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## THAT'S OK, IT'S ONLY A RENTAL: THE BUSINESS OF RENTING DOGS

RACHIT ANAND

### I. INTRODUCTION

Often referred to as “man’s best friend,” dogs hold a special place in our society and our hearts. Dog companionship, and its incidental benefits to human physical and mental health, have been long recognized and continue to be further substantiated by the scientific community and the sheer number of households that have a dog as a pet. According to a 2007-2008 National Pet Owner survey by the American Pet Products Manufacturers Association, there are 74.8 million “owned dogs” in the United States and “[t]hirty-nine percent of U.S. households own at least one dog.”<sup>1</sup> In Great Britain, where forty-nine percent of the population owns a pet, dog owners spend the greatest amount of time with their pets and are more likely to take time off work for their dog(s) in comparison to other pet owners.<sup>2</sup> Besides providing companionship, health benefits from interacting with dogs are becoming increasingly recognized. The positive impact of dogs in various human treatment and rehabilitative settings can be evidenced by the growing fields of animal assisted therapy and counseling.<sup>3</sup> Since the beginning of their association with humans, dogs have served a number of different roles such as hunting companions, weapons in battles,<sup>4</sup> guards, rescuers in perilous terrains, instruments for detecting drugs,<sup>5</sup> aiding law enforcement agents and guides to

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<sup>1</sup> The Humane Soc’y of the United States, [http://www.hsus.org/pets/issues\\_affecting\\_our\\_pets/pet\\_overpopulation\\_and\\_ownership\\_statistics/us\\_pet\\_ownership\\_statistics.html](http://www.hsus.org/pets/issues_affecting_our_pets/pet_overpopulation_and_ownership_statistics/us_pet_ownership_statistics.html) (last visited Jan. 6, 2009) (The survey also indicates that dog owners spend \$219.00 a year on veterinary visits.).

<sup>2</sup> Steve O’Malley, *The Blue Cross UK Pet Census 2007*, Dec. 11, 2007, <http://www.ukpets.co.uk/> (search “UK Pet Census 2007”; then follow “The Blue Cross UK Pet Census 2007” hyperlink) (last visited Jan.6, 2009).

<sup>3</sup> See AUBREY FINE, *HANDBOOK ON ANIMAL-ASSISTED THERAPY XXXV* (2000) (The Delta Society, an international, non-profit organization that unites people with mental and physical disabilities and patients in healthcare facilities with professionally trained animals to help improve their health, estimates there are about 2000 Animal Assisted Treatment programs in the United States, with psychotherapy and physical rehabilitation using dogs being the most common.); see also CHRISTINE STEVENS, *Chapter VI: Dogs*, in *ANIMALS AND THEIR LEGAL RIGHTS*, 118 (4th ed. 1990) (A survey of 50 state health departments in 1986 showed that all states allow pets in nursing homes.).

<sup>4</sup> See J.J. BARLOY, *MAN AND ANIMALS 100 CENTURIES OF FRIENDSHIP* 14 (1978) (Egyptians sent dogs with spiked collars to attack their enemies. After death, dogs would sometimes be mummified, adorned with death masks and collars made of flowers, and placed in sarcophagi.).

<sup>5</sup> *Id.* at 19-21.

the handicapped, and specimen for laboratory testing<sup>6</sup> to name just a few. Yet, the relationship between dogs and human beings transcends that of mere utility for the benefit of humans. Our interactions with dogs are better described as that of mutual kinship and co-dependence which have nurtured a veritable bond between the two species. With our evolving societies, dogs have evolved as well.<sup>7</sup> Dogs have become a colorful and prominent thread in our history; they are a part of our culture, our literature and our families.<sup>8</sup>

While the benefits of dog ownership or even being in the presence of dogs have been widely accepted,<sup>9</sup> such opportunities are not always available to those who desire them. Whether it is the time or travel associated with work, family responsibilities, financial limitations, inability to make a commitment, or simply a lack of desire to take care of a dog, some people have generally been unable to own dogs despite wanting their company. It is with the expectation of servicing this demographic that Flexpetz,<sup>10</sup> a San Diego based corporation, has created a niche for itself by providing a dog rental service in the United States. Started in February of 2007, Flexpetz contracts out dogs by the day to urbanites without the time or space to care for a full time pet.<sup>11</sup> Whereas the idea of renting dogs is not new,<sup>12</sup> Flexpetz is the first company in the United States to use such a concept to provide companionship<sup>13</sup> along with the main objective of making a profit.

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<sup>6</sup> See PETER SINGER, *ANIMAL LIBERATION* 217-23 (1984) (discussing how the French Philosopher and the father of vivisection, Rene Descartes and his followers, the Cartesians were able to carry out cruel acts such as nailing animals up on boards by their four paws to vivisect them and see the circulation of the blood by believing the mechanistic doctrine that animals were soulless machines, incapable of thought or sensation).

<sup>7</sup> Editorial, *Pet-For-A-Day Taking Advantage of Man's Best Friend*, *PITT. POST-GAZETTE*, Aug. 8, 2007, at B4 available at <http://www.post-gazette.com/pg/07215/806529-192.stm> ("Many scientists are beginning to suggest that dogs, as well as other animals, may be smarter than previously believed. In fact, some researchers say canine IQ has increased over the millennia precisely because of their close association with humans.").

<sup>8</sup> *Id.*; See Susan J. Hankin, *Not A Living Room Sofa: Changing The Legal Status of Companion Animals*, 4 *RUTGERS J.L. & PUB. POL'Y* 314, 377 (2007) (arguing for a new legal category for companion animals that better reflects their status as somewhere between property and persons); see also The Blue Cross, *Pet Owners Prefer Their Furry Friends to Their Human Pals*, Oct. 12, 2007, [http://www.bluecross.org.uk/web/site/Media\\_centre/Press\\_releases\\_2007/December/Pet\\_Census\\_2007.asp](http://www.bluecross.org.uk/web/site/Media_centre/Press_releases_2007/December/Pet_Census_2007.asp) (according to a 2007 national survey conducted in the UK, 1 out of 10 people would choose to spend time with their pets rather than close family).

<sup>9</sup> See FINE, *supra* note 3, at 49.

<sup>10</sup> FlexPetz, <http://flexpetz.com/contact.html> (last visited Jan. 6, 2008) (FlexPetz is incorporated in the state of Delaware.).

<sup>11</sup> See *MSNBC: No Time for a Pet? How About Sharing One?* July 30, 2007, <http://today.msnbc.msn.com/id/20024378>.

<sup>12</sup> *Id.*; See Terry Selucky, *Leaders And Bow-Wowers: A New Pet Rental Company Draws A Waiting List-And Some Controversy*, <http://www.timeout.com/newyork/article/22785> (last visited Jan. 6, 2009) ("Dog rental services have been around since the '80s, and are especially popular in cramped cities like Hong Kong and Tokyo.").

<sup>13</sup> *Id.* Renting dogs and other animals as "character animals" for movies, television shows and other theatrical events as well as for agricultural production differs in that the animal is not being

While the company has grown from San Diego to other cities in the United States,<sup>14</sup> as well as into the United Kingdom and Europe,<sup>15</sup> the idea of renting dogs has been met with mixed reviews and concerns for the welfare of the dogs. Further, such a scheme of temporary pet ownership could raise some novel legal issues that the courts have not dealt with in the nascent area of animal law.

This paper will discuss the concept of renting dogs, explore in specifics the services provided by Flexpetz and highlight the general public reaction to the idea of temporary dog ownership. It will then explore whether such a practice could be deemed cruel or inhumane in the United States under the Animal Welfare Act or the anti-cruelty statutes of California and New York (states in which the company currently operates) as well as animal welfare laws of the United Kingdom.<sup>16</sup> After establishing that although dogs exposed to such a scheme may suffer from psychological and behavioral problems, this paper will nonetheless assert that the practice and consequences of renting dogs are beyond the ambit of anti-cruelty statutes and animal welfare legislation as currently enacted.<sup>17</sup> In its conclusion, this paper will briefly discuss the alternatives available to those that are unable to commit to full-time pet ownership and whether Flexpetz and its dog rental scheme is truly a service benefiting both humans and dogs or a blatant exploitation of “man’s best friend.”

## II. FLEXPETZ: THE BUSINESS<sup>18</sup>

Ironically, Flexpetz was founded by a former behavioral therapist, Marlena Cervantes, “who got the idea [for the company] while working with pets and autistic

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rented for companionship but rather a commercial enterprise.

<sup>14</sup> *Id.*

<sup>15</sup> Flexpetz, <http://www.flexpetz.com/location.html> (last visited Jan. 6, 2009).

