Website development

This information sheet covers the most important issues that a person should consider and possibly address in a contract when engaging a website developer to create a website.

Who should use this information sheet?

This information sheet is to help you to engage a website developer (**web developer**) to create a website. It assumes that you have found a web developer who has the necessary skills, expertise and resources to deliver the website you want.

This information sheet also directs attention to the best practice for setting up online contracts with users of the website.

Why should you have a written agreement with your web developer?

Having a written agreement helps to ensure that you receive what you want from your web developer, for example:

- by setting out the scope of work you want the web developer to do;
- when you want the website to be delivered, tested and live;
- how much you are to pay and when;
- what rights each party has in relation to the website.

Arts Law recommends you discuss and finalise an agreement **before** the web developer starts work and **before** you pay any money to the web developer.

What should you do if the web developer gives you a ‘standard’ agreement?

If a web developer gives you an agreement, it will generally reflect a position which is most favourable to the web developer. If you are not satisfied with some of the terms, you should try to negotiate changes or prepare a new agreement. Look at the agreement in light of the issues discussed below and consider:

- if you – or anyone you know – has dealt with the web developer before. You might discover problems that have come up in the past;
- the potential costs of engaging the web developer;
- how important and complex the website is;
- what each party is responsible for;
- whether you are likely to have a long term relationship with the web developer, for instance in relation to ongoing website hosting, maintenance or hosting; and
- whether you can continue using and modifying the website if the relationship turns sour.

What issues should a web development agreement cover?

Who is the web developer?

It is important to establish who the web developer is and in which capacity the web developer is entering into the website development agreement. For example, is the web developer an individual or are you dealing with a company? It is important to establish who is entering into the agreement or it may be difficult or impossible to enforce if something goes wrong. Business or trading names are not proof of a separate legal entity. Accordingly, you should ask any individuals you are

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dealing with under which business structure they operate, and for the details of any company if they are using a separate legal entity.

The website of the Australian Securities and Investment Commission (**ASIC**) has a search function which allows you to check ASIC's Registers for possible company names or relevant numbers to the legal entity such as Australian Business Numbers (**ABN**). This information can also be accessed at the ABN Lookup database which is the public view of the Australian Business Register (ABR).

What are your obligations?

- **Payments**: You should consider how you want the fees to be structured.

  Set fees can be useful, for instance a set maximum payable fee for the completion of the entire website or a set fee per identified stage completed.

  If you agree to pay on the basis of time spent, there is a risk that you will be charged more than you expected if the project becomes larger than expected. Try to cap hours that can be spent on the project and ensure that the web developer can only carry out additional hours with your prior written approval, or be very specific about what you want the web developer to do.

- **When do you have to pay?** Paying set fees at different stages of the project rather than upfront can be helpful and mitigate risk.

  You should think about whether you want to be able to withhold payment if you are not happy with what the web developer has delivered.

What are the web developer's obligations?

- **Website**: be as clear and detailed as possible in the agreement about what you want the web developer to create. You should specify what you want the website to do and what you want it to look like.
- **Timetable**: you should set out a clear timetable for the web developer to comply with for the various stages including final delivery, testing (if applicable) and live date. If the web developer causes a delay or is unable to deliver, what should your options be under the agreement? One option may be to withhold money until the web developer continues or completes the development work. Another option might be to terminate the agreement (see below) but this generally means that the web developer will not complete your website and you will need to spend more time and money with a new web developer coming up to speed on the project.
- **Testing**: if your website is large or complicated, you should request acceptance testing at various stages of the website development and agree that you do not pay for delivery until the tests are passed. If you do not do this, you risk paying for a website which does not work in the agreed manner. For a testing regime to be useful, you will need to identify the performance standards the website must satisfy and make sure that you can actually test the website in this way. The performance standards the website must satisfy should also be part of the contract with the web developer.
- **Confidentiality**: if your plan to launch the website is confidential, or you have other confidential information you need to share with the web developer, you should require that the web developer promises to keep that information confidential, not share it with anyone else and only use it for the purpose of developing the website for you. See the Arts Law's information sheet on "Protecting your ideas" for more information as well as a sample confidentiality agreement.
- **Domain names**: if the web developer is applying for domain name registration on your behalf, you should require that the application be made in your name rather than the web developer's name. If the web developer uses their own name, it may be more difficult to ensure the domain name is renewed and to transfer the domain name if you decide to sell this part of your business in the future. See the Arts Law information sheet "Protecting your professional name" for information

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on domain names.

- **Deliverables**: make sure the agreement is clear as to what 'deliverables' the web developer must provide to you for you to operate the website, as well as any technical requirements that you may need from a web host (should the requirement to change hosts arise).
- **Code**: you should ask the web developer to provide you with a copy of all website code created for each stage so that if you need to get another web developer to complete the project you have the information they require.
- **Source code:** the agreement should also cover whether the web developer is giving you the source code (the "human readable" code) and related materials. If the web developer does not agree to give the source code, you should require the web developer to put the source code and materials in escrow for you to be held by an independent third party escrow agent. This will enable you to access the source code if the developer fails to support the website or becomes insolvent. If you do not have the source code and you cannot access it, it may be difficult to support the website without the web developer.

