



1-1-2000

Symposium Presentation: Doing Internet Co-Branding Agreements

Eric Goldman

Santa Clara University School of Law, egoldman@gmail.com

Follow this and additional works at: <http://digitalcommons.law.scu.edu/facpubs>



Part of the [Internet Law Commons](#)

Automated Citation

Eric Goldman, *Symposium Presentation: Doing Internet Co-Branding Agreements*, 22 HASTINGS COMM. & ENT. L. J. 221 (2000), Available at: <http://digitalcommons.law.scu.edu/facpubs/72>

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

Symposium Presentation: Doing Internet Co-Branding Agreements

by
ERIC GOLDMAN*

MODERATOR: Our next speaker is Eric Goldman. He's a professor of cyberspace law at Santa Clara University.

ERIC GOLDMAN: Today we are going to talk about co-branding agreements. As Jonathan has indicated, his goal in putting this conference together was to find people to talk about practical things, such as what's going on in the industry, and what's going on in the world. Co-brand agreements are what I do. I am the self-titled "King of Co-Brands," as this is what I've been doing with my life.

So, let's talk a little about co-branding agreements and about why they might matter. First let's define our terms.

A co-branding agreement starts with two websites. There is Website A, which we'll call, for purposes of this talk, a "provider"; and there is Website B, which we'll call a "portal," or a "brander." Website A will take its standard website that offers functionality or content, and it will create a version of that and slap the branding of the portal onto a different set of pages.

Now, where there used to be one site, the provider site, there will be two sites, the provider site and co-branded site, which contains the branding of the portal, but contains all the same functionality, or similar functionality, as is in the provider's site.

Then the portal will drive traffic to this co-branding site,

* Eric Goldman is General Counsel at Epinions, Inc., in Brisbane, California. Previously he practiced in the Information Technology group of Cooley Godward LLP in Palo Alto, California. He is also an Adjunct Professor of cyberspace law at the Santa Clara University School of Law. He can be reached at eric@epinions-inc.com.

for purposes that we'll discuss in a bit. This kind of behavior has actually become ubiquitous on the Internet. This is what people are doing, and in fact, many companies are building entire businesses on the idea that they want to be a provider of co-branded sites as their main line of business. So let me give you some examples in the real world of how people are doing this.

Yahoo!, for example, has a large suite of services that they offer their users. Some of those services require registration, and others you can get by just navigating through the links on their home page. Many of those sites Yahoo! operates itself. For example, it has bought its e-mail service provider, and its web page hosts, but with respect to other services, it actually does not operate those services at all. It has gone out to other parties and said, "Will you please provide these services that you have already built for your main business or your other businesses and slap on the Yahoo! branding?"

In some cases, Yahoo! actually private-labels it, so it's almost impossible for you to tell that you've actually left the Yahoo! universe. In other cases, you'll see a little "powered by" logo, or you'll see, in the upper-right-hand corner, the branding of someone else, or there will be something else that will indicate to you that this is actually being operated by a third party, but at the behest of Yahoo!. Actually, in fact, usually, Yahoo! is not doing this because they have asked the provider to do it. Usually the provider is paying them money, but we'll come to that in a moment.

This type of behavior is ubiquitous. Many of these portal-type entities, like Yahoo!, AOL, or Excite, have done tens or hundreds of co-branding agreements to build together an aggregated network of services that are available to you.

In a co-branding agreement, one of the difficulties that we've had as practitioners is understanding the right paradigm. What is the right starting point for creating an agreement of this sort? Part of the confusion comes from the fact that there are multiple paradigms at play here. The provider is basically hosting a service. In fact, usually, it's acting as a form of service provider in order to operate the services that are part of the co-brand.

There is also, almost invariably, an advertising component to the deal, where the portal is basically

promising to provide advertising to this co-brand, or maybe to the provider individually as well. And then, finally, there's usually at least some form of trademark license, where these co-branded pages will be reflecting the brand name of the portal. To get that branding effectuated, there will be a trademark license from the portal to the provider.