<sup>16</sup> *Id.*

<sup>17</sup> On August 8, 2008, the Massachusetts Legislature passed a law prohibiting renting of dogs, as contemplated by the Flexpetz business model. Codified as §80I, under Massachusetts General Laws Annotated, Chapter 272 and effective November 3, 2008, the law bans the business of leasing or renting dogs and further imposes fines on “both the business that is leasing a dog and the person that has entered into a rental agreement” (M.G.L.A. 272 §80I). The statute was enacted a few months after this paper was completed and before Flexpetz commenced operations in Boston. Since it expressly prevents Flexpetz from operating in Massachusetts alone, the passage of §80I is merely noted here to qualify the discussions in this paper and to present a current legislative act in response to Flexpetz.

<sup>18</sup> While researching this topic, the author made numerous attempts to contact a representative of Flexpetz in order obtain information beyond that which was provided on the company’s website but was unsuccessful. On one occasion, after a number of messages were left with the general 1-800 number of the company, the author did receive a reply phone call from Marlena Cervantes, the founder of Flexpetz, and was advised to submit his inquiry via email to her personally which was sent on November 8, 2007; however, a response has yet to be received. Therefore, the information pertaining to the company’s general procedures and chargeable fees provided in this section and elsewhere in this paper was obtained through its website at <http://www.flexpetz.com>.

children.”<sup>19</sup> Perhaps of little or no significance or perhaps a foretelling fact it is nonetheless interesting to note that Ms. Cervantes has no background in animal husbandry or behavior.<sup>20</sup> Nevertheless, Flexpetz is a growing enterprise. Having started in San Diego in early 2007,<sup>21</sup> the company currently has operations in Los Angeles, New York, San Francisco, Washington, D.C., Boston and London, UK.<sup>22</sup> Members are selected by their willingness to pay exorbitant fees as well as through a rather vague screening process<sup>23</sup>. To become a Flexpetz dog, youth, pedigree and social skills are among the most important factors, though having been rescued or in need of a home seem to be considered as well.<sup>24</sup>

## A. MEMBERSHIP

In order to become a FlexPetz member, an individual is required to pay a registration fee for an introductory session of \$150.00, an annual account maintenance charge of \$99.00, a monthly membership fee of \$99.95 and a minimum of \$180.00 per month in dog rental (“Doggy Time”) fees “regardless of actual usage” with a Flexpetz dog.<sup>25</sup> Therefore, an annual membership will cost a minimum of approximately \$3,608.40 irrespective of whether the member rents a dog.

The registration fee of \$150.00 covers a mandatory one hour introduction session with a FlexPetz trainer which introduces the member to the “dogs, dog handling & training” and Flexpetz “encourage[s] the whole family to attend.”<sup>26</sup> Membership fees entitle a person to a “free Convenience Package that includes a dog bed, food/water bowls and a custom leash.”<sup>27</sup> Membership fees also cover all veterinary expenses as well as a checkup by a veterinarian every 3 months.<sup>28</sup> The fees also allow the Flexpetz dogs to be fitted with GPS-tracking collars so that they can be located if they go for “walkies” on their own.<sup>29</sup> Presumably, proceeds from the fees also cover the costs of when the dogs are not rented out and “live in a home environment with a primary carer . . . [where they] love to frequent the beach, local dog parks and long walks several times daily through the beautiful cities where they live.”<sup>30</sup>

<sup>19</sup> See *MSNBC*, *supra* note 11.

<sup>20</sup> See Denise Flaim, *No Time for Pets by the Hour*, Sept. 24, 2007, <http://www.newsday.com/news/columnists/ny-sp49agbar3245387902>.

<sup>21</sup> See Selucky, *supra* note 12.

<sup>22</sup> See Flexpetz, *supra* note 15.

<sup>23</sup> Flexpetz, <http://www.flexpetz.com/membership.html> (last visited Feb. 14, 2009).

<sup>24</sup> Flexpetz, <http://www.flexpetz.com/ourdogs.html> (last visited Feb. 14, 2009).

<sup>25</sup> Flexpetz, *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (Monthly membership fees “contribute[ ] towards providing full care for all the dogs . . .”) Such care includes that “dogs are veterinary checked every 3 months . . .” Flexpetz, <http://www.flexpetz.com/faq.html> (last visited Feb. 14, 2009).

<sup>29</sup> Flexpetz, *supra* note 23.

<sup>30</sup> Flexpetz, <http://www.flexpetz.com/faq.html>.

Further, a member may choose shuttle services “that can deliver and collect a Flexpetz dog to your home or office”<sup>31</sup> and costs generally about \$25.00 each way for a pickup and collection.<sup>32</sup> An inconvenience charge of \$75.00 per day applies if a FlexPetz dog is not returned on the last day of the reservation period; however, if the dog is returned “between opening time (7 AM) and the start of the next reservation period (8 AM), then the Member will not be charged the Inconvenience Fee.”<sup>33</sup>

Besides paying the required annual and monthly fees, in order to become a FlexPetz member, an individual is screened to ensure he/she is a proper candidate for renting dogs. Flexpetz “gather[s] a great deal of personal information from [ . . . ] potential members and meet[s] all in person in the presence of a certified dog trainer.”<sup>34</sup> “Each member participates in a training session and must be able to demonstrate sensitivity, compassion, patience and the desire to be a responsible dog owner.”<sup>35</sup> Flexpetz also has “each member sign[s] documents stating he/she has not had any history of animal violence or abuse and a promissory note to treat all Flexpetz dogs with absolute respect.”<sup>36</sup>

## B. FLEXPETZ DOGS

From where the Flexpetz dogs are obtained is not known with any certainty.<sup>37</sup> According to the Flexpetz website, the company claims that “[w]here possible, Flexpetz dogs are rescues or in urgent need of rehoming.”<sup>38</sup> Where and why it would not be “possible”<sup>39</sup> is not mentioned on the company’s website; however, the criteria for being selected as a Flexpetz dog may shed some light on how such a possibility is determined.

All Flexpetz dogs are between the ages of 2 and 5 because dogs of this age have developed their personalities and have been properly socialized.<sup>40</sup> Much like the screening process for its members, Flexpetz “screen[s] each dog for social skills, temperament, interest in befriending people, and ability to easily adapt to different people.”<sup>41</sup> Of course, certain breeds instinctively possess the social skills sought

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<sup>31</sup> Flexpetz, *supra* note 23.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See Flexpetz, *supra* note 30.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Flexpetz’s website does not state whether their dogs have been adopted from pounds, shelters or any other animal rescue organization. As previously mentioned, the company has not responded to such inquiries submitted via email and telephone messages.

<sup>38</sup> Flexpetz, *supra* note 24.

<sup>39</sup> See Rebecca J. Huss, *Rescue Me: Legislating Cooperation Between Animal Control Authorities And Rescue Organizations*, 39 CONN. L. REV. 2059, 2061 (2007) (stating that the leading cause of death for dogs in the United States is euthanasia because of lack of homes, between 3-4 million dogs are euthanized each year based on conservative estimates).

<sup>40</sup> See Flexpetz, *supra* note 30.

<sup>41</sup> *Id.*

out by Flexpetz and would be ideal candidates simply based on their pedigree.<sup>42</sup> However, the company does not explicitly state its preference for purebreds though the dogs featured on the company's website do include a Labrador Retriever, a Boston Terrier, two Afghan Hounds, and a Miniature Pinscher.<sup>43</sup> While the company's website also proclaims on a number of pages that Flexpetz provides an opportunity to help rescued or re-homed dogs,<sup>44</sup> it is hard to imagine that a homely looking mixed-breed dog would be chosen by Flexpetz. Since Flexpetz is a profit seeking enterprise, the selection of dogs available is understandable in light of Ms. Cervantes statement: "Look, at the end of the day, we're a business . . . [p]eople aren't looking for a brown mutt. They want a breed they can feel good about taking to Central Park."<sup>45</sup>

Other than "full of fun time"<sup>46</sup> visits with Flexpetz members as well as stays with one primary "carer" where they are never kenneled, Flexpetz dogs are checked by a veterinarian every 3 months, provided prepackaged and premeasured food and have the possibility of being adopted on a full-time basis by a member.<sup>47</sup> The company's website states that if a member's situation changes and they become able to "have a dog full-time" adoption is an option. "We anticipate a constant rotation of dogs being adopted out and new dogs entering the Flexpetz program."<sup>48</sup> When, how or for how much a pet may be adopted is not disclosed on the company's website and such information was not provided upon inquiry. Nevertheless, the company does ensure that if a dog "becomes unable to continue within the Flexpetz program due to illness or ailment the dog would be provided for by Flexpetz for life and placed into a permanent home."<sup>49</sup> Whether permanent homes have already been secured for any such dog or dogs that get older<sup>50</sup> and are no longer "a joy to spend time with"<sup>51</sup> is not mentioned on the company's website.

