

Moral rights¹ in the construction of World Wide Web sites

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Copyright In A World Wide Web Site²

Text, photographs, illustrations, graphics³, sound, video and software applications

(which elements can be found on web sites) are all works which can be protected by copyright law.

In addition:

(a) the actual HTML code can be protected (as computer software or a literary work);

(b) a collection of links can be the subject of copyright. Such a collection could fall into

the category of a "digest", which is protected (like a database) by reason of the creativity

in choosing the individual elements;

(c) the layout of a page or site, namely the location of the elements appearing on the page

and the organisation of the pages (the site plan, which is generally reflected by the site map)

is apparently not per se the subject of copyright protection. However, this is not certain,

especially when the layout includes a work or the use of graphics, illustrations, Java

applications and the like as an integral part of the page or site. Together, the choice of those elements and their integration in the site might constitute a "digest" and as such, be recognised as a protected work.

Different elements might have different "owners". A distinction must therefore be made between

"original works", which are created specifically for the site and "existing works", that have been

created for other purposes, generally by a third party, which it is sought to incorporate in the site.

As regards original works, it can be ensured that the copyright in them belongs to the site owner.

So far as existing works are concerned, there is generally a duty to obtain a licence from the

copyright owner and to use them subject to the terms of the licence.

Stages In The Creation Of A Web Site

The first stage is to define the object of the site.

The second stage is designing the web site, namely determining the elements which are

to appear on the pages and the relationship between the pages.

In the third stage the site is built, constructed or engineered, that is to say the code is written

and the various elements are actually incorporated in the site.

The fourth and final stage is maintaining the web site, when it is put on line and then

periodically updated, modified and the like. This stage is a continuing one and of indefinite duration.

Do It Yourself Or Through An Independent Contractor

Many companies offer web site creation and maintenance services. The services can cover

all or only some of the stages mentioned above.

The design and construction of a site can be commissioned from an independent contractor

and then the site owner can personally put it on line and maintain it. Alternatively, the whole

process can be commissioned from the contractor, which can design, construct and maintain the site.

Moral Rights In The Design And Construction Of A Web Site

As mentioned above, a web site has numerous elements which are the subject of copyright protection.

Copyright has two aspects: the commercial one (in accordance with the Copyright Act, 1911) and the

moral one (in accordance with section 4A of the Copyright Ordinance, 1924).

Whilst the commercial right is transferable by the author or creator, the moral right is personal and

retained by the author or creator, although according to Israeli law (unlike French law, for example)

the moral right can be waived.

Although the right is personal to the author, in the relationship between employer and employee,

Israeli law is unclear as to whether the employee's moral rights in the work created by him for his

employer are retained by the employee or pass to the employer. There is no unequivocal answer

in the legislation. Prof. J. Weissman, relying on the personal character of the right and the Model

Law published by UNESCO and WIPO,⁴ sees two alternatives: either the rights are retained by the

employee or the employee is deemed to waive them (in which case, having regard to the personal

character of the right, on being waived nobody, including the employer, has any moral right in the work).

Prof. Weissman prefers the alternative whereby the moral rights are retained by the employee.

⁵ It is interesting to note that according to the new Copyright Law, which is currently being formulated

by the Ministry of Justice, the moral right will be retained by the employee.

On the other hand, there are those who believe that the moral right passes to the employer,

based on section 5(1)(b) of the Copyright Act, which provides that in the relationship between

employer and employee, the first owner of the copyright in the employee's works is the employer,

unless otherwise provided between the parties. The proponents of this approach view the said section

as applying both to the commercial rights under the Copyright Act, 1911 and to the moral rights

pursuant to the Copyright Ordinance, 1924. Thus, the employer is viewed as the first owner of all

the rights in the employee's work, including the moral rights.⁶

The conclusion obliged by the foregoing is that there are two opposing views in Israel:

(a) the moral rights are retained by the employee;

(b) the moral rights pass to the employer.

Consequently, all practical reference to the issue of moral rights must take into account these

two conflicting possibilities.

The Proposed Solution - What To Incorporate In The Contract With The Site Builder

(a) A distinction should be made between original works, which the site builder creates for the

customer, and existing works.

(b) As regards original works, it should be provided that all copyright in them belongs to the customer.

(c) As regards existing works, an accurate record of those works should be made and the site

builder should be placed under a duty to obtain the appropriate licences to use them on the site.

(d) It should be provided that the site builder waives all his moral rights in the original works.

The contract should also prescribe complete conditions both with regard to the mention of the

builder's name and concerning future modifications to the site. The contract's provisions in

this respect will supersede the moral rights in accordance with the law.

(e) In order to avoid any claim of copyright (whether commercial or moral) by an employee of

the site builder, the builder should warrant in the contract that its employees have no rights,

including moral rights, in the works, and it should arrange for its employees to sign a written

contract of employment to that effect (or for them to sign the site construction contract in an

appropriate place); and the builder should undertake to indemnify the customer in the event

that any of its employees (or former employees) claims a right in the work.

(f) In general, the builder should provide an indemnity in respect of allegations by any third

party as to the existence of rights in works on the site.