So, as you can see, there are multiple types of agreements all baked into one. As a result, I've seen an enormous amount of confusion among people who just cannot grasp that there are multiple factors at play, and they usually then pick the wrong starting point for the documentation. We'll talk a little about how the documentation ought to look as we go through this talk. It's important to understand that there are multiple things all going on at once, and if you pick just one paradigm, you're not going to get to the right place.

So why do people co-brand? The portals like to enter into co-branding agreements because this allows them to not only offer an integrated suite of services that all contain their branding, but to benefit from economies of scale that are accessible through outsourcing. If they don't have the capacity, the wherewithal, or the management bandwidth to pay attention to a particular type of service, they can outsource it to somebody else, and still allow the portal to retain the branding relationship with the user, and oftentimes to integrate the experience so that there is a package of services that are all put into one nice, elegant product for the users.

The providers do this to obtain new users who go to the co-brand, register with the provider or otherwise engage in some kind of relationship with the provider, and hopefully keep coming back and wanting to obtain the provider's services over time. Sometimes a provider won't get the right to keep the relationship with the users, but will still be able to get increased visibility or branding, and will thereby be able to establish its business more firmly. Nowadays, when you see these really ugly co-branding agreements, those deals are usually done primarily for the press release value that attracts analysts' attention in the marketplace, presumably indicating that this service provider is now important enough to have captured the attention of a major portal. We'll talk about how the economics of those deals never make sense.

They're not being done for any rational economic reason; they're done for show. But press releases and publicity are among the reasons why providers will engage in these types of deals.

And then, finally, both parties want to do these types of deals because they provide a stream of revenue that will be generated from the co-branded site, which will usually be subject to some sort of split. It's a way for both parties to gain access to a revenue stream that might not have existed otherwise.

So, before we get into some of the specifics of what occurs in co-branding agreements and how they get resolved, there are some threshold issues that kind of cut across everything and are critical to understanding the deal. Let's start with a very basic one: who is paying whom? Often, I match up my clients who want to do deals with each other. I'll say, "Hey, you should really talk to my other client," and they say, "Great!" And when I do that, I never can figure out which of my two clients will be paying the other. It's entirely indeterminable up front which client's actually going to pony up the cash to do these deals; whether it's going to be the portal saying, "I'm so desperate to get this service as part of my network that I'm going to pay the service provider to do the work"; or whether it's going to be the provider saying, "I'm so desperate to get new users, or to get increased visibility, I'm going to pay the portal to be their service provider."

It's really kind of wild, because in most other deals that I have done in my career, it's usually very obvious which party pays whom. But in these deals, that is not the case, and it's completely up to the particular aspects of the deal – and, of course, who has more leverage.

Obviously, it makes a big difference what paradigm you're going to apply. If you're going to apply the paradigm of the service provider saying, "I'm paying to get users," you would usually expect the commitments to deliver new users, or to deliver advertising, to be relatively extensive. On the other hand, when it's a portal paying the service provider, the portal usually expects there to be rigorous service levels, where the service provider has to earn its keep.

In fact, you'll find all of that gets mushed up too. Usually, when a provider pays a portal to get users, the portal still requires the provider to adhere to service levels. One of those

little wacky things. But it makes a huge difference, obviously, in understanding how the dynamics of the deal are going to go, to understand who's paying whom.

Another threshold issue is: Whose servers are actually going to host the requisite aspects of the co-branded site? So, it's entirely possible for each party to have a little piece of the co-branded site on their servers, or it could be that the provider is hosting all of the pages that are associated with the co-branded site.

One of the problems I always have with my clients is that they'll say, "OK, we're going to create this co-branded site."

And I'll say, "OK, who's doing the work?"

And they say, "Oh, we haven't decided that yet. That's a detail. We'll come to that later, but there's going to be this thing called a 'co-branded site.'"

And I'll say, "OK, but who's going to do the development work? And who has responsibilities for hosting? And who is going to need the copyright and trademark licenses to actually have those pieces of ownership property on their servers?"

"Oh, we'll get to that later."

Well, that actually needs to be considered up front. It's a very important thing. It affects the entire character of the deal, and it's the difference between where a co-branding deal is different from a software license. So that the provider, oftentimes, could license its software, or license its content, to the portal, and say, "You operate it! Here you go, here's the stuff, you're in charge."