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<sup>42</sup> See DR. BRUCE FOGLE, *DOG OWNER'S MANUAL* 92-97 (2003) (Breeds such as Golden Retrievers, Pembroke Welsh Corgis, Labrador Retrievers, Pointers, just to name a few, are known to be good tempered, family companions that are easily trained.).

<sup>43</sup> See Flexpetz, *supra* note 24.

<sup>44</sup> See Flexpetz, <http://www.flexpetz.com/about.html> (last visited Jan. 7, 2009) ("Flexpetz is also a unique opportunity to provide rescue dogs or dogs that need a new home with a carefree, loving environment."); see also Flexpetz, *supra* note 24 ("Flexpetz dogs are rescues or in urgent need of rehoming."); see also Flexpetz, <http://www.flexpetz.com/isitforyou.html> (last visited Jan. 7, 2009) ("Would you feel even better if such a program helped dogs in need of rescuing or re-homing? . . . Flexpetz aims to help by taking in dogs that need rescuing or re-homing."); see also Flexpetz, <http://www.flexpetz.com/how.html> (last visited Jan. 7, 2009) ("Flexpetz provides our members with local access to a variety of dogs, all of whom are rescued or rehomed . . ."). "Where possible" qualifier apparently not deemed important enough for repetition in any of the above representations.

<sup>45</sup> See Selucky, *supra* note 12.

<sup>46</sup> See Flexpetz, *supra* note 30.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See FOGLE, *supra* note 42 at 276 (Noting that diminished sight and hearing, tendency to sleep more, dogs own dislike to changing routines, constipation and gas, painful joints, lack of strength, incontinence are among the many medical conditions that aging dogs can develop).

<sup>51</sup> See Flexpetz, *supra* note 24.

### III. PUBLIC REACTION TO TEMPORARY DOG OWNERSHIP

Of the number of people to whom the idea of renting dogs was mentioned, not a single person responded in favorable terms. Whereas such a reaction may be to some extent biased as most people questioned have companion pets and are either friends or family of the author, the few randomly selected people who were questioned responded unfavorably and perplexed. Not surprisingly however, public reaction in the media to the idea of renting dogs has also been overwhelmingly negative.

The practices of Flexpetz have been criticized as being cruel and ignorant to the needs and psychology of dogs. “The whole point of having a dog is having a relationship . . . [i]t’s not like wearing a piece of jewelry. Dogs get attached quickly and then it’s lifted away from them, which is cruel.”<sup>52</sup> Dismissing her business as a “rent-a-pet operation” and likening it instead to a vacation time-share or a gym membership, Ms. Cervantes seems to be intimating that such a characterization makes the practice less objectionable.<sup>53</sup> Yet, it is obvious that though such a trend in “consumers who are more interested in the experience rather than owning” is growing, even business strategists commenting on shared ownership of inanimate objects such as cars, art, and luxury bags warn that “[p]eople will not feel connected to the brand. It’s another disposable.”<sup>54</sup> While thinking of bags or cars as disposables when rented may hurt the bottom line of a company seeking brand loyalty, thinking of dogs as disposable items hurts dogs and how we view them in our society. Perhaps recognizing this dichotomy in our treatment of dogs as compared to inanimate objects, along with the possible harm caused to the particular dogs being rented out, is why some people have had such a vehement reaction to Flexpetz.

If you can’t tell already, I think all of this is a supremely bad idea-for the dog, at least. Renting may be fine for cars or tuxedos, but dogs are sentient beings that, like children, crave stability and routine. They want to belong to a stable pack, and they want a leader – not an ever-changing cast of Hummer driving, Slate-reading urbanites.<sup>55</sup>

Veterinarians, animal rights activists and a number of humane societies in the United States and United Kingdom have also reacted similarly. Veterinarians, dog trainers, and many pet owners consider the practice as “shocking.”<sup>56</sup> “Veterinarians say renting out dogs could inflict permanent damage to their psyches, as multiple

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<sup>52</sup> Annie Karni, *The New York Sun: Pet-Renting Concept Termed ‘Shocking,’* Aug. 17, 2007, available at <http://www.nysun.com/article/60715> (quoting Deborah Sarfaty, a veterinarian and health director of the doggie day care center Biscuit and Bath).

<sup>53</sup> See *Pet-For-A Day*, *supra* note 7.

<sup>54</sup> Kimberly D. William, *Give this Pooch a Home (Whenever you have the time)*, ADVERTISING AGE, Aug. 13, 2007, at 4 (quoting Richard Laermer, the author of “Trendspotting” and other works on the topic of transumers).

<sup>55</sup> Flaim, *supra* note 20.

<sup>56</sup> See Karni, *supra* note 52.

owners could muddle their understanding of loyalty.”<sup>57</sup> While no one denies the positive impact of dogs in one’s life and programs that take animals to nursing homes have a positive effect, those dogs, nevertheless, have a stable home life.<sup>58</sup> Moreover, given the detrimental effects of such a practice on dogs, others question: “What sort of scrutiny is the company doing to gauge the impact on its animals as they are passed from client to client for a fee?”<sup>59</sup>

The Humane Society of the United States commenting on Flexpetz transmitted the following press release:

Dogs form attachments to their families and instinctively learn to protect their packs. Frequent and abrupt changes in location, routine, discipline and attention are confusing and are likely to lead to stress-induced behavior problems. Dogs are not like cars or furniture. Moving them from person to person, home to home, can induce problems such as anxiety and depression.<sup>60</sup>

The release went on to state that the Humane Society was critical of the concept of renting pets and that despite its good intentions, “Flexpetz is not likely to benefit the overall welfare of the dogs they rent.”<sup>61</sup> Similarly, the American Society for the Prevention of Cruelty to Animals (ASPCA) issued a statement on Flexpetz “Flexible Dog Ownership Program” stating:

The ASPCA believes this goes against the very concept of developing the human-animal bond, which we in the animal welfare world work so hard to promote. Dogs and other pets deserve a family and home that they can depend on. They are not commodities to be availed of when the whim strikes, and to be put away when not.<sup>62</sup>

The ASPCA’s press release also pointed out that Flexpetz’s rental program is fundamentally different from other practices of homing and fostering pets, since it does not seek to find permanent homes for the animals.<sup>63</sup>

To the extent that Flexpetz may in fact provide dogs with a better environment than a shelter and perhaps even a permanent home, given the lack of information

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<sup>57</sup> *Id.*

<sup>58</sup> *Pet-For-A Day*, *supra* note 7.

<sup>59</sup> *Id.*

<sup>60</sup> The Humane Soc’y of the United States, *Dogs Deserve Life-Long Homes*, Press Release Aug. 6, 2007, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/dogs\\_deserve\\_lifelong\\_homes.html](http://www.hsus.org/press_and_publications/press_releases/dogs_deserve_lifelong_homes.html).

<sup>61</sup> *Id.*

<sup>62</sup> The American Soc’y for the Prevention of Cruelty to Animals, *ASPCA Issues Statement on Flexpetz “Flexible Dog Ownership Program,”* Press Release Aug. 3, 2007, <http://www.aspc.org/pressroom/press-releases/080307-1.html>.

<sup>63</sup> *Id.*

provided by the company, reservations about the benefits to the dogs can be anticipated.<sup>64</sup> In fact, after finding out about Flexpetz's plans to open in the United Kingdom, the Kennel Club of United Kingdom issued the following statement:

It is with deep concern that the Kennel Club has heard about a new scheme under way in America called FlexPetz, which is set to come to the UK in October [ . . . ] The concept of renting out dogs as a 'timeshare' equivalent is detrimental to the dog, leading to all kinds of confusion for the animal. It also raises many questions about the kind of person who is making money at the dog's expense, what happens when the dog gets older and no one wants it, and what happens in the situation where people who are renting the dog don't want to give it back? 'It is also of concern that different people will have different ideas about house rules, leading to even further confusion for the dog when it is not given any consistency with which rules to follow.'<sup>65</sup>

Despite the unanswered questions about Flexpetz, the practice of renting dogs is abhorrent to many. In criticizing Flexpetz, Ryan Neile, an animal behaviorist at The Blue Cross, a registered United Kingdom animal welfare charity, stated:

Dogs are dependent on meaningful lifelong relationships with their human owners. Both parties of the human dog partnership develop a strong bond which is underpinned by both trust and understanding. The more deep-rooted a relationship becomes, the more stable and secure the dog will be. The opposite occurs when a dog is passed around one person or home to another. They may become confused, distressed and unpredictable-something we sadly see all too often in dogs that come to The Blue Cross. It is only through consistency and predictability of routine and the awareness of social boundaries that a dog can truly thrive.<sup>66</sup>

Considering the overwhelmingly negative response to Flexpetz and the detrimental effects of its practices on dogs, one would think that a business like Flexpetz would have no clients and quickly go out of business. On the contrary,

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<sup>64</sup> See Selucky, *supra* at 12 ("Stephanie Scroggs, the director of communications for the SPCA International, has mixed feelings about the program. 'We're glad that people are able to experience the therapeutic qualities of companion animals through services like Flexpetz, but we hope customers will research how these programs treat pets after-hours.'"). *Id.*

<sup>65</sup> Steve O'Malley, *Kennel Club Statement on Flexpetz*, Aug. 2, 2007, <http://www.ukpets.co.uk/ukp/index.php?section=Home&sub=News&method=fetch&item=1266>.

