Legal Issues in Web Design

Philip Thompson, a partner at specialist corporate and technology law firm White & Black, shares his views on common legal issues which can arise in the world of web design.

We’ve all heard the stories of people who claimed their work has been ripped off: the designer who shows designs to a potential client, doesn’t win the contract but then finds an exact replica of his work appearing a few months later, or the designer who produces a website containing a bespoke graphic which is then used by the client across other forms of media.

Sometimes these situations end in legal disputes, on other occasions they simply act as a lesson to those involved, either way, they show that designers and clients alike are often unaware of their rights and obligations and this article sets out to help correct this.

It also seeks to raise awareness of some of the lesser-appreciated legal issues associated with the development of a website and the information it contains.

Protecting your rights from the start

When asked to pitch for some work for a new client, as a first step you should think about whether to ask the client to sign a non-disclosure agreement in advance of the pitch meeting. This document (which is also referred to as an “NDA” or a confidentiality agreement) is an express acknowledgement by the client that he or she will keep your ideas confidential, and will only use them for the purposes of deciding whether or not to engage you. It asserts your rights (such as copyright, trade secrets and any potentially patentable work) in any information you provide to the client. Obviously, it can’t physically prevent them from using your ideas in an unauthorised way, but it can act as a significant deterrent to them doing so and it gives you a real head start if you discover that your ideas have been used in an unwanted way. It leaves both parties in no doubt from the outset that any intellectual property rights (referred to elsewhere in this article as IPR) and any value attached to those rights belong to you until the client has commissioned, and has (usually) paid for, the work.

This is of particular relevance where you are asked to provide a number of alternative designs as part of the same pitch, as you’ll almost certainly want to be free to use any ideas which are not taken up for future proposals. If this is not agreed (and documented) with the client, confusion can arise over the ownership of the IPR, which could be a source of friction in your commercial relationship at a later point.

The information contained in the pitch document may benefit from the protection of under the laws of copyright (discussed in more detail below). It is important therefore to assert your ownership over any rights in the pitch document itself. Contrary to popular belief, in the United Kingdom you don’t actually have to do anything to give your work the protection of copyright: if
the document is capable of attracting copyright, this will subsist automatically, however, the
assertion of your rights in such a document can leave the recipient in no doubt that you believe
there is value in it, and intend to protect your rights. This is commonly achieved by the inclusion
of the © symbol along with your name and the year of production at the bottom of each page of
the document.

Your client may take copies of the pitch document to show to others and therefore the pitch
document should include a small confidentiality notice on the front page, stating that the
information is confidential. In certain circumstances, particularly where the stakes are high (for
example, if there’s an aspect of your work which you believe may attract patent protection), it
may even be more advisable to ask each recipient to sign a separate non-disclosure
agreement.

Once you have signed your client up to a legally binding non-disclosure agreement, you can feel
free to provide them with your pitch material with a view to winning the work. The focus then
turns to documenting the terms of the commission in a legally binding agreement.

Documenting the commission

Lawyers are often asked to produce a legal agreement in which the detailed commercial
arrangements are relegated to a specification schedule with little or no input from the lawyer.
Too many lawyers seem happy to accept this position, meaning that the developer has often
lost the opportunity to translate the agreed scope of work and other key deliverables into
contractually binding “milestones” and service levels. By instructing the right, specialist lawyer at
an early stage in the process, and by engaging them to fit the commercial issues into a legal
framework, you can ensure that a legal document is produced which reflects the commercial
negotiations of the two parties (and which means you get the best value from your lawyer!). The
process will also be a lot smoother if your lawyer has at least a basic understanding of the
technical nature of your specification.

Missed milestones

A legal analysis of the commercial deal may also provide you with an alternative view of issues
which, at first glance, appeared to be acceptable. Any milestone which relies on the client’s
judgement or discretion or requires an action on the part of the client which is outside your
control, should be considered carefully. Are there penalties attached to missing any such
milestone? What if you are paid by reference to that milestone: could payment be avoided or
delayed if the client does not provide you with the information you need to reach that milestone?
It’s surprising how many agreements completely miss the point that any penalty attaching to
your obligations should be effective where your work is rendered impossible by your clients
action or inaction.

