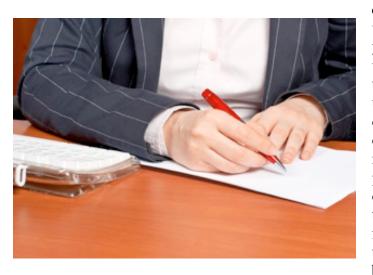Seven Tips For Negotiating Your Website Development Contract

By Clem Turner, Esq.

For many entrepreneurs the first major agreement you will execute will be the contract with your web site developer. Your company's website is its portal to the world. The professionalism and creativity of your site will influence the way the world regards your product, your company, and you. Because your website will be such a principal branding tool, many entrepreneurs decide to utilize the services of a professional developer to assist them with its vision, creation and maintenance. Entrepreneurs running their own music label, film production, or television production companies face this issue more often, as they typically design separate websites for each album, feature film, or television show under their company's banner. Because of the importance and prevalence of website development, this article will explore several key aspects of the development contract and provide some useful tips concerning their various provisions.

Tip One:

Every entrepreneur should control his company's website (or websites). This includes all screens, graphics, domain names, content, formatting, underlying software, source code, object code, etc. Your site should be dynamic, with the ability to adjust to the trends in your target audience. You need the ability to alter the content, structure, and design of your site to conform with these trends or your visitors may stop coming. Your contract should clearly state that the developer is providing you with a "work for hire" as defined by the Copyright Act and the rights in and to the website are held by you. Without this language (and other provisions such as the developer's agreement to assign any rights he may have in the website to you, if necessary) you could find your developer or another third party with rights in your company's site. This could effect your ability to modify or update the site, or to keep the site active.

Tip Two:

Regardless of Tip One, often developers will utilize programming that they own, having developed it independently, prior to working on your site. The language suggested above may give you ownership of this code, once it is embedded in your site. Your developer will probably be unwilling to allow you to assume ownership or control of this code, which would probably be an unfair result. They would no longer be able to use the programming on future sites and it would cause issues for their previous customers, whose websites may contain this code. However, you don't necessarily want them to develop your site from scratch. The use of this pre-programmed code could save you time (and money) in the development process. One solution to

this problem is for you to acknowledge that any pre-programmed code will still be owned to the developer, but for you to obtain a license for the developer's code broad enough to cover the current and future uses of your website. For instance, you may bargain for a "perpetual, irrevocable, worldwide, royalty free, and transferable" license to any pre-programmed code that the developer incorporates into your site. You should then be able to exert certain rights regarding this pre-programmed code, albeit solely with respect to your website. This gives you the right to make any revisions to your website that you wish, without worrying about developer's ownership of the underlying code.

Tip Three:

If you want to use third party content (such as text, video or audio) on your site, don't assume that the developer will obtain the licenses or clearances you need. In fact, many developers will not perform this service and the responsibility will be yours. Incorporating content that belongs to others on your site may be an infringement of the owner's intellectual property rights. This can expose you to liability and result in your having to deactivate the site, at least until the infringing items can be replaced. Furthermore, do no assume that any content the developer provides will be non-infringing. Ask the developer to confirm his sources of content and give you a warranty that he can convey to you the rights you need to post the content online. The developer should hold you harmless if he provides you with material that infringes on another's rights. This includes liability you may face due to violations of privacy and publicity rights, anti-defamation laws, anti-obscenity laws, anti-discrimination laws and other related causes of action. Of course, any "hold harmless" provision (also known as an "indemnity") is only as sound as the company that gives it, so do your best to double check the developer's content yourself.

Tip Four:

You may be coordinating several events based on the anticipated launch of your website, such as your company's opening, commencement of a major promotional campaign or the release of your artist's album. Be sure to build in extra time to account for delays and adjustments to the site. Moreover, you want to motivate your developer to work efficiently on your site. You want your payment obligations to be triggered by the accomplishment of milestones, and you want to space out your payments, increasing them as the project nears completion. In addition to the mutually agreed upon project timetable and payment schedule, you might want to negotiate bonuses for early completion of project milestones and penalties for late deliverables. If you have room in your budget, this can keep your project on an accelerated time schedule.