But, usually, there's some kind of hosting aspect that the provider will actually do. That's why we call it a "co-branding agreement." The provider is building these pages that actually have co-branding on them. And that detail just gets lost. It's a threshold issue that cannot be skipped.

One other threshold issue to consider is: Whose domain name will be used for the co-branded site? And this particular issue has flown onto the radar-screen of most of the co-branding deals that I've seen come from people to me. And, actually, it turns out to be huge.

Now, there are at least three different issues that arise from the control of the domain name that make it crucial from a business standpoint. Number one is the domain name. This is usually the key that unlocks the door to

counting the page impressions, or the unique audience that goes to this co-brand, for the third-party validators who are going out there and trying to establish rankings for the Internet.

So, some of you may have heard of a company called "Mediametrics," who's the leader in this space. Mediametrics goes out and does independent, third-party validation of how many users have visited a particular website. Mediametrics drives those calculations, usually, by domain name. So whoever's domain name is slapped onto that co-branded site will get the Mediametrics numbers counted towards them.

Well, it turns out that Mediametrics rankings have become a very important thing, and I've seen clients who have watched their Mediametrics rankings soar – even when it's not an important part of their business – and they get a lot more attention. They get more traction in the marketplace. They get more analysts tracking them. They get more investors willing to invest. They get more leverage in the negotiations. So, Mediametrics ranking is huge, and it almost is invariably driven by the domain name.

And so, whoever gets a domain name is allocated a very valuable property right. And I've seen, probably, ninety percent of the co-branding agreements that have come to me not even mention the domain name for the website – a very important issue.

Another important issue that comes from the domain name is: What happens post-termination? So, let's say that users get really loyal to this site, and want to keep coming back after the co-branding agreement is terminated. Well, where do they go? That domain name will be the key that will allow them to access these set of pages in the future. Or, they're going to get a "404: Server not found." Or, whoever's domain name it was will get the ability to direct them wherever the heck they want.

So, figuring out who has control of the domain name can be a proxy for who is going to be able to dictate what happens to the co-branded site users post-termination – another one of those things almost never addressed in the agreements that I get. Makes a huge difference, particularly if you're the provider and the reason why you've been doing this deal is to buy these users, to get these users part of your services. Well, if the other party controls the domain name and, post-

termination, that domain name goes into the ether, well, all of a sudden, you no longer can get access to the users you thought you'd purchased.

The final reason that the domain name matters is because, oftentimes, the parties will establish a domain name that will be "party-A's-name-dot-party-B's-name-dot-com," the idea being that it will contain the names of both parties in the domain name. Well, it turns out, that's what we would call a "combination mark." And combination marks are their own animals under trademark law. You need to do special things when you've got combination marks formed. And, once again, never addressed. Really important.

So these are some of the threshold issues to consider. I'm working on an up to thirteen million dollar co-branding agreement where we've got a half-a-page long provision about what domain names are going to be shown on which pages, because if that domain name issue isn't worked out right, that thirteen-million-dollar deal tanks.

OK, we're going to talk a little about specific issues that arise in co-brands. And let me start with one of the more interesting ones, which is what I call "how to track referrals." So, the portal's going to be promoting the co-branded site, and it's going to be sending users over that way, and, usually, it's going to want certain things to happen to those users. It may be that there's a User Data Clause that will allocate what the provider can do with those users. It may be that the portal will want to ensure that those users actually see the branding that's associated with the co-brand. Or, it may be that those users are going to be generating some revenues that need to be tracked, and kept separate from other revenue streams that the provider will be generating.

So the question is: How do you track these users who go to the co-brand? How do you know that these users are separate from the other users who are using the services of the provider?

There are three primary ways that this is done. It turns out, actually, there's only one that makes any sense any more. The second one kind of works. The third one doesn't work any more.

What most people do, nowadays, is set up a unique domain name for the co-brand that will be, as I said, something like "party-name-A-party-name-B-dot-com." Then,

there will be nothing else that will be visible from those pages except the co-brand. There won't be other kinds of stuff there, whatever. And that's the typical way that people do that now, and it makes a lot of sense to keep it separate. It's really easy to track the activities of those users, make sure that they have the right user experience, and so on.

