**CHECKLIST**

**PROVISIONS FOR A CO-BRANDING AGREEMENT**

The following checklist is simply a guideline as to what provisions may be necessary to include when entering a co-branding agreement. In some cases, more or less items may be required. This document is not a substitute for legal advice and is not written in legal wording

* **Title of contract**
* **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, company, CC, LLC, etc.)
* Name of person signing on behalf of the business
* Signer’s official title. Does he, she or they have authority to bind the business?
* **Addresses of the parties**
* **General Purpose of Co-Branding Agreements**
* The Co-branded page(s) generally include the business concept and certain of the content of the first party.
* The parties generally agree to the financial relationship relative to advertising revenues from the Co-branded page.
* Agreement allocates responsibilities for development and ongoing financial responsibility.
* **Preliminary Matters – Matters generally contained in the opening paragraph**
* What party owns the copyrights? Make sure all relevant parties are made parties to the Agreement.
* Describe the purpose of the agreement.
* Describe the general business of the page to be Co-branded.
* Describe 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.
* Describe the fact of the development responsibility for the Co-branded pages.
* **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.
* Outline compensation, if any, for creating the Co-branded page. Will expenses be passed to the non-developing party? What will those expenses be?
* Outline the 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 the final page?
* Will the site be accessible during the development?
* What delivery obligations relative to website content? (Text, Graphics, Logo, Product, etc.)
* What are the obligations concerning updating the Co-branded pages?
* What if the primary site changes. Does the Co-branded site also change?
* **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 it’s page to the Co-branded or other pages of the developing party? What is the positioning, dimension, content of those links? Must the primary site owner provide graphics etc. for the placement on the website?
* 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 the owner of the primary site make any contribution to advertising?
* Can either party use the affiliation in their marketing and advertising materials? Must approval be received prior to use?
* Will the parties do a joint press release announcing the affiliations? If so, will the cost be split? What is the scope of the press release? What service will be used?
* **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.
* **Copyrights, Trademarks, Other Intellectual Property**
* Define what party has rights to the various intellectual property.
* Define the content, logos, graphics, etc.
* Provide for licences where one party is permitted to use the intellectual property of the other party.
* Provide for the licence of materials contained in links that will be included on websites. This should include a licence 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.
* **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?
* **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 the Co-branded page(s)?
* Click-throughs to Co-branded pages?
* Percentage of membership fees?
* **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?
* **Confidentiality and Trade Secrets**
* Each party will come into contact with confidential information and trade secrets of the other party in the course of the relationship.
* It is important to include a standard confidentiality clause in a Co-branding agreement.
* **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?
* **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 Rands 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? e.g. the discontinuation of intellectual property use or ongoing payments.
* **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?
* **Default**
* What are the events of default?
* Does a party have a period to cure a default?
* What are the consequences of a default?
* **Arbitration clause**
* How are disputes to be handled – litigation, mediation or arbitration?
* If arbitration, what rules will govern? (e.g., Ombudsman or an 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?
* **Waiver**

Note that a delay by one party to pursue its rights against another does not forfeit their right to rectify a situation in the future if the need arises.

* **Assignment**

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

* **Severability**

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

* **Notice**

Describes how and where the parties shall formally communicate to each other in the event they need to take such action (normally by email).

* **Entire Agreement**

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

* **Signatures of authorised signatories**
* What authority is required for one party to sign the contract (e.g., Board of Director's approval)?
* How many signatures are required?
* Are the signature blocks correct?
* **Miscellaneous**
* Attorneys’ fees
* Modification of Agreement
* Time of the Essence
* Survival
* Ambiguities
* Headings
* Necessary Acts and Further Assurances
* Execution
* Jury Trial Waivers
* Specific Performances
* Governing law
* Notarisation
* Representation on Authority of Parties
* Force Majeure
* Company seal
* Witness(es)