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***“Intellectual Property lies at the centre of the modern company's economic success or failure”***

Lester Thurow : Economist

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Transactional Intellectual Property

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Regulated by the Solicitors Regulation Authority  
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## Are you at the mercy of your website developer?

**A guide to the common issues which arise and how to avoid the pitfalls when commissioning the development of a website.**

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Nowadays most businesses use the Internet in some manner to perform their everyday transactions. For example, many businesses trade by selling their products and/or services via their own website. Whilst actually trading on the web can raise a multitude of legal issues, in this article we are specifically looking at some of the issues which arise and how to avoid them when a third party developer is commissioned to design and develop a website.

### Development of a website

If a business has sufficient IT capability it may be able to develop its own website in-house. However, in most cases, businesses look to instruct an external specialist to create an Internet presence. If a third party developer is to be used, it is essential that a written contract is in place which governs the terms of the instruction. Many developers will have their own terms and conditions which, of course, will be biased in their favour. Therefore, it is very important before commissioning a consultant to develop a website that the terms and conditions upon which you contract are reviewed very carefully. Outlined below are some of the common pitfalls in commissioning the development of a website and how best to avoid them:

### Ownership of intellectual property

Copyright is a form of intellectual property and will subsist in website content and the underlying website programming. To have complete freedom to do whatever you like with your website and its content you will need to own that copyright. Under UK copyright law, the author of a work is the owner of the copyright subsisting in that work. However, if the author of the copyright work is an employee, the employer is the owner of the copyright. Therefore, if it is your employee who has created a website, the issue of ownership of copyright does not arise. However,

where an external consultant is commissioned to develop a website, unless otherwise contracted, it is the consultant who will own the copyright in the work. In order to ensure that you own all the copyright, the contract upon which the developer is commissioned must contain a provision assigning all copyright and other intellectual property subsisting in the website and its contents to you.

Ultimately the ideal position to be in is to own all the copyright and other intellectual property in the website and its content. However, in reality not all website developers will agree to this, particularly if they have included certain code underlying the website which they will want to re-use in the design of other websites or if the website incorporates third party software. In those cases, a less satisfactory alternative is for the developer to assign all intellectual property rights in the unique look and feel of the website to you and to grant you an irrevocable non-exclusive licence to use the other code.

It is advisable to include a provision in the contract which ensures that you can assign all your rights in the website to third parties. This may be appropriate if you are considering the sale of your business sometime in the future. You should also ensure that your intellectual property rights in any materials supplied to the developer are protected and that the developer is under obligations of confidentiality.

It is also a good idea to ensure that the contract contains a warranty which provides that all intellectual property subsisting in the website and its content will not infringe the rights of any third party. You should also ask for an indemnity from the developer that will cover all your costs in the event that your use of the website results in you getting sued for infringement of a third party's intellectual property rights.

### Domain Name

It is important that you own the domain name at which your website will be located. Often it is the website developer who registers your domain name and they may register it in their name instead of yours. You should make sure that the domain name is registered in your name and that the contract clearly states that you own the domain name.



## Agree a specification

Often disputes arise because the website developers fail to meet the customer's expectations. For instance, issues often arise in relation to the time frame with which the website was delivered or the website does not look, function or contain what is required and/or expected. It is therefore essential that a detailed specification for the work to be carried out is agreed before commencement of the work so that each party knows the requirements and objectives.

## Payment

Another obvious cause of dispute is in relation to payment. Consider if payment is on a fixed fee basis or if it is based on time spent and materials. Issues can arise if the developer considers certain work falls outside any figure which was originally estimated or agreed. One way to help avoiding issues regarding payment is to ensure that the contract provides for staged payments which are linked to achieving specific milestones within certain time scales and acceptance testing procedures. Before the last payment is made there should be a final acceptance which ensures the website meets with the agreed specification.

## Hosting, support and maintenance

For a website to be accessible via the Internet it must be hosted on a server. For the majority of businesses, their websites are hosted by a third party service provider, although some businesses can host their own website. In addition, businesses may also contract with a third party to maintain and provide support for their website.

If the website developer is to host, maintain and/or support your website you will need to consider the basis upon which those particular services are to be provided and provisions dealing with these additional services can be included in the website development contract. However, you can also enter into separate contracts dealing specifically with the provision of those services.

So far as hosting your website, it is important to ensure that your provider contracts to provide your required levels of service. Of particular importance is the requirement for server uptimes and the provision of sufficient bandwidth to effectively operate your website.

You should also ensure that the contract provides that if you decide to change your provider you are able to move your website.

In order to protect your position, the contract should provide you with access to the source code for the website. This can be done by ensuring that the developer puts the source code in escrow to be held by a third party. An escrow agreement can provide for the release of the code to you in certain circumstances such as in the event of a dispute arising or if the developer goes out of business.

## Conclusion

As with most commercial transactions, when commissioning the development of a website it is important to get a good contract in place. Don't just accept the website developer's terms and conditions. Take time to review and negotiate the terms under which the website is being developed and provided to you.

It is advisable to obtain advice from a solicitor specialising in information technology - in the long run this advice may save you a lot of wasted time and money.