Some people have done it in the past by establishing the co-brand by cookie, so that users who take the cookie and present it back to the provider will get the co-branded set of pages. But, if they erase their cookies, or they flush their cookies, or they're using a different browser and they go to the exact same domain name, they would get a non-co-brand experience. So people don't use cookies very much any more. It works as long as we understand that not everyone takes the cookie. So, for example, I don't know how many of you are nutty like this, but I flush all my cookies, unless I absolutely have to take them. So, you know, it's not a perfect system. There are the nuts out there who won't take cookies.

So, one of the ways that referrals used to be tracked is by setting up a URL that contained keywords in the URL. So it might be, "www.provider.com/", and then there would be keywords that would be specific to the portal in the URL. If you think about this, that's how a lot of the search engines now make sure that they deliver the right results to you. So, if you get results eleven through twenty at AltaVista, and then you want twenty-one through thirty, the way that AltaVista knows that you want that is because they baked in the codes into the URL, so that they can realize that, when they ask for the next page, they'll say, "Oh, this is what URL they're coming from. Therefore, we can figure out that we need to deliver the next set of results." People don't do this very much any more. It's almost kind of silly.

This is so important, particularly to the revenue stream issue. You've got to figure out who is going to be subject to what splits. And, if you have a very loose definition of who's subject to what splits, it can turn out that that can swallow up an entire business.

If you say, "You get fifty percent of net revenues," and you say, "Net revenues is everything we get," well, you'd better be clear: "Everything we get from the co-brand," or, "From the user's referral," or something. It's got to be tied down, or else, all of a sudden, you've swallowed up an entire chunk of your

revenue stream.

I just wanted to talk a little bit about some of the traditional things that I'm seeing as part of co-brand deals that portals are promising to providers as part of the deal. These are some of the ways that portals are promising to promote the provider and co-brands. And I thought I'd give you some editorialism about this as well. This is a classic thing, where we see what I call "the abuse of the portal," and we're going to come to that in a moment.

A lot of the portals will say, "Pay us lots of money, provider, and we'll think about promoting you. We'll promote you if we feel like it." Or, "Yeah, we'll make commercially reasonable efforts to promote you, but thank you very much for that thirteen million dollars."

So usually when I'm on the provider's side, we try and get really specific, and some of the things we request include the following. A lot of times you'll hear about how a portal is going to "integrate" a co-brand into its site. And, usually, that term "integrate" means navigationally. So, if you think about what we choose to use when we have an interface at a website, a lot of times the things that we look for first are: What are the navigation links that are available as part of the set features of the website? By doing that – by having the co-branded site be one of the phrases in the navigation links – that's usually the most effective way to let users know this is a valuable service, and to actually get them to adopt a service, and move from the provider's portal site to the co-brand. So, navigation links is a good one. We use that one quite extensively as a way to drive traffic.

The other thing you'll see is co-registration. For example, when a user registers at the portal you'll see: "As part of registering with us, you now are given access to this suite of services." One of those suites of services might be this co-brand. Alternatively, there might be multiple co-branded services by different providers, all of whom are automatically a portion of the registration process.

Usually, that requires the portal to transfer some user data over to the provider, for the provider to create an account. And we're going to talk about the User Data Clauses associated with that in a bit.

But co-registration is a very effective tool to get. It allows you to have a valuable service that you've procured as part of

your registration with a portal. You should use this thing. You should actually take advantage of it.

One of the other things – that I never expected, but is actually a very common way now for providers to get traffic to their site – is that providers will provide editorial content that will drive traffic back to the co-brand. You can imagine this as a set of links, where the links are headlines. You know, “Lakers Beat the Pacers, 100 to 85.”

And that will be all it will say on the portal site. It’s still valuable information. You could stop right there and say, “I know everything I want to know.” Or, it could be a link to an article, that is actually part of the co-brand, where users would then go and get the full story. Other people will do this, where they’ll give full stories about bands as a way to drive traffic to a co-branded music store. Whatever the case.

It used to be in the old days – you know, all of three years ago or so – that portals had to pay to get editorial content. Now, editorial content is an advertisement that providers are willing to pay to place.

