



7-1-2002

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Mike Rodenbaugh, Alan N. Herda & Mari Stewart, *Cobranding on the World Wide Web*, 8 Tex. Wesleyan L. Rev. 665 (2002).

Available at: <https://doi.org/10.37419/TWLR.V8.I3.13>

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COBRANDING ON THE WORLD WIDE WEB

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I. INTRODUCTION.....	665
II. SEPARATE PARTY IDENTITY AND GOODWILL.....	668
A. <i>Contract Provisions</i>	669
B. <i>End-User “Terms of Service” Agreement</i>	669
III. SUBSTANTIVE OBLIGATIONS	671
A. <i>Site Hosting and “Ownership”</i>	671
B. <i>Content and Service Delivery</i>	672
C. <i>User Data and Privacy Issues</i>	673
D. <i>Security</i>	674
E. <i>Auditing and Measuring Metrics</i>	674
F. <i>Promotions</i>	675
G. <i>Exclusivity</i>	675
IV. RISK ALLOCATION.....	676
V. TERMINATION OF COBRANDING RELATIONSHIPS.....	677
VI. UNAUTHORIZED COBRANDING OF WEBSITES	678
VII. CONCLUSION	678

I. INTRODUCTION

Cobranding, the process of forming partnerships to “boost sales and build brand awareness,”¹ is perhaps more prevalent in the online world than in the “real world.” On the World Wide Web (Web), cobranding typically involves displaying two parties’ brands together on a website owned by one party and often incorporates links to a website owned by the other party, such that the website user “considers the site or feature to be a joint enterprise.”²

The prevalence of cobranding on the Web is due in part to the ease of creating and distributing online marketing materials, even as to

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1. BUSINESS 2.0 GLOSSARY at <http://www.business2.com/glossary/1,1652,B,FF.html> (last visited Apr. 25, 2002) (defining “branding”). Another definition of cobranding is the “integration of product or service offerings of two or more companies, and . . . [the] utiliz[ation of] the brand names of the parties to the transaction in a manner designed to draw one party’s customers to the other party’s goods or services.” Stephen N. Hollman, *E-Commerce Licensing Agreements*, 617 PLI’S SIXTH ANN. INST. FOR INTELL. PROP. L. 445, 448 (2000).

2. Diane W. Savage, *Cobranding Agreements*, 644 ADVANCED LICENSING AGREEMENTS FOR NEW ECON. 345, 347 (2001).

physical goods, and the breadth of online services and business models that have been developed. For example, Yahoo! cobrands entire business units,³ charitable promotions,⁴ and content from Reuters, Associated Press, and many other sources. In addition, many companies cobrand services such as Internet services with Internet Service Providers (ISPs), tax filing, and other financial services.

There are many web services available that parties may want to place on their websites.⁵ Often such arrangements are called "affiliate programs."⁶ Specific examples of such web services include search engines or web-based calendars;⁷ communication services such as email and instant messaging, chat rooms or message boards;⁸ storage space;⁹ content that a client may want to distribute such as stock quotes, newsletters, or psychology tests;¹⁰ co-marketing ventures and promotions of all varieties;¹¹ and financing.¹²

Accompanying the myriad types of services that are available on the Web are a multitude of cobranding business model experiments. In general, it is much easier and cheaper to use another entity's service or content than to develop original content. The question is at what price, if any, should the service or content be offered. Cobranding business models may be divided into two broad categories, revenue models and non-revenue models.

3. See, e.g., OFFICIAL SITE OF THE 2002 FIFA WORLD CUP, at <http://fifaworldcup.yahoo.com> (last visited Apr. 25, 2002).

4. See AMERICAN RED CROSS, at <http://relief.yahoo.com/redcross> (last visited June 21, 2002).

5. See generally BRAVENET WEB SERVICES, at <http://www.bravenet.com> (last visited June 21, 2002) (providing an extensive set of Web services available for cobranding).

