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LICENSING UPDATE

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CHAPTER 2 TRADEMARK LICENSING

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§2.01 INTRODUCTION

Licensing is one of the most effective ways to maximize the value of a trademark. It is also the easiest way for a trademark owner to expand geographically within a short period of time. However, successful trademark licensing still requires navigating around several tricky pitfalls. As always, up-to-date knowledge of the evolving landscape is necessary to identify and avoid those pitfalls. That is especially true given the rather active 2020 dockets with respect to trademark licensing developments. This chapter reviews prominent 2020 trademark licensing cases at the appellate court level addressing contract interpretation, quality control and naked licensing, trademark infringement by former and alleged licensees, as well as the importation of goods bearing counterfeit trademarks.

§2.02 INTERPRETING LICENSING TERMS UNDER CONTRACT LAW PRINCIPLES

When interpreting the terms and scope of a licensing agreement, courts apply general principles of contract interpretation.[1] Generally, the courts review the plain language in the agreement in these disputes to affect the mutual intention of the parties as gathered from the four corners of the instrument. It is well settled law that a claim for trademark infringement exists if a licensee acts outside the scope granted by the right holder.[2] After the expiration of a license agreement, the licensee has no right to continue using the licensed mark, and any use by the licensee without the trademark owner's consent is infringement. Courts may grant preliminary injunctions against a former licensee's use of a licensed trademark to minimize consumer confusion.[3]

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[1]Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 989 (9th Cir. 2006).

[2]Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1026, 1121 (9th Cir. 2000) and Hardy Life, LLC v. Nervous Tattoo, Inc., No. CV 08-3524 PA (CTx), 2008 WL 11338698, at *4 (C.D. Cal. July 14, 2008) (applying the rule from *Sun Microsystems* to when trademark infringement can be brought despite a trademark license.).

[3]Sunward Electronics, Inc. v. McDonald, 362 F.3d 17, 25 (2d Cir. 2004) ("There is a compelling need for injunctive relief especially when the case involves a former licensee because, after a license has been

In *Really Good Stuff, LLC v. BAP Investors, L.C.*,[4] the Second Circuit considered the terms of the parties' license agreement and the parties' course of conduct to determine the proper scope of the requested injunctive relief. Plaintiff Really Good Stuff, LLC ("RGS/Licensor") granted an exclusive license to BAP Investors ("BAP/Licensee") to market certain trademarks and intellectual property. The license agreement also provided that BAP/Licensee in return would give RGS/Licensor the "first and prior right" to purchase remaining copies of products that were going to be discontinued.

After the license agreement ended, BAP continued to use the licensed marks in its advertising and promotional materials. In response, RGS/Licensor sued BAP/Licensee for trademark infringement and unfair competition based on BAP's continued use of the licensed marks following the expiration of their license agreement. RGS also added breach of contract claims that BAP breached the license agreement by refusing to sell RGS the products that RGS sought to purchase after the license agreement expired. BAP argued that the license agreement did not obligate BAP to sell any of those products to RGS; instead, the license agreement allowed BAP to sell the products to third parties. RGS sought a preliminary injunction enjoining BAP from using the licensed marks in commerce or on any products.

The district court determined that RGS was likely to succeed on its breach of contract claims because the license agreement was a valid contract, which BAP breached by refusing to sell to RGS fewer copies of the products bearing the licensed marks than RGS sought to purchase. Although the terms of the license agreement were ambiguous, the district court analyzed RGS's conduct of previously purchasing some, but not all, of the products that had been discontinued during the term of the license agreement. On appeal, the Second Circuit also considered the parties' past conduct and agreed that RGS had established a likelihood of success on the merits of its breach of contract claims because BAP refused to sell the products at issue to RGS.

The Second Circuit vacated the preliminary injunction, however, because it improperly enjoined BAP from selling products that RGS had elected to not purchase. Under the license agreement, BAP could sell to third parties the units of leftover products that RGS did not seek to purchase. Accordingly, the Second Circuit vacated the preliminary injunction only to the extent that it enjoined the sale of units of any product lines and remanded for reexamination of the proper scope of the injunction. The court further agreed that BAP's continued unauthorized use of the marks was likely to cause confusion, citing Second Circuit precedent holding that a strong likelihood of consumer confusion arises where an ex-licensee continues to use a mark after its license expires. The Second Circuit affirmed the remainder of the district court's judgment.