Moving milestones

Of course some clients don’t know exactly what they require at the outset (as the project may
evolve during the development process itself) and they may view a detailed specification as
being unhelpful. There’s also a danger that a rigid specification can restrict the scope for your
creative development. By contrast, if the specification is too loose, it can be almost worthless as no-one can say with any certainty what it is you’re supposed to be designing!

To address this, some web developers are now beginning to adopt a technique similar to the “agile” approach adopted in some software development projects [www.agilealliance.org/home](http://www.agilealliance.org/home). Here, the development process is dealt with as a continuing, evolving process and each stage in the process is documented only a couple of weeks in advance. In theory this enables the development process to be more collaborative and responsive to discoveries along the way. This can help to ensure that the final product satisfies the client’s needs at the end of the process rather at the start. Many people believe there is a conflict between an agile approach to development and the traditional approach of pre-agreed milestones, payment, schedules and service levels, but this need not be the case. Whilst it is true to say that you cannot have an “agreement to agree” (i.e. a commitment to agree something, as yet unknown, at some time in the future) it is possible to legislate for the basis upon which an agreement can be made. Agile development simply requires a more sophisticated approach to the process commonly known as “change control”. This involves the insertion of contractual provisions to allow for variations to the existing contract. The Key thing to remember is to agree the next steps in writing so as to ensure that this approach does not take away any legal certainty from the commission.

A more discreet benefit of involving your lawyer at an early stage in the process is that you are, in effect, performing a limitation of liability exercise in the contract. By giving proper consideration to the obligations placed upon you in the specification (whether you’re adopting a traditional approach or an agile one) and in any milestones, not only will you be aware of the areas in the agreement where you may have potential exposure but you will also ensure the obligations are both reasonable and achievable, thereby reducing the scope for any claim under the development agreement. You’re just less likely to encounter problems along the way because you’ve thought through all the issues at the outset.

**Intellectual property**

The single most important issue which both you and your client will wish to cover in the development agreement (with the possible exception of payment terms!) is the ownership of IPR in the website.

In the context of web design the two most important types of IPR are copyright and trademarks. Copyright is governed by the Copyright Designs and Patents Act 1988 ([www.opsi.gov.uk/acts/acts1988/UKpga_19880048_en_1.htm](http://www.opsi.gov.uk/acts/acts1988/UKpga_19880048_en_1.htm)) and trademarks are governed by the Trademarks Act 1994 ([www.opsi.gov.uk/acts/acts1994/Ukpga_19940026_en_1.htm](http://www.opsi.gov.uk/acts/acts1994/Ukpga_19940026_en_1.htm)). Patent protection may also be relevant in a limited set of circumstances. Further information on the nature of IPR can also be obtained from the UK Intellectual Property Office at [www.ipo.gov.uk/home.htm](http://www.ipo.gov.uk/home.htm).

The text and the code to a website is protected by copyright. Copyright generally vest in the creator of a copyrighted work but ownership of this can be transferred. The first question to deal with therefore is, who will be the owner of the copyrighted work? Your client may be happy for
you to licence this to them, whilst you retain ownership however if your client has instructed you to create a bespoke website, including some unique functionality, for its web-based business and has paid a significant sum for this, don’t be surprised if they instead expect to have the ownership of the copyright assigned to them.

If you have agreed that you are going to grant a licence to use the copyrighted material in your website, whilst retaining the ownership yourself, your client may ask you to place the source code in escrow. In fact, if your client is resisting your wish to grant a licence rather than a full assignment to them, you may want to offer an escrow solution to try to convince them to agree to this approach. By placing source code into escrow, you’re putting the business-critical material into the hands of a trusted third party so that, if certain circumstances occur (e.g. you become insolvent and cease to trade), the code is released to the client. An escrow agreement will need to be prepared to ensure there are only specific circumstances when the code can be released to your client. It will be incumbent on you as the owner of the source code to ensure that the code placed in escrow is kept up to date. There are a number of escrow agents who provide these services, the most well known of these being NCC Group whose website is at www.nccgroup.com.

For many clients a website is seen as an extension of their existing marketing and advertising and, as such, the branding used on their website will largely consist of their existing trade marks. For new clients whose primary focus for their business is the internet, the branding and copyrighted material which you produce will be new creations and the exploitation of the rights attaching to these will need to be dealt with in the development agreement.

