

Contractual Tips for Advertising, Web, Experiential, Data Capture and SEO Agencies

Further Information and Disclaimer

Legal Issues & Editor

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1. INTRODUCTION

Over many years, I have acted for all kinds of agencies, notably experiential, web-development, SEO, advertising and data capture. In this brief guide, I will share some of the key legal issues and pitfalls.

- Intellectual Property Rights (IPR), Warranties and Indemnities
- Acceptance Testing
- Revenue Share
- Limitation of Liability
- External Factors — Beyond Control
- Data Protection/Privacy Rights

2. INTELLECTUAL PROPERTY RIGHTS (IPR), WARRANTIES AND INDEMNITIES

If your client is providing you with any images, graphics or other content, you want to be sure that it is fully entitled to do so. If not, you may find yourself on the receiving end of a threatening letter or even court proceedings from a third party alleging infringement of its IPR. From a legal perspective you will need appropriate warranty and indemnity provisions from the client. Beware that the comfort you derive from an indemnity may be illusory if the client does not have the finances to pay out in the event of a claim.

Also, bear in mind that you should not transfer IPR in any elements that you may wish to reuse in other projects whether that be "background technology" or to be developed during the course of the project. Similarly, any warranty and particularly indemnities you proffer in respect of any deliverables should not extend to third party elements.

There may be additional complexities where there are open source elements. If you agree with your client to transfer IPR, make sure you carve out open source and other third party elements.

3. ACCEPTANCE TESTING

If you are creating any sort of website, app or other bespoke digital asset for your client then it is likely that the asset will have to undergo acceptance testing prior to the client paying you the final instalment. It is vital that such testing be tied into an objective benchmark, as usually encapsulated in a functional/technical specification document. Ideally, this document should be appended to the development agreement and be very precise. The agreement should give you some leeway and protection as follows:

- minor discrepancies - if what you produce diverges from the specification in an immaterial, minor way, this should not impede acceptance
- any rejection by the client must be based on a material discrepancy between the specification and what you have produced i.e. there should be no subjective, arbitrary right to reject
- if the client does not identify and notify you of any such discrepancies within a fixed timeframe after you have delivered the asset, acceptance should be deemed
- chance to remedy — in the event that what you produce does diverge materially from the specification, you should have at least one chance to remedy this prior to the client having any definitive right to reject

4. REVENUE SHARE

An increasing number of SEO and similar deals are structured on a revenue-share basis. While there are upside attractions to having skin in the game, there are various pitfalls that need to be avoided if you are to profit from such arrangements. Contractual terms should:

- give you access to previous sales figures so that you can ensure accurate base level
- preclude the client doing anything which might undermine your efforts
- address potential changes in the market which might affect results

5. LIMITATION OF LIABILITY

Your contract needs to deal with this issue very carefully. Bad drafting can come back to haunt you in the event of litigation. There are myriad different heads of liability to be limited and/or excluded. Moreover, loss of profits should not be stated to be a subset of indirect or consequential losses. As regards your maximum liability, this should be tied into an objective and reasonable benchmark. Often, the figure that is chosen reflects the cap on your professional indemnity insurance but each case needs to be considered in light of the specific contractual circumstances.

6. EXTERNAL FACTORS — BEYOND CONTROL

You should not assume or underwrite obligations which depend on the acquiescence or assistance of third parties. For example, SEO companies should not guarantee that a third party inbound link will be maintained by that third party and agencies should not commit to time of essence obligations, especially where dependent on client/third party input/assistance.

SEO companies should not commit to achieving a particular page ranking as, besides other things, the viability of achieving such rankings is subject to changes in search engine algorithms which are beyond the company's control.

7. DATA PROTECTION/PRIVACY RIGHTS

Where you are collecting personal data on behalf of a client or are provided with such data by the client, you need, amongst other things, to ensure that:

- you are categorised as the "data processor" not "data controller"
- the contract includes the necessary data processing provisions required by the GDPR whereby you are expressly authorised to process the personal data to provide the services, transfer personal data to third countries (countries outside of the European Economic Area) and that you can appoint sub-contractors. As you need authorisation from your client under the GDPR to perform these acts so it is best to include them within the contract
- the client indemnifies you against third party claims resulting from harvesting or deploying such data on the client's behalf
- you reserve a contractual right to use the data on an anonymised basis for your own statistical and/or demographic research
- you limit or exclude your liability for any loss or damage to the data

Further Information

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