Co-Branding

Sometimes the Hardest Part About Getting Together Is Breaking Up

By Michael Serra

It sounds like a pop song, but this article is not about puppy love or teenage drama. It's about a common business practice that, if not set up properly, can result in unexpected consequences.

What is co-branding?

Co-branding is a partnership in which two businesses agree to designate a product or service with brands from joint manufacturers or sponsors.[1] Think of it as a strategic marketing alliance using multiple brand names to intersect markets. It takes the positive association of one brand and combines it with another. Brand-loyal customers are then more likely to purchase products or services of the co-branding partner and vice versa. On the following page are a few examples.

Finding a compatible partner

The first step in starting a co-branding relationship is finding a suitable partner. Many factors play a role, including:

- What products or services do you want associated with your brand?
- How will this association attract more customers?
- Could this relationship push away current customers?
- Are similar products already in the marketplace?
- Can you trust this partner to bolster your brand and not harm it?
- With whom has your potential partner worked in the past?
- Are you okay with being associated with those previous partners as well?

These questions are what internal marketing teams must wrestle with. No one wants to be associated with a dud, because all your future "dates"—customers, co-branding partners, etc.—might think you're a dud too. If that happens, you might have to spend countless hours and a lot of money rebuilding your brand. This is why due diligence is key. After selecting a few strategic partners, start researching financials and your marketing strategy. You'll want to swipe right on a healthy company with a clean past and an untapped market.

Prepare the terms of engagement

The next step is to tie the knot. Before committing to marriage, many people take a class as part of their personal due

diligence. My wife and I attended one such class preceding our marriage. During the class, the instructor asked, "Are there any lawyers here today?" My hand shot up (yes, I'm *that* guy). The instructor then asked, "What is marriage, legally speaking?" The answer: a contract.

The rights and obligations of co-branding parties are laid out in a contract. There, you should address the following terms:

- The exact trademarks to be licensed
- The exact goods/services that will be co-branded
- Trade channels where those goods/services will be sold
- Exclusive versus nonexclusive rights with potential limits on geographic distribution, duration, and quantities
- Approval of final product, marketing materials, and marketing plan
- Revenue sharing or cost sharing
- Insurance and indemnity
- Events of default entitling a party to terminate—including, for example, if your co-branding partner has some business, legal, or public relations nightmares

Other considerations include:

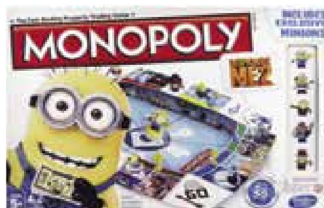
- Specific competitors with whom neither party will co-brand in the future
- The process for addressing product recalls, government investigations, and product claims
- The entity that will undertake the cost and obligations for research, testing, prototyping, and regulatory approvals, if necessary

AT A GLANCE

Co-branding is frequently used as a creative way for brands to market to new audiences. This article explores attributes that brand owners should consider when selecting a co-branding partner, how to structure the co-branding deal, and examples of pitfalls that brand owners should avoid.

- Specific benchmarks to continue the agreement; for example, quantities of products sold, overall revenue, future projections, etc.
- The process for handling product claims, investigations, or selloff of leftover products after the relationship has ended
- Data sharing on information related to the co-branded product
- Ownership or control over social media based on the co-branded product or service

As they say, all good things must come to an end. What happens if your co-branding partner doesn't live up to expectations? Or what if your co-branding partner becomes embroiled in a nationwide controversy? Sometimes ending a relationship is simply inevitable.



Doritos and Taco Bell, Universal and Hasbro, COVERGIRL and Star Wars, Disney and Coach

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The breakup

Who thinks about breaking up when they start a relationship? Pessimists and lawyers (many times, those groups are not mutually exclusive) think about it. Dating can only lead to two endings: either you stay together forever or you break up. Those 50-50 odds give pessimists and lawyers all the reason they need to be wary. It's the lawyer's job to ensure that when things end, clients are in the best possible position. Here are some cautionary tales that could have been avoided with more thoughtful due diligence or a more comprehensive contract.

Disputes sometimes arise over who controls the co-branded product. In *Christopher Norman Chocolates v Schokinag Chocolates North America*, the parties had a relationship to manufacture and sell co-branded chocolate products. As manufacturing began, one party backed out of the relationship and sued to prevent the co-branded products from being sold, claiming trademark infringement. The court denied this claim because the contract said the parties would "co-develop" a product, and now that the product was being made, the co-branding partner had rights to sell it even if the other party disagreed.[2]

A similar result occurred in *L.L. Bean, Inc v Bank of America*. L.L. Bean was unable to stop the sale of branded credit cards after the co-branding agreement terminated. This was because the contract did not specifically require its co-branding partner, Bank of America, to deactivate or dishonor transactions made after termination. The contract only required Bank of America to issue new unbranded cards, which it did.[3] The *L.L. Bean* and *Christopher Norman* cases show that without a carefully worded contract, the co-branded product could be sold *without any input* from one of the supposed partners.

Another issue is liability for injuries caused by a co-branded product. In *Kennedy v Guess*, Guess licensed its trademark for branded umbrellas, and the plaintiff was hurt when a branded umbrella malfunctioned. Even though Guess had little, if any, control in the production, design, marketing, or distribution of the product, the Indiana Supreme Court said that Guess could be held liable proportionate to its role in causing the injury (whatever that may be).[4]

The last example comes straight out of the headlines. Sometimes a co-branding partner faces bad press for political or criminal reasons. This happened when the #BoycottNRA movement swept across the nation. Companies like Enterprise Rent-A-Car advertised discounts to National Rifle Association members. After receiving pushback for its tie to the NRA, Enterprise decided to sever the relationship. What the actual breakup looked like is probably confidential. We do know that whatever penalties or restrictions that were put into their contract intended to prevent early termination (if any) were not enough to outweigh the apparent public relations boost by severing ties.[5]

Reflecting on past relationships

Co-branding relationships can be effective. That's a fact. The contract component may even make up for your partner's shortcomings. It can assure quality control, limit or disclaim liability, and include indemnity for further protection. Contracts should also account for control over the products when the relationship ends or suffers the effects of bad press. ■

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ENDNOTES

1. Stec, *Co-Marketing vs. Co-Branding: What's the Difference?*, iMPACT (November 27, 2013) <https://www.impactbnd.com/co-marketing-vs-co-branding-whats-the-difference> (accessed March 20, 2019).
2. *Christopher Norman Chocolates v Schokinag Chocolates North America*, 270 F Supp 2d 432 (SD NY, 2003).
3. *L.L. Bean v Bank of America*, 630 F Supp 2d 83 (D Maine, 2009).
4. *Kennedy v Guess*, 806 NE 2d 776 (Ind. 2004).
5. Barbash and Bever, *#BoycottNRA: Hertz and Avis are the latest companies to cut ties with gun lobby as movement gains steam*, The Washington Post (February 23, 2018) <https://www.washingtonpost.com/news/morning-mix/wp/2018/02/23/boycottnra-enterprise-omaha-bank-end-gun-lobby-deals-as-boycott-movement-gains-steam/?utm_term=.ee1a086babd9> (accessed March 20, 2019).