6. See, e.g., AFFILIATE PROGRAMS CAN HELP YOU EARN YOUR LIVING ONLINE!, at <http://www.affiliatematch.com> (last visited Apr. 25, 2002); AFFILIATE PROGRAMS DIRECTORY, at <http://www.associateprograms.com> (last visited Apr. 25, 2002); AFFILIATE PROGRAMS, at <http://www.affiliateguide.com> (last visited Apr. 25, 2002). These websites describe affiliate programs and provide affiliate program directories.

7. E.g., YOUR OWN FREE CUSTOM MONEYSEARCH.COM SEARCH ENGINE FOR YOUR WEB SITE, at <http://moneysearch.com/searchcobrand/cobrand.html> (last visited Apr. 25, 2002); COBRANDING OPPORTUNITIES, at <http://www.localendar.com/calendar/cobranding> (last visited Apr. 25, 2002).

8. E.g., CERTIFIED MAIL PARTNER PROGRAM, at <http://certifiedmail.com/partners/default.asp> (last visited Apr. 25, 2002); CO-BRANDING SERVICES FOR YOUR WEBSITE, at <http://virtuallyignorant.com/cobranding.htm> (last visited June 19, 2002).

9. E.g., XDRIVE TECHNOLOGIES, WELCOME TO XDRIVE TECHNOLOGIES, THE INTERNET INFORMATION MANAGEMENT COMPANY, at <http://www.freedrive.com> (last visited Apr. 25, 2002).

10. E.g., COBRANDING PROGRAM, at <http://www.oshillman.com/cobrandingprogram> (last visited June 21, 2002) (fund raising); CO-BRANDING, at <http://www.psychtests.com/usetest/cobranding/index.html> (last visited Apr. 25, 2002) (psychology tests).

11. See, e.g., BID4VACATIONS.COM, AFFILIATE APPLICATION, at http://www.bid4vacations.com/affiliate_app.jsp (last visited June 21, 2002).

12. E.g., FINANCE, FUNDING & OPPORTUNITIES, at <http://www.moneyzone.com/usa/affiliates> (last visited Apr. 25, 2002).

Most models are revenue-based, involving some sort of revenue sharing so that the risk between the cobranding partners is evenly distributed. There are many forms of revenue and many ways to share it. These revenue sharing payments are called “commissions” or “bounties,” and minimum guarantees are often negotiated.

There are several popular revenue models, generally labeled in terms of the method used to determine the payments to be made by the party displaying its brand on the other party’s website.¹³ One such model, called “per click” payment, requires the party displaying its brand on the other’s website to pay for traffic sent to its service. This “per click” payment is sometimes conditioned upon the user registering on the website, purchasing a product, or making some other affirmative action. Another model, called “per subscriber” payment, allows payment to be tendered for actual subscriber sign-up. Parties may share future subscription revenue, and may also require ongoing payment from the user for a period of time before revenue sharing begins. Another model is called “per use,” where revenue from actual user purchases is shared—essentially a royalty-based model.

Two additional revenue sharing models include advertising and licensing. In the former, advertising takes place within the service or content and/or on the cobranded site.¹⁴ The revenue generated from this advertising then may be shared. In a licensing model, user data from the cobranded site may be licensed for marketing or other purposes.

The second broad category of cobranding business models are non-revenue models. There are at least three reasons why parties might cobrand a website, web-based service, or web-based content despite the lack of any revenue to one of the parties.¹⁵ The first reason relates to future revenue. A party may want to distribute its service or content with its design on future revenue streams. For example, Microsoft is offering any website (subject to specified guidelines, of course!) the opportunity to cobrand its “Passport” software because it hopes to make Passport ubiquitous on the Web.¹⁶ The second primary reason for non-revenue models is traffic-building promotion.¹⁷ Instead of revenue generation, the party may want to increase user traffic to its website or web-based service or content. Another reason is

13. Eric Goldman & Candace Lee, *Understanding Internet Co-Branding Deals*, 16 SANTA CLARA COMPUTER & HIGH TECH L.J. 65, 67 (1999) (discussing different payment types and “variable fees based on user activity”); see Savage, *supra* note 2, at 358 (discussing “user activity” fees).

