

Checklist for Co-Branding Agreements

1. Title of contract

Samples

- Co-Branding Agreement
- Joint Marketing Agreement with Limited Trademark License
- Joint Marketing Agreement
- Strategic Alliance Agreement
- Strategic Alliance Memorandum of Understanding

2. Identity of the parties

- Individuals or business entities;
- In a Co-branding agreement, one party who generally has a developed web concept, creates a Co-branded page, accessible through the web page of the other party;
- If businesses, what type? (partnership, corporation, LLC, etc.);

3. Addresses of the parties

Sample for identity of parties and addresses:

Agreement made on the _____ (**date**), between _____
_____ (**Name of Corporation Alpha**), a corporation organized and
existing under the laws of the state of _____, with its principal office located
at _____
(**street address, city, state, zip code**), referred to herein as *Alpha*, and _____
_____ (**Name of Corporation Beta**), a corporation organized and
existing under the laws of the state of _____, with its principal office
located at _____
_____ (**street address, city, state, zip code**), referred to herein as *Beta*.

4. General Purpose of Co-Branding Agreements

- Co-branded agreements generally include the business concept and certain information about both parties;
- The parties generally agree to the financial relationship relative to revenues from the Co-branded page.
- Agreement allocates responsibilities for development and ongoing financial responsibility.

Samples:

- Advertisements and Promotion
- Joint Marketing

5. Preliminary Matters – Matters generally contained in the opening paragraph

- What party owns the copyrights? Make sure all parties with rights that are affected are made parties to the agreement.
- Describe the purpose for entering the agreement.

- Describe the general business of the page to be Co-branded.
- What is the scope of that page? What scope of rights are being subject to the Co-branded page? Describe all aspects of what is being Co-branded.
- Describe the URL locations of the various pages.
- Generally described the fact of the development responsibility over the Co-branded pages.

6. Responsibilities Concerning Development of Co-Branded Pages

- Describe what party is responsible for developing the Co-branded page(s). Generally this will be the owner of the primary page.
- Any compensation for creating the Co-branded page? Will expenses be passed to the non-developing party? What will those expenses be?
- What content will be included in the Co-branded page(s)?
- Will look, feel and functionality be the same as the primary site?
- Is any material from primary site prohibited from being used in the Co-branded page?
- Will the non-developing party have approval rights over final page?
- Will the site be accessible during the development?
- What delivery obligations relative to web site content? (Text, Graphics, Logo, Product, etc.)
- What obligations concerning updating the Co-branded pages?
- What if the primary site changes. Does the Co-branded site also change?

7. Marketing and Linking Obligations

- What are the responsibilities of each party to market the Co-branded page(s)?
- Define any specific requirements relative to marketing
- Must a specific marketing budget be dedicated to marketing the site? Or to the site through which users will gain access to the Co-branded site?
- Must the owner of the primary site provide a link from its page to the Co-branded or other pages of the developing party? What is the positioning, size, content of those links? Must the primary site owner provide graphics etc for placement on the web site?
- Will the owner of the primary site have any responsibilities concerning marketing? Will it provide assistance in marketing, consultation, etc.?
- Will there be any special offers or promotions that will apply to users what party access the Co-branded site? Will these users be offered the same promotions etc. as the primary customers?
- What party will be responsible for funding advertising? Will owner of primary site make any contribution to advertising?
- Will the parties do a joint press release announcing the affiliations? If so, what party will pay the cost? What is the scope of the press release? What service will be used?

8. Customer and Technical Support

- What party will provide customer service to users accessing the Co-branded page?
- It usually makes sense to have the owner of the primary site provide customer service as that party has existing mechanisms and knows its own business.
- Is there any additional compensation for customer support?
- Define parameters of customer service responsibilities.

9. Copyrights, Trademarks, Other Intellectual Property

- Define what party has rights to various intellectual property.
- Content, logos, graphics, *etc.*
- Provide for licenses where one party is permitted to use the intellectual property of the other party.
- Provide for license of materials contained in links that will be included on web sites. This should include a license to use trademarks where appropriate.
- Permit use of trademarks of the non-developing party to be included on the Co-branded page.
- What party owns the rights to the Co-branded pages upon termination of the agreement? Generally these rights will go to the owner of the primary site, subject to trademarks and other proprietary materials of the other party which revert to that party.

10. Monitoring of Activity

- What party will collect revenues from the Co-branded page?
- What party will keep track of sales, click-throughs, impressions on the Co-branded page?
- What responsibilities for reporting this information to the other party?
- Does it tie into compensation?