(g) The contract should also contain a clause, whereby the builder will, at its sole expense,

remove any infringing work from the site and replace it with a non-infringing work.

Appended hereto are model contractual provisions with regard to copyright in the construction

of web sites.⁷ In the appendix, the site builder is termed "the Contractor".

It is emphasised that this is a mere specimen, which presents one of a wide range of possibilities

for implementing the solution proposed above. The contract draftsman should prescribe provisions

which are appropriate to the specific contract and he is legally liable to ensure that the contract is in

conformity with the circumstances.

Notes

1. For a discussion of the nature of moral rights, see: Sarah Prizanti, *Copyright Law*, vol. 2, p. 465 et seq; Prof. Joshua Weissman, *Droit Moral in Copyright Law*, Legal Research 7, 5749, p. 51; Prof. Gad Tedeski, *Intellectual Property and Personal Rights*, Mishpatim 10, 5740, p. 392; Leslie Ellen Harris, *Just What Are Moral Rights Anyway? A Primer for Directors*; Charles Oppenheim, *Moral Rights and the Electronic Library*, <http://www.ariadne.ac.uk/issue4/copyright/>

General Note On References To Internet Addresses: the references to Internet addresses

are based on information that was up-to-date when this document was written.

Addresses

change and documents are removed from the Internet. After the publication of this document

it might therefore not be possible to find some or other document at the address cited here.

The writer has therefore retained a printout of every document from the Internet which is mentioned here.

2. For a detailed discussion of the issue, see Geoffrey Gussis, *Website Development Agreements*, *A Guide to Planning and Drafting*, (draft 1.0, March 8, 1997), <http://www.digidem.com/legal/wda/wda.html>

3. As regards copyright in graphics generally (not on the Internet), see: CA 360/83, *Strusky Ltd et al v. Whitman Ice Cream Ltd et al*, PD 40(3) 340; and as regards the rights in the graphic elements and graphic design of an Internet site, see: *Web Sites Feud Over Design*, c/net, March 29, 1997,
4. *Model Provisions for National Laws on Employed Authors*, UNESCO/WIPO.CGE/EA/4,1986
5. Joshua Weissman, *Droit Moral in Copyright Law*, Legal Research, vol. 7, 5749, pp. 51-78. At pp. 60-61 Weissman writes:

"Indeed, in the Model Law on Employed Authors, prepared by the international organisations WIPO and UNESCO, two alternatives were proposed. The first - an author who is an employee retains the right for his work to be ascribed to him, unless he has expressly otherwise agreed [i.e. the employee has agreed to waive his moral rights - B.N.]; the other alternative - the author is deemed to have agreed to forego having his work ascribed to him, unless otherwise agreed.

We tend to prefer the first alternative, whereby the employed author retains the right for the work to be ascribed to him, unless there is an express agreement in which the employee has waived the right. The cases where difficult consequences might apparently result from such a situation will be resolved by means of the general proviso which is proposed with regard to the right, whereby the right is only to be applied in circumstances where it is reasonable and customary".

6. Sarah Prizanti, in her work, *Copyright Law* (vol. 2, p. 471), writes:

"The last category is that of employees who create works which are published in the employer's name. In section 5(1)(b) of the Copyright Act, the legislature has laid down a statutory presumption, whereby in the absence of contrary agreement the employer will be the first owner of the work, rather than its author, the employee. That is with regard to the economic right. In this context the question arises as to whether the same presumption also applies in respect of the right of 'paternity' and the other personal rights [the moral rights - B.N.]. The answer is in the affirmative, according to the wording of the section of the

Ordinance and the incorporation of the amendments to the Copyright Act 1911."Ms Prizanti refers the reader, in a footnote to the preceding paragraph, to Prof. Weissman's article, supra, at pp. 60-61. In my opinion, Prof. Weissman's article does not support her position. On the contrary, Prof. Weissman believes that the moral rights are retained by the employee. Ms Prizanti's approach was adopted in a judgment of the Jerusalem Magistrates Court in CF 2441/89, *Cook v. Skaler*, which was published in District Judgments 52(4) 3, 16 et seq. However, the Court's approach was essentially based on an economic analysis of the desirable law, the conclusion being that the employee's retaining the moral rights (in the absence of contrary agreement) is not a reasonable commercial result. At p. 18 of the judgment, the Judge wrote: "In truth, on the one hand there might be an initial tendency to say that the moral right is personal, inherent to the author, not howsoever transferable and in any event to be ascribed to the author. (Compare J. Weissman, in his article, supra, at p. 60.) However, from the practical point of view, befitting the needs of life and the complexity of the labour and creative relationship, such an approach cannot be sustained in reality".

7. These provisions (adapted to Israeli law and the specific needs of government ministries) are based on the US company King & Spalding's web site development contract. The contract appears on the company's site and has been "dedicated" to the public domain. The agreement can be found at: <http://www.kslaw.com/menu/agr.htm>

Appendix

Section One - Ownership And Rights

1.1 Transfer Of Rights

1.1.1 Save for existing works, as provided below in clauses 1.2 and 1.3, the Contractor undertakes to assign, and on the creation of every work which forms an element of the site automatically assigns, to the State of Israel, its ownership of the copyright in accordance with Israeli and international law, together with alother intellproperty rights in every such work

as aforesaid. For the avoidance of doubt, it is expressed and agreed that all intellectual property rights in the site, including the various works therein, shall be transferred to the State of Israel, subject as provided below in clause 1.2.

