refers to the license itself. In *Scheck v. Burger King Corp.* ("*Scheck I*"), the court applied Florida law to hold that while the franchise agreement contained language expressly denying to the franchisee "any area, market or territorial rights," that did not "imply a wholly different right to [the franchisor] Burger King—the right to open other proximate franchises at will regardless of their effect on the Plaintiff's operations."[181] While this opinion has been roundly criticized and sets forth a position usually rejected by other courts,[182] the reasoning can be understood, even if not accepted. Essentially, what the court in *Scheck I* said was that the contractual clause at issue merely meant there was no exclusivity for the franchisee; it did not bestow upon the franchisor a concomitant, absolute right to insert new franchise units or company units anywhere it wanted, no matter the impact on the current franchisee. In other words, the negating of a franchisee right established no affirmative right on the part of the franchisor.[183]

Half of the undergraduates (slightly lower, 47%, in 2008), along with 41% of the graduate students and 37.5% of the business owners, incorrectly decided that the second stipulation, "Terry [the franchisee] has absolutely *no* market or territorial rights," is least favorable to Terry.[184] This clause, however, merely concerns the franchisee's market, whether contractual or otherwise. It is more strongly phrased than the first statement, in that this second assertion is not limited to simply the license between the parties,

180. *Infra* Appendix Question 21. At the other extreme, few erroneously believed that this first phrase was *least* favorable for the franchisee (and was the most pro-franchisor). Only about 5% of the businesspeople, 10% of the undergraduates, and 8% of the MBA students thought that was the case. *Infra* Appendix Question 22.

181. Scheck v. Burger King Corp., 756 F. Supp. 543, 549 (S.D. Fla. 1991).

182. Emerson, *supra* note 1, at 249–50.

183. This may be illustrative of the problems associated with boilerplate and the slightest differences in wording:

> Over time, slight mutations in the precise language that different actors have in their contracts often emerge—mutations which may not have any particular meaning for the contracting parties and that a court taking a textualist approach may attach too great weight. Different boilerplate terms may get cobbled together in the same contract, leading to potential inconsistencies when interpreted through a purely textualist approach. The chance for court error in interpreting boilerplate is therefore high.

Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1131 (2006).

184. *Infra* Appendix Question 21. At the other end of the spectrum, most survey respondents did at least recognize that the clause was not the *most* beneficial phrasing for the franchisee; only 43.6% of the businesspersons, 8.0% of the undergraduates, and 43.9% of the graduate students felt that the clause was the most pro-franchisee (and anti-franchisor) of the three statements. *Infra* Appendix Question 21.

but also declares outright a complete absence of market or territorial rights. So these survey respondents were correct to see this second declaration as more "anti-franchisee" than the first. Still, the most problematic phrasing, from the franchisee's point of view, remains the third clause.

Worst of all, in terms of accurate assessments about the contractual language, were the responses concerning the third provision. Only 30% of the undergraduates, 38% of the graduate students, and 43% of the business owners correctly decided that the statement dictating that the franchisor "has the complete right to open new outlets anywhere it wants" hinders the franchisee's interests the most.[185] This third statement expressly declares the *franchisor's* rights and thereby directly overcomes the unstated, potentially inferred privileges of the franchisee. Unlike the first and second clauses, which just negate the presumed, implied rights of the franchisee, this clause explicitly avows the rights of the franchisor, with this affirmative proclamation triumphant over any unstated, implied concession or license somehow arising from a franchisee's "negative" rights. As the court in *Scheck I* noted, a franchisor can easily steer clear of future encroachment claims by simply reserving for itself, in its franchise contracts, the right to establish competing franchises wherever it so desires.[186]

Indeed, these abstruse phrasings show just how muddled the encroachment case law can be. Assumptions have been drawn based on the relative value or effect of different contract clauses when, in fact, even educated persons often would not understand the meaning of those clauses and—even if they could choose "correctly" between varying interpretations of one clause[187] (rather than the more difficult articulation of one's own "translation" into laymen's terms)—clearly have little feel for nuances. In a franchise market in which franchisees can examine varying contract proposals, prospective franchisees are not equipped to make the subtle distinctions, à la *Scheck*, between the meanings of clauses or the conclusions to be drawn when there are no express provisions.