<sup>66</sup> The Blue Cross, <http://www.bluecross.org.uk/web/site/news/2007/Flexpetz.asp> (last visited Jan. 7, 2009).

Flexpetz has already tripled in locations since its flagship branch opened in San Diego in February of 2007 and has opened a number of new national and international locations.<sup>67</sup> Unless the company is operating at a loss, it can be assumed practically that it has a growing number of members who are willing to pay the estimated \$1450 a year for pet companionship and are undeterred in their lifestyles from what these dogs may undergo.

For now, at least, it does not seem that the business of renting dogs for profit will cease to exist from a lack of demand or public condemnation based on the treatment of dogs. In fact, pet rental businesses already operating in Japan and Hong Kong have been thriving in the past few years. “[T]he number of companies dedicated to renting out pets in Tokyo alone has risen from 17 in 2000 to 134 today,”<sup>68</sup> despite being condemned by animal welfarists as stressful and unhealthy for the animals.<sup>69</sup> Similarly, while “Hong Kong’s Society for the Prevention of Cruelty to Animals stopped short of describing the practice as revolting, arguing that an animal should not be leased out like a disposable asset[,]”<sup>70</sup> the venture has been such a commercial success for a pet shop owner in Hong Kong that “sales have increased five-fold since he launched his pet rental program.”<sup>71</sup> Although an examination of animal welfare laws in Asia is beyond the scope of this paper, it should nevertheless be pointed out that there are vast differences in how cultures across the world view animals and their roles in society.<sup>72</sup> Further, and without engaging in the offensive practice of cultural imperialism, it should be noted that dogs and cats are commonly consumed by humans as food and slaughtered for their fur in China and many parts of Asia.<sup>73</sup>

Insofar as the practices of Flexpetz are concerned, the United States and each respective state in which Flexpetz currently operates as well as the United Kingdom, where a Flexpetz location is anticipated in 2008, have an animal anti-cruelty statute and the next section of this paper will discuss how those statutes affect the business of renting dogs.

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<sup>67</sup> See Flexpetz, *supra* note 15.

<sup>68</sup> Danielle Demetriou, *A Dog is Just for the Afternoon*, Nov. 26, 2007, <http://www.telegraph.co.uk/news/worldnews/1570492/A-dog-is-just-for-the-afternoon.html>.

<sup>69</sup> *Id.*

<sup>70</sup> Andrew Brown, *Hong Kong’s Rent-A-Pet Unleashes Row*, Sep. 5, 2002, <http://edition.cnn.com/2002/WORLD/asiapcf/east/09/05/hk.pet.rent/index.html>.

<sup>71</sup> *Id.*

<sup>72</sup> Animal Asia Foundation, *Friends...or Food?*, <http://www.animalsasia.org/index.php?UID=OGJFM65K03Y3> (last visited Feb. 14, 2009) (stating “[c]ertain cultures view dogs as vermin,” and discussing the efforts of Animal Asia Foundation’s, a Hong Kong-based government-registered animal welfare charity, efforts in raising awareness of the poor treatment and slaughtering of millions of dogs and cats each year and pushing for legislation to ameliorate the situation.).

<sup>73</sup> *Id.*; See also Stanley J. Olsen, *Dogs*, in *THE CAMBRIDGE WORLD HISTORY OF FOOD*, at 508 (2000) (stating “Today dogs are employed as food for human consumption in many parts of Asia, and China in particular, but the origins and reasons for this practice are not well documented, or if they are, they are probably recorded in one or more of the many Asia sources not yet translated.”).

#### IV. ANIMAL WELFARE LEGISLATION IN THE UNITED STATES

##### *a. Animal Welfare Act*

The Animal Welfare Act<sup>74</sup> (AWA) could apply to FlexPetz through its procurement and/or interstate transportation of dogs. AWA is the only Federal law in the United States that regulates the treatment of animals in research exhibition, transport, commerce and by dealers, even though it does not “ban remedial state legislation in the field of interstate commerce in pets.”<sup>75</sup> The Act is enforced by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) and Animal Care (AC). AC develops regulations that interpret the Act with each amendment. The regulations are published in the Code of Federal Regulations, Title 9, Chapter 1, Subchapter A - Animal Welfare, which is popularly known as 9CFR.<sup>76</sup>

The AWA is a “regulatory scheme, in that its primary activity is to register certain animal users and then inspect the facilities of those users to determine whether the care guidelines or regulations for animals in their possession are being followed. Though it is not a national anti-cruelty law, which exist at the state level,”<sup>77</sup> it may nonetheless have limited implications for Flexpetz.

Section 2134 of the AWA requires dealers and exhibitors to obtain a license from the Secretary of Agriculture of the United States or his representative in order to operate.<sup>78</sup> The AWA defines the term dealer in pertinent part as:

...any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes.<sup>79</sup>

Person is defined as “any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.”<sup>80</sup> Since Flexpetz is a

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<sup>74</sup> 7 U.S.C §§ 2131-2159 (West 2007).

<sup>75</sup> See *Winkler v. Colorado Dep't of Health*, 564 P.2d 107 (1977) (court held that Colorado's regulations to prohibit importation of pets for resale from states whose licensing laws and regulations for commercial pet dealers were not as stringent as those of Colorado were not preempted by the AWA.) 111); but see *Taub v. State*, 463 A.2d 819 (1983) ( Maryland Court of Appeals held that since the Animal Welfare Act provided a comprehensive plan for the protection of animals used in research and as a subject to detailed regulations of the Secretary of Agriculture with respect to humane handling, care, treatment, transportation of nonhuman primates, Maryland animal cruelty statute did not apply to a laboratory funded by the National Institute of Health.).

<sup>76</sup> See U.S. Dep't of Agric., <http://www.nal.usda.gov/awic/legislat/regsqa.htm> (last visited Jan. 7, 2009).

<sup>77</sup> See <http://animallaw.info/articles/qvusawa.htm> (last visited Jan. 7, 2009).

<sup>78</sup> 7 U.S.C. § 2134 (2000).

<sup>79</sup> 7 U.S.C. § 2132(f) (2000).

<sup>80</sup> 7 U.S.C. § 2132(a) (2000).

corporation and may transport dogs to be rented for use as pets from one state to another in order to meet the demands of its members,<sup>81</sup> it may fall within the definition of a dealer in commerce and thus the purview of the Animal Welfare Act.

Under the Animal Welfare Act, Flexpetz would be subject to inspections of its dogs and records at reasonable hours upon request by law enforcement agencies in search of lost animals.<sup>82</sup> Furthermore, Flexpetz would be required to keep records with respect to the purchase, sale, transportation, identification, and previous ownership of the dogs;<sup>83</sup> develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise; provide proper housing and care;<sup>84</sup> and mark and identify each dog.<sup>85</sup>

Even though the AWA provides for criminal penalties, civil penalties and revocation of permits for violations, since the Act is primarily regulatory and of limited purpose and scope, it does not govern the practice of renting dogs. Therefore, absent violations of the aforementioned applicable provisions or standards as set forth in 9 C.F.R, Part 3, it is unlikely that an injunction would be sought or successfully obtained against Flexpetz for the renting of dogs under the Animal Welfare Act.<sup>86</sup>

### *b. State Laws*

While historically state animal cruelty laws, much like the Animal Welfare Act, were limited in scope and provided insufficient penalties for violations, in the past decade state animal laws have been considerably strengthened.<sup>87</sup> “In 1993, only seven states had felony animal abuse laws,”<sup>88</sup> whereas, by “June 2008, 45 states ha[d] enacted felony-level penalties for certain acts of animal cruelty, 31 of them in the last ten years.”<sup>89</sup> Since each state has its own unique statute, their

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<sup>81</sup> It can be foreseeable that due to fluctuations in rental demands, Flexpetz might transport a dog or some of its dogs to another state so that a dog may be rented by a member there.