The final way that people promote the co-brand is through stuff like banner ads, buttons, text-links, and sponsorships. I call these things the “junk advertisements,” because they’re usually not very effective. So, usually, the portal will offer them up as something that they are willing to do, but as a practical matter, it’s actually not all that valuable.

One of the biggest things that we spend time on in co-brand agreements is exclusivity. This is one of the few places we’ve actually seen litigation emerging, so this is one of those hot-buttons that we need to be really careful of.

And the usual way this comes up is that someone will say, “I want to be a ‘category-exclusive’ provider to you. I want to be the only person who can promote music on your website,” or, “the only music retailer on your website.”

And you say, “What does that mean?” And you ask, “What rights have been given up by that, and what rights haven’t?” And you can do it by industry: “We’re the only music retailer.” You can do it by functionality: “We’re the only e-mail provider;” “We’re the only voice-over IP provider;” “We’re the only map provider,” or whatever. We see a lot of these kinds of things.

Let’s cut to the chase. I kill these approaches every single

opportunity I have to do so because these are effectively untestable. There is no way to do these properly in a way that someone will be able to make sure it actually is adhered to.

There is some litigation that's pending on this. CDNow did a deal with Lycos where CDNow said, "We're the exclusive music retailer on the Lycos properties." CDNow asserts Lycos started running ads for other music providers. Lycos says, "No, we didn't promise CDNow the areas they're claiming that we did." And so they go to court to explain what it meant to be an exclusive music retailer.

What I tend to do, or tend to advise my clients to do, is exclusivity based on identified competitors. In other words, we will not do the following types of deals with the following identified competitors, so that you can actually have a testable statement. If a banner ad deal is done with Amazon Music, and you had the exclusive right to display banner ads for music promotion on the Lycos network to the exclusion of Amazon Music, well then, it's violated. Otherwise it's not.

So, we're really pushing people towards identified-competitor exclusivity. That is the wave of the future. In fact, it's the only thing that really makes much sense.

The only other thing you'll sometimes see is exclusivity based on positioning, where it's something like, "We're the only people in the following spot on a page." Like, "We're the only people in the white area of the page," or, "We're the only people who get a fixed placement on the following part of the page." And you can do that as well. That tends to work. That's a lot less frequent.

One of the things that people really get tripped up on is setting the boundaries of the exclusivity, making it clear that, when there are these networks of sites, how far the exclusivity goes. So if you take a look at Yahoo!, for example, if they said, "You are the only music retailer on the Yahoo! network," well, that sweeps in a ton of co-brands over which Yahoo! effectively has no control. So that probably is not a good idea. So Yahoo! then needs to say, "Well, we only mean Yahoo.com. That's set by the following boundaries, to where we can actually effectuate the promise that we've made."

And it doesn't matter whether it's category exclusivity or exclusivity by identified competitors. The point is that these networks have become very complicated and extensive, with a hodgepodge of homegrown operated stuff, and a hodgepodge

of third-party operated stuff, some of which cannot be controlled.

Let's talk a little bit about data integration exchange. This is, oftentimes, a key, essential part of the co-branding deal. And this is another one of those things where I see a lot of arm waving, and I pound on my clients to say exactly what's going on here. Often, this can't be done, and it turns out that those issues are the lynchpin of the deal.

If we have a co-registration situation, where a portal has said, "When someone registers with me, they also automatically register with this third-party service provider, and I'm going to pass the data to them," the question is: what data is going, and how? What technical measures are being used to move that data from site A to site B?

Well, it turns out, there are no industry standards about that. There's no predictability. I can say, "Oh, this is how everyone does it." It turns out there are at least half a dozen different ways people do this, each of which, if the parties don't agree upon it, will require one or both of the parties to invest some cash to actually do the development work to make this thing work. And then, the parties have to make sure that they keep in sequence with each other: if one party wants to change a piece of their site, that the transfer mechanism actually works together to make that happen.

Oftentimes, a portal will demand that the provider give back information about the user. They're going to say, "You know what? We have a hunch that, as a provider, you are going to get good information about these users. For us to effectuate our direct marketing objectives, we need some of that information to come back to us." Once again, you have to work out the data exchange provisions in order to make that happen.