Perhaps the most forthright answer from survey respondents was "uncertain." A fairly large portion of those surveyed (32% of

185. *Infra* Appendix Question 22. Again, while more than half the respondents did not identify the best choice from the three possibilities, the respondents were fairly good at not selecting the least accurate of the three choices. Just 12.5% of the businesspeople, 24.8% of the undergraduate students, and 19.6% of the MBA students incorrectly concluded that the phrasing, "Great Business [the franchisor] has the complete right to open up new outlets anywhere it wants" was the provision most favorable to a franchisee. *Infra* Appendix Question 21.

186. *Scheck*, 756 F. Supp. at 549.

187. That is what most respondents did with respect to a series of the survey questions. *Infra* Appendix Questions 9–11 & 16–20, discussed *supra* notes 151–68 and accompanying text.

business owners, 23% of the graduate students, and 28% of the undergraduate students) were uncertain about which of the three suggested contract clauses was most favorable for a franchisee, while smaller numbers (13% of business owners and 11% each of undergraduate and graduate students) were unsure which clause was least favorable.[188] Despite the difficulties of interpretation,[189] though, the *Scheck II* court, just eighteen months after its first holding, decided that whether Burger King had breached the implied covenant of good faith and fair dealing by granting another franchise in close proximity to the plaintiff's franchised restaurant was a question of fact for the jury.[190]

B. Three Proposed Improvements: A Refined Legal Test, the Adoption of Standards, and Better Warnings to Potential Franchisees

As discussed previously,[191] my three-part test to determine the territorial rights of franchisees or franchisors recognizes that there is no way to avoid a substantial body of what is, in effect, pro-franchisor case law—court holdings that, so long as clear and express franchise contract provisions are not unconscionable or against public policy, then the parties are bound by those provisions. Because the franchisor (more specifically, its legal counsel) almost always drafts the contract terms, the upshot may be "pro-franchisor" but not really subject to judicial alteration. It is only when contractual clauses are missing, imprecise, incomplete, grossly unfair, or violative of public policy that courts go beyond the express wording to consider, independently, what the parties knew or believed. At this point, judges should recognize that franchising parties are part of a business community that has group standards (common values); these values, in turn, help in the formation of contracting parties' reasonable expectations, driving the prospective franchisee toward entering a franchise relationship.

Unless a contractual clause is absolutely clear in meaning, the survey results in this Article indicate that many (often most) franchise parties simply would not understand the implications of that clause, such as for franchisee marketing rights or for franchisor expansion. The surveys further reveal that many businesspersons ordinarily would enter a contract as a new franchisee, expecting certain territorial or market protections from the franchisor, regardless of the franchise agreement's failure to say anything at all (or at least anything comprehensive and unmistakable) about these matters. A would-be franchisee should, per the majority views of all

188. *Infra* Appendix Questions 21–22.

189. Those fact questions inherently tied to issues of legal interpretation are especially difficult to interpret.

190. Scheck v. Burger King Corp., 798 F. Supp. 692, 696 (S.D. Fla. 1992).

191. *See supra* notes 73–75 and accompanying text.

groups in the surveys,[192] reasonably expect the following three rights (standards) when confronting possible encroachment: (1) the franchisee has an option to buy any new outlets the franchisor wants to open near that franchisee's outlet;[193] (2) the franchisee has an option to invest in and participate in direct sales to consumers through "nontraditional" (i.e., nonfranchised) means, such as via catalogs, the Internet, or department stores;[194] and (3) the franchisor is barred from opening any new, nearby outlet unless a market study shows that it would do little or no harm to the existing franchisee's business.[195]