§2.03 LICENSEE ESTOPPEL ISSUES

A licensee is generally precluded from challenging the validity of the trademark under the licensee estoppel doctrine on the grounds that maintaining the stability of a contractual relationship often outweighs the need to challenge a trademark. The estoppel doctrine means that the licensee effectively agrees that the mark is valid. However, there still can be disputes as to when the estoppel doctrine applies. Courts have adopted differing and sometimes inconsistent approaches to resolving disputes evaluating as to when a licensee can challenge the validity of the trademark holder's ownership of the mark.[5] Some courts have held that the estoppel expires once the license has terminated, while others have refused to allow any subsequent challenges by former licensees. Other courts have adopted a middle-of-the-road approach in which a former

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revoked, there is an increased danger that consumers will be confused and believe that the former licensee is still an authorized representative of the trademark holder.").

[4]813 F. App'x 39 (2d Cir. 2020).

[5]*See* Prof'l Golfers Ass'n of Am. v. Bankers Life & Cas. Co., 514 F.2d 665 (5th Cir. 1975), and WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42 (1st Cir. 1991). Some courts have refused to allow any subsequent challenges by former licensees. *Prof'l Golfers* at 514.

trademark licensee may challenge the licensor's title on facts that arose after the license has expired.[6]

The Second Circuit decided a case involving a former licensee's continued and infringing use of licensed marks in *Waterkeeper Alliance, Inc. v. Salt.*[7] Waterkeeper Alliance, Inc. sued Spirit of Utah Wilderness d/b/a Great Salt Lakekeeper for trademark infringement, unfair competition and under state law claims. Waterkeeper Alliance owned several marks, including the names "Waterkeeper," "Lakekeeper," and "Great Salt Lakekeeper." Waterkeeper Alliance licensed its Waterkeeper marks to approximately 200 entities that had successfully applied to be member organizations. The defendant, Spirit of Utah Wilderness ("SUW"), had been a member organization licensed to use the Waterkeeper marks. After SUW violated the terms of the license agreement and failed to adhere to the required quality standards, Waterkeeper Alliance revoked SUW's membership and license to use the Waterkeeper marks.

After the revocation of SUW's membership and license, SUW and its principal, Jeffrey Salt, continued to use the Waterkeeper marks, including in Salt's email address (@agreatsaltlakekeeper.org) and title ("Executive Director of the Great Salt Lakekeeper" or the "Great Salt Lakekeeper"). Waterkeeper Alliance sued SUW for trademark infringement and unfair competition and sought a preliminary injunction to stop SUW and Salt's use of its marks.

SUW's license agreement to use the Waterkeeper marks contained a provision that SUW recognized Waterkeeper's ownership of the licensed marks and that SUW would not attack Waterkeeper's title to the marks or the validity of the license. During the litigation, however, Salt argued that he, and not Waterkeeper, was the first user of the Waterkeeper marks. Nevertheless, the district court found that Waterkeeper Alliance owned the marks and had used them in commerce prior to Salt or SUW. Accordingly, the district court enjoined SUW and Salt from using marks owned by Waterkeeper Alliance.

Salt continued to use Waterkeeper's marks in commerce, however, which prompted Waterkeeper to move to hold SUW and Salt, as SUW's principal, in civil contempt. Neither SUW nor Salt appeared at the hearing to show cause as to why they should not be held in contempt. Accordingly, the court entered the contempt order and denied Salt's motion to reconsider the contempt order. Although Salt filed an appeal and argued that he had the right to use the marks through purported first use, he did not appeal the denial of the motion to reconsider the contempt order or the order denying his ownership rights in the marks. On appeal, therefore, the Second Circuit held that Salt waived his challenge to the civil contempt ruling and affirmed the district court order rejecting Salt's argument that he had the right to continue using the Lakekeeper marks through first and continued use.

