

Licensing & Franchising

The added value of a proper exploitation

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Licensing & Franchising



Licensing

Objectives

- Idealistic
- Administrative
- Commercial



Licensing

Freedom

- Form
 - Exclusivity (Section 2-3 Copyright Act and Section 9-2 Neighboring Rights Act)
 - Third party effect (Section 2.33 BCIP)
- Content
- Parties
 - Abuse of a dominant position
 - Compulsory License



Licensing

Strategies

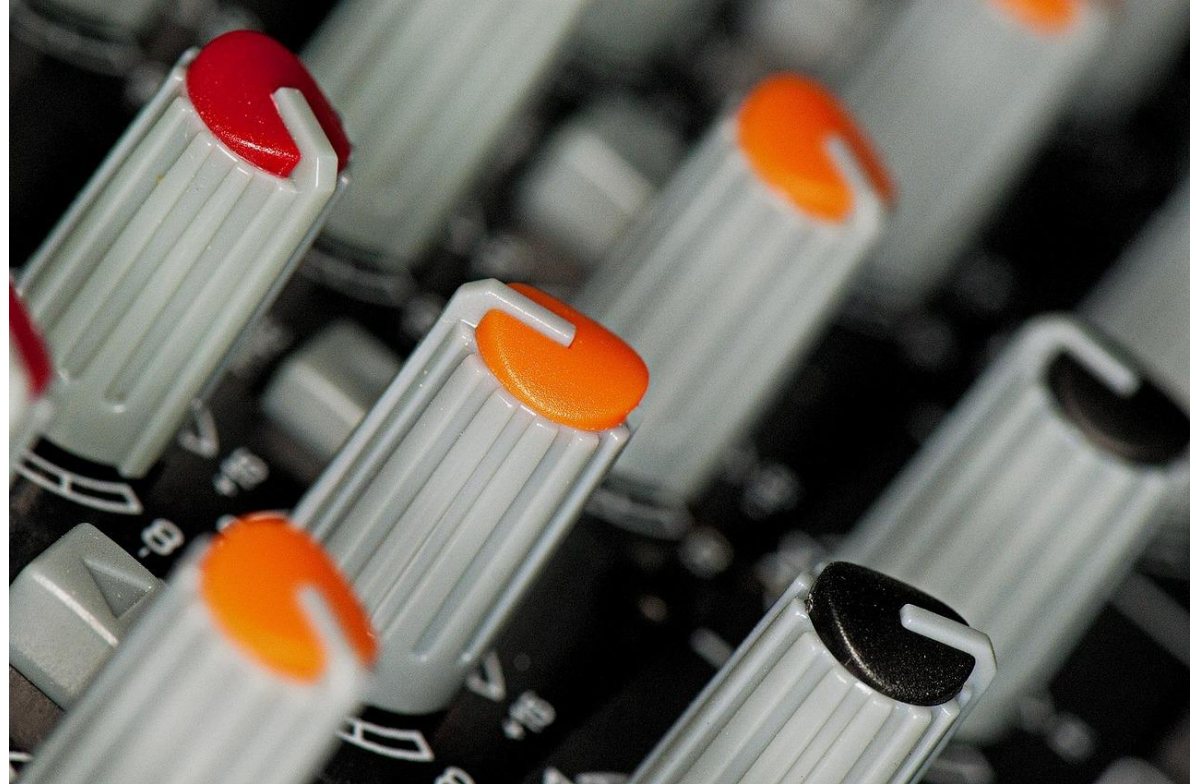
- Expanding into new markets
- Spreading of risks
- Stimulation of innovation
- Strengthen competitive position
- Maximize revenue



Licensing

License Agreement

1. Financial Agreements
2. Term and Termination
3. Exclusivity
4. Use
5. Liability



Licensing

1. Financial Agreements

- The objective determines the value.
- Three ways
 - Royalties
 - Fixed fee
 - Hybrid



Licensing

2. Term and Termination

- By operation of law
- Notice
- Dissolution
- Annulment



Licensing

2. Term and Termination

- By operation of law
- Notice
 - A fixed-term contract.

This cannot be terminated unless:

- It is expressly agreed upon.
- It is based on reasonableness and fairness.
- It is based on unforeseen circumstances.



Licensing

2. Term and Termination

- By operation of law
- Notice
 - A contract for an indefinite period of time.

This can be terminated. Possible further requirements:

- Serious ground
- Notice period
- Damage compensation



HR 28 Oktober 2011, *NJ* 2012/685
(*Gemeente De Ronde Venen/ SNU en Stedin*)

Licensing

2. Term and Termination

- By operation of law
- Notice
 - A contract for an indefinite period of time.