The surveys also show the need for even more thorough warnings to prospective franchisees. The FTC rule, as amended in 2007,[196] already mandates this warning to potential franchisees not set to receive territorial protection: "You will not receive an exclusive territory. You may face competition from other franchisees, from outlets that we own, or from other channels of distribution or competitive brands that we control."[197] That may seem adequate, until you consider the fact that most survey respondents simply could not identify, among three choices, the contractual or disclaimer language most favorable for the franchisee or the franchisor.[198] Indeed, all three choices offered in the survey should, to assure franchisee understanding and protection, be included in prominent precontract disclosures *and* in bold print in the contract. The resulting language would go beyond the FTC mandate and therefore deal more directly with the ignorance and inexperience of many people considering the purchase of a franchise. It is especially helpful given how prospective franchisees often proceed pro se (without the benefit of a genuine franchise law specialist) as well as how dense and unfathomable, even for educated laypersons, the franchise contract language may be. The language would thus incorporate all three concepts: the franchisee's license, the franchisee's market or territory, and the franchisor's right to encroach. It could say, in combination with the language from the amended FTC rule:

> You [the franchisee] will not receive an exclusive territory. The license that you receive from the franchisor, or any other

192. Besides simply looking at percentages, the surveys, via an *Average Value*, demonstrates the degree of collective agreement with a position, as explained and then calculated in the Appendix and the survey's first twenty questions. *Infra* Appendix, Key to Survey Results.

193. *Infra* Appendix Question 3.

194. *Infra* Appendix Question 7.

195. *Infra* Appendix Question 2.

196. 16 C.F.R. §§ 436–437 (2010).

197. 16 C.F.R. § 436.5(*l*)(c)(5)(i); s*ee also supra* notes 14, 62–63 and accompanying text.

198. *Infra* Appendix Questions 21–22.

> license (no matter from whom) relating to this franchise, will not give you any market or territorial rights. Moreover, you will have absolutely no market or territorial rights for any other reason, whether due to the actions or inaction of the franchisor or any other person or company, or due to any other circumstances.
>
> You may face competition from other franchisees, from outlets that we own, or from other channels of distribution or competitive brands that we control. In fact, we have the complete right and power, not subject to any objection or other assertion of rights on your part, to open new franchises or our own outlets anywhere we want. Our right to open new franchises or other outlets is absolute; it protects us from any claim or legal defense by you, no matter how close a new franchise or other outlet is to your business or what impact it has on your market, your sales, or any other aspect of your business.

CONCLUSION

The aforesaid three-part approach for determining the content of territoriality provisions could help to rectify the uncertainty and unfairness often found in the law of franchisee markets and franchisor encroachment. As part of that test, courts could look to surveys for guidance about what may be the reasonable expectations of the parties. The surveys associated with this Article indicate that franchisors likely would have little to fear from thereby opening the discussion, as business-oriented survey respondents often would limit the remedies of aggrieved franchisees[199] and bind the parties to those duties clearly agreed to in a contract.

The surveys do show, however, that there are some widely understood precepts about the franchise relationship that may be fairly applied as reasonable expectations of the parties. Three such standards or expectations found in the responses to this Article's survey questions are (1) that franchisees should have the option to purchase any new outlets opening nearby, (2) that franchisees likewise should have the option to participate in nonfranchised marketing and sales methods such as via the Internet, and (3) that when franchisors plan to open new outlets that might be considered encroaching on existing units there must first be market studies

199. *Infra* Appendix Questions 1, 4, 6 & 8 (showing a majority of all three surveyed groups opining against giving the franchisee an exclusive territory, against making the franchisor pay an existing franchisee for lost sales to a new outlet, against making the franchisor conduct a market study showing little or no harm to an existing franchisee before the franchisor engages in direct sales such as through the Internet, and against making the franchisor reimburse a franchisee for lost business due to these direct sales by the franchisor).

showing little or no prospective harm to existing franchisees.[200]

Lastly, subject to any recognized community standards, such as those just mentioned, those franchisors who desire to have no franchisee territorial rights or any recourse against alleged encroachment should place prominently within their disclosure documents to prospective franchisees (as well as in any franchise contract ultimately reached by the parties) a comprehensive and frank set of statements spelling out, in several ways,[201] that the franchisee has no protected territory or market; that any license that comes with the franchise grants no territorial rights nor any marketing zone; and that the franchisor has complete, utter power to establish new outlets, franchised or franchisor-owned, anywhere it wants, including literally next door to the franchisee.