14. Savage, *supra* note 2, at 358–59.

15. See Goldman & Lee, *supra* note 13, at 67–68 (discussing different perspectives and additional motives for cobranding).

16. MICROSOFT, MICROSOFT .NET PASSPORT, at <http://www.passport.com/Consumer/DotNETBranding.asp?1c=1033> (last visited June 25, 2002) (describing generally Microsoft’s .NET Passport program).

17. Savage, *supra* note 2, at 358–59.

charitable promotion, where the party desires to increase awareness of a particular charity or cause.

Regardless of the type of cobranding revenue model used, development or setup fees require consideration.¹⁸ These start-up costs are often negotiated because generally one party will have to engineer its technology to coordinate with the other party's technology.

The drafting of cobranding agreements¹⁹ related to websites requires the consideration of the cobranding parties' needs as well as the end-user experience. This Article outlines most of the primary issues to consider when drafting agreements related to cobranded websites, including: separate party identity and goodwill, substantive obligations, risk allocation, termination of the cobranding relationship, and unauthorized cobranding of websites.²⁰

II. SEPARATE PARTY IDENTITY AND GOODWILL

It is of paramount importance that the parties' cobranded website agreement and course of performance confirm each party's separate identity and core goodwill. Toward this goal, before signing the cobranding agreement, the contracting parties should ascertain, to the fullest extent possible, exactly how the web page will look to the user and exactly what each party is contributing to the website. Mock-ups and schedules of work should be negotiated and attached to the Agreement as Exhibits.

Standard contract provisions will support the notion of separate identity and goodwill; however, course of performance—how the website and marketing actually appears to the user—will often blur the distinction between the parties' brands and services. This is understandable given the small size of a viewable web page²¹ and the fact that many services may be offered through one "portal" page. This reality emphasizes the importance of both parties' contract provisions and the public "user agreement" provisions.

18. See Goldman & Lee, *supra* note 13, at 74–77 (discussing development, placement, and other fees); Savage, *supra* note 2, at 357–58 (discussing development and other fees).

19. One definition of a cobranding agreement is that it is a "license agreement pursuant to which two parties agree to license their trademarks to each other so that either party can offer an agreed upon good or service under both trademarks." Savage, *supra* note 2, at 347.

20. Goldman & Lee, *supra* note 13, at 79–80 (discussing trademark policing and licensing). In addition to these primary concerns, there are other issues that should be addressed, especially in relation to trademark law. See generally Hollman, *supra* note 1, at 448–49 (discussing trademark policing, abandonment, searches in targeted and/or host jurisdictions); Savage, *supra* note 2, at 353–54 (discussing trademarks, licensing, and registration).

21. The small size of a viewable web page is getting smaller, particularly in the more "mobile" future of the Web.

A. *Contract Provisions*

To ensure the parties' separate identities and goodwill, standard contract terms in a cobranding agreement should include cross-licensing, intellectual property ownership, action approval procedures, "no joint venture" clauses, and confidentiality provisions. Via cross-licensing provisions, the parties may exchange rights to use, copy, distribute, publicly display, and/or perform copyrighted material, trademarks, and other intellectual property. Such cross-licensing terms are narrowly tailored, but typically provide for worldwide use. In addition, these licensing terms are generally non-transferable and non-exclusive.

In regard to intellectual property (IP) ownership, all use of a party's IP must flow to that party's benefit alone. Each party should promise not to register, materially alter, or reverse engineer the other party's IP. Furthermore, the agreement should provide that the stated guidelines governing the use of each party's respective IP will be adhered to by the other party. Approval procedures and timing provisions should be included in the event of material change to the content, service, or website. Periodic review sessions of the subject web material are advisable to ensure that such approval procedures are being followed. Where each party is an independent contractor who cannot legally bind or make representations as to the other, it is important to include a "no joint venture" clause.²² In regard to confidentiality, the contract should provide that there be no publicity with respect to contractual matters without joint, prior written consent. Also, all terms of the contract should be deemed confidential.