In order to do the data integration exchange, there are some difficult issues that need to be worked out. One of the obvious ones is privacy policies. A lot of people put in privacy policies that use the very dangerous word "never." "We never disclose your information to a third party." Well, it turns out in a co-brand situation that's almost invariably not true, usually the parties are exchanging information with each other. By having a privacy policy that prohibited that, one or more of the parties is going to get in trouble, or just not be able to effectuate their business objectives.

So privacy policies need to be reviewed. Oftentimes, they need to be amended. Of course, they need to be made consistent with what's actually happening.

There's also the issue of database synchronization, which is: assume that a user gave information to the portal and to the provider. Let's say that in one place, they give a home address; another place they give a shipping address.

Well, the parties need to talk about whether or not they want to synchronize this information if someone enters a home address on site B, it also get propagated automatically to site A. This is a relationship issue with the users. It's very complicated. It makes the experience seamless, but it actually requires some very sensitive development work and a clear understanding with the users about what's going to happen if they make changes to one side of the equation in terms of their data.

Finally, as I indicated earlier, User Data Clauses are very complicated, and I could spend an entire talk on that, and I won't do that here. But, clearly, it's crucial for the parties to understand why they're doing this deal, and to make sure that the User Data Clause reflects that.

Let me give you some examples. I have some of my clients who will pay a bounty for every registered user that the portal can generate for them. So, let's say that the portal generates a thousand users. The bounty is ten bucks. The provider agrees to pay ten thousand dollars for those users.

Now, usually, when the provider agrees to pay a bounty, that's with the expectation they're going to get to keep that relationship with the user, in perpetuity. And the bounty represents some fraction of the net present value of the revenue that that user will generate over time.

Now, what we'll see is that the portals will put into place a User Data Clause that says, "Pay us a bounty, a one-time fee, that represents the discounted net present value of that user. But when the relationship's over, you've got to stop talking to that user and flush their data."

And so, you say, "Well, wait a minute. What happens if we get a user on the very last day of the contract, and we owe you a bounty of ten bucks?"

And the portals say, "You need to get rid of that user."

And you say, "What?" Right. That doesn't make any sense. That's not consistent with the economic model.

And, usually, I think about it in terms of: is the provider trying to buy a perpetual relationship with the user – or is it, they quote, “renting” the user? Is it expecting to get the right to have a relationship with this user for a limited period of time, after which time it ends? It needs to track with the business model.

The last category of things that I wanted to talk to you about, that we run into in co-branding agreements, is payment. And there are many different ways that payment can be done, and I just want to touch on a few issues.

We’ll see payments in co-branding agreements for development, for placement, for exclusivity, and for click-throughs and bounties. The reason why we’ll see all these various categories of payment is because each of them gets separate treatment for revenue recognition purposes.

So, for example, a development fee can be recognized as soon as the development is completed. A placement fee will be recognized ratably over time as the placements actually occur. If someone promises a hundred million banner ads for the payment, that payment will be amortized as those banner ads are actually delivered. If the party can deliver the banner ads all in one day, the payment is earned all in one day. If the banner ads are spread out, with fifty million one month, and then two million in another month, the payment gets recognized ratably over that time. The exclusivity fee gets recognized per month. Just, you know, every month, so it goes. And then, finally, click-throughs or bounty fees are usually recognized as those things occur.

So, you can see that there are actually very complicated systems for working out the payments, and they are all driven by accounting treatment. And it’s obviously very crucial to understand how that plays into the business model and what the deal is supposed to be.

Now remember, the threshold issue concerns who’s paying whom for what? Right? And it’s not always clear, even up front, which way that’s going to go.

Now, usually, in many of my deals, there’s some kind of advertising inventory generated in the co-branded site. The co-branded site generates a suite of advertising opportunities, and, as those opportunities are filled, money is generated that is subject to a split. And defining that is very important. There are key issues: Who sells this? Who serves the ads into

those inventories?

I wanted to give you an example of the types of abuses that we see on the Internet. This is really where the rubber meets the road. I want you to remember that "Portals are Pigs."