Sometimes this is not cancelable after all:

- Burden of proof lies with the terminated party.
- The terminating party may defend by invoking reasonableness and fairness and unforeseen circumstances.



HR 15 April 2016, NJ 2016/236

(Provincie Noord-Holland c.s./Gemeente Amsterdam)

Licensing

2. Term and Termination

- By operation of law
- Notice
- Dissolution
- Annulment



Licensing

3. Exclusivity

- Exclusive
- Sole
- Non-Exclusive
- Open



Licensing

4. Use

The perception of the end user is crucial for maintaining the distinctiveness of a brand. If end users consider a brand to be generic, this can lead to the revocation of the trademark right, regardless of the knowledge of professional sellers.



HvJ EU 6 Maart 2014, C-409/12

ECLI:EU:C:2014:130 (*Kornspitz*)

Licensing

4. Use

The failure of the trademark owner to encourage sellers to use the trademark as such towards end users, may be considered an inactivity contributing to the revocation of the trademark.



HvJ EU 6 Maart 2014, C-409/12

ECLI:EU:C:2014:130 (*Kornspitz*)

Licensing

5. Liability

...that the term "producer" referred to in this provision does not require that the person who has affixed his name, trademark or other distinguishing mark to the product or has permitted it to be affixed also presents himself in any other way as the producer of the product.



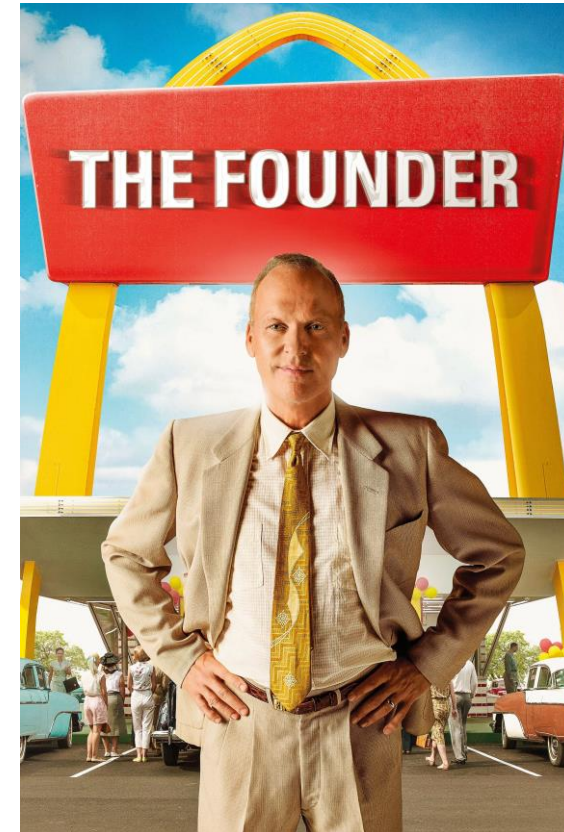
HvJ EU 7 juli 2022, C-264/21

ECLI:EU:C:2022:536 (*Fennia / Koninklijke Philips*)

Franchising

Background

- USA
- Franchise Act 7:911 – 922 Dutch Civil Code



Franchising

Explanation

- Franchise Formula
- Know How
- Cooperation
- Support



Franchising

Article 7:911 lid 1 DCC

The franchise agreement is the agreement whereby the franchisor grants the franchisee, in exchange for compensation, the right and imposes the obligation to operate a franchise formula in the manner designated by the franchisor for the production or sale of goods or the provision of services.



Franchising

Financial Arrangements

1. Franchise Fees
2. Threshold Value
3. Goodwill



Franchising

1. Franchise Fees

- Entrance Fee
- General Fees
- Special Fees



Franchising

Counter-performance

- Support & Assistance
- Pre contractual Information
- Information during the cooperation



Franchising

Support & Assistance

Article 7:919 DCC - Support and Assistance



1. The franchisor shall provide the franchisee with the assistance and commercial and technical support that may reasonably be expected in relation to the nature and scope of the franchise formula in respect to the exploitation of the franchise formula by the franchisee.

Franchising

Support & Assistance

Article 7:919 DCC - Support and Assistance



2. If the franchisee considers a specific form of assistance or support as referred to in the first paragraph to be necessary, he shall make this known to the franchisor and the franchisor and the franchisee shall consult with each other about this.