These approaches—improved legal tests, the adoption of standards for the franchising community, and better information (warnings) for franchisees—should help to reduce considerably the number and intensity of encroachment disputes. In a highly competitive environment, this should produce advantages for both franchisors and franchisees, who can turn away from inward-looking, systemically disruptive, internecine warfare and instead concentrate on achieving success versus interbrand, and not intrabrand, rivals.

200. *Supra* notes 193–95 and accompanying text.

201. Thus, it has a certain measure of intentional redundancy, in order that it may act as a safety or reliability feature meant to ensure that prospective franchisees understand the franchise arrangement. As the surveys show, a single statement may be insufficient. *See infra* Appendix Questions 21–22.

APPENDIX

A. The Same Survey Given to Four Groups

There were four different groups given the same survey: (1) the survey in the year 2000 of 895 upper-level, undergraduate business students ("UUBS"); (2) the 2008 survey of 757 UUBS;[202] (3) a survey in 2000 of 56 business owners; and (4) a 2000 survey of 102 MBA students. Results for each of those four groups are reported for every question (all 23 questions) of the survey.

B. Key to Survey Results:

1. Percentages.

For all results except the "Average Value," the results are reported in percentages. Percentages may not add up exactly to 100.0% because of rounding.

2. The Average Value.

The *Average Value* is, for each of Questions 1 through 20, the average of the answers provided by all the respondents (not counting the very small number of respondents, if any, who gave no answer to that question). A value of 1 is given for the response "Strongly Disagree," 2 for the response "Disagree," 3 for the neutral response "Uncertain," 4 for the response "Agree," and 5 for the response "Strongly Agree."

For example, for the 2008 survey of the UUBS, there were 124 persons who responded "Strongly Disagree," 343 who responded "Disagree," 207 who responded "Uncertain," 71 who responded "Agree," 11 who responded "Strongly Agree," and 1 who did not answer the question. So, to derive the Average Value for the response to Question 1's UUBS respondents in 2008, the equation is:

$$\frac{(124x1)+(343x2)+(207x3)+(71x4)+(11x5)}{756\ (total\ number\ of\ respondents)} = \frac{(124+686+621+284+55)}{756} = 2.34126$$

The lower the Average Value falls below 3.0, the more the respondents, on average, disagreed with the statement presented to them. The higher the Average Value rises above 3.0, the more the respondents, on average, agreed with the statement presented to them. The reported Average Values (1.00 to 5.00) are all in *italics*.

Figures for the final category, MBA Overall Values (1.00 to 5.00), are also all in *italics*. The set of MBA Overall Values are average values (as described above), and are shown with the average value generated for four different categories, based on the

202. Also reported are the combined results for the 1652 such respondents.

respondents' prognostication as to when they expect to own a business, and/or to purchase a franchise (within the next five years, sometime after five years from now, uncertain, or never). The particular percentage for answers to each question used to generate the MBA Overall Values are on file with the author.

C. The Survey and the Results

The following presents the survey, including the Introduction and each question for the respondents, with the results indicated for each of the twenty-three questions.

D. Introduction

A franchise is a license to own and operate an outlet that carries the name of an often well-known business. The franchisee buys the franchise from a franchisor. Many fast-food restaurants, hotels, and other businesses are franchised, such as McDonald's, Holiday Inn, and Budget Rent-a-Car.

For this survey, assume that a nationwide chain, Great Business, is a franchisor. It has hundreds or thousands of franchised outlets. Further assume that Terry is a franchisee. Terry owns and operates one of Great Business' franchise outlets. Terry's outlet is the only Great Business franchise in Cobb County, and most of the customers for Terry's outlet come from throughout Cobb County.

For each statement, please tell me whether you agree, disagree, or have no opinion. Or tell me whether you feel strongly either way.

Please respond on a 1 to 5 scale, from Strongly Disagree (1), to Disagree (2), to Uncertain (3), to Agree (4), to Strongly Agree (5).