Rights in the website

Even though you are paying the web developer to create the website, they will own any intellectual property in the website if the agreement is silent on ownership. It is, however, preferable for you to own the intellectual property. To achieve this, you must include an express written assignment of copyright and other rights by the web developer to you in the agreement.

This is often a contentious issue and the web developer might not accept an assignment to you. The web developer may want to retain some rights in the website, for example if the web developer uses code that they had written before working on your website. You could request a combination of assignment of certain aspects and a licence of other aspects which the web developer wants to retain. You should identify what, if any, code you want to own in order to continue using, maintaining and building on the website if your relationship with the web developer ends. See the Arts Law information sheet: "Computer Games – legal issues for creative designers", on the use of 'authoring programs' and the use of specific routines or modules of code created by the web developer that augment or improve the operation of an authoring program.

A licence should be:

- not limited in time;
- granted worldwide;
- allow you to amend, modify and support the website or sub-licence another developer to do this; and
- fully transferable. This is important should you sell your business or the website in the future.

The assignment and/or licence should apply to any material delivered in accordance with your agreement. If you fall out with the web developer and one of you terminates the agreement, you want to have the right to use and develop (or have another person develop) the website using the material created by the first web developer.

Third party software

You should ask the web developer not to use any third party software without your consent.

The web developer may want to use some third party software, for instance a "content management system" in the website. If so, request the web developer to evidence a licence allowing the use of that software to operate or change your website prior to actually using the software. You should review that licence carefully, because it will cover how you can use that software and if you can further develop it. Some open source licences (e.g. GNU General Public Licence) require that notice be given to the original software developer if there is any development to the core system components.

Web developer's warranties and indemnities

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It is common in agreements for parties to provide certain warranties (i.e. promises) to the other party. You should request the following warranties from the web developer:

- the use of the website does not infringe anyone else's rights. If you are providing content to the website, it would be appropriate to carve out the material you provide;
- the web developer has obtained "moral rights consents" from any person involved in the creation of the website, including any underlying software. Very generally, moral rights include the right to be attributed as the author of a work and the right not to have the work treated in a derogatory manner. It is normal to specify that the party providing material in relation to which moral rights exist has the responsibility of obtaining any moral rights consents See the Arts Law information sheets: "Moral rights" and "Computer Games – legal issues for creative designers", for information on moral rights of computer programmers;
- the web developer has the required expertise and resources to fulfil their obligations under the agreement; and
- the website will perform to the agreed specifications.

An indemnity is an obligation on one party to compensate the other party for all of their loss and expenses should certain things happen. You should ask for an indemnity from the web developer in relation to a breach of any warranty, for example any claim by a third party that the website infringes their rights.

Exclusion or disclaimers clauses

The website development agreement may include statements that are intended to limit the liability of a contracting party in the event of loss or damage. Exclusion clauses may also be called a 'limitation of liability", "exemption", "exception" or "disclaimer" clauses or may be set out in a clause that states what the website developer does not "warrant". See the Arts Law information sheet: "Exclusion clauses, disclaimers and risk warnings".

You should consider whether any exclusion clause operating for the benefit of the web developer is appropriate to manage risks involved in the creation of the website. You are relying on the professional expertise of the web developer so that you could expect the developer to take responsibility for their work and the performance of the website. However there are some risks that it may not be reasonable to consider are responsibility of the web developer, such as interruption of the internet or protection of the website from cyber-attacks.

Termination rights

You should include a right for you to end the agreement if the web developer fails to meet deadlines, or the website deliverables are not acceptable.

You should ensure the agreement sets out what happens if it is terminated. For example, you should specify that the developer must provide to you the partially or fully completed website deliverables.

The relationship with the users of the website

A 'clickthru' agreement and a 'browsewrap' agreement are the names used to describe two different ways of setting up online contracts. These will be considered in relation to contracting with users of a website and for completing contract arrangements for the supply of products of services (e-commerce).

Contracting with users of the website: e-commerce

Websites which provide information will often state that no responsibility will be taken for losses caused by reliance on the information supplied. An exclusion or disclaimer of legal liability for losses caused by reliance on the information is likely to be effective where reasonable person would have notice of the disclaimer. The Arts Law information sheet: "Exclusion clauses, disclaimers and risk warnings", discusses when a user of a website is likely to be accepted as having either actual notice or

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constructive notice of an exclusion clause or disclaimer of legal liability.

A clickthru agreement describes when a purchaser of software or a subscriber to an online service must click a button before the software installation is completed or the online service can be accessed by the subscriber. A clickthru agreement also describes the process of completing an e-commerce transaction (such as the purchase of some product from a website) where the purchaser must click a button before completing the transaction. The legal effect of the purchaser being required to click-through the button (where there is notice given that there are terms and conditions that are to be accepted or rejected) is that the purchaser is acknowledging their acceptance of those terms and conditions. The assent to those terms and conditions by clicking through the button will take effect regardless of whether the purchaser chooses to read or ignore the terms and conditions.