Now, what do I mean by "Portals are Pigs?" I need to be careful here, because I may be talking about some of my clients who fit into this box. But, in concept, what we've seen is what I call "the abuse of the portal."

Websites are so desperate for attention that they will do anything to get a slice of the traffic. So, if a site has been able to aggregate traffic, it usually has extreme leverage to force egregious terms upon providers to pay big bucks and agree to many unreasonable terms.

Now, I'm not going to name who has these types of clauses. If you think about who the largest names in the portal business are, and what their relative monopoly positions are, you might be able to discern who some of them are.

Let's talk a little about some of the egregious things that have come across my desk. The fundamental paradigm that portals apply is that they want to be paid for the right to appoint somebody else as a service provider.

Now, in the old days, when we used to actually have economic rationality, the service providers got paid for performing services. But nowadays, the "new math" is that portals want providers to pay for the privilege of being a service provider. It's very wacky, if you think about it.

So, as a result, the way the portals really started exercising their leverage was to do some egregious things. They said, "Pay us, but we won't promise you any placement or minimum promotional efforts. You'll get what you get - and don't throw a fit!"

They won't promise any click-throughs or registered users. In other words, they won't actually promise that they'll deliver any results. They'll say, "You're so lucky to have this opportunity, that if you don't get any results, well, you were still lucky, weren't you?"

One of my favorites is what I call "triple dipping." Portals will say, "It's not enough for us to get paid a placement fee for your advertisements on our site; we will also ask for a revenue share on the activity of the users that we send to

you. So you paid us something to get those users, and then you pay us again when you get them. But not only that, we're so happy that we are able to extract a high fee from you, we're going to go one step further. We're going to demand warrants in your company, so if you're actually able to make any money at the end of the day, and your stock value can go up, well, we'll take a piece of that as well."

Portals will require co-branding and custom development work. They will put user data restrictions into place, which effectively prevent customer acquisition. This is the example of a bounty that will say, "Pay us now, but you don't get to keep the user."

They will put in place a whole host of restrictions on what the provider must do and can't do, and then they'll say, "If you breach those, we can terminate you, and we keep all the money."

So, they basically get the right to terminate for bogus breaches. If you consider all of those hundred-million-dollar deals, that could actually hurt.

Let me give you some other examples of what the portals will demand. These are things off of contracts that I have developed.

The portal will say, "You want the right to deal with us? You have to pay us, tens or hundreds of millions of dollars, and you've still got to give us exclusivity, so you can't also do this for our competitor."

They'll say, "You've got to promote our website, or our business, but we won't pay you. So if you have a regular non-co-branded site, you've got to promote us, but we won't pay you for that. Meanwhile, you're paying for the right to drive traffic to your co-brand, where we have triple-dipped."

And this one is one of my all-time favorites. This is one of those logic pretzels that you just can't unravel. The portal says, "Pay us lots of money to promote the co-brand, but if you ever do any other advertisement, well, you've got to advertise on our site as well."

Now, I want you to think about that. That's saying, "We didn't take enough money for your advertisements to actually give you good stuff. If you ever want to try and do more advertising, you've got to pay us some more – even though you're already paying us for, presumably, what was a requisite level of promotion to reach your business

objectives.” In other words, “We either are not charging the right amount for the promotion that you seek in the co-branding deal,” or, “You’re basically frozen out from ever being able to build your business because we’re going to take chunks of money from you for any type of business you’re trying to promote.”

You can see my bottom line, which is: when doing a co-portal deal, try and figure out how much money you’re willing to lose. That’s what I tell my clients. If they’re thinking about doing such a deal, I tell them to just assume they are going to take a bath in the market from this deal. Say, “How much are you willing to lose in order to do this deal, and let’s just see if we can figure out a way to limit ourselves to just that.”

Any questions about co-branding deals?

AUDIENCE MEMBER: Why are people still doing portal deals?