B. *End-User "Terms of Service" Agreement*

In addition to standard contract provisions, the public "user agreement" provisions are very important in confirming the parties' separate identities and goodwill. These provisions, which may also be collectively called the end-user "terms of service" agreement (TOS), are communicated to inform the end-user as to which party is providing the service or content that is being accessed. The TOS should be in plain language and state clearly what each party is providing to the user, *so as to prevent any confusion as to the source of the services*.

In practice, clear and posted TOS agreements are difficult to find. This may be a reflection of the fact that the industry is still relatively young and that little litigation has occurred. Another reason for the rare use of TOS agreements is that common cobranding scenarios involve one site using content and services from many different sources. In these scenarios, having several different agreements for each

22. "Co-branding agreements are not joint ventures because no new company is formed by the parties as a result of the co-branding relationship." Hollman, *supra* note 1, at 448.

source may clutter the site and possibly confuse the user, detracting from the overall user experience. A possible alternative to not having any agreements at all is to have each component of the site contain a link to the applicable TOS for that service.²³

Though multiple TOS agreements on one site may be confusing to the user, these contracts provide important protection to the cobranding parties. There are several items that should be included within any TOS agreement.²⁴ The first item addresses the user's acceptance of a client's terms of service. If a client provides services to a cobranded website, then there must be an automated process that ensures a record that the user agrees to the service provider's terms and disclaimers. The second item is a corollary to the first: if instead the client utilizes the other party's service or content on its cobranded site, then there should be terms that (a) ensure that this outside source configuration is clear to the user; (b) disclaim liability for the services or content of the outside source; and (c) ensure that users have an adequate ability to proffer questions or claims directly to the service provider.

Regardless of which party is providing the services, there are at least four items that will probably apply equally to all parties and should be included in any TOS agreement. First, the TOS should state how the user may send notices to the appropriate party or parties. Second, the terms of service should state that uninterrupted service is not guaranteed, disclaim all warranties, and otherwise limit the site's liability to the extent practicable. Damage caps, even as low as one dollar, are commonplace.

Third, the terms of service generally should preclude any commercial, illegal, high-volume, or other objectionable use by the consumer and permit the discontinuance of the service at any time and for any reason. Of course, where the user is paying for the service, her expectations may dictate different terms.

Finally, but very importantly, the cobranded site should have a Privacy Policy that (a) clearly defines how any data concerning a user's identity and activity may be used by either party; (b) states how cook-

23. Contract terms governing services or material provided on a website should require the user to make a positive act of assent to the contract terms at the time service or material is made available to the user or the terms may not be held enforceable. *See* *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 595-96 (S.D.N.Y. 2001) (holding Netscape's browse-wrap license agreement unenforceable due to the lack of (1) a positive act of assent and (2) notice to the user that a contract was being entered into). *But see* *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 980-82 (E.D. Cal. 2000) (suggesting that a binding contract may be formed when a user views the terms posted on a website or simply follows a link to a page displaying the license agreement terms).

24. All of these items ideally would be considered in drafting both the "user agreement" provisions section of the cobranding agreement between the two cobranding parties, and the equivalent "terms of service" agreement assented to by each user of the cobranded service.

ies, beacons, or other tracking technologies are used on the site; and (c) demonstrates compliance with all regulations of the targeted and/or host jurisdiction or jurisdictions.²⁵ Privacy is a key issue for most web users, so every website provider must be vigilant in how they handle personally identifiable user data.

III. SUBSTANTIVE OBLIGATIONS

The second primary issue involved when drafting a web-based cobranding agreement concerns the parties' substantive obligations. The parties should resist the temptation to leave out any of these obligations to a future "mutual agreement." There are seven substantive obligation areas that must be addressed: (1) site hosting and "ownership;" (2) content and/or service delivery; (3) user data and privacy issues; (4) security; (5) auditing and/or measuring metrics; (6) site and/or service promotion; and (7) exclusivity.

