

Alternative Funding Series: Crowdfunding And The Terms You Fund On

In the midst of all the crowd-funding fever I can't help but feel a tad....uneasy.

Perhaps its my "legal counsel" nature kicking in. Being in-house I tend to see my role a little differently than most. But when folks start getting into a fervor, throwing out ideas, jotting down action items and assuming a runner's stance for a full on sprint I feel I have the responsibility of posing one question; "What's the Catch?" Does that make me a bit of a wet noodle? Perhaps. Do most people appreciate it once they come down from their high? Sure do ("ok Erin, maybe hosting a rodeo party on the roof of that condo with live chickens and donkeys for a fundraiser isn't the best idea").

I admit, it's exciting that there's new platforms creative individuals and organizations can use to raise funds....but I can't help but wonder what the catch is? What is it people aren't thinking about that they should be?

That's kinda what this alternative funding series will be all about; my endeavor to work through some of the alternative funding models and see what it is people may not be thinking about. Perhaps even things I've initially missed myself.

In the end, there may be something more to look into with some models and nothing for others. Even so, this is an exercise all organizations should go through when endeavoring into new territory of any sort. Sit down and think through "What is it I'm missing? What haven't I looked at? And what ancillary impact could this have on the organization?" Particularly those that are tax-exempt and with the most to lose.

So, naturally I've started with crowd-funding. Having little familiarity with the various sites, I turned first to their terms of use/service. Something I bet most of you haven't read but, based upon what I've seen, should.

Some of the terms below may surprise you, and they are by no means all inclusive. What I really want organizations to take out of this is 1) You, **MUST** read anything that requires consent. Be it paper, software or a smoke signal; and 2) once you've read it you need to take a moment to really soak in what is being asked of the organization.

Website Users Must Agree to Heavy License Grants

So these were the terms that actually surprised me the most. Many of the websites asked for some pretty heavy licenses with regard to the various videos and content users would post on their funding campaigns.

Taking a step back, a license is simply where the creator of some type of work (say a video) grants someone else a right to use that video (things get more complicated when you talk about work you don't own so we'll just leave it there for now). The parameters around how that video may be used by the person getting the license is generally depicted by what is in the license grant.

The license grants posted on the various websites were tremendously broad, essentially giving them a:

- perpetual (infinite)
 - transferable (may be passed on to others, for example someone that buys a company)
 - irrevocable (may not be taken back)
 - royalty-free (royalties for use of the video don't have to be paid to you)
 - sub-licensable (the website may turn around and license rights to your work to someone else)
- right to:

- use
- edit
- modify
- display
- perform
- reproduce

- stream
- transmit
- playback
- sell
- distribute
- market
- generally exploit
- and prepare derivative works (other works containing or changing the video)

your work (whew). Seems like a bit much? That's because it is. Most sites use "marketing" as a reason for granting such extensive rights, but if you ask me they could market just fine without half of this language.

I will point out however that some sites say that ownership of all content stays with the creator.....some sites noticeably don't. There were a few sites that tied this grant solely to the use of the service.....others tied it to that necessary for the use of the service and the company's business and marketing the site. Kinda broad and kinda scary.

What does this mean for you? Well, the problem is no one really quite knows yet. This type of "extensive" language is still fairly recent for most online service providers. In fact, there was a recent firestorm over similar terms put in place by Google. It could mean nothing. However, if that was the case then why include two pages of language asking users to give up their mother and left kidney to use the site?

There are attorneys who quickly point out that some of the language can be attributed to the reality that content is usually kept on a hosted server or in the cloud, in which case content may need to be "modified" "changed" and "derivatives made" when a user tries to recall it. But who knows. At the end of the day organization's will need to review this language to see if they're comfortable with what is being asked. Depending on what type of content is being posted, you may find the potential cost outweighs any benefit.

Audit Rights

Somewhat understandably, many sites require users to agree that organization's and their use of the funds may be subject to an audit. What is of concern is, more often than not, the language I saw dealing with audits was tremendously broad. As in no limitation as to what could be requested by the website or reviewed in the actual audit kinda broad. There were a few sites that tied the audit to use of the services (such as posting a funding campaign), but in a couple of instances they didn't.

What organizations should pick up on, however, is that if they plan to use these types of websites particular attention will need to be paid to accounting. There may be a need to treat books and records accounting for how money is spent from a campaign differently than other general books and records, particularly if organizations have a document retention policy in place, as these may need to be kept longer than your policy provides for.

Age Requirements

There were a couple of sites that posted age requirements for use. Where there were age restrictions, use by individuals 13 years or younger was universally prohibited. Even more interesting, some sites required individuals 18 years or younger to be emancipated or have parental consent before using the site. Something organizations will definitely want to keep in mind if interns are setting these sites up.

One thing I thought about was what if someone 13 years or younger did use the site and contributed to a campaign? Presumably this money might have to be refunded? And if the contribution made by the underage user is what allowed for the organization to meet its funding goal would the one refund, which then brings the total under the goal, require that the organization refund all the money back for failure to meet its goal. Sounds like a law school exam in the making....

Changes to the Terms

This provision changed from site to site. Some sites agree to put users on notice when their terms and conditions changed. Others required users to check back periodically. I think this one speaks for itself.

Control Over Campaigns

This language was fairly consistent throughout all the sites. Almost all of them reserve the right to cancel, interrupt, change, suspend or remove campaigns regardless of where it stands and how much has been fund-raised. I thought it interesting that this right wasn't tied to a belief that laws or terms had been violated, alleged fraud, a legal request or some type of catalyst but instead was just a blanket right.

So what happens if a campaign is cancelled, when it shouldn't have been, and that results in money being lost? Absolutely nothing! Most sites also require users to release them from damages suffered as a result of using the services. And that lost money? That would be a damage.

Takeaway

Let's face it, the terms of service police aren't going to come ambushing the moment you fail to follow a provision. So what does it matter if don't follow all the rules per se?

The way this scenario usually plays out is something bad happens, and breach of website terms creates the veritable domino effect; a bad situation suddenly turns worse.

Say someone sues the site for copyright infringement because of something you posted. Now the site not only comes after you to account for that copyright infringement, but somewhere embedded in those terms was a provision where you agreed you'd gotten all the permissions you needed and that, where you didn't, you would pay for all the costs associated with dealing with an infringement claim. Now the original copyright owner and the website have claims against you.

The odds of that original claim hitting you may seem small...but if it does hit all those seemingly innocent transgressions definitely catch up too. Another instance is where an organization sues a website, and (lo and behold) the website finds out the organization breached its terms and sues back...it happens.

Organizations must bear all this in mind the next time they consider a funding campaign. Use the website terms as a way to frame the discussion. Start thinking, "Can I abide by these terms?", "Have I gotten all the rights to use everything I'm posting?", "Have I ensured that the money is used exactly as I posted?" and "What are the possible 'side-effects' of posting this campaign that I'm not thinking about?"

Also think about the logistics involved with using these sites. Do you need to ensure that someone over the age of 18 is administering the site? Have employees been trained to print out terms of use before agreeing to them and allowing the appropriate management review? Is the content and engagement on the site being monitored by more than one person to ensure compliance? I would even suggest these sites be added to any existing social media policy as well.

Other Posts To Check Out

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