

Modifying A Client's Web Site - How To Avoid Getting Sued

By J Fisher

Modifying A Client's Web Site - How To Avoid Getting Sued

J Fisher
digilaw_2000@yahoo.com

Digilaw Publishing, Inc. <http://www.weblawresources.com>

It is very common for a web site developer to have clients that wish to have then modify existing sites that were created by another developer. The client may be unhappy with the ongoing relationship with their previous developer or may simply have more confidence in the services of a new developer. Regardless of the reasons, modification relationships create special and unique legal issues and present potential legal exposure to the developer.

Developers should approach modification services with caution. However, there is no reason why this work cannot be performed if you take a few simple due diligence steps in advance of agreeing to provide the services.

It is possible that the previous developer is the actual owner of the copyright to the client's web site. This is actually a more prevalent situation that most people imagine. Generally, an independent contractor who develops a web site will be the copyright owner of the work that he creates. The copyright act provides that the author of a work is the copyright owner and has the right to register the copyright of the work. Even without a valid registration filed, the author has the exclusive rights granted under the copyright act and can later file a registration and sue in federal court for infringement of those exclusive rights. The exclusive rights include the right to make derivative works based upon the original work. Derivative works will include most modifications and enhancements to the original site.

Who Was The Author Of The Site You Are Modifying? If the original site was created by a bona fide employee of the client, there should be no problem. The copyright act considers works that are created by employees within the scope of their job responsibilities to be works made for hire. With a work for hire, the employer will be considered to be the author regardless of the fact that the employee actually created the work.

The same is not true of independent contractors. In order for a work created by an independent contractor to be considered a work for hire, three separate conditions must be met. These conditions are very difficult to satisfy in the case of a web site. As such, few web site projects developed by independent contractors will actually qualify for work for hire status.

The first requirement for independent contractor works to be considered works for hire is that the work be especially ordered or commissioned by you. In most cases, this test will be met if you have contracted the web developer to create your web site from scratch and not based upon a site that the developer has previously created.

The second test is more difficult. In order to be considered a work made for hire, the work must fall within one of the statutory categories. These categories are limited to (1) contribution to a collective work; (2) a part of a motion picture or other audiovisual work; (3) a translation; (4) supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) answer material for a test; or (9) an atlas. As you can see, most web site creations will not fall within one of the above listed categories and will therefore not be considered works for hire.

If the web site does fall within one of the categories listed above, there is a third requirement that must be met in order for the web site to be considered a work made for hire. This third requirement is that there must be an agreement that is signed by the parties that expressly makes the work a work made for hire. Specific language must be used in connection with the work for hire clause.

It is evident from the above, that most web sites will not be considered works for hire unless they were created in house by employees of the client. Therefore, the original developer will have rights in the site that he created. Your modification work will be considered infringement of the original developer's copyright.

What Can You Do About It? Before you accepts any modification work, you should make certain that the original developer has given his permission. There are basically two ways that this permission can be given.

First, the original developer can execute an assignment of the copyright to the client. You should require the client to provide you with a validly executed assignment of the copyright. You need to review the document to be certain that an absolute and unconditional assignment was made and that the assignment included all of the exclusive rights of the copyright owner, including the right to make derivative works based upon the original work.

The second way that the original developer can give permission is through a license of the rights to the client. In this case, the original developer retains the underlying copyright. However, certain rights are licensed to the client. This license language may be included in the original web development agreement or may be included in a separate document. You need to review this language to be certain of the scope of the license and whether there are any conditions to the license or conditions that may lead to the termination of the license. Specifically, you should be certain that the license is perpetual and that it includes the right to make derivative works based upon the original site.

Keep in mind that under a license agreement, the client will have no greater rights than are specifically covered in the license agreement. If there is any doubt whether the right to make derivative works has been licensed, you should require the client to obtain further rights from the original developer.

You should also be certain that the client has fully paid the previous developer and has not otherwise defaulted under the web development agreement. If the licensing terms are dependent upon payment, the failure of payment can cause a revocation of the licensed rights. It is not untypical for a client to come to you to complete a site or modify a site because of an ongoing dispute with the original developer. It is possible that the ongoing dispute will have an effect on the rights that are licensed.

You should also be certain that the license granted is not conditioned upon using the continued hosting services of the developer or another party. This is also a fairly typical situation where the original developer ties the right of the client to use and modify the site to continued use of the prior developer's hosting services.

Be cautious in situations where you are called upon to modify works that were created by another party. These relationships are fraught with possible legal risks. Do your due diligence up front. Do not enter into an agreement until you are certain about the situation. Lastly, make certain that you enter an agreement with the client whereby the client indemnifies you from any potential suit and makes comprehensive representations and warranties concerning the rights to make modifications and non-infringement with the rights of the previous developer and other parties.

Article provided by Digilaw Publishing, Inc. publisher of value added legal ebooks document packages, including web development and technology agreements, automated incorporation document ebooks, estate planning ebook document packages. www.weblawresources.com ; www.automated-incorporating.com ; www.free2estateplan.com

Get-Articles.com : 1000's of reprintable business and internet marketing-related articles.

[Submit your article for reprint.](#)