Terms of use (TOU) / Terms of service (TOS)

The best practice for setting up online contracts is to require any user of the website to click an 'I agree' button on a web page to confirm the user is agreeing to the terms of use (**TOU**) or terms of service (**TOS**) of the use of a website (That is, a 'clickthru' agreement). The actual notice of the TOS/TOU can be established where the user is forced to accept the TOS/TOU before proceeding to complete a transaction or to use the website.

A browsewrap agreement describes the situation where the TOU/TOS of the use of a website can be viewed on a linked page (such as via a button at the bottom of the home page) but the user of the website is not required to click a button to acknowledge that the user is acknowledging their acceptance of those terms and conditions.

It may not be feasible to design the website so that every user must click an 'I agree' button to accept the TOS/TOU, which would be actual notice of the terms of the contract with the user. The test for constructive notice of the TOS/TOU requires the operator of the website to do all that is reasonably necessary to bring the TOS/TOU to the user's attention. Australian courts have not considered whether a browsewrap agreement achieves constructive notice of the TOS/TOU, so as to make them contractually binding. U.S. courts have determined that a discreet hyperlink to the TOS/TOU buried among other links at the bottom of the home page does not provide constructive notice of the TOS/TOU.

In Australia it is uncertain as to whether TOU/TOS that are presented in the form of a browsewrap agreement are legally enforceable as there can be questions as to whether the user had actual or constructive notice of the TOU/TOS. Where you are not implementing a clickthru agreement, the best practice would be to draw the attention of the user to the TOU/TOS link displayed prominently on the home page, as simply including a link at the bottom of the home page may not be sufficient to establish constructive notice of the TOU/TOS.

See Arts Law's: Sample Website Terms of Use.

Unilateral changes to the Terms of use (TOU) / Terms of service (TOS)

It is a common practice for the TOU/TOS to state that the operator of the website can unilaterally decide to change the TOU/TOS.

The *Australian Consumer Law* (**ACL**), as set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), is the national law concerning consumer protection and fair trading. It is administered and enforced jointly by the Australian Competition and Consumer Commission (**ACCC**) and the state and territory consumer protection agencies.

The ACL prohibits a person from engaging in 'unconscionable conduct' towards consumers or businesses. There could be circumstances in which the supplier, when attempting to change the TOU/TOS, engages in particularly harsh or oppressive behaviour against an existing user that could be considered 'unconscionable'.

There are various factors listed in the ACL that are to be considered by courts as indicators of unconscionable conduct including the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer

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and the relative strengths of the bargaining positions of the acquirer and the supplier.

The ACL also addresses the use of unfair contract terms in standard form consumer contracts. The term is 'unfair' when:

1. it causes significant imbalance in the parties' rights and obligations;
2. it is not reasonably necessary to protect the legitimate interests of the suppliers; and
3. it causes detriment to the consumer.

Examples of unfair contract terms include:

- permitting the operator of the website to vary price without giving the consumer a right to terminate the contract;
- requiring the consumer to indemnity the operator of the website in circumstances where the consumer has not breached the contract and the operator may have caused the loss;
- permitting the operator of the website to unilaterally terminate the contract at any time with or without cause or reason.

The Australian courts have declared terms that contravene the unfair contract terms provisions of the ALC as void.

Further, in New Zealand, the courts have held that if a party wishes to exercise a unilateral right under a contract (particularly if it intends to make a significant change) it should give the other party a reasonable period of notice. The other party should also have the opportunity to assess and adjust to the change or consider its options. This ensures that rights under a contract are exercised consistently with their purposes.

Where a clickthru agreement is used, the unilateral amendment provision can be avoided as the website is entering into a new transaction each time a user returns to the site. While the ACL provides for standards of fair business practices, the ACL does not restrict the freedom to contract, such as when the acquirer of the goods or services has a choice as to whether or not to accept the supply made under the TOU/TOS presented by the supplier. Therefore the terms of a clickthru agreement can be presented to the user when they click through to complete the transaction.

The ACC publish guides to the operation of the ACL, including:

- **ACL protections in relation to standard form consumer contracts**: See 'A guide to unfair contract terms law' (ACCC);
- **ACL prohibition in relation to unfair trading practices**: See 'The avoiding unfair business practices guide' (ACCC);

Further information

- The Australian Copyright Council (ACC) has published free information sheets:
  - Websites & Copyright
  - Websites: Social Networks, Blogs & User-generated Media
  - Arts Law's information sheet on Contracts: Introduction offers basic advice about problems with agreements that are not in writing, and some general advice about contracts.

- See also the Arts Law information sheets: Exclusion clauses, disclaimers and risk warnings and Contracts: a glossary of jargon.
- Other Arts Law resources that may be helpful in relation to the content that you want to put on your website are:
- Information sheet: Computer Games – legal issues for creative designers
- Information sheet: Legal issues for bloggers
- Information sheet: Moral rights

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- Information sheet: Protecting your ideas
- Information sheet: Protecting your professional name
- Checklists and guides: Displaying Visual Art on the Internet
- Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013); which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4); contracts (ch 5); collecting societies (Ch 7); art and the internet (Ch 10).

Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the Arts Law website (www.artslaw.com.au) for more articles and information sheets.

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