More and more companies start their life trading (or at least generating goodwill) on the internet. We’re now seeing mainstream media being used by these companies as a tool to increase traffic to their website (an obvious example being eBay). As a licence to exploit IPR may be restricted in many ways, you could consider restricting the type of media in which the client is licensed to reproduce the IP you’ve created. Whilst you may be happy to grant your client a non-exclusive, royalty-free and perpetual licence to use the IPR in the website you’ve created for them, are you happy for these to be used on TV or in magazines?

If creating a ‘corporate brand’ is important to your client, it’s likely that they will want to apply a uniform strategy for their marketing activities across the board which will, in many cases, require the use of the same style font and graphics in all their advertising. This will apply to the use of any secondary imagery on your client’s website as well as their main branding. A good example here is the use of the “cloud” graphic on the Expedia website. From looking at their website, you wouldn’t necessarily realise that this is a a key component of their branding. However, the company has applied to have the “cloud” mark registered as a trade mark in the UK and the mark has featured prominently in a number of TV adverts.

**Accessibility**

An area which is gaining increasing exposure in the media is the accessibility of websites for disabled people. Whilst it is likely that any claim in relation to a website’s accessibility will be made against your client rather than you (in the first instance at least), it is vital that you are
aware of the standards which you need to adhere to in order for a website which you create to be considered “accessible”. You may also find yourself dragged into any claim being brought under the disability discrimination legislation, so it’s vital to get this right!

**External content**

There are legal issues attaching to every functional aspect of a website. If your client wants an RSS feed which links to items on a third party website, it is advisable for them to seek the permission of the owner of the website to do this as this could be prohibited under the websites terms of use. Your client should also be careful that the feed does not lead to any potential claim that they are either endorsing, distributing or publicising any potentially unlawful information contained in such a website (this area is largely untested in UK law but the theoretical risk is there). If they wish to allow information on their website to be included in a third party’s feed, you should ensure that specific terms and conditions attaching to the information are in place, or restrict what is shown within the feed, and a copyright notice should always be inserted at the bottom of the feed.

If your client wishes to create a website which contains a wiki or other user-generated content, they need to ensure that there are procedures in place for any offensive, defamatory or unlawful content to be removed. The decision whether or not to moderate a website is a difficult one to reconcile legally as a result of the obligations placed on the owner of a moderated website. Regardless of the decision taken, the client will still need to have terms and conditions of use (to deal with copyright issues for example) and a complaints procedure in place which will need to be adhered to rigorously if they are to avoid potential liability for the content placed on their website.

The legal risks attached to your client having a blog on their website are largely the same as those attaching to third-party generated content (i.e. infringement of IPR, defamation etc). However there are two additional risks for a business to consider when setting up a corporate blog. The first of these is the risk of the company’s reputation suffering in the eyes of the public as a result of information contained in the blog and the second is the possibility of confidential information being leaked through the material posted on the blog. A company should have specific terms and conditions over what may or may not be disclosed in a blog and should try to have a policy in place governing the use of blogs in the company. It is usually prudent for a person in the company other than the author of the blog (ideally someone who is authorised to bind the company in the ordinary course of business) to be required to approve a blog entry before it is published. The company could also give this person the responsibility for providing guidance on the blog and dealing with any complaints received. The company will be held responsible for any blog which is created either during the course of an employee’s employment or made on behalf of the company, whether as a marketing tool or otherwise.

The law relating to data protection and freedom of information is of obvious relevance to web design but is beyond the scope of this article. The important point is to take advice on how it affects you.
As you can see, there are many issues to consider when contracting with third parties and creating a website. This article does not, and is not intended to, represent an exhaustive list of issues which may arise during the course of your business. However, as we can see the information contained in this article is not given as legal advice and should not be relied on for any specific issue which you encounter. It is intended to act as a guide to raise your awareness of the legal implications of the work that you do to enable you to assess, when faced with issues analogous to those discussed in the article, the potential exposure that your business is facing so that you can obtain professional legal advice at that time.

Phil Thompson, Partner, White & Black Legal LLP
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