Question 1. Agree or Disagree: The law should grant to Terry the sole right to own or operate in Cobb County any other Great Business outlets.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	19.6/16.4/18.1	26.8/31.4
Disagree (2)	39.0/45.3/41.9	44.6/49.0
Uncertain (3)	15.0/27.3/20.6	14.3/2.9
Agree (4)	21.2/9.4/15.8	12.5/13.7
Strongly Agree (5)	5.3/1.5/3.5	1.8/1.0
No Answer	0.0/0.1/0.1	0.0/2.0
Average Values	*2.54/2.34*	*2.18/2.02*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*2.04/2.11*	
Uncertain/Never	*2.00/1.92*	

Question 2. Agree or Disagree: Great Business should be prohibited from opening another outlet near Terry's outlet unless a market study shows that the new outlet would do little or no harm to Terry's business.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	5.3/8.5/6.7	19.6/8.8
Disagree (2)	22.4/30.0/25.9	17.9/16.7
Uncertain (3)	17.4/20.9/19.0	3.6/7.8
Agree (4)	42.7/33.4/38.4	48.2/50.0
Strongly Agree (5)	12.3/7.0/9.9	10.7/13.7
No Answer	0.0/0.3/0.1	0.0/2.9
Average Values	*3.34/3.01*	*3.13/3.44*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*3.57/3.74*	
Uncertain/Never	*3.36/3.08*	

Question 3. Agree or Disagree: Great Business should be required to give Terry an option to buy any new outlet that Great Business wants to open near Terry's outlet.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	4.3/5.4/4.8	10.7/6.9
Disagree (2)	22.1/21.1/21.7	14.3/21.6
Uncertain (3)	20.6/21.5/21.0	17.9/16.7
Agree (4)	40.8/43.7/42.1	37.5/38.2
Strongly Agree (5)	12.1/8.1/10.2	19.6/14.7
No Answer	0.2/0.1/0.2	0.0/2.0
Average Values	*3.34/3.28*	*3.41/3.33*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*3.35/3.59*	
Uncertain/Never	*3.61/3.17*	

Question 4. Agree or Disagree: If someone else opens a new Great Business outlet and Terry loses sales to this new outlet, Great Business should have to reimburse Terry for those lost sales.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	16.3/15.7/16.0	14.3/27.5
Disagree (2)	47.4/46.5/47.0	46.4/41.2
Uncertain (3)	20.6/25.0/22.6	21.4/15.7
Agree (4)	13.5/11.8/12.7	17.9/11.8
Strongly Agree (5)	2.1/0.9/1.6	0.0/1.0
No Answer	0.1/0.1/0.1	0.0/2.9
Average Values	*2.38/2.36*	*2.43/2.15*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*1.95/2.52*	
Uncertain/Never	*2.04/2.04*	

Question 5. Agree or Disagree: The law should assume that a drop in Terry's sales stems from the opening of that new outlet. In other words, for Great Business to avoid having to pay Terry for Terry's lost sales, Great Business should have to show that Terry's sales dropped for some reason other than the opening of that new outlet.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	7.5/10.2/8.7	23.2/20.6
Disagree (2)	27.0/25.6/26.4	35.7/26.5
Uncertain (3)	25.0/31.4/28.0	19.6/16.7
Agree (4)	35.2/28.4/32.1	21.4/30.4
Strongly Agree (5)	5.3/4.2/4.8	0.0/2.9
No Answer	0.0/0.1/0.1	0.0/2.9
Average Values	*3.04*/*2.91*	*2.39*/*2.68*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*2.27*/*3.00*	
Uncertain/Never	*2.77*/*2.58*	

For 6–8: Assume that Great Business now wants to also sell its products or services directly to consumers through catalogs, the Internet, department stores, or other methods besides just opening more outlets.

> *Question 6. Agree or Disagree: The law should prohibit Great Business from making any such direct sales in Cobb County, unless a market study shows that these direct sales would do little or no harm to Terry's business.*

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	16.8/17.2/17.0	21.4/23.5
Disagree (2)	45.8/43.5/44.7	46.4/46.1
Uncertain (3)	15.3/21.8/18.3	10.7/5.9
Agree (4)	18.9/14.8/17.0	17.9/17.7
Strongly Agree (5)	3.1/2.5/2.9	3.6/4.9
No Answer	0.1/0.3/0.2	0.0/2.0
Average Values	*2.46*/*2.42*	*2.36*/*2.33*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*2.48*/*2.07*	
Uncertain/Never	*2.54*/*2.25*	