§2.04 QUALITY CONTROL AND NAKED LICENSING ISSUES

In the United States, quality control is a fundamental element in all trademark licensing agreements. Controlling the quality of the licensed products ensures that the trademark owner is the "source" of those products and prevents the public from being misled into thinking it will receive a product of similar quality and character from a licensee as it would receive from the licensor, if in fact there is no such similarity. Insufficient quality control, also called "naked licensing," will lead to the abandonment of the licensed mark.[8] Not surprisingly, the proponent of a naked license theory of trademark abandonment must meet a stringent standard of proof.[9]

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[6] *Id.*

[7] Waterkeeper Alliance, Inc. v. Salt, 829 F. App'x 541 (2d Cir. 2020) (summary order).

[8] *See* Barcamerica Int'l USA Trust v. Tyfield Importers, 289 F.3d 589, 596 (9th Cir. 2002) and FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 515 (9th Cir. 2010) (Naked licensing is "inherently deceptive and constitutes abandonment of any rights to the trademark by the licensor.").

[9] *Barcamerica*, 289 F.3d 589 at 596.

The Eighth Circuit recently decided an appeal involving claims of naked licensing in *Lawn Managers, Inc. v. Progressive Lawn Managers, Inc.*[10] This case illustrates the high bar for prevailing on a claim of naked licensing, even in the absence of explicit quality control provisions.

In *Lawn Managers*, Randy Zweifel and Linda Smith had been married for nearly 20 years, during which time they owned and operated a lawn care business together called Lawn Managers, Inc. When Zweifel and Smith divorced, Zweifel kept the corporate name and all interest in the business, but the divorce decree permitted Smith to use the name "Lawn Managers" for two years by establishing a new lawn care company called "Progressive Lawn Managers, Inc. doing business as Lawn Managers."

After the two-year period expired, Lawn Managers obtained a federal trademark registration for the word mark "Lawn Managers" and sued Smith's company, Progressive Lawn Managers ("Progressive"), for federal trademark infringement based on Progressive's continued use of an allegedly infringing logo. Progressive filed a counterclaim asserting cancellation through naked licensing and raising the affirmative defense of unclean hands. The trial court found that Zweifel had not granted Smith a naked license. Instead, the court determined that Progressive infringed the Lawn Managers mark by continuing to use it in commerce after the expiration of the two-year license, which caused consumer confusion. The court rejected Progressive's unclean hands defense and awarded Lawn Managers damages, corrective advertising costs, and attorneys' fees.

On appeal, Progressive focused on the argument that Zweifel had abandoned the mark through naked licensing and that the district court improperly rejected its unclean hands defense. Progressive also argued that the district court abused its discretion in awarding damages to Lawn Managers. The Eighth Circuit examined whether Lawn Managers exercised sufficient control over Progressive to avoid naked licensing but agreed with the district court that although the parties' licensing agreement did not contain express contractual right of control provisions, and despite the lack of evidence of actual control by Lawn Managers, the licensor could reasonably rely on the licensee to maintain the quality of services sold under the licensor's mark.

The Eighth Circuit emphasized that the licensing terms were of "crucial importance" to this finding, as they provided that the parties would essentially operate parallel companies in different zip codes, and even permitted Progressive to use Lawn Managers' credit to purchase equipment. The court also noted the parties' operation of Lawn Management for over 17 years and the lack of evidence of quality deviations by Progressive. Employees of Lawn Management observed and reported that Progressive's services were consistent with Lawn Managers' standards, and the court concluded that it was reasonable to expect Smith to use those standards and procedures at Progressive during the licensing period. Even though Zweifel and Smith may have had an adversarial relationship during or after their divorce proceedings, there was no evidence that their companies, Lawn Managers and Progressive, had an adversarial relationship that would make it unreasonable for Zweifel to rely on Smith's quality control efforts.

Given the high bar for proving naked licensing, counsel should pay particular attention to the elements of the claim. A claim of naked licensing fails when there is proof that: (1) the license included an express contractual right to inspect and supervise the operation of the licensee; (2) the licensor maintained actual control over the licensee's use of the mark; and (3) the licensor and licensee were involved in a close working relationship such that quality control was established despite the lack of a formal agreement or contract.[11] However, the absence of an agreement with provisions restricting or monitoring the quality of goods or services under a trademark produced supports a finding of naked licensing. Further, the reliance on a licensee's quality control alone is usually insufficient to prevent a finding of naked licensing.

When drafting and implementing a quality control provision, the license agreement should purport to state the minimum quality standard and, in advance of the production schedule, set forth a timetable for the

[10] 959 F.3d 903 (8th Cir. 2020).