11. Compensation

- Fixed up front payment to the developing party?
- Development fee, plus “license fee” One time up front payment.
- Percentage of advertising revenues?
- Percentage of sales made through Co-branded page(s)?
- Click-throughs to Co-branded pages?
- Percentage of membership fees?

12. Exclusivity

- Should the party for whom the Co-branded site is created be permitted to enter into other Co-branding relationships?
- Within the scope of the products, services and content of the Co-branded page?
- Competitors or non-competitors of the developing party?

13. Confidentiality and Trade Secrets

- Almost inevitably, each party will come into contact with confidential information and trade secrets of the other party in the course of the relationship.
- This material may include marketing plans and strategies, programming techniques, financial information, advertising and referral source, and what party will host of other information that the disclosing party will consider of strategic importance.
- It is important to include a standard confidentiality clause in a Co-branding agreement.

14. Representations and Warranties

- What representations and warranties are to be made by the parties?
- Are certain warranties disclaimed (e.g., merchantability or fitness for a particular purpose)?
- How long are any warranties good for?

15. Term and Termination of Agreement

- How long will the agreement last?
- What are occurrences that can lead to early termination?
- Can either party terminate the relationship without cause?
- Where significant marketing dollars are involved, the parties will want to give the relationship a long enough time to determine whether it will be fruitful.
- At the same time, if there are ongoing payments required for marketing and advertising, at some point the party responsible for these payments may want to say “enough is enough”
- What obligations do the parties have to each other upon termination?
 - Ongoing payments for receivables received after termination
 - Delivery of proprietary information
 - Discontinue using trademarks and other intellectual property?
 - Do any provisions (i.e. confidentiality requirements) survive the termination of the agreement? If so, how long do they last?

16. Indemnification agreement

- Is there indemnification for certain breaches or problems?
- What is the procedure required to obtain indemnification?
- Is there a cap on or exclusions from indemnification?

17. Default

- What are the events of default?
- Does a party have a period to cure a default?
- What are the consequences of a default?

18. Arbitration clause

- How are disputes to be handled – litigation, mediation or arbitration?
- If arbitration, what rules will govern? (e.g., American Arbitration Association)
- If arbitration, how many arbitrators and how will they be picked?

- If arbitration, will there be procedures for discovery and what the arbitrator can and can't do?
- If litigation, where can or must the litigation be brought?

Sample:

Any dispute under this Agreement shall be required to be resolved by binding arbitration of the parties hereto. If the parties cannot agree on an arbitrator, each party shall select one arbitrator and both arbitrators shall then select a third. The third arbitrator so selected shall arbitrate said dispute. The arbitration shall be governed by the rules of the American Arbitration Association then in force and effect.

19.

Waiver

- An assertion that any delay or partial pursuit by one party of its rights against the other party does not constitute a forfeiture of the right to later seek further or complete remedy or redress to a situation, should the need arise.

Sample:

The failure of either party to this Agreement to insist upon the performance of any of the terms and conditions of this Agreement, or the waiver of any breach of any of the terms and conditions of this Agreement, shall not be construed as subsequently waiving any such terms and conditions, but the same shall continue and remain in full force and effect as if no such forbearance or waiver had occurred.

20.

Assignment

- Identifies if either party to the contract can transfer the contract, in whole or in part, to another party, and under what conditions (if any).

Sample:

The rights of each party under this Agreement are personal to that party and may not be assigned or transferred to any other person, firm, corporation, or other entity without the prior, express, and written consent of the other party.

21.

Severability

- Explains that if any of the provisions of the contract are rendered null and void, all other provisions remain in force.

Sample:

The invalidity of any portion of this Agreement will not and shall not be deemed to affect the validity of any other provision. If any provision of this Agreement is held to be invalid, the parties agree that the remaining provisions shall be deemed to be in full force and effect as if they had been executed by both parties subsequent to the expungement of the invalid provision.

22.

Notice

- Describes how and where the parties shall formally communicate to each other in the event they need to take such action (e.g., all notices shall be deemed to have been received by the other party within five working days if sent by regular mail to the addresses below).

Sample:

Unless provided herein to the contrary, any notice provided for or concerning this Agreement shall be in writing and shall be deemed sufficiently given when sent by certified or registered mail if sent to the respective address of each party as set forth at the beginning of this Agreement.