Question 7. Agree or Disagree: Great Business should be required to give Terry an option to invest in and participate in such direct sales.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	3.0/4.6/3.8	12.5/4.9
Disagree (2)	15.3/18.8/16.9	21.4/22.6
Uncertain (3)	17.3/20.3/18.7	12.5/9.8
Agree (4)	51.8/49.5/50.8	42.9/49.0
Strongly Agree (5)	12.5/6.5/9.8	10.7/11.8
No Answer	0.0/0.3/0.1	0.0/2.0
Average Values	*3.56*/*3.35*	*3.18*/*3.41*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*3.61*/*3.59*	
Uncertain/Never	*3.31*/*3.13*	

Question 8. Agree or Disagree: If Terry's outlet loses business to these direct sales, Great Business should have to reimburse Terry for that lost business.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	12.1/13.2/12.6	19.6/19.6
Disagree (2)	50.7/48.1/49.5	50.0/52.9
Uncertain (3)	21.8/24.3/22.9	19.6/15.7
Agree (4)	12.4/12.4/12.4	8.9/9.8
Strongly Agree (5)	3.0/1.7/2.4	1.8/0.0
No Answer	0.0/0.3/0.1	0.0/2.0
Average Values	*2.44*/*2.41*	*2.23*/*2.16*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*2.35*/*2.00*	
Uncertain/Never	*2.19*/*2.13*	

For 9–11: Suppose that the franchise contract between Great Business and Terry says: "This license does not grant to Terry any market or territorial rights."

Question 9. Agree or Disagree: This means that Terry cannot keep other Great Business outlets from being opened in Cobb County.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	3.5/3.7/3.6	1.8/2.9
Disagree (2)	10.1/7.8/9.0	3.6/5.9
Uncertain (3)	11.0/13.7/12.2	3.6/3.9
Agree (4)	50.3/47.4/49.0	41.1/50.0
Strongly Agree (5)	25.0/27.1/26.0	50.0/34.3
No Answer	0.2/0.3/0.2	0.0/2.9
Average Values	*3.84/3.87*	*4.34/4.10*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*4.26/4.15*	
Uncertain/Never	*3.85/4.17*	

Question 10. Agree or Disagree: This means that Great Business can open another outlet anywhere it wants, even just down the block from the one it sold to Terry.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	4.4/3.6/4.0	1.8/2.9
Disagree (2)	15.4/9.8/12.8	10.7/5.9
Uncertain (3)	15.2/13.0/14.2	3.6/9.8
Agree (4)	47.9/51.4/49.5	46.4/55.9
Strongly Agree (5)	16.7/22.1/19.1	37.5/22.6
No Answer	0.5/0.3/0.4	0.0/2.9
Average Values	*3.57/3.79*	*4.07/3.92*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*4.26/3.54*	
Uncertain/Never	*4.00/3.92*	

Question 11. Agree or Disagree: This means that Great Business can open another outlet anywhere it wants, including near Terry's outlet, if a market study shows that the new outlet would do little or no harm to Terry's business.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	3.9/2.9/3.5	5.4/2.9
Disagree (2)	15.1/14.7/14.9	21.4/16.7
Uncertain (3)	18.6/19.7/19.1	10.7/11.8
Agree (4)	46.2/46.2/46.2	35.7/43.1
Strongly Agree (5)	16.3/16.3/16.3	26.8/23.5
No Answer	0.0/0.3/0.1	0.0/2.0
Average Values	*3.56*/*3.58*	*3.57*/*3.69*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*4.04*/*3.52*	
Uncertain/Never	*3.54*/*3.71*	

Question 12. Assume that Great Business wants the complete right to set up new outlets wherever it desires. Agree or Disagree: To have that complete right, Great Business should be required to guarantee a minimal sales level for its existing franchisees.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	4.1/5.0/4.5	16.1/10.8
Disagree (2)	24.7/22.1/23.5	30.4/29.4
Uncertain (3)	32.4/32.9/32.6	19.6/19.6
Agree (4)	34.5/35.9/35.2	30.4/35.3
Strongly Agree (5)	4.1/3.6/3.9	3.6/2.9
No Answer	0.1/0.5/0.3	0.0/2.0
Average Values	*3.10*/*3.11*	*2.75*/*2.90*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*2.74*/*3.19*	
Uncertain/Never	*3.19*/*2.42*	

For 13–15: Assume that Terry and most of the other franchise owners have formed an association to represent their interests.