[11] *Barcamerica*, 289 F.3d 589 at 596.

licensee to submit its product samples for the licensor's review and written approval. It should not only specify the licensor's right to routinely inspect licensee's manufacturing facilities and review customer comments in order to monitor the quality of licensee's products and its compliance, but also describe the procedure for product inspection and the criteria for approval. Further, the licensing agreement should dictate that the licensed trademark be removed from any products that falls below the minimum quality standard. It is also advisable that a licensor keep records of its efforts in maintaining quality control as evidence against invalidity challenge in the future.

§2.05 IMPORTATION OF PRODUCTS BEARING LICENSED MARKS

Under the Tariff Act, 19 U.S.C.A. §1526(e), U.S. Customs and Border Protection may seize merchandise of foreign manufacture bearing a counterfeit mark, including counterfeit certification marks. A recent case from the Federal Circuit, *ICCS USA Corp. v. United States*,[12] illustrates the importance of complying with the terms and timing of license agreements for licensees importing goods into the United States.

ICCS USA Corporation ("ICCS") imported over 56,000 butane gas canisters into the United States that displayed a registered certification mark owned by Underwriters Laboratories Inc. ("UL") and a "PREMIUM" brand label. United States Customs and Border Protection determined that the canisters made unauthorized use of the UL certification mark and issued a notice to ICCS to deliver the canisters to Customs' custody. But after ICCS delivered only 29,008 of the 56,616 canisters to Customs, Customs issued a Notice of Penalty or Liquidated Damages Incurred and Demand for Payment to ICCS with respect to the remaining non-delivered canisters.

ICCS was the U.S. affiliate of One Jung Can Mtf. Co. Ltd. ("OJC"), which manufactured the canisters. Prior to the importation of the PREMIUM-branded butane canisters, OJC and UL had entered into a Multiple Listing Services Agreement, which allowed ICCS to market products that OJC manufactured and which UL had certified. The contract between OJC and UL provided that OJC's MEGA-1 canister was authorized to display UL's certification mark when marked with ICCS's brand label. The contract also authorized ICCS to display UL's certification mark on ICCS models that were the same physical product as the MEGA-1 canister, provided that UL verified that any differences between the products were superficial. This process required that ICCS make a request to UL and UL provide its express approval.

At the time of their importation, the PREMIUM-branded canisters at issue were not listed on UL's Online Certification Directory. In fact, ICCS did not request UL to add the PREMIUM model to UL's multiple listing services until after the PREMIUM canisters had been imported. Upon receiving ICCS's request, however, UL authorized ICCS to display UL's certification mark on the PREMIUM model canisters.

ICCS challenged Customs' demand for redelivery, arguing that the redelivery notice was unlawful because ICCS had a valid license with UL to display the UL certification mark on the PREMIUM model canisters. When Customs contacted UL regarding the license, however, UL confirmed not only that the ICCS canisters were not authorized to display the UL logo on the date of entry, but also that UL certifications are not retroactive. On summary judgment, the Court of International Trade upheld Customs' determination that the UL certification mark on the ICCS merchandise was counterfeit because, at the time of entry, ICCS lacked the express authorization to display the UL mark, which was required by the parties' agreement, and the UL certification was not retroactive.

The issue before the Federal Circuit was whether the PREMIUM-model canisters displayed a "counterfeit" certification mark within the meaning of Section 1127 of the Lanham Act. Section 1127

[12] 952 F.3d 1325 (Fed. Cir. 2020).

defines “counterfeit” as “a spurious mark which is identical with, or substantially indistinguishable from, a registered mark,” and the court noted that a “spurious” mark is a false or not genuine mark. The parties agreed that the UL mark on the PREMIUM canisters was identical to UL's mark. The Federal Circuit agreed with the Court of International Trade that ICCS lacked UL's express authorization to display UL's certification mark on the PREMIUM model on the date of importation and, therefore, the certification mark was counterfeit.

The Federal Circuit noted that an owner of a certification mark has an affirmative duty to police the use of its certification mark to protect the public's expectations, and ICCS's actions in unilaterally using the UL certification mark without UL's express authorization raised concerns about UL's ability to monitor the use of its certification mark. The Federal Circuit concluded that Customs complied with all applicable statutes and regulations when, in the absence of UL's written consent at the time of importation, Customs required the redelivery of ICCS's imported merchandise. The Federal Circuit, therefore, affirmed the United States Court of International Trade's grant of summary judgment in favor of the government.