23. Entire Agreement

- Explains that the written contract is the only description of the agreement between the vendor and buyer, regardless of what may have been previously stated or written down. Explains the process for updating the contract (often based upon mutual agreement, in writing).

Sample:

This Agreement shall constitute the entire agreement between the parties and any prior understanding or representation of any kind preceding the date of this Agreement shall not be binding upon either party except to the extent incorporated in this Agreement.

24. Signatures of authorized signatories

- What authority is required for one party to sign the contract (e.g., Board of Directors approval)?
- How many signatures are required?
- Are the signature blocks correct?

25. Attorneys fees

Sample:

In the event that any lawsuit is filed in relation to this Agreement, the unsuccessful party in the action shall pay to the successful party, in addition to all the sums that either party may be called on to pay, a reasonable sum for the successful party's attorney fees.

26. Modification of Agreement

Sample:

Any modification of this Agreement or additional obligation assumed by either party in connection with this Agreement shall be binding only if placed in writing and signed by each party or an authorized representative of each party.

27. Survival

Sample:

This Agreement shall be binding upon, inure to the benefit of, and be enforceable

by _____ (**Party A**), its successors, and assigns; and
_____ (**Party B**), its successors and assigns.

28. Necessary Acts and Further Assurances

The *Necessary Acts and Further Assurances* clause in a contract is a catchall clause that can be used to require a party to sign a document or perform some act that is not specifically required elsewhere in the contract. This clause can be particularly useful for two reasons: (i) it can be used to require an act in the future not anticipated at the time the agreement was signed; and (ii) it allows the parties not to have to draft the contract down to the most excruciatingly detailed points.

Sample:

The parties shall at their own cost and expense execute and deliver such further documents and instruments and shall take such other actions as may be reasonably required or appropriate to evidence or carry out the intent and purposes of this Agreement or to show the ability to carry out the intent and purposes of this Agreement.

29. Specific Performance

An *order of specific performance* is an order of the court which requires a party to perform a specific act, usually what is stated in a contract. It is commonly used in the form of injunctive relief concerning confidential information or real property. While *specific performance* can be in the form of any type of forced action, it is usually used to complete a previously established transaction, thus being the most effective remedy in protecting the expectation interest of the innocent party to a contract. It is usually the opposite of a prohibitory injunction but there are mandatory injunctions which have a similar effect to specific performance.

30. Governing law

Sample:

This Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of _____.

31. Representation on Authority of Parties

A *representation on authority of parties/signatories* clause of a contract states that the parties who sign the agreement have the authority to bind the parties to the agreement. When you sign your contract with another party, you are not asking for this person's autograph — you want the signature to certify that that party has the authority to sign the contract and have it be legally binding.

Sample:

Representation on Authority of Parties/Signatories.

Each person signing this Agreement represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each party represents and warrants to the other that the execution and delivery of the Agreement and the performance of such party's obligations hereunder have been duly authorized

and that the Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.

32. Force Majeure

Force majeure is a term that generally refers to an irresistible force or overcoming power. It affects someone's ability to do something and may be used as a legal excuse for not having carried out the terms of a contract. It is a form of the impossibility defense. In some cases, the defense may not apply, such as when there are terms requiring a backup or contingency plan to be in effect.

The following is an example of a force majeure clause in a contract:

No Party shall be liable for any failure to perform its obligations where such failure is as a result of Acts of Nature (including fire, flood, earthquake, storm, hurricane or other natural disaster), war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, terrorist activities, nationalization, government sanction, blockage, embargo, labor dispute, strike, lockout or interruption or failure of power sources.

33. Name of Person Signing on Behalf of the Business

Sample:

_____	_____
<i>(Name of Party A)</i>	<i>(Name of Party B)</i>
By: _____	By: _____
_____	_____
<i>(Printed Name & Office in Corporation)</i>	<i>(Printed Name & Office in Corporation)</i>
_____	_____
<i>(Signature of Officer)</i>	<i>(Signature of Officer)</i>

34. Notary

Acknowledgment form may vary by state. The following is a generic sample:

STATE OF _____

COUNTY OF _____

Personally appeared before me, the undersigned authority in and for the said county and state, on this _____ day of _____, 20____, within my jurisdiction, the within named _____ **(Name of Officer)**, who acknowledged that he is _____ **(Name of Office)** of _____ **(Name of Corporation)**, a _____ **(name of state)** corporation, and that for and on behalf of the said corporation, and as its act and deed he executed the above and foregoing instrument, after first having been duly authorized by said corporation so to do.

My Commission Expires:

NOTARY PUBLIC