



Website development agreements

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- 🌀 **Websites are becoming increasingly important to business activity**
- 🌀 **As this role expands there is greater need to ensure commercial functionality**
- 🌀 **Management must also be aware of peripheral issues such as intellectual property rights, defamatory content and privacy laws**

Much has been said and written of the Internet in recent years, but when it comes to contracting with a developer to give you a web presence, not much is known.

To date, companies have used the Internet principally as an information disbursing tool.

With the drive of e-commerce and changing laws that facilitate transacting electronically, we can expect more and more traditionally off-line businesses to appear on the web and to use their websites as a critical part of business operations.

We will see more complex websites, and necessarily more sophisticated website development agreements.

With a greater number and variety of websites on the Internet there is now little room for pro forma contracts.

It is important to identify what we mean by a 'website development agreement'. We are not concerned with a service provider subscription, hosting agreement, Internet advertising contract or on-line contracting terms — although all these aspects may form part of a development agreement.

A website developer will focus on the process of building the website itself, and a development agreement will thus supply the framework in which the developer will act.

It will define the scope of the website and allocate legal risk between the developer and

the customer.

Existing principles of contract and intellectual property law, as well as basic drafting techniques, form the basis of any website development agreement.

It is these principles that must be looked to in order to manage the risks that arise when contracting with a developer.

This risk management exercise cannot, however, capture all risks associated with having a website. An analysis of the complex array of risks associated with entering cyberspace is beyond the scope of this article.


In drafting a website development agreement the following areas generate risks for a customer and should be the main focus:

- software development and the website's functionality
- provision or development of content
- future maintenance and training
- domain name registration
- hosting
- privacy considerations and
- restricting the developer from working for your competitors.

It is also important to maintain a project management approach to the development. The agreement with the developer may place a customer in a good position to recover damages if the developer fails or delays in delivery. A useful development agreement will also include detailed mechanisms for dealing with delays and these should not be ignored.

Website functionality

An essential question for a company is: Will the website do what you want it to? When dealing with website development there is a significant risk that the website will not be what the customer wanted as it is difficult to accurately identify the attributes of the final product. While to most people a website exists as a series of pages to be looked at on a computer screen, the more essential features of



a website lie behind this facade. Operating software and hardware create the features of a website and dictate its speed of operation. Thus it is important in a website development agreement to outline all the technical specifications involved in developing that website.

A website development agreement should have two essential features to ensure a fully functional website is delivered. Firstly, the developer should provide warranties as to the functionality of the site.

While this would seem obvious, developers will often be reluctant to provide such warranties because the operation of the website may involve reliance on software which the developer has not created themselves. In this situation, the customer should ensure any warranties relating to software supplied by third parties are passed through to the customer.

Another approach is to require the developer to still give some form of performance warranty if the developer has given recommendations to use software developed by a third party.

Secondly, due to the difficulty in specifying exactly what the finished product will be, the customer should also insist an acceptance testing procedure is included within the agreement.

Linking final payment to a series of milestones and testing procedures can help to spread the risk between the developer and the customer. Acceptance testing will also assist in identifying faults before completion.

'Portability'

The more legally difficult issue arises on completion of the website. If the agreement has not transferred the appropriate ownership or use rights over the software and any other material that supports the website, the customer may be entrenched with a developer.

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agreement will enable the customer to 'walk away' from the developer with a fully functioning website intact — a factor that can be called 'portability'.

The customer should then be able to engage another host or developer, or host the website inhouse on its own hardware systems.

In constructing the site, the developer may use its own as well as the customer's existing material, both of which may incorporate intellectual property rights. Also, new material protected by intellectual property rights may be created within the website.

Where the development agreement remains silent on this matter, the developer may retain ownership of its own material and, as creator of the new material, may argue it owns that material and use the intellectual property protections to prevent the customer from using that material after the agreement has terminated.

This may leave the customer with little more than the content they supplied in the first place.

The developer is likely to take this approach where:

- the website was developed using material they had previously created and can use again in the future; or
- the development of the website has created new material that they wish to use on other projects in the future.

The solution to this problem is for the customer to purchase or license the website's supporting software and tools.

While portability will be ensured if there is full assignment of the intellectual property rights in all the necessary material to run the website, portability can also be achieved by obtaining perpetual licences to use software and tools.

Payment of licence fees is usually easier than valuation of the material for sale. Where the developer has used software created by third parties, the customer should ensure it obtains the appropriate licences to use such software.

The granting of world-wide rights in a licence is the standard approach, given the difficulty in defining geographic scope on the Internet.

A good basic scope of licence would be a non-exclusive licence granted to the customer enabling it to use the material for the operation, development and modification of the customer's website, and enabling the customer to engage third parties to do the same on the customer's behalf.

Where the customer places importance on possessing a website that is unique and cannot be mirrored by its competitors, it may seek to negotiate for, or pay a premium for, a sole or exclusive licence or for assignment of the intellectual property rights of particular components of the developed site.

It is also vital for the website development agreement to specify what documentation regarding the software and licences or assignments must be delivered to the customer upon termination to ensure that the transfer and continued operation of the website is possible.

In the process of developing any software or tools for the website, the developer may use third party material protected by intellectual property rights.

Liability for breach of such rights



must be allocated. The developer is the usual party to accept the risk of such a breach as it is the party best able to minimise the risk by licensing or buying the third party material.

This risk can be managed through an indemnity provided to the customer.

This should provide that the developer will indemnify the customer against any loss arising from breach of third party intellectual rights in the website, excluding material introduced by the customer.

