

# Protect the intellectual property in your website

In setting up a website, it is essential to include standard terms which address such issues as liability disclaimers, user access terms and privacy policy. However, it is also important to ensure that your own intellectual property is fully protected and that you do not infringe the IP rights of others.

## 1. YOUR OWN IP

### DOMAIN NAMES

Domain name registration constitutes a licence to use that name for a particular domain level for a set period. Nonetheless, like business names and company names, domain names provide no proprietary rights in those names. The only way to obtain proprietary rights in a name is to register it as a trade mark. Unless your domain name is quite descriptive, it is vital that you register it as a trade mark for all the goods and services which you will promote on your website. For example, if you are promoting education and legal services you should register your domain name as a trade mark in classes 41 and 45 respectively. It is also important to remember that if you are selling goods via your website, you should also register your domain name in class 35 for retailing services.

### LAYOUT AND CONTENT

When you decide to set up a website, you are likely to commission a website design agency to design the format and layout you require. It is important to remember that the provision of such material may involve the creation of artistic works. In addition, if the agency also provides you with written content, this may involve the creation of literary works. The copyright in such artistic and literary works generally vests in the agency, even though you have paid them to create these works. As a client of the agency, you will only acquire an implied right to use the created works for purposes envisaged by the parties. As a consequence, it is wise to arrange for the written assignment of the copyright in the created works from the agency to you. If such an assignment is not available, you should at least ensure that your implied rights of copyright are expressly broadened so that you are entitled to use these created works for any purpose.

In many situations, you may yourself create artistic or literary works which may form a major part of the content of your website. If these works are created by your employees in-house, the copyright in such works will generally vest in your business. It is therefore advisable to include a clear statement on your website in which you specifically reserve your rights of copyright in such material. You might also consider protecting any patent rights you may hold in website material such as digital inventions and software which you may have developed.

Even if you create works for your website in-house, your employees may be entitled to claim moral rights which are personal to the authors of such works. Such moral rights include the non-denigration and author attribution of works created by employees. Moral rights may not be assigned, so it is wise to include a provision in your standard employment contracts under which your employees undertake not to assert their moral rights in any works they may create on your behalf. In dealing with your website design agency, you should also require that they undertake in writing that their own employees will not assert moral rights in relation to the works they create for your website.

## 2. THE IP OF OTHERS

If you include the works of third parties on your website, it is important to ensure that you obtain their written permission to do so. Otherwise, any reproduction, adaptation or communication of such works may constitute an infringement of the copyright of these third parties. There are provisions in the Copyright Act for Fair Dealing with all or part of third party works but such rights are likely to be very limited in the context of commercial website content.

As a general rule, links to third party websites generally do not constitute copyright infringement because they are perceived to be merely providing a “sign post” to those websites. However, in providing such links it is important not to imply any endorsement or affiliation with these third party websites. In some cases, website owners may decide to purchase AdWords from providers such as Google under which a reference to the owner’s own site will pop up when searchers nominate a key word in their search instructions. Such key words often include well-known brands and this situation has been the subject of frequent litigation in Australia and overseas. In Australia, the use of such AdWords has generally been found not to constitute trade mark infringement because this procedure does not involve “use” of a trade mark under section 120 of the Trade Marks Act.

## 3. UPLOADING BY USERS

When you invite users to access your website, it is essential to make such use strictly subject to your formal terms of access. These terms of access should include provisions which protect you as the website owner in relation to third party material uploaded to your website by users. Such provisions can include the following required undertakings from the website user:

- a that the uploaded material includes no defamatory statements, IP infringing content or any other illegal material;
- b that the user grants a royalty-free perpetual licence for the website owner to reproduce, adapt and communicate the uploaded materials;
- c that the website owner has the right to remove any uploaded material without notice and to terminate the user agreement at will; and
- d that the user indemnifies the website owner against any claim by third parties concerning the uploaded material.

Although the above undertakings should be mandatory for website users, it is important to remember that individual users may have limited financial means and that their indemnification of the website owner may therefore be of little practical value. As a consequence, a strict terms of access regime does not obviate the necessity for strict scrutiny by the website owner of any uploaded material which may be of questionable legality. Such enforcement procedures may also serve to reduce exemplary damages which may be claimed in the event of litigation by third parties.

## CONCLUSION

Your website is a window to your business and a showpiece for your IP and the authorised IP of others. However, your website can also represent a significant danger to your own IP and a potential source of exposure to litigation by others. It is therefore important to do your IP homework before finalising the development and operation of your website.

The protection of the intellectual property in your website should be part of a wider strategy of identifying, protecting and exploiting all the intellectual property in your business. Swaab can offer you a free IP Health Check as the first step in developing a comprehensive intellectual property program. You are welcome to give us a call at any time.



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