This case highlights the critical role of the timing of license agreements. Licensees should be careful to not use a licensed mark, or import goods bearing a licensed mark into the United States, before the effective date of the license agreement. Furthermore, obtaining a license after receiving an objection does not always solve the problem. Licensors are not required to apply the licenses retroactively. Indeed, many licensors (particularly certification bodies) have policies against retroactive licensing. Additionally, licensees should take care to use the mark only in connection with the goods or services authorized in the agreement—using the mark in connection with different goods or services may constitute unauthorized use.

§2.06 EXTRATERRITORIAL INJUNCTIONS TO PROTECT DOMESTIC JOINT OWNER

Parties contemplating joint ownership of a trademark should consider future implications for licensing, quality control, and other rights in the mark. Disagreements between joint owners can create trademark infringement or naked licensing risks. The Eleventh Circuit recently heard an appeal involving the contested ownership of a jointly owned trademark in *Commodores Entertainment Corp. v. McClary*.[13]

The dispute centered around the ownership of the mark “The Commodores,” which is the name of a famous Grammy-award winning band. The members of The Commodores entered into an agreement with Motown Record Corporation that provided that the members of The Commodores were joint owners of all rights in and to The Commodores name. The agreement also provided that the members could not use The Commodores name when performing with other artists or groups.

Thomas McClary, once a member of The Commodores, left the band in 1984 and had no interaction with The Commodores until 2010. In the late 2000s and early 2010s, McClary formed musical groups that performed as “The 2014 Commodores” and “The Commodores featuring Thomas McClary.” Commodores Entertainment Corporation (“CEC”) filed suit against McClary for trademark infringement, trademark dilution, passing off, unfair competition, and false advertising.

The district court granted CEC's motion for a preliminary injunction with extraterritorial application, concluding that McClary's planned performances in Europe would have a substantial and negative impact on CEC, an American corporation. The Eleventh Circuit affirmed the district court's grant of judgment as a matter of law to CEC as to the ownership of The Commodores mark and the permanent injunction in favor of CEC. The district court found, and the Eleventh Circuit agreed, that McClary left his rights to the marks when he left the band in 1984. The court rejected McClary's argument that he retained rights in the marks because he continued to collect royalties. The court pointed to Eleventh Circuit precedent holding that royalties from the sale of records were insufficient to confer rights in the associated marks. Further, the

[13] 822 F. App'x 904 (11th Cir. 2020).

Eleventh Circuit had not previously held that royalties could satisfy the genuine use requirement and avoid abandonment. And in fact, McClary only collected royalties for songs he wrote with the band before his departure, which also supported a finding that McClary did not own rights in the marks.

Moreover, no reasonable jury could conclude that McClary had exercised any control over the quality or characteristics of the band, its services, or products, since he departed in 1984. Further, the band's agreements stated that the marks were jointly—not severally—owned, and the members, including McClary, had agreed to not use the marks as individual identifiers when they departed the band. Accordingly, the district court permanently enjoined McClary from using the marks in any manner other than fair use.

The district court also granted partial summary judgment in favor of CEC on its trademark infringement claim, and the jury found that CEC was entitled to damages from several of McClary's musical performances. McClary then moved to modify the permanent injunction and argued that he had acquired exclusive licenses to use "The Commodores" mark in Mexico, New Zealand, and Switzerland. In fact, McClary, through entities he owned or in which he owned an interest, obtained trademark registrations for the mark "The Commodores" covering musical performances in Mexico, New Zealand, and Switzerland. McClary then received exclusive licenses to use The Commodores mark in those countries. After the district court denied the motion as untimely and lacking a sufficient basis for modifying the injunction, McClary appealed.

The Fifth Circuit affirmed the denial of the motion to modify the scope of the permanent injunction. Although McClary obtained exclusive licenses for the mark "The Commodores" in Mexico, New Zealand, and Switzerland between 2017 and 2018, McClary did not move to modify the injunction within a reasonable time, as required by Federal Rule of Civil Procedure 60(c)(1). McClary waited between nine months and two years after receiving the licenses to seek to modify the injunction, which was more than a year after the Eleventh Circuit had affirmed the scope of the permanent injunction (and more than three years after the district court had confirmed the extraterritorial reach of the injunction). Considering the extensive litigation over the injunction and McClary's lack of an explanation for the delay, the Eleventh Circuit affirmed the denial of McClary's motion and affirmed the district court's summary judgment and damages rulings.