<sup>82</sup> See 7 U.S.C. § 2147 (2000).

<sup>83</sup> See 7 U.S.C. § 2140 (2000).

<sup>84</sup> See 7 U.S.C. § 2143(a)(2)(B) (2000) (sets out the requirement that exercise be provided); 9 C.F.R. §3.8 (1967) (sets forth the standards for exercise to be provided).

<sup>85</sup> 7 U.S.C. § 2141 (2000).

<sup>86</sup> 7 U.S.C. § 2159 (2000) (allows an injunction to be sought if “Secretary has reason to believe that any dealer, carrier, exhibitor, or intermediate handler is dealing in stolen animals, or is placing the health of any animal in serious danger in violation of this Act or the regulations or standards promulgated.”); 7 U.S.C. §§ 2143, 2147, 2141 (2000).

<sup>87</sup> See Hankin, *supra* note 8.

<sup>88</sup> See Stephan K. Otto, *State Animal Protection Law – The Next Generation*, 11 ANIMAL L. 131, 132 (2005) (explaining the effectiveness of animal protection law across the country and how these laws can be amended to provide for better protection and through improved statutory standards and more comprehensive provisions).

<sup>89</sup> See The Humane Soc’y of the United States, *Animal Cruelty Laws: Where Does Your State Stand?*, [http://www.hsus.org/legislation\\_laws/state\\_legislation/animal\\_cruelty\\_laws\\_where\\_does\\_your\\_state\\_stand.html](http://www.hsus.org/legislation_laws/state_legislation/animal_cruelty_laws_where_does_your_state_stand.html) (last visited Nov. 12, 2007).

coverage can vary. Thus, this section will explore how Flexpetz' business of renting dogs can be affected by anti-cruelty statutes in California and New York.

Furthermore, since specific documented instances of animal abuse, whether through beatings, mutilation or neglect cannot be generally presumed to be part of a dog rental program,<sup>90</sup> the examination of such a program through various state laws is limited to the inherently detrimental effects of such practices on dogs. As mentioned previously, being constantly moved from one home to another can cause stress induced behavioral problems in dogs such as anxiety and depression. "One of the most important things for canines is their pack—their family[.] The two most important things pack animals do are eat and sleep together."<sup>91</sup>

Unfortunately, documented scientific studies to fully demonstrate the direct connection of an unstable environment and inconsistent routines on the health and psyches of dogs are presently lacking.<sup>92</sup> Adding to the frustration is the fact that "[p]hobias, anxieties, depression, and grieving have not been considered an integral part of veterinary medicine until recently"<sup>93</sup> and that is sure to impede such disorders from being readily accepted as an injury recognized by the law.

## I. CALIFORNIA

California, Illinois, Maine, Michigan and Oregon have the best anti-cruelty laws in the United States.<sup>94</sup> In analyzing whether the practice of dog renting can be brought within the ambit of California's animal anti-cruelty law, the most pertinent section of the law to be considered is California Penal Code Section 597 (b), which states:

[E]very person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance,

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<sup>90</sup> That is not to say that renting dogs to people who do not want the responsibility of ownership would not foster an environment conducive to neglect, cruel treatment or abuse.

<sup>91</sup> DR. LARRY LACHMAN & FRANK MICKADEIT, *DOGS ON THE COUCH: BEHAVIOR THERAPY FOR TRAINING AND CARING FOR YOUR DOG* 264 (1999).

<sup>92</sup> While researching this topic, the author corresponded with Marc Bekoff, Dr. Lynette Hart, Ph.D., M.S., and Dr. Raymond Coppinger, Ph.D. in order to find studies relating to the affects of an ever-changing environment and different human companions on dogs but was advised that to their knowledge there were no authoritative studies to date on such a topic. Nevertheless, their consensus was that while some breeds may be better suited for such a lifestyle, dogs in general would suffer from confusion and the inability to form a long-term bond with a human companion. (on file with author).

<sup>93</sup> See FOGLE, *supra* note 42 at 275.

<sup>94</sup> See *Best States to Abuse an Animal?* THE ANIMALS' ADVOCATE, THE Q. NEWSL. OF THE ANIMAL LEGAL DEF. FUND (ALDF, Cotati, Cal.), Vol. 25, No.2 (Summer 2006), at 1, available at [http://www.aldf.org/downloads/130\\_animalsadvocatessummer06.pdf](http://www.aldf.org/downloads/130_animalsadvocatessummer06.pdf) (The determination that California, Illinois, Maine, Michigan and Oregon had the best anti-cruelty laws was based on an analysis of the animal protection laws of each state in the U.S.; the 50 States and the District of Columbia were scored for the general comprehensiveness and relative strength of their respective legal protections for animals.).

drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal, or causes or procures any animal to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, drink, shelter, or to be cruelly beaten, mutilated, or cruelly killed; and whoever, having the charge or custody of any animal, either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty upon the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is, for every such offense, guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or or [sic] a felony and by a fine of not more than twenty thousand dollars(\$20,000).<sup>95</sup>

It can be argued that Flexpetz dogs are being subjected to needless suffering since they are deprived of a stable home and a predictable environment. These dogs do not have a stable pack and being constantly moved around could lead to stress induced anxiety or depression. Also, an argument can be made that the dogs are being overdriven when they are sent from one member to the next as it can be anticipated that a dog could be rented the very same day that it is returned to a Flexpetz facility by a member.<sup>96</sup> This could also be considered unnecessarily cruel since dogs generally sleep at least twelve hours a day.<sup>97</sup> It is unlikely that a member will allow for a restful environment when the very purpose for which he/she has rented the dog is to spend time with it through various activities.

While one specific rental period may not amount to needless suffering, if it can be shown that these dogs are constantly rented out and are subject to back to back rentals a California court may find a valid anti-cruelty claim. An offense is of a continuing nature when it may be committed by “a series of acts, which if individually considered, might not amount to a crime, but the cumulative effect is criminal.”<sup>98</sup> Further, violations of California Penal Code § 597 are general intent crimes and thus a showing that Flexpetz intended to overdrive or inflict needless suffering on the dogs would not be required.<sup>99</sup>

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<sup>95</sup> CAL. PENAL CODE § 597(b) (West 1999).

<sup>96</sup> See Flexpetz, *supra* note 23 (If the dog is returned “between opening time (7 AM) and the start of the next reservation period (8 AM), then the Member will not be charged the Inconvenience Fee.”); *Id.*

<sup>97</sup> ARDEN MOORE, THE DOG BEHAVIOR ANSWER BOOK 50 (2006).

<sup>98</sup> See *People v. Sanchez*, 114 Cal.Rptr.2d 437, 444 (Ct. App. 2001) (*quoting* *People v. Epps*, 176 Cal.Rptr. 332 (Ct. App. 1981)) (defendant’s convictions under title 14, section 597(b) of the California Penal Code were affirmed in part and reversed in part based on the trial judge’s failure to give unanimity instructions).

<sup>99</sup> See *People v. Alvarado*, 23 Cal.Rptr.3d 391 (Ct. App. 2005) (court affirmed conviction of man who was inebriated and stabbed to death his two dogs).

If animal cruelty charges against the practice of renting dogs and Flexpetz are brought with the required evidence of how such a transient existence has harmed the dogs, it will likely be a case of first impression in California. Even if there is proof that Flexpetz practices have been the cause in fact to a dog's psychological or behavioral problem, at this point, given the lack of explicit statutory language and case law on the practice of renting pets, it is unlikely that such a claim would succeed in California.

## II. NEW YORK

Similar to California's anti-cruelty statute, New York also provides for a prohibition against overdriving, torturing and injuring animals in its Agriculture and Markets Law § 353. New York's statute states:

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class A misdemeanor and for purposes of paragraph (b) of subdivision one of section 160.10 of the criminal procedure law, shall be treated as a misdemeanor defined in the penal law.<sup>100</sup>

New York case law on the interpretation and application of § 353 is not extensive and a cruelty charge brought against Flexpetz and its dog rental practices would also be of first impression in the state. However, a Criminal Court decision from the City of New York could provide guidance on how such a case may be decided. In *People v. Arroyo*,<sup>101</sup> defendant was charged with overdriving, torturing and injuring animals and failure to provide proper sustenance<sup>102</sup> in violation of Agriculture and Markets Law § 353. The violation arose from defendant's failure to provide medical care to his dog which was found by an A.S.P.C.A. special investigator with a large bleeding tumor hanging from its stomach.<sup>103</sup>

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<sup>100</sup> N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 2004) (Unlike California Penal Code § 597, which prescribes violations as a felony, New York's § 353 treats such acts as a misdemeanor.).