A. Site Hosting and "Ownership"

The first substantive obligation to be included in the cobranding agreement concerns site hosting and "ownership." There are many possible ownership scenarios, depending on the circumstances of each prospective site. Because deemed ownership may result in liability, these issues should be carefully considered and specified in the parties' agreement.

One ownership obligation issue to be addressed concerns the site's domain name and/or uniform resource locator (URL). Generally, parties will agree to a new domain name and/or URL that will host the site. Often, this new domain name will contain both parties' trademarks, such as *pepsi.yahoo.com* or *aol.com/cocacola*. The agreement should specify which party will "own" the traffic and therefore count that traffic in its Media Metrix²⁶ or NetRatings²⁷ statistics.²⁸

Either party may be considered to "own" a portion or all of the site, depending upon which has ultimate control over the "look and feel" and/or other content. However, site ownership may be dependent upon which party controls the registration and ownership of the domain name. Although only one party may host the site, that party may merely provide the hosting service and will not necessarily "own" the site. Because real ownership may be determined in different ways

25. See generally Savage, *supra* note 2, at 355-56.

26. "Jupiter Media Metrix analyzes and measures the end-to-end impact of the Internet and new technologies on commerce and marketing." Jupiter Media Metrix, JUPITER MEDIA METRIX, at <http://www.jmm.com> (last visited June 11, 2002).

27. NetRatings, Inc. provides Internet audience measurement and analysis in partnership with Nielsen Media Research and ACNielsen. GLOBAL LEADER IN INTERNET MEDIA & MARKET RESEARCH, at <http://www.netratings.com> (last visited June 11, 2002).

28. See Goldman & Lee, *supra* note 13, at 79-80.

depending upon the context of the issue, it is important that these issues be as explicitly resolved as possible in the cobranding agreement.

B. *Content and Service Delivery*

The second substantive obligation to address when drafting the cobranding agreement is the regulation of content on the cobranded website and the delivery of services to users. The contract should specify how frequently services or other content will be delivered to the website host and the technical means of delivery. The obligations of the host to deliver content or services to end-users should also be carefully detailed in the agreement.²⁹

The parties must determine whether the host will have the practical ability to monitor the content that is delivered. If the host is given the right to materially alter the website content or delay delivery to end users, the agreement should specify the scope of the host's right and the procedures that will be required before that right may be invoked. On the other hand, if the host is not given the right to monitor or alter content, or does not exercise that right, the host may be better shielded against potential liability arising out of the delivered content.

The contract should also specify the various placements, types and frequencies of any advertising, and provide for how this advertising will be served.³⁰ Frequently, a third-party ad server will be utilized; however, these third-party servers can further complicate the technical design of the website and the analysis of the parties' potential liabilities.³¹

To ensure that each party's expectations will be fulfilled, counsel should also consider the imposition of performance requirements in the cobranding agreement. For example, a website may be expected to be accessible to users ninety-nine percent of the time and serve a certain number of simultaneous requests within a specified amount of time.³² Each party's respective "customer care" obligations should also be provided for in the contract to ensure that a visitor to the

29. *See id.* at 81–82.

30. *See Savage, supra* note 2, at 358–59.

31. *See id.*

32. Goldman & Lee, *supra* note 13, at 81.

Uptime refers to the percentage of time that the co-branded site is available to users. Ideally, the co-branded site will be available 24 hours a day, 7 days a week without interruption. However, usually the parties will agree that the site will be up some lesser percentage of time (*e.g.*, 99%).

...

Slow servers can be as bad as down servers, so the parties may agree on a minimum time it takes for servers to respond to referral requests.

cobranded website will have a positive experience.³³ Reasonable customer care performance obligations that may be imposed include providing that each query must receive a reply within forty-eight hours, or if more than five percent of unique users complain during a one year period, then the agreement may be terminated. Finally, methods for auditing or verifying that agreed-upon performance requirements are being satisfied should also be addressed in the contract.