§2.07 LICENSEE STANDING TO SUE

License agreements between private parties can limit a licensee's ability to bring a claim under the Lanham Act. Courts generally look at the plain language of the agreement to determine whether the right to sue or enforce the trademark has been reserved to one party or another. Additionally, the Lanham Act may restrict licensee standing to sue.

The Fifth Circuit affirmed the dismissal of a licensee's trademark infringement claims for lack of statutory standing in *Neutron Depot, LLC v. Bankrate, Inc.*[14] In 2013, CSi Agency Services, Inc. ("CSi") granted Neutron Depot a license to use CSi's registered mark "INSURANCE DEPOT" to promote its insurance business. Between 2010 and 2014, a division of Bankrate, Inc. used "insurance depot" as a keyword in online advertisements to generate web traffic to websites designed to collect contact information, which was then sold to insurers. Most of the keywords were generated by computer algorithm, and the "insurance depot" keyword generated 73 leads (out of nearly 7.6 million leads). In May 2014, Neutron Depot sued Bankrate under the Lanham Act for infringing the mark, and Bankrate subsequently stopped using the mark.

The Fifth Circuit noted the requirement under Sections 32(1) and 43(c) of the Lanham Act that a claimant must own the mark outright to have statutory standing. Exclusive licensees, who do not own the

[14] 798 F. App'x 803 (5th Cir. 2020).

licensed mark, do not have standing to bring claims under those sections of the Lanham Act. Instead, owners and assignees, who have title to the mark, have standing.

Neutron Depot was an exclusive licensee of the mark when it sued for infringement in 2014. Only in 2016, two years after litigation began, did Neutron Depot become the owner of the mark via assignment. Neutron Depot argued that the district court had erroneously applied the time-of-filing rule from the Federal Circuit in dismissing its suit for lack of statutory standing. Bankrate, in turn, had cited two Federal Circuit cases holding that patent assignees cannot cure statutory-standing defects through patent assignments that occur during the litigation.

The Fifth Circuit, however, declined to decide whether the Federal Circuit's time-of-filing rule applied. Instead, the court focused on the fact that CSi's 2016 assignment to Neutron Depot was not retroactive—it was effective as of December 28, 2016. Importantly, the parties did not dispute that Bankrate's alleged infringement stopped in 2014. The assignment date meant, therefore, that Neutron Depot did not own the mark at any point during the alleged infringement. The court declined to address whether the mid-litigation assignment was effective to cure statutory standing and, instead, affirmed the dismissal of Neutron Depot's claims under Sections 32(1) and 43(c) because Neutron Depot did not own the mark at any point during the alleged infringement.

The Fifth Circuit also affirmed summary judgment finding Neutron Depot was not entitled to profit disgorgement on its false designation claim under Section 43(a)(1)(A). The court found no evidence that suggested that Bankrate even knew of CSi or Neutron Depot or that it was aware of the mark's registration when it infringed the mark. Because the evidence did not support a finding that Bankrate had a specific intent to cause confusion or to deceive, there was no evidence that Bankrate willfully infringed the mark. Consequently, there was no genuine issue of material fact that Bankrate did not willfully infringe the mark.

§2.08 CONCLUSION

The terms of trademark licensing agreements remain important in determining parties' conduct during the life of the agreement and potential remedies after the agreements expire. Trademark licensees' standing to sue will depend on the language of the agreement as well as statutory standing requirements. Licensees should pay careful attention to the quality control standards and other requirements of the license, as failure to adhere to the contractual requirements may result in the revocation of the license. Quality control provisions are also important for licensors, as the failure to maintain control of the quality of a licensee's goods or services could result in a finding that the licensor abandoned its trademark through a naked license. For licensees importing goods bearing licensed marks into the United States, using trademarks without effective licenses may result in the seizure of the goods. And former licensees who continue to use the licensed marks after the end of the agreement risk liability for trademark infringement and potentially breach of contract.