<sup>101</sup> *People v. Arroyo*, 777 N.Y.S.2d 836 (2004).

<sup>102</sup> *Id.* at 838.

<sup>103</sup> *Id.*

The defendant acknowledged that he was aware of the dog's medical condition but that he could not provide treatment because of his limited finances.<sup>104</sup> Nevertheless, the defendant argued that the statute was vague because its proscription against "unjustifiable pain" and requirement of "necessary sustenance" were not "specific enough to provide notice that an owner must provide medical care to a terminally ill animal."<sup>105</sup>

In finding that Section 353 was vague as applied to the facts of the case, the court reasoned that the language of the statute was not clear, the legislative history did not shed any light on the intent of the legislature when it included the term "sustenance" in the statute<sup>106</sup> and that it did "not afford notice to a person of ordinary intelligence."<sup>107</sup> The court also reasoned that as determined by common understanding and practice, as well as society's sense of morality, the phrase "unjustifiable physical pain" did not provide sufficient notice to a person that his or her decision not to provide a pet with medical care is a crime.<sup>108</sup>

In light of this decision, Flexpetz would seem to have a very good defense to any charges of cruelty stemming from its practices. In essence, based on the *Arroyo* court's reasoning, the terms "overdrive," "overload," and "any act of cruelty" would not seem to give a person of ordinary intelligence<sup>109</sup> notice that renting dogs for mere companionship is a violation of the statute. Further, as already discussed, behavioral problems stemming from unstable environments and a lack of a permanent bond to a "pack" are only recently being scientifically explored and accepted by the veterinary community. Absent recognition of such needs by the legislature and explicit legislation to address those needs, it is unlikely a New York court would venture to find dog renting in violation of the New York Agriculture and Markets Law § 350 et seq. This is especially so considering that visibly bleeding tumors did not suffice to give notice to a person of ordinary intelligence that a dog is suffering from "unjustifiable physical pain."<sup>110</sup>

Notwithstanding the relative ease with which Flexpetz may avoid cruelty or overdriving charges, another New York statute may still hinder its eleemosynary claim of helping dogs in need of rescue or re-homing. Agriculture and Markets Law § 374(2)(e) states:

No person shall release any dog or cat from the custody or control of any pound, shelter, society for the prevention of cruelty to animals, humane society, dog protective association, dog control officer,

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<sup>104</sup> *Id.* (Further, it was undisputed that despite defendant's financial situation, he was on vacation when the dog was initially found and confiscated by the A.S.P.C.A agent.).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 840.

<sup>107</sup> *Id.* at 842.

<sup>108</sup> *Id.* at 844.

<sup>109</sup> As mentioned previously, Marlena Cervantes has no experience in animal husbandry or behavior. The credentials of Flexpetz trainers are also unknown.

<sup>110</sup> *See Arroyo*, 777 N.Y.S.2d at 842-46.

peace officer or any agent thereof, for any purpose except adoption or redemption by its owner.<sup>111</sup>

As defined in § 350 “[a]doption” means the delivery to any natural person eighteen years of age or older, for the limited purpose of harboring a pet, of any dog or cat, seized or surrendered.”<sup>112</sup> It would be safe to say that Flexpetz does not adopt pets for the “purpose of harboring a pet” but more accurately for the purpose of renting to others for a limited duration in exchange for monetary compensation. Perhaps this is also one of many circumstances where it would not be “possible”<sup>113</sup> for a dog that is in need of a home to be considered for the Flexpetz program.

In any case, it is unknown whether Flexpetz brings its dogs from other states or is privy to a network of people who are either willing to give up or sell their dogs to Flexpetz. Yet, as a matter of public policy and truthful advertising, Flexpetz should be required to disclose on its website information relating to exactly where its dogs are obtained from so that at least those who rent dogs with the intent or belief that they are helping abandoned animals in their city or state are not misled.

## V. ANIMAL WELFARE LEGISLATION IN THE UNITED KINGDOM

Having the distinct mark as the first country where a national animal society in the world was founded,<sup>114</sup> the United Kingdom is also considered to be the first country where animal protection was seriously debated by a full legislative body.<sup>115</sup> It naturally follows then that recognition of animal welfare and efforts to enact legislation to that end predate similar efforts in the United States. Whether it is the earlier establishment of the animal welfare movement in the United Kingdom or the desire of its citizens in pressing for more extensive legislation, it is clear from an examination of the below statutes and case law that the United Kingdom has stricter and broader laws to protect the welfare of animals in comparison to the United States.<sup>116</sup> Of the numerous existing laws that are applicable to animals and

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<sup>111</sup> N.Y. AGRIC. & MKTS. LAW § 374(2)(e) (McKinney 2004).

<sup>112</sup> *Id.* § 350.

<sup>113</sup> *See supra* text accompanying note 44 (There it was pointed out that Flexpetz’s website proclaims its program as helping dogs in need of rescuing or re-homing while omitting the “where possible” qualifier and the founder’s understanding that people do not want to be seen around with a mutt.).

<sup>114</sup> *See* Royal Soc’y for the Prot. of Animals, *History of the RSPCA*, [www.rspca.org.uk/](http://www.rspca.org.uk/) (follow “About the RSPCA” hyperlink; then follow “History” hyperlink) (last visited Feb. 2, 2008).

<sup>115</sup> David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800’s*, DET. C.L. REV. 1, 4 (1993).

<sup>116</sup> Just one example is The Hunting Act 2004, chapter 37, section 1, which makes unlawful the hunting of wild mammals with dogs. Hunting Act, 2004, c.37, § 1 (U.K.). Whereas, the Act does provide for exemptions, its prohibition is unparalleled in any U.S. Federal law and where limitations are imposed by the respective laws of California and New York, such limitations only proscribe to regulate the time, manner and location of hunting with dogs as opposed to announcing

activities for which they may be employed in the United Kingdom, none either explicitly prohibit or permit the renting of dogs. Therefore, this note will discuss the recently enacted Animal Welfare Act of 2006<sup>117</sup> which could either preclude Flexpetz from operating in London or have a substantial impact on its operations.

*a. The Animal Welfare Act 2006*

The Animal Welfare Act 2006 came into force on April 6, 2007 in England.<sup>118</sup> It has been described as “[t]he biggest crackdown on animal cruelty for nearly a century”<sup>119</sup> and besides raising penalties for offenses, the Act also “giv[es] law enforcement agencies the power to take action to prevent animal suffering before it has a chance to occur.”<sup>120</sup> The most pertinent part of the Act as bearing upon Flexpetz is Section 9, which states in pertinent part:

Duty of person responsible for animal to ensure welfare

- (1) A person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice.
- (2) For the purposes of this Act, an animal’s needs shall be taken to include—
  - (a) its need for a suitable environment,
  - (b) its need for a suitable diet,
  - (c) its need to be able to exhibit normal behaviour patterns,
  - (d) any need it has to be housed with, or apart from, other animals, and
  - (e) its need to be protected from pain, suffering, injury and disease.<sup>121</sup>

The Act defines “suffering” as “physical or mental suffering and related expressions.”<sup>122</sup> Further, since there is an affirmative duty upon a person responsible for an animal, in order for someone to have violated the law, the Act does not require that an animal has suffered but merely that reasonable steps have not been taken to ensure its needs. “Hence where the person knew (or ought reasonably to have known), that their actions or failed actions would be likely to result in the animal

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a general ban. *Id.*; see N.Y. ENVTL. CONSERV. LAW § 11-0923 (McKinney 2005); CAL. FISH & GAME CODE § 3008 (West 1998).

<sup>117</sup> Animal Welfare Act, 2006, S.I. 2007/499, art. 2 (U.K.).

<sup>118</sup> *Id.*

<sup>119</sup> *Overhaul for Animal Welfare Laws*, BBC NEWS, July 14, 2004, [http://news.bbc.co.uk/2/hi/uk\\_news/3891119.stm](http://news.bbc.co.uk/2/hi/uk_news/3891119.stm).

<sup>120</sup> Dog Trust, *New Laws and Bills in Progress*, <http://www.dogstrust.org.uk/information/factsheets/doglaw/newlawandbills/> (last visited Jan. 28, 2008).

<sup>121</sup> Animal Welfare Act, 2006, c. 45, § 9(2) (U.K.).