C. *User Data and Privacy Issues*

The third substantive obligation to be addressed, concerning user data and privacy issues, is one of the greatest risks involved in operating a website.³⁴ Privacy is a “hot-button issue” that has spawned substantial and frequent press, government investigation, and litigation. Operation of the cobranding site will generate information about the website’s users.³⁵ Privacy rules relating to user information vary among the different jurisdictions with regard to the age of the user and the content that is served. Nevertheless, both cobranding parties will often want to exploit user data obtained from the website to the fullest extent that is possible and legally permissible.

Generally, when a global and multidimensional website is involved, counsel’s best course of action is to draft a privacy policy that is in compliance with all the laws of the hosting nation and the primarily “targeted” nation or nations, particularly in regard to the targeted age group and the primary focus content of the website. The privacy agreement should distinguish between “personally identifiable information” (PII), such as the user’s name, email address, or phone number, and aggregated data that relates to all users of the website or a specified group of users.³⁶

The specific consent of the user should always be obtained before personally identifiable information is used. In general, information obtained may be used by the parties to the fullest extent granted by the user. The most important elements are the user’s consent-granting experience and the form of consent required by the website. Consent may be obtained from the parties by requiring the user to affirmatively “opt-in” to receive marketing messages. Another alternative is to require the user to “opt-out” of receiving marketing messages by

33. *Id.* (“The brander wants referrals to have a good experience with the cobranding site to maintain the goodwill associated with the brander.”).

34. *See id.* at 78–79 (“Properly drafting clauses governing the use and disclosure of referral information remains one of the most vexing problems in co-branding agreements. There is no industry-standard clause for this situation, so each clause requires, but rarely receives, careful and individual consideration.”).

35. *See id.* at 78.

36. *See id.* (“[I]nformation about [users] can range from modestly valuable aggregated demographic and psychographic information to extremely valuable personally identifiable information including . . . sensitive information [like] credit card numbers and social security numbers.”).

removing a check from a box displayed on the website. However, simply providing a link to a “privacy policy” that permits the use of user data is not recommended. Such a link may be held insufficient to show user consent to that policy.³⁷

Another critical issue to address is the scope of use of user-provided data by the parties. The contract should ensure that such use of user information by both parties complies with all applicable laws and falls within the scope of the user’s consent and the privacy agreement. The contract provisions should specify the exact data that each party will receive and how the data may be used. This provision should distinguish between PII and aggregated demographic data. The technical means and timing of the parties’ respective data disclosures should also be described. The agreement should also provide the means for users to update their data with the party in possession of the information; furthermore, the privacy laws in some foreign jurisdictions make a provision such as this a mandatory requirement.

D. Security

Another substantive obligation is security of website content and user data. The website host typically should be made responsible for making specifically enumerated or commercially reasonable efforts to ensure the security of website content and the user data that is collected and stored.³⁸ When user data is transferred to one of the parties, the receiving party should then have the affirmative duty to maintain the data in a secure environment.

E. Auditing and Measuring Metrics

Counsel should consider how each party’s fulfillment of its obligations can be verified or audited. The contract may specify reporting requirements and timing, and whether third-party standards will be utilized. The host may only be able to verify that its accounting systems are periodically tested and certified by an independent third party because there is no other way to verify computer-generated statistics. The agreement should also provide a method for dealing with

37. The court in *Specht v. Netscape Communications Corp.* held that a configuration that made the terms of a software license agreement available to visitors of Netscape’s website by following a link, but did not require the user to make an affirmative act of assent or view the terms before the software was made available, was unenforceable due to (1) lack of notice to the user that a contract was being entered into and (2) no positive manifestation of assent to the terms. *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 595–96 (S.D.N.Y. 2001). *But see* *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 980–82 (E.D. Cal. 2000) (suggesting that a binding contract may be formed when a user views the terms posted on a website or simply follows a link to a page displaying the license agreement terms).

38. *See* *Goldman & Lee*, *supra* note 13, at 81 (“The parties may agree on steps that the provider will take to keep the co-branded site or its associated data secure and free from unauthorized intrusion or hacking.”).

a party's discrepancies and how that party can "make good" any shortfall to the other party.

