

Website Design & Development

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Web design and development is the basis for having an online presence. However, as was mentioned in the context of the Technology Column dealing with web-hosting, it is SMEs which are frequently afflicted with legal and commercial problems during or following the completion of the design and development phase of the website, however, this is not to say that larger businesses are immune, as sometimes the impetus for website completion by a launch deadline, can result in some of the key legal issues being overlooked.

We therefore will take this opportunity to look at some of the key issues which need to be addressed in a web design and development contract:

Contracting Party

Due to the ease with which a web design business can be established, it is important to check the financial standing of the web design company itself. Even large companies have been known to engage small web design companies for their web design work. More than likely, such web design companies will usually be little more than 'shell companies.'

In such situations, it is important to consider the insurance arrangements which the web design company has in place, the cover which is available, and the amount of such cover. The customer needs to satisfy itself that such cover is adequate to address any particular concerns the customer may have about the output which is to be provided by the web design company.

Type of Contract

From a lawyer's perspective, it is important to establish the type of work which is to be undertaken by the web design company for the customer. If the project can easily be specified in totality, and is relatively simple and for a short period of time, then a one-off web design agreement can be used. However, lawyers sometimes seem keen to apply this same type of agreement to all web design engagements.

Web design projects can suffer from the same problem as many software projects, namely the difficulty in specifying all of the requirements upfront prior to contract signature, as after all, web development is just a specialised form of software development. Web development has though, the advantage of having various aspects of the project being amenable to self-contained modules. Thus, consideration should be given to using a framework web design and development agreement.

A framework web design and development agreement has the benefit of allowing the customer to be able to specify requirements and additional changes in a piecemeal manner during the course of the project. The customer should however, have in place a schedule to the agreement with an agreed basis of charges which can be applied to each 'call off' or 'work project' under the framework agreement. Both parties will also want to have a scope schedule, as well as some certainty as to the chargeable and non-chargeable aspects of the web design and development work.

Web Design & Accessibility

The profile of ‘accessibility’ has received particular attention over the past year, with publicity through surveys and ‘naming and shaming’ of large companies.

The relevant legislation is the Disability Discrimination Act 1995, and in the context of the web, the issue has been to make web pages accessible to those suffering from disabilities. The inherent requirement therefore consists of having alternative interfaces available to those with disabilities.

However, this gives rise to some issues in itself, namely: (1) the level of awareness amongst web designers about the mechanisms which need to be incorporated to address accessibility requirements; and (2) the lack of any prescribed standard for web accessibility.

With regard to the first issue, this is something that a customer should discuss with a web designer prior to entering into a contract commitment, to check that the web designer is aware of what needs to be implemented to address this legislation. If the web designer can not provide sufficient comfort, then the customer should either consider an alternative designer, or face the risk that the website which will be designed and developed, will not be compliant with legislative requirements.

With regard to the second issue, guidance has been provided in the form of the World Wide Web Consortium's Content Accessibility Guidelines, but the Disability Rights Commission (DRC) has called for these to be updated, and for a standard to be prescribed, so this is still something which is an evolving process.

Intellectual Property Rights

The issue of intellectual property rights arises with regard to various aspect of web design:

- **Meta-Tags:**

Meta-tags are ‘invisible’ keywords inserted into web pages, so that they can be used by search engines to index and locate web pages.

Although the concept for the inclusion of meta-tags is sound, their use has been open to abuse. The abuse arises from website operators or designers using the names or trade marks of other organisations as meta-tags. Thus if McDonalds used the keyword “Burger King” in their meta-tag, certain search engines might show the listing for McDonalds when a user entered a search for “Burger King”. This form of unlawful activity has already received the attention of the Courts, initially in the USA, but also subsequently in the UK, and the clear message from the Courts, is that such use of terms in meta-tags will not be tolerated.

Although a customer might decide against use of such prohibited keywords in its meta-tags, an over-zealous web designer might unknowingly to the customer include such very terms without appreciating the consequences of the designer's actions. This therefore needs to be guarded against both in the contract, through intellectual property rights' warranties and indemnities, and also from a practical perspective by discussing with the web designer which terms have been included in the meta-tags of the web pages.

- **Images, text and designs:**

Images, text and designs are the common aspects of web pages that come to mind when one thinks of intellectual property rights. However, it is important to ensure that the web designer has the rights to use in particular, any third party stock photos or clip art which have been included in the web pages.

Although from a legal perspective this can again be guarded to some extent by the contract, from a practical perspective it might be worth investigating the source of any third party images and checking or obtaining confirmation that such third party is authorised to provide such stock photos, particularly if the stock photos are going to be used in a

parallel print marketing campaign by the customer.

There is then the question of rights ownership. A customer needs to ensure that it is not locked into an arrangement where it can only use its existing web designer for changes to the website. The customer will thus want to own the rights in the website. This gives rise to 2 problems:

- The web designer will not want the ownership in the non-bespoke code being transferred to the customer, as it will be using that as a basis for other web design work. In addition, there might be development undertaken in the bespoke work which the designer may wish to also re-use with other clients.
- The third party stock photos might be licensed to the web design company to only use with its clients, and might be restricted with regard to use by other web design companies.

With regard to the first of the above problems, a solution might be to transfer ownership in the bespoke part, whilst providing a perpetual licence in respect of the non-bespoke code, or alternatively a licence in respect of all of the code, so that both parties can have the benefit of the development work. Whatever arrangement is going to be reached can also be used in the pricing negotiations for the design and development work.

There is also the issue of 'sensitivity' which must be considered. A customer entering into an engagement for a high value web design and development project, might be justified in owning the rights in the bespoke work, either because of the cost involved and/or to maintain its competitive advantage.

With regard to the second issue, provisions could be included in the agreement to ensure that the web

designer will procure licences in respect of such third party stock photos for the purposes communicated upfront by the customer.

Timing

With regard to web design work, there often is a business deadline which dictates the development timetable. If time is of the essence, then this should be made clear in the contract, as well as the consequences of non-compliance with timelines, including the applicability of liquidated damages.

Timing is also important with regard to agreeing service levels for making changes to the website, depending upon the nature of updates which may be required either on a regular or ad hoc basis.

Conclusion

Although there are numerous issues with regard to web design and development agreements, the above focus on some of the key issues from a customer's perspective. With the web now being almost an integral part of a business and marketing strategy for an organisation, it is important that these types of issues are addressed at the outset, rather than post the event – as once an organisation has invested in a web presence, suspension or unavailability of that presence due to a dispute with a web designer, even for a short period of time, becomes infeasible from a business perspective.

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