Content

Having decided to develop a website, the customer should ask itself: What content are users of the website going to have access to?

The risks associated with content that is published via a website are significant, including liability for:

- defamatory content
- breach of privacy laws
- misleading and deceptive conduct under Commonwealth and State legislation
- publication of 'objectionable content' under State laws and recent Federal legislation
- loss of confidential information and
- inadequate protection of intellectual property.

It is up to the party that supplies the content (usually the customer) to take steps to control that content and manage the risk of liability for any of the above.

Accordingly, it is usual practice for the customer to indemnify the developer for liability or damage arising from content provided by the customer.

In addition to this indemnity, the development agreement can be drafted to manage confidential information.

Both parties should be under obligations to protect the other party's confidential information used

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The obligation here should be drafted to include the employees, subcontractors, agents and assigns of each party.

Maintenance obligations

Due to the unpredictable and changing nature of website technology, future maintenance and training is an important feature of a website development agreement.

Charges for these services should be set to provide certainty for the customer, along with time limits for maintenance as repairing the website will often involve taking it off-line.

This will minimise the risk of future disputes as well as provide certainty for the customer in relation to the future costs of running the website.

Domain name registration

The risks associated with domain names have been a hot topic in recent years, in particular litigation involving so-called 'cyber-squatters' who seek to profit out of registering a domain name featuring another company's name.

While the customer may register domain names themselves, where they choose to include domain name registration as part of the

development services, the development agreement must address the specific requirements for registration. This includes which top-level domain names to register (eg '.com' or '.com.au') and what second-level domain name (usually some derivation of a company name or trademark) to register.

Once a website has developed a reputation, changing the domain name can result in a major reduction in 'hits' as users can no longer find the site. To ensure portability of the website the agreement should specify that the registration of the domain name be in the customer's name and not the developer's.

Privacy considerations

Where a developer is charged with the task of hosting, they may seek to use a third party host. Here there is a risk that the host will have access to the customer's confidential and/or commercially sensitive information.

The development agreement should be drafted to pass through obligations regarding security and confidential information to third parties engaged to host the website.

Under new privacy legislation introduced by the Federal government, companies handling personal information of customers will have obligations regarding the handling of that information.

Where a website is designed to collect personal information from users, failure by the website owner to comply with privacy legislation could result in fines and other penalties.

The developer may construct the tools for complying with such legislation, including the relevant 'Notice' pages for informing users of a website of the ways in which personal information is collected and used. However, the developer may expect an indemnity from such liability on the grounds that the continued compliance with privacy

legislation should be the responsibility of the customer.

Competition restrictions

Where a company develops a new website that is likely to attract the attention of its competitors, the company may seek to restrict the developer from working with any of its competitors.

Such a restriction may attract the State and Federal anti-competitive laws, thus should be drafted carefully.

Rather than a blanket restriction from engaging in business with certain companies, drafting of licences can have the effect of preventing copying of the website by a competitor.

Where a sole licence is granted by the developer, no other company can licence the supporting software and tools to operate the site. Full assignment of the supporting software and tools will also have this effect.

A developer will usually charge a premium for such a sole licence or assignment as the developer is then

prevented from exploiting the intellectual capital cultivated in the development process.

Conclusion

The risks that have been discussed above are unique to website development.

Failure to address them in a website development agreement may lead to difficulties in operating the site, loss of the site altogether if the developer 'walks away' with vital components of the site, or even breach of the law.



ASIC's online action plan

ASIC's Online Action Plan, developed as part of the Government Online strategy, is published on ASIC's website at <http://www.asic.gov.au>. It is a public document identifying which services ASIC will make available online by 2001 and how this will be achieved. It provides an opportunity for client comment and allows ASIC to review and strengthen the methods used to ensure that their online services are client focused.

ASIC's approach to ecommerce

Over the next three years, ASIC plans to build a regulatory and business environment in which:

- Consumers of ecommerce financial products and services can be confident that their interests are properly protected.
- Industry participants can confidently plan and develop ecommerce initiatives.
- ASIC further enhances its ability to be an effective and credible regulator in the ecommerce context.
- ASIC continues to enhance its

online delivery of services, in accordance with the Government Online initiative.

This year, ASIC will undertake a number of activities and projects to help achieve this outcome. The plan has six dimensions each of which contain key areas of focus:

- eCapability
- eRegulation
- eEnforcement
- eCommunication
- eCoordination
- eBusiness Development

ASIC undertook a detailed audit of its services as part of its online services strategy review and, together with supporting business case analysis, the following key projects have been identified for development during this year:

- Financial Services Reform (FSR) alert.
- Enforceable undertakings online.
- Online complaints management.
- Corporate Law Economic Reform Program (CLERP) 7 payments infrastructure.
- Online licensing for FSR.
- Online lodgment of external administration forms.

News and Views

- Online offer documents feasibility study.
- Email management feasibility study.

The detailed audit of services also identified a series of potential impediments to online service delivery including:

- Resources and funding.
- Online capability of clients.
- Transaction volumes and size of client group.
- Paper attachments.
- Information requirements and standards.

In its commitment to the Government Online strategy ASIC's emphasis is also on ensuring that ASIC meets the key national standards identified in the strategy. These are the:

- Online Information Service Obligations requirements.
- Authentication standards.
- Privacy standards.
- Security standards.
- Metadata standards.
- Electronic publishing standards.
- Electronic record keeping guidelines and archiving standards.
- Accessibility standards.
- Electronic procurement requirements.