Franchising

Pre-contractual information

- PID (7:913 DCC)
 - (Draft) Franchise Agreement
 - Overview of financial obligations
 - Overview of investments
 - Financial Health of Franchisor
 - Financial information of location
 - Any other relevant information



Franchising

Pre-contractual information

- PID
- Stand Still Period (7:914 DCC)
 - No changes to the draft
 - No undersigning
 - No financial transactions
- Obligation to investigate (7:915 DCC)



Rb. Zeeland-West-Brabant 13 December 2024
ECLI:NL:RBZWB:2024:9312 (*Go Health*)

Franchising

Information during the cooperation

- Incidentally:
 - Proposed changes
 - Investments
 - Derived formula
 - All other information
- Annually:
 - Justify financial expenditures
 - Meeting



Rb. Midden-Nederland 18 Oktober 2023
ECLI:NL:RBMNE:2023:7737 (*Broodjeskar*)

Franchising

2. Threshold Value

- Modification or derived formula
- Threshold



Rb. Noord Holland 8 Januari 2025

ECLI:NL:RBNHO:2025:43 (*Albert Heijn / Maaltijd Thuis*)

Franchising

3. Goodwill

Article 7:920 DCC:

The franchise agreement shall in any case stipulate:

a. the manner in which it is determined:

1° whether goodwill is present in the franchisee's business;

2° if so, what the amount of goodwill is; and

3° to what extent it can be attributed to the franchisor;



Franchising

3. Goodwill

b. the way in which goodwill, that can reasonably be attributed to the franchisee is compensated to the franchisee upon termination of the franchise agreement, if the franchisor takes over the franchise business of the franchisee in question in order to continue this business independently, or to transfer it to a third party with whom the franchisor concludes a new franchise agreement.



Licensing vs Franchising

Competition Law

- Competition limitations allowed on 2 conditions:
- The limitations serve:
 1. The protection of the know how.
 2. The Preservation of the identity and the reputation of the franchise organization.



HvJ EU 28 Januari 1986, C-161/84
ECCLI:EU:C:1986:41 (*Pronuptia*)

Licensing vs Franchising

Competition Law

The agreement concluded between the parties was signed by [X] as 'licensing entrepreneur' and The Company as 'licensee'.

The foregoing, in conjunction with the content of the other provisions of the agreement concluded between the parties, leads to the conclusion that the agreement concluded between the parties must be regarded as a franchise agreement.



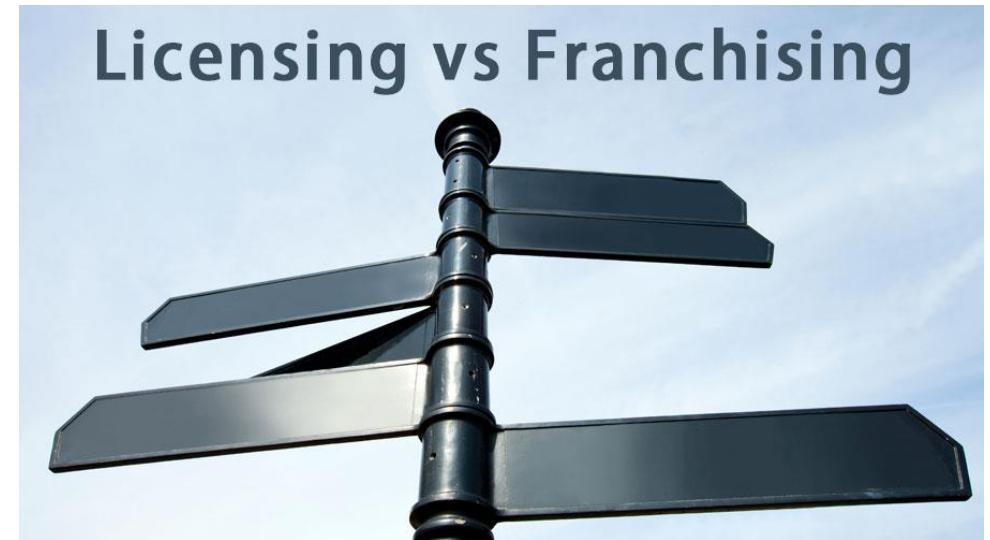
Rb. Breda 21 December 2011

ECLI:NL:RBBRE:2011:BU9904 (*The Company*)

Licensing vs Franchising

Differences

- Freedom vs Obligations
- Single IP right vs Franchise Formula (incl. know how)
- Independence vs Support
- Superficial Cooperation vs Intensive Cooperation
- No Competition Limitations vs Competition Limitations



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