F. *Promotions*

Promotions of the cobranded website are often necessary to generate traffic and increase the breadth of data provided by the user.³⁹ The parties' expectations of revenue generated by the website will be directly affected by the marketing efforts of the parties. Therefore, the promotional framework and marketing obligations of the parties should not be left to future "mutual agreement." Although marketing personnel are often not involved in a project until after a contract is signed, this practice is not recommended. Instead, marketing personnel should become involved early in the negotiations process of the cobranding agreement.

There are a variety of online and offline promotional possibilities available to promote a cobranded website such as linking, sponsorship, banner ads, contests or sweepstakes, direct mail, email, print, or radio.⁴⁰ The parties may also use percentage-of-revenue obligations that would require the provider to spend a percentage of the net revenue to market the service.⁴¹

G. *Exclusivity*

Finally, contractual exclusivity should be considered. Although exclusivity is another hotbed of controversy, it is also a potential magnifier of revenue for either party. An exclusivity agreement might provide that one party may not enter into similar cobranding agreements with the other party's competitors⁴² or target services to a particular jurisdiction. The parties should carefully consider granting any exclusivity,⁴³ particularly in deals that will last for a significant period of time, because the competitive landscape tends to change very quickly. Nevertheless, exclusivity may be very valuable to the content or service provider.⁴⁴

Cobranding parties often negotiate non-competitive advertising or content restrictions that allow one party to list competitors with whom the other party may not enter into certain types of relationships. The

39. *Id.* at 70.

40. *See id.* at 70-71.

41. *C.f. id.* at 71 ("[T]he provider will want the brander to ensure some minimum level of promotion.").

42. Savage, *supra* note 2, at 356.

43. Goldman & Lee, *supra* note 13, at 71.

44. Hollman, *supra* note 1, at 449 ("To maximize the potential for success of the co-branding initiative, it is usually necessary for the agreement to contain some form of exclusivity provision, and the relevant market subject to the exclusivity covenant must be carefully defined.").

list may be all-inclusive⁴⁵ or illustrative, using such language as “including, but not limited to.” It is important to understand the limitations of an illustrative list⁴⁶ and to narrowly define both the class of companies and types of relationships that are restricted. This can be a tricky area because many online companies offer an array of content and services under one brand. At a minimum, the parties should ensure that they will not use PII collected from the cobranded site to target the advertising of the other party’s competitors.⁴⁷ An alternative is to offer premium placement or other marketing benefits to positively promote the cobranded site, rather than to negatively restrict one party from expanding its business elsewhere.⁴⁸

IV. RISK ALLOCATION

The third primary issue to consider when drafting a website cobranding agreement is risk allocation. The effective allocation of risk requires the parties to carefully consider the experience of users visiting the website, the most likely risks of claims, and the party most capable of addressing those risks. All major potential risks can be addressed via warranty and indemnity clauses or within a force majeure clause. At the very least, the agreement should include two provisions. First, a representation and warranty that the other party owns or has the full right to license all applicable intellectual property. Second, a provision that the party will “comply with all applicable laws,” will “conduct itself in accord with industry standards,” and will indemnify the client if their conduct or intellectual property is subject to any action or claim.

Other contract provisions applicable to risk allocation include disclaimers of all warranties of merchantability, fitness and non-infringement, and recovery of indirect or special damages. Given the generally unsettled state of “Internet law,” it is highly advisable to include a mutual limitation of damages. Hacking, Internet outage, or power outages may be considered force majeure or may be the subject of considered risk allocation. Guarantees as to uninterrupted service are often sought, but should rarely be granted.

When addressing risk allocation, choice of law and forum clauses between the parties as to their contractual relationship should also be considered. Jurisdiction and “choice of law” over Internet activities is

45. See Goldman & Lee, *supra* note 13, at 72 (“A party can enumerate a list of companies with whom the other party cannot enter into specified types of relationships. . . . [T]he restricted party can tell with a strong degree of certainty whether a subsequent relationship will . . . violate the restriction.”).

46. Savage, *supra* note 2, at 356 (“Defining competitors by describing the business that is considered competitive . . . is less precise and therefore more susceptible to disputes.”).

