

## ANASSUTZI & CO LIMITED

[www.anassutzi.com](http://www.anassutzi.com)

### KEY ISSUES TO CONSIDER WHEN CREATING A WEBSITE

A company wishing to create or re-vamp a website must, first of all decide and then agree with the designer/developer, how the website should be designed and constructed. This should be specified in a website design and development agreement which will ensure that, the company gets what it requires, by imposing an obligation on the designer to create the site, according to the company's specifications and the designer/developer is certain to have correct instructions to ensure that the project is delivered on time and in budget and remains profitable.

The key issues that should be addressed in a website design and development agreement are:

- **What is to be created:** the contract should set out clearly, in sufficient detail, the **company's requirements for the website, in terms of a functional and performance requirements and in terms of any visible content** (whether this is video, images, music or text). The agreement should clearly state who is responsible for ensure that legal requirements to which the company is subject are identified and address. This will ensure that they are taken into account when designing the site. Such legal requirements include (i) access requirements under disability discrimination legislation, (ii) consent requirements under data protection legislation and/or the requirements of distance selling legislation (iii) information provision requirements and (iv) E-privacy directive recent changes reflecting the use of cookies.
- **Ownership of what is developed:** The company will want to ensure that if it develops any specific features or applications that differentiate the site or any design or other material, it owns all rights in them. The type. of intellectual property that apply to various website elements are mainly copyright. By law, **the first creator of the materials (i.e. the designer or its consultant, sub-contractor etc who created the materials), will be the owner of the copyright in such materials (text, images, music, software, trade mark) unless it has signed an agreement transferring such rights to the company.** The company by ensuring that it owns or has the right to exploit the copyright and related rights in all aspects of the web pages (including the overall design, any specially written text or graphics, and the coded version of the pages), can then transfer the website to another designer/developer to complete the project where, for example, the current designer/developer is not performing, use it as leverage to increase the value of its company or seek investment. Intellectual property rights are assets of the company even if they are "intangible" or as I would say very often "invisible".

In most cases, there is no reason why the designer should not agree to transfer ownership of the IPRs developed specifically for the company, or to license such rights where the designer is not in a position to grant an outright transfer (such as where third party works are included in the site content). However, **the designer should ensure that it does not transfer to the company ownership of any intellectual property in any underlying software of the designer not specifically developed for the company but needed to operate the website.** In such a case, the designer will grant a licence permitting the company to use the relevant works in the operation of the website. However, the company must be careful to ensure that it obtains all the necessary rights so that it is not restricted in the operation of the website (whether by territory, time or other restrictions).

- **Content licences:** if it is necessary to source from **third parties** different types of content will be needed for the site, such as text, photographs, audiovisual material or software, the designer/developer should (unless otherwise agreed) have the obligation to source such content and a **relevant licence**. In addition, the website owner should seek appropriate warranties and indemnities (and insurance) to protect itself against any claim that the content is illegal (for example, because it infringes third party rights). The licensor, on the other hand, should not warrant the legality of the content on a worldwide basis and back the warranties with the third parties from which he has sourced the content and should ensure that if any allegations or claims are made that any content it supplies is illegal or harmful, it has the right to (or require the website owner to) remove such content from the site so as to minimise its liability.
- **Timetable:** the company should seek to ensure that the designer is contractually bound to meet **key milestones**, in particular the date for launch of the site and what are the remedies in the event they are not met.
- **A budget and payment options:** need to be agreed at the outset as costs will vary depending on the complexity of the proposed site, the types of graphics required and so on and this very often will be the first point where a dispute may start between the parties. Payment may be on a **fixed-fee** or **time-and-materials basis** (or a combination of both)
- **Acceptance tests:** the company will want to satisfy itself that **the website performs on the designated servers in accordance with the company's functional and performance specification**, and can deal with anticipated usage levels.
- **IPRs infringement.** The company should insist to receive from the designer/developer some protection against claims that any content or software produced by the designer in the course of the development of the site infringes the rights of third parties. This could arise either because the designer inadvertently uses material it has developed for (and assigned to) other customers, or where it seeks to incorporate third party works in the design (such as photographs, video clips or music) for which no permissions have been obtained. **The company**

**should seek such protection in the form of an indemnity (and insurance) to cover any liabilities that might arise.**

- **Maintenance, support and hosting agreements.** It is important to consider **how the site will be maintained and updated after it has been launched, including:**
  - Availability on the designated server, security features, maintenance and support of the site (such as updating content or help-desk support), back-up and disaster recovery or statistics relating to usage of the site;
  - Response times;
  - Uptime requirements;
  - Liability for website content;
  - Hosting fees;
  - Data collected;
  - Policing content: if the site has message board or chat-room facilities in order to avoid or limit liability, it will be important to ensure that there are obligations in the agreement for the removal of infringing material from the site as quickly as possible.

By Dr Maria Anassutzi July 2010 –extract from the presentation to the Aylesbury Business Lunch