<sup>122</sup> *Id.* § 62(1).

suffering, they can be prosecuted.”<sup>123</sup> Additionally, in determining the reasonableness of a person’s action or lack thereof, an objective test is to be utilized.<sup>124</sup> This would dramatically lessen, if not vitiate the need to weigh the defendant’s assertion of having taken the proper subjective measures under the circumstances when prosecuted for not acting in accordance with the duty of care he/she owes to an animal.

Ostensibly, the practices of Flexpetz and its affects on dogs could fall within the language of the Act in respect to a “need for a suitable environment,” “need to be able to exhibit normal behavior patterns” and “need to be protected from suffering” which includes “mental suffering.” While, and as noted above, scientific studies and veterinary medicine dealing with behavioral and psychological problems in animals are only recently gaining acceptance, the explicit reference of an animal’s needs to include suitable environment, ability to exhibit normal behavior pattern and protection from mental suffering in the Act would seem to indicate a recognition and protection of those needs notwithstanding scientific proof. “Expert evidence may well be of assistance in many cases to establish not only the needs of an animal, but also whether or not they have been met in accordance with good practice. However, courts should not be afraid of concluding that these matters may well often be within their own experience and knowledge.”<sup>125</sup> It is not unfathomable that renting dogs and its detrimental effects or potential of such could be found as not meeting their needs to the extent required by good practice based on dogs’ general needs for stable environment, a hierarchical ‘pack,’ and long term bonds with human companions to name just a few.

However, much like the U.S., there is no U.K. case that addresses the specific issues raised by Flexpetz and the way in which a court may resolve a claim against the company for failing to ensure the welfare of an animal is at best speculative. Adding to the uncertainty is the fact that there are no officially reported cases of prosecutions for the newly enacted Animal Welfare Act 2006, which may have given some insight into how a court will interpret and apply the aforementioned duty of care provisions. While a number of offenses and violations of other provisions in the Act have been publicized in the media,<sup>126</sup> a case decided by the High Court of Justice

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<sup>123</sup> Dogs Trust, *Changes to Animal Welfare Legislation*, <http://www.dogstrust.org.uk/information/atozofdogs/animalwelfareacts/text.htm> (last visited Jan. 28, 2007).

<sup>124</sup> Sally Case, *The Animal Welfare Act 2006*, 169 CRIM. LAW. 3 (2007) (U.K.).

<sup>125</sup> *Id.* at 3.

<sup>126</sup> See Laura Churchill, *Geese Starved to Death on Plot with no Grazing*, N. DEVON J., Jan. 17, 2008, available at 2008 WLNR 1009394 (farm worker ordered to pay £736.06 for causing the animals’ unnecessary suffering under the Animal Welfare Act 2006 by not providing a nutritionally balanced diet and admonished by the Chairman of the Bench: “You should be ashamed of this and know better, working in the farming industry.”); see also Darren Evans, *Couple Fined for Neglect of Pedigree Dog*, THISISGWENT.CO.UK, Dec. 12, 2007, available at 2007 WLNR 24522606 (due to financial constraints a couple did not take their dog to a veterinarian when it developed a chronic skin condition resulting in substantial weight and fur loss and they were fined £520 each under the Animal Welfare Act 2006); see also Dean Kirby, *AMAN has Escaped Jail After He was Filmed Pinning a Dog to a Wall by its Throat and Repeatedly Beating it*, MANCHESTER EVENING NEWS, Jan. 17, 2008, available at 2008 WLNR 938212 (a man pleading guilty to three counts of causing

Queen's Bench Division interpreting the anti-cruelty provision of the Protection of Animals Act 1911, which was repealed and replaced by the Animal Welfare Act of 2006, may elucidate the breadth and application of the Act.

In *Hussey v. Royal Society for the Prevention of Cruelty to Animals*,<sup>127</sup> the plaintiff appealed her conviction for "causing unnecessary suffering to an animal, contrary to Section 1(1)(a) of the Protection of Animals Act 1911, on the basis that she unreasonably omitted, for want of professional advice which a responsible dog owner would have sought, to provide the dog with an adequate diet suitable for its breed, age and condition."<sup>128</sup> The plaintiff was the owner of a two year old German shepherd which was significantly underweight for a dog of its age and breed. Justices in the court below had found that the care given by the appellant to other animals in her care was satisfactory. And though the appellant was aware the dog had suffered a substantial loss of weight, her "response [was that] of a caring person"<sup>129</sup> when she fed the dog a range of food to change its diet.<sup>130</sup> Nonetheless, since the appellant had not taken the dog to a veterinarian for advice, as a reasonable person would have done, she was fined £200.00 and disqualified from having custody of a dog for two years.<sup>131</sup> On appeal, the court analyzed the language of the Section 1(1)(a) of the Protection of Animals Act 1911, which stated:

If any person-

- (a) shall...by wantonly or unreasonably doing or omitting to do any act...cause any unnecessary suffering...to any animal such person shall be guilty of an offence of cruelty within the meaning of this Act...<sup>132</sup>

In expounding on the meaning of "unreasonably," the court said: "the word 'unreasonably' connotes an objective test," the standard for which is "that of the ordinary reasonably competent, reasonably humane, modern' owner."<sup>133</sup> Furthermore, the court went on to state that "suffering becomes unnecessary when it is not inevitable in that it could be alleviated by some reasonably practical measure."<sup>134</sup>

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unnecessary suffering to his dog and disqualified from owning or keeping an animal for 10 years under the Animal Welfare Act 2006 among other penalties when his neighbor filmed him abusing the dog and though the dog seemed fine when the police were called, an RSPCA inspector was quoted as saying: "If it wasn't for the neighbour's webcam footage this dog could have ended up living in fear for years."

<sup>127</sup> *Hussey v. Royal Soc'y for the Prevention of Cruelty to Animals* [2007] EWHC (Admin) 1083 (Eng.).

<sup>128</sup> *Id.* at [1], [8].

<sup>129</sup> *Id.* at [5]

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at [7].

<sup>132</sup> *Id.* at [1] (*citing* Protection of Animals Act, 1911, c. 27, § 1(1)(a), *repealed* by Animal Welfare Act, 2006, c.45).

<sup>133</sup> *Id.* at [9] (*citing* Hall v. Royal Soc'y for the Prevention to Animals (Unreported, Nov. 11, 1993)).

<sup>134</sup> *Id.* at [1] (*citing* Royal Soc'y for the Prevention of Cruelty to Animals v. Isaacs, [1994] Crim. L.R. 517).

The appellant argued that “it . . . had to be proved by the prosecution not only that the [a]ppellant knew of the condition of the dog but also knew that that condition would, or might, lead to suffering.”<sup>135</sup> The court rejected this argument and confirmed the prosecution’s position that the only mens rea that needed to be proved was that the appellant had knowledge of the condition of the dog and that had been established by her awareness of the substantial weight loss.<sup>136</sup> The court went on to dismiss the appeal and affirm the conviction of the appellant based upon her failure to consult a veterinarian, as a reasonable person would have for the dog’s substantial weight loss which caused it unnecessary suffering.

The Animal Welfare Act of 2006 maintains the main anti-cruelty provisions of the Protection of Animals Act 1911 and also explicitly adopts the objective standard of a reasonably competent, humane owner and provides considerations for determining unnecessary suffering to include “whether the suffering could reasonably have been avoided or reduced.”<sup>137</sup> While it is clear that *Hussey* would be decided as it was even, or especially so, under the unnecessary provision of the new Act, it is also clear that the explicit reference to a suitable diet under the duty of care provision of the new Act would make a controversy such as in *Hussey* a straightforward case of statutory application rather than interpretation.<sup>138</sup>

Insofar as the operations and practices of Flexpetz can be implicated by the Animal Welfare Act of 2006, questions still remain. Foremost being: whether applying the standards (as predicated under *Hussey* and incorporated within the new Act) of unnecessary suffering (including mental suffering),<sup>139</sup> and steps as are reasonable (adjudged by an objective, humane owner) “to the extent required by good practice,”<sup>140</sup> make renting dogs unnecessarily cruel and/or failing to meet the needs of an animal and thus violative of the Animal Welfare Act 2006? In part, the answer depends on the extent to which the emotional, psychological and physical needs of a dog can be validated by veterinary medicine as well as generally recognized by society. Whereas, scientific studies are presently lacking to demonstrate and address the mental and behavioral needs of dogs, given the fervor with which Flexpetz has been admonished in the UK<sup>141</sup> as well as the Act’s imposition of a positive duty upon a person to ensure the needs of an animal, the prospect of a successful claim against the company do not seem that suppositious. “In introducing the first draft of the Animal Welfare Bill to the House of Commons in October 2005, Animal Welfare Minister Ben Bradshaw said: ‘Once this legislation is enacted, our law

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<sup>135</sup> *Id.* at [14].