Question 13. Agree or Disagree: Great Business should be required to negotiate *with that association on issues that matter to the franchise owners, such as* exclusive territories.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	4.4/4.6/4.5	17.9/6.9
Disagree (2)	21.0/17.2/19.3	35.7/32.4
Uncertain (3)	22.1/30.3/25.9	8.9/14.7
Agree (4)	44.3/42.4/43.4	26.8/40.2
Strongly Agree (5)	8.2/5.3/6.8	10.7/3.9
No Answer	0.1/0.3/0.2	0.0/2.0
Average Values	*3.31/3.27*	*2.77/3.02*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*2.74/3.26*	
Uncertain/Never	*2.96/3.08*	

Question 14. Agree or Disagree: Great Business should be required to negotiate *with that association on issues that matter to the franchise owners, such as the* franchise owner's right to buy a potentially competing new outlet.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	3.0/4.1/3.5	17.9/8.8
Disagree (2)	21.2/16.9/19.3	33.9/32.4
Uncertain (3)	24.5/28.9/26.5	3.6/18.6
Agree (4)	43.7/45.8/44.7	39.3/31.4
Strongly Agree (5)	7.6/4.0/5.9	5.4/6.9
No Answer	0.0/0.3/0.1	0.0/2.0
Average Values	*3.32/3.29*	*2.80/2.95*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*2.39/3.22*	
Uncertain/Never	*2.92/3.21*	

Question 15. Agree or Disagree: Great Business should be required to negotiate with that association on issues that matter to the franchise owners, such as paying franchise owners for sales lost to new outlets.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	4.0/6.1/5.0	17.9/11.8
Disagree (2)	33.9/30.0/32.1	39.3/42.2
Uncertain (3)	27.4/30.4/28.8	14.3/24.5
Agree (4)	31.0/29.6/30.3	23.2/18.6
Strongly Agree (5)	3.7/3.7/3.7	5.4/1.0
No Answer	0.1/0.3/0.2	0.0/2.0
Average Values	*2.96*/*2.95*	*2.59*/*2.54*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*2.22*/*2.52*	
Uncertain/Never	*2.69*/*2.71*	

For 16–18: Assume that the franchise contract between Great Business and Terry says, "Terry has absolutely no market or territorial rights."

Question 16. Agree or Disagree: This means that Terry cannot keep other Great Business outlets from being opened in Cobb County.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	3.5/2.6/3.1	0.0/3.9
Disagree (2)	9.6/7.1/8.5	7.1/5.9
Uncertain (3)	11.4/11.8/11.6	5.4/2.0
Agree (4)	51.3/50.7/51.0	39.3/46.1
Strongly Agree (5)	24.3/27.5/25.7	48.2/40.2
No Answer	0.0/0.3/0.1	0.0/2.0
Average Values	*3.83*/*3.94*	*4.29*/*4.15*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*4.17*/*4.11*	
Uncertain/Never	*4.15*/*4.17*	

Question 17. Agree or Disagree: This means that, when adding new outlets near Terry's outlet, Great Business owes no duty to Terry to try to prevent a loss of sales for Terry's outlet.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	4.0/2.9/3.5	0.0/2.0
Disagree (2)	14.8/9.9/12.5	16.1/8.8
Uncertain (3)	17.0/16.4/16.7	3.6/9.8
Agree (4)	50.2/49.9/50.1	44.6/46.1
Strongly Agree (5)	13.7/20.6/16.9	35.7/31.4
No Answer	0.3/0.3/0.3	0.0/2.0
Average Values	*3.55*/*3.76*	*4.00*/*3.98*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*3.96*/*4.07*	
Uncertain/Never	*3.81*/*4.08*	