GOLDMAN: I cannot figure it out for the life of me. There actually was a study done by a group – it was reported in CNET – that ninety-five percent of the companies that did portal deals said they were not going to renew their portal deals. Ninety-five percent of people who were customers of the portals said, “We’re not going to do businesses with these people again.” And the reason why, of course, is, that they have already lost more money than they could afford, and therefore they’re never going to do that again:

The reason why people still do these egregious portal deals is because there’s so much venture capital money flowing into these companies that they need to get traction however they can. Interestingly enough, the VCs, the analysts, and the other investor representatives, are not applying the kind of filter that one would expect them to, and saying, “We’re going to ding you for doing a portal deal.”

Oftentimes, when the companies do portal deals, their stock goes up. And I cannot, for the life of me, figure that out because I would denigrate a stock for doing that. But, if the market’s going to continue to reward people for doing portal deals, it’s actually a good investment for them. Ultimately, over time, we would expect companies to be smarter about these deals, realizing that they’re such bad deals, that they should not be doing them, in which case that would presumably ensure that they won’t be done in the future.

AUDIENCE MEMBER: When do you identify competitor lists

for exclusivity? How do you handle the fact that competitive sets change all the time, almost every six months?

GOLDMAN: The answer is that there are a few ways to do that. Depending on the length of deal, you might just take the risk. If it's a six month deal, you say, "Fine, we're going to lock it in for six months, and that will be it."

The other way that we do it is that we will say that each party gets the right to update list within a certain requisite period of time. By doing that, then, they can't knock out existing relationships, but they can, over time, shift the mix towards their new competitive set. So we give kind of a "refresh right" that's limited in scope and time, which will allow those lists to update.

Now, as a practical matter, you'll actually find that those exclusivity provisions are far less important than people give them credit for. Usually, they want exclusivity because of the market press-release value, not because it's actually like a lock or a handcuff that will restrict the behavior. In those cases where it is, that's how we deal with the lists.

Actually, I've had very few situations where that's not acceptable to both parties. Almost invariably, even if they assume that they were going to have this exclusivity, we successfully talk them into a competitive set list.

And, if you think about it, in an industry with, let's say, a hundred players, there are usually only five that matter. Numbers one through five will occupy ninety-five percent of the market share, and that maxim, played out over again, makes it very easy to identify a list of people that matter.

AUDIENCE MEMBER: Is there a viable alternative to getting promotion through the portals?

GOLDMAN: There used to be. It used to be that if you looked at results and compared them to cost, stuff like advertising on radio, advertising on TV, advertising on billboards, or advertising in newspapers was far more cost-effective than the portal deals.

However, because there's so much money flowing into dot-coms, and there is so much need to gain attention in the marketplace, the dot-coms are investing an enormous amount of money in all of those advertising opportunities. As a result, all of those advertising opportunities have been bid up astronomically.

It used to be that you could get a billboard on Highway

101 for three months for, let's say, twenty thousand bucks. Now the number is a hundred thousand dollars because there's such demand by the dot-coms for that real estate. Naturally, the price goes up.

As a result, it's actually an interesting question: is there any really easy and effective way to get traction in the market, to get users coming to your site? And the answer is that it has become more expensive across the board. However, despite that, I still assert that portals are probably the last on my list of ways to do that, unless the portals are willing to not take the egregious amount of money and you can do a no-hard-dollar deal, which some portals will do, depending on the leverage of the other party.

AUDIENCE MEMBER: Do these things that portals do raise the possibility of antitrust violations?

GOLDMAN: Some of the portals have already been sued on antitrust grounds in one way or another. I'm not going to name names, let's just defer that, because I'm not about to bash them. I can assert that I believe that, at least with one portal, who will remain nameless – but whom all of you have heard of and received gifts from in the mail – I believe that if the Justice Department ever got their hands on the form of co-branding agreement used by that particular portal, that an antitrust investigation would have to ensue because the monopoly power exercised by that party and the egregiousness of the terms can only be a sign that there's bad behavior going on in the marketplace.

Now, I'm not an antitrust lawyer, so some of you will say, "No, no, no, they don't meet the requisite elements of antitrust law." But, I will assert that the monopoly power is so extreme that I believe that it might give rise to antitrust investigations. Now, that's not true with anyone below the very top tier of portals. So, if you go to a second-tier portal, you will not have that problem. Their market power is not nearly so extreme. It's only at the very highest levels.

Thank you very much.