Tip Five:

It's the customer's prerogative to change his mind. Make sure your contract has a mechanism that allows you to deviate from the specifications agreed upon before the project began. At that point, everything was conceptual. It is reasonable to expect that some of the ideas won't satisfy you when you see them in front of you. It is also reasonable to expect that the concept in your head may be slightly different from what the developer envisioned when it was discussed. You should have a procedure for change orders that clearly delineates any extra costs and time that will be necessary to effectuate your new direction, before you authorize the developer to make the changes. Of course, you should also have a project management timeline that allows you to see samples, exemplars, and mockups as early as possible in the process, so you can modify your vision before much time and resources are invested.

Tip Six:

You do not want to have to rely on the developer to maintain the software associated with the site, or to make simple changes, post additional content or to do any of the tasks that you or your team can be trained to handle. Using the developer for simple tasks can become expensive and create undue delays. If your resources allow, negotiate with the developer to insure that certain key employees are trained in the basic functioning of the site. Make sure that your team can make the changes you will need to make on a regular basis. If this is not possible, try to negotiate a small retainer agreement with the developer, perhaps payable on a monthly basis, so that you can contact him often to maintain the site or make changes within a fixed cost. This may not alleviate undue delays, but if you want to update your site on a regularly scheduled basis, it may be possible to work out a fixed schedule with your developer. If nothing else, you should be trained in how to access, record and compile information about the website's visitors and/or customers. Furthermore, make sure he delivers you the source code, so you can hire someone else to fix or maintain the site, should that be necessary.
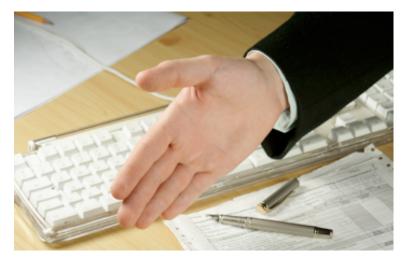
Tip Seven:

When problems such as bugs and failed links occur, and they usually do, it should state clearly in your contract that the developer has a responsibility to correct them, including the timeframe for such corrections. When the site is done, it should perform exactly as outlined in the system specifications agreed upon before commencement of work. The developer should provide a warranty that the software for your site is free from viruses, disabling devices or "back-doors" and remove them and indemnify you should you discover any. Many developers will provide a limited warranty on their work for a specified time, so you can have some comfort that the site can be fixed without cost if it crashes from viruses, bugs, heavy traffic or other reasons after launch.

Odds and Ends:

Of course, there are a myriad of other issues to be concerned about that we do not have the space to cover in detail in this article. For instance, your developer may become privy to your confidential information or trade secrets, and you should want a provision regarding confidentiality. As the point of the website is to get your company's brand into the marketplace,

you may want to make sure your developer is knowledgeable about search engine optimization (SEO), which, if implemented properly, will drive traffic to your site. In the case of a dispute, you may want to arbitrate instead of going to court, as this is usually a less expensive and faster way to resolve conflicts. Lastly, you should want the contract to be unassignable by the developer, so that the person you hire is the person who works on your website. These examples are not exhaustive, and there are other provisions and clauses in website development agreements that are important. If your resources allow, you should seriously consider retaining an attorney to help you draft and negotiate this critical contract.

Furthermore, if your resources allow, you should seriously consider utilizing the skills of a lawyer to draft your website's Privacy Policy and Terms of Use. These documents govern your company's rights, responsibilities and obligations pertaining to the general public's interactions with your website. Be very careful if you decide to use an "off the shelf" privacy policy and terms of use supplied by your developer. If your company's actual policies and procedures are incongruent with the provisions of your Privacy Policy and Terms of Use, you could face lawsuits, governmental intervention, and a reduction in visitors and goodwill.