Question 18. Agree or Disagree: This means that Great Business can open another outlet anywhere it wants, even just down the block from the one it sold to Terry.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	4.5/1.5/3.1	0.0/0.0
Disagree (2)	11.3/8.3/9.9	14.3/5.9
Uncertain (3)	16.7/14.4/15.6	3.6/5.9
Agree (4)	51.2/53.8/52.4	46.4/55.9
Strongly Agree (5)	16.2/21.7/18.7	35.7/30.4
No Answer	0.2/0.4/0.3	0.0/2.0
Average Values	*3.63*/*3.86*	*4.04*/*4.13*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*4.13*/*4.19*	
Uncertain/Never	*4.04*/*4.17*	

For 19–20: Assume that the franchise contract between Great Business and Terry says, "Great Business has the complete right to open new outlets anywhere it wants."

Question 19. Agree or Disagree: This means that, when adding new outlets near Terry's outlet, Great Business owes no duty to Terry to try to prevent a loss of sales for Terry's outlet.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	2.9/2.6/2.8	1.8/1.0
Disagree (2)	17.1/11.8/14.7	12.5/9.8
Uncertain (3)	17.5/20.2/18.8	7.1/11.8
Agree (4)	44.7/42.7/43.8	42.9/38.2
Strongly Agree (5)	17.7/22.5/19.9	35.7/37.3
No Answer	0.1/0.3/0.2	0.0/2.0
Average Values	*3.57*/*3.71*	*3.98*/*4.03*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*3.91*/*4.22*	
Uncertain/Never	*3.81*/*4.17*	

Question 20. Agree or Disagree: This means that Great Business can open another outlet anywhere it wants, even just down the block from the one it sold to Terry.

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Strongly Disagree (1)	3.5/1.3/2.5	3.6/0.0
Disagree (2)	12.6/7.9/10.5	5.4/8.8
Uncertain (3)	13.0/13.5/13.2	7.1/6.9
Agree (4)	49.2/53.1/51.0	48.2/45.1
Strongly Agree (5)	21.7/23.9/22.7	35.7/36.3
No Answer	0.1/0.3/0.2	0.0/2.9
Average Values	*3.73*/*3.91*	*4.07*/*4.12*
	MBA Overall Values	
Within the Next Five Years/After Five Years	*3.95*/*4.26*	
Uncertain/Never	*4.08*/*4.17*	

Question 21. Choose which of these three statements, in the franchise contract between Great Business and Terry, is the ***most*** *favorable to Terry.*

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
This license does not grant to Terry any market or territorial rights.	38.3/39.2/38.7	50.0/52.0
Terry has absolutely no market or territorial rights.	7.3/8.9/8.0	3.6/3.9
Great Business has the complete right to open new outlets anywhere it wants.	22.8/27.2/24.8	12.5/19.6
Uncertain	30.7/24.4/27.9	32.1/22.6
No Answer	0.9/0.3/0.6	1.8/2.0

Question 22. Choose which of these three statements, in the franchise contract between Great business and Terry, is the ***least*** *favorable to Terry.*

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
This license does not grant to Terry any market or territorial rights.	7.7/12.2/9.8	5.4/7.8
Terry has absolutely no market or territorial rights.	50.6/47.2/49.0	37.5/41.2
Great Business has the complete right to open new outlets anywhere it wants.	29.9/28.9/29.5	42.9/38.2
Uncertain	11.1/11.5/11.3	12.5/10.8
No Answer	0.7/0.3/0.5	1.8/2.0

Question 23. State whether you expect to own your own business, and/or to purchase a franchise. I expect to own my own business, and/or to purchase a franchise:

	2000 UUBS/ 2008 UUBS/ Combined UUBS	2000 Business Owners/ 2000 MBA
Within the Next Two Years	3.2/6.9/4.9	10.7/9.8
Within the Next Five Years	12.8/11.9/12.4	14.3/12.8
Sometime After Five Years from Now	34.9/32.5/33.8	10.7/26.5
Never	17.8/21.5/19.5	26.8/23.5
Uncertain	25.7/27.1/26.3	33.9/25.5
No Answer	5.6/0.1/3.1	3.6/2.0