47. See Goldman & Lee, *supra* note 13, at 79.

48. *Id.* at 73.

an extremely unsettled area of law. The laws that are most likely to govern the parties' conduct as to end users will be the law of the actual "host" or "targeted" jurisdiction. As laws of several jurisdictions may potentially apply to a cobranding agreement, the most severe risks should be evaluated and then the site's activities can be targeted away from those jurisdictions by denial of service messages or processes in extreme cases, or more typically by choosing to operate the site in accord with one jurisdiction's laws and customs.

V. TERMINATION OF COBRANDING RELATIONSHIPS

The cobranding agreement should specify the effects of termination on the parties' duties and obligations.⁴⁹ Termination provisions in the cobranding agreement should reflect the relative positions and commitments of the parties. These provisions must address up-front costs, contract duration and extensions, and the effects of termination.

A cobranding relationship often involves substantial up-front expenditures by one party; the primary opportunity for the party to recuperate these expenditures may be through future revenue. Therefore, the investing party will want to establish a long term for the cobranding agreement and wish to make it difficult for the other party to terminate. The party may provide that termination can only occur in the event of a stated breach and require substantial advance notice of termination with a reasonable opportunity to cure the breach. Other relationships between cobranding parties may be fairly balanced between the parties and should allow flexibility for either party to terminate the relationship, at any time and for any reason.

The cobranding agreement should set out the effective duration of the cobranding relationship and provide for extensions of time by mutual assent of the parties.⁵⁰ However, the investing party may wish to create an agreement that will automatically renew at the end of the term. Consideration must be given to whether an automatic renewal provision would likely benefit or harm the client; any renewal provision should be made cancelable upon written notice provided sufficiently in advance of the termination date.

The contract should specify which of the parties' obligations should survive termination of the agreement and specifically list those sections in the contract. User data, confidentiality provisions, and indemnity clauses should survive termination. "De-branding" of the site is also possible following termination. A de-branding provision could allow one party to essentially continue the site on its own, with substitute branding or possibly substitute content. Alternatively, the site may essentially disappear upon termination of the cobranding relationship. Finally, the agreement should establish measures for appro-

49. See Hollman, *supra* note 1, at 450.

50. *Id.* at 449.

ropriate notification to end-users upon termination and specify the general content and timing of such notification.

VI. UNAUTHORIZED COBRANDING OF WEBSITES

Another issue to be considered when drafting a web-based cobranding agreement, at least when a famous brand is involved, is unauthorized "cobranding" with the famous brand, essentially a form of trademark infringement. Typically, the owner of the famous brand is highly motivated to maintain the value of commercial association with its famous brand, by preventing any unlicensed use by either the other cobranding party or any third parties. The other cobranding party may attempt to act outside of the scope of their license to use the famous brand while third parties may seek to gain an association with the famous brand in the absence of any license. For the party with the famous brand, this unlicensed use by either the other cobranding party or third parties will probably constitute infringement or dilution of the famous trademark. For the cobranding party that has paid for the association with the famous brand, unlicensed use by third parties is considered "ambush marketing" which may seriously derogate the value of the cobranding relationship.⁵¹ Protection and enforcement strategies should be carefully considered by the parties to the cobranding agreement in order to minimize the effects of such unlicensed use.

VII. CONCLUSION

The drafting of cobranding agreements related to websites requires the consideration of the cobranding parties' needs as well as the end-user experience. Primary issues that must be addressed in the cobranding agreement include the parties' separate identities and goodwill, substantive obligations, risk allocation, the termination of the cobranding relationship, and unauthorized cobranding of the parties' websites.

51. See 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:66, AT 27-109 TO 27-110 (4TH ED. 2001).

Ambush advertising is a type of marketing by a company that is not an official sponsor of an event, but which places advertising using the event to induce customers to pay attention to the ad. The ad may only remind customers of the event, or it may go further to create the misleading impression that the company is an official sponsor regarding these goods or services or is affiliated with the event.

Id. at 27-109 (citation omitted).