<sup>136</sup> *Id.* at [13].

<sup>137</sup> Animal Welfare Act, 2006, c. 45, § 4(3) (U.K.).

<sup>138</sup> *Id.* § 9(2)(b).

<sup>139</sup> *Id.* § 62(1) (“In this Act- ‘suffering’ means physical or mental suffering and related expressions shall be construed accordingly.”).

<sup>140</sup> *Id.* § 9(1).

<sup>141</sup> See text accompanying note 64, 65; see also, Dogs Trust, *Flexpetz Comment*, [http://www.dogstrust.org.uk/press\\_office/pressreleases/2007/flexpetzcomment.htm](http://www.dogstrust.org.uk/press_office/pressreleases/2007/flexpetzcomment.htm) (last visited Feb. 2, 2008) (Dogs Trust’s press release commenting on Flexpetz stated: “Dogs Trust . . . is concerned about the emotional impact this will have upon these dogs; who does this service really benefit? Certainly not the dogs who need a stable routine and a constant owner to bond with.”); *Id.*

will be worthy of our reputation as a nation of animals lovers.”<sup>142</sup> Whether the UK wishes to endorse its reputation or advance it with the imprimatur of its laws by finding the practice of renting dogs illegal still remains to be seen. A Flexpetz location recently opened in the UK in 2008.<sup>143</sup>

## VI. CONCLUSION

United Kingdom’s Animal Welfare Act 2006 affords animals greater protection than federal and state laws in the United States. However, while the laws in the United States are unlikely to substantially impede the operations of Flexpetz and its harmful affects on dogs, it cannot be said with exactitude that UK laws will definitely fare better. Perhaps the reason why it is hard to authoritatively conclude on the legality of Flexpetz’s rental scheme is that existing laws do not fully address the needs of animals. This deficiency may very well be a product of our failure to recognize, explore and safeguard the needs of dogs and other species with whom we share the planet. Nevertheless, the Animal Welfare Act, California Penal Code § 597 et seq., New York Agricultural and Market Laws § 350 et seq., and the Animal Welfare Act of 2006 along with anti-cruelty statutes of other countries, reflect our evolving understanding of animals and our recognition of their worth to us as a society. While these laws are not all encompassing and grant exemptions for major institutional forms of exploitation,<sup>144</sup> they are still a progression in our efforts and desires to protect those that are incapable of speaking on their own behalf.<sup>145</sup>

The debate about the status of animals as property, non-property or somewhere in between as companion animal property, continues to fill the pages of scholarly articles and commentaries on the growth of Animal Law as a legal practice.<sup>146</sup> The significance of this debate lies not just in the fecundity of its legal

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<sup>142</sup> See Case, *supra* note 124 at 4, 5.

<sup>143</sup> See Flexpetz, *supra* note 15.

<sup>144</sup> See Wayne Pacelle, *Law and Public Policy: Future Directions for the Animal Protection Movement*, 11 ANIMAL L. 1, 3 (2005) (“Yet the body of law that now exists is porous and weak in confronting major institutional forms of animal exploitation. There are no categories of animal research that are forbidden, and there are but a handful of laws that exist to protect animals reared for food production.”).

<sup>145</sup> Cf. Lesley J. Rogers, Gisela Kaplan, *Think or be Damned: The Problematic Case of Higher Cognition in Animals and Legislation for Animal Welfare*, 12 ANIMAL L. 151 (2006) (Authors Dr. Lesley and Dr. Kaplan are both full professors in the Centre of Neuroscience and Animal Behaviour at the University of New England, N.S.W., Australia. Their article discusses the expansion of research on the higher cognitive abilities of animals and reaction of lawmakers to such scientific studies. However, it argues that scientific processes used to research cognitive abilities in animals that have served as the impetus for legislators and the general public to accord certain animals greater rights and protections is counterproductive inasmuch as they exclude other animals since not all scientific processes adequately gauge or reflect the sensory perception and higher cognitive abilities of animals.).

<sup>146</sup> See David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. 87 (2004) (author argues that maintaining the legal status of animals as property and increasing the legal

analysis but also in how it is to such a great extent an acknowledgement of our sensitivities to the needs of animals. As offensive and demoralizing one might find the idea of renting dogs and the fact that it is lawfully permitted at the moment, one should also be comforted by the fervor with which the majority of the public has condemned such a practice.

Most important to note is that while pointing out the ignorance and short sightedness of Flexpetz, critics continue to affirm the benefits of dog companionship and encourage people to spend time with dogs but in a way that also benefits those animals who need it the most. “The ASPCA recommends that if you are unable to have a pet of your own due to time or other constraints...you can volunteer at your local animal shelter where you can walk dogs, socialize cats and help pets find new homes, without committing an extensive amount of time to a companion animal.”<sup>147</sup> Similarly, the Humane Society of the United States “urges dog lovers unable to make a life-long commitment to a pet to seek better and equally fulfilling options. Animal shelters and dog rescue organizations across the country seek caring volunteers to spend quality time with animals available for adoption, for play-time, walking and other forms of socialization. People can also provide foster care, in their home, for a dog or cat who needs extra attention while he or she awaits a permanent adoptive family.”<sup>148</sup> Programs that allow people to interact with dogs are available throughout the country and in contrast to Flexpetz, they cost absolutely nothing.<sup>149</sup> Analogous programs also exist in the UK, where a person desperate to spend time with a dog can volunteer at a Rehoming Centre and for no cost “spend time with many different dogs of all shapes and sizes, pedigrees and crossbreeds, as well as hav[e] the knowledge [they] are really making a difference to their lives.”<sup>150</sup>

Perhaps no other animal has served humans as well as the dog. Notorious for unconditional love and unyielding loyalty, dogs instinctively seek our approval

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obligations that humans have to animals in their care is in the best interest of the animals); *see also* Gary Francione, *Reflection on Animals, Property, and the Law and Rain Without Thunder*, 70-WTR LAW AND CONTEMP. PROBS. 9 (2007) (author argues that the property status of animals should be done away with altogether as it is a “substantial impediment to the meaningful protection of nonhuman interests”); *see also* Susan J. Hankin, *Not a Living Room Sofa: Changing the Legal Status of Companion Animals*, 4 RUTGERS J.L. & PUB. POL’Y 314, 379 (2007) (author proposes a new category of Companion Animal Property. “The ‘companion animal property’ category would thus take into account companion animals’ dependence on their human owners, their capacity to suffer if mistreated or neglected, and the bonds that we form with our animals and that they form with us.”); *see also* Terry Carter, *Beast Practices*, ABA JOURNAL, Nov. 2007, at 39.

<sup>147</sup> The American Socy’ for the Prevention of..., *supra* note 62.

<sup>148</sup> The Humane Soc’y of the United States, *supra* note 60.

<sup>149</sup> *See* Flaim, *supra* note 20 (while discussing different ways for people to spend time with dogs and doing so in a way that benefits the countless number of dogs that are in pounds or shelters, the author discusses Rent-A-Pet, started by Randy Grim, founder of Stray Rescue of St. Louis, which is the mirror image of Flexpetz but it does not cost anything. “Volunteers are assigned ‘home-work:’ Get your dog used to the sound of a vacuum. Take him for his first car ride. Teach her how to climb stairs. A behaviorist and an obedience trainer are on stand-by in case of roadblocks.”).

<sup>150</sup> Dogs Trust, *Flexpetz Comment*, [http://www.dogstrust.org.uk/press\\_office/pressreleases/2007/flexpetzcomment.htm](http://www.dogstrust.org.uk/press_office/pressreleases/2007/flexpetzcomment.htm) (last visited Feb. 2, 2008).

and derive pleasure from our company. Despite being ill-treated or met with indifference, dogs have an affinity with humans that is unparalleled between any two species on this planet.<sup>151</sup> To the extent that Flexpetz's practices injure dogs and further perpetuate the obtuse misconception that dogs are commodities or fashion accessories, they should be outlawed. Dogs are sentient beings with complex emotional and physical needs. These needs may not be readily recognized by the law or addressed in our animal welfare statutes but that does not make the practices of Flexpetz any less cruel or inhumane.

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<sup>151</sup> See Charles Darwin, *The Descent of Man* 71 (2nd ed., Prometheus Books 1998) (1874), also available at [http://www.darwin-literature.com/The\\_Descent\\_of\\_Man/5.html](http://www.darwin-literature.com/The_Descent_of_Man/5.html) ("In the agony of death a dog has been known to caress his master, and every one has heard of the dog suffering under vivisection, who licked the hand of the operator.").