1.1.2 From time to time, at the State's request, the Contractor and/or its employees shall confirm such assignments as required by the State.

1.1.3 The State and all its successors and assigns shall have the right to obtain and hold in its own name all official registrations of its rights as aforesaid.

1.1.4 For the avoidance of doubt, it is hereby expressed and agreed that the State may, after acceptance of the site, make any use of all or any of it, including the various works therein, at Government offices, their units and in the Knesset, as it deems fit, in reliance upon the rights which it is acquiring in the site and the works therein pursuant hereto. The provisions of this clause shall not derogate from any other rights of the State pursuant to this agreement or by law.

1.2 Existing Works

1.2.1 Insofar as any part of the site (or the whole site) is an existing work, in respect where of the Contractor may not assign the rights therein as provided above in clause 1.1, the Contractor shall specify below:

- (a) the description and nature of the existing work;
- (b) the owner of the rights in the work;
- (c) any restriction or royalty payment duty in respect of the Contractor's or the State's use of the work or the work's exploitation as a derivative work;
- (d) the source of the Contractor's authority to make use of the existing work in the design and construction of the site.

1.2.2 The above-mentioned works are hereinafter referred to as "existing works".

The sole existing works which may be used in the design and construction of the site are those specified above and any other existing work, the use of which is approved by _____.

1.2.3 Furthermore, before preparing any part of the site which is to include one or more existing works, the Contractor shall, at its sole expense, cause the State of Israel to receive an international, perpetual, non-exclusive, royalty free and irrevocable licence, free of moral rights:

(a) to use the existing work and to reproduce, display, distribute and sell copies thereof and prepare derivative works therefrom;

(b) to authorise or grant licences to others to do all or any of the foregoing.

1.3 Moral Rights

1.3.1 The Contractor hereby waives any moral right it now or in future has in the works which it or its employees create in the performance of its obligations pursuant hereto.

1.3.2 The right of the Contractor for its name or the name of any of its employees to be ascribed to the site or to the works in the site and the right of the Contractor (or of any of its employees) to the integrity of those works are exhausted solely by the provisions of this agreement, as set out below in this clause.

1.3.3 The Name Of The Contractor Or Of Any Of Its Employees (Alternative 'A')

The name of the Contractor and/or of any of its employees shall not appear on the site.

1.3.3 The Name Of The Contractor Or Of Any Of Its Employees (Alternative 'B')

(a) The name of the Contractor and/or of any of its employees shall appear on the page of the site entitled "About the Site", in accordance with the technical specification, solely as long as the site is maintained by the Contractor.

(b) After the site ceases to be maintained by the Contractor, the name of the Contractor and/or of any of its employees shall stop appearing on the "About the Site" page or elsewhere on the site.

1.3.4 Integrity Of The Site And The Works Therein

After the site, including the works therein, has been delivered to the State for maintenance by it, the State may, itself or through anyone else on its behalf, make any modification to the site and the works therein without the Contractor's consent or knowledge, and the Contractor shall have no right to plead that such modifications are such as to damage it, its honour or reputation and no such plea shall be admissible by or in respect of any employee or employees of the Contractor who were engaged in the preparation of the works.

1.3.5 Existing Works

The terms of the licences for the use of existing works shall apply to the ascribing of names thereto and modifications thereof.

1.4 Indemnity

1.4.1 In the performance of its obligations pursuant to this agreement, the Contractor undertakes not to design, construct or provide to the State of Israel anything which infringes one or more intellectual property rights, including patents, copyright, trademarks or trade secrets, or which infringes privacy or any other right of any person or entity.

1.4.2 If, in the course of performing this agreement, the Contractor becomes aware of the possibility of such an infringement, it shall immediately so notify the Ministry's representative in writing.

1.4.3 The Contractor undertakes to indemnify the State of Israel, its employees, representatives and agents -

(a) for any infringement of the foregoing rights, whether merely alleged or actually proven;

(b) for any debt, liability or other obligation deriving from the performance of this agreement or relating to all or any of the site, as delivered to the State of Israel pursuant to this agreement.

The indemnity shall include advocates' professional fees and expenses, unless the Contractor defends the allegations using reasonable legal counsel acceptable to the State.

1.4.4 The provisions of this clause shall continue in effect after the termination of this agreement.

1.5 Replacement Of Infringing Works

1.5.1 If, in the course of designing, constructing or maintaining the site, the Contractor becomes aware that any of the works on the site infringes any right contrary to the provisions of this agreement, it shall not make use thereof or immediately remove it from the site, as the case may be, and agree with the State upon the use of a lawful work or obtain a licence for the lawful use of the work in accordance with the terms of this agreement, all the foregoing at its sole expense and as agreed between the parties.

1.5.2 If, after receiving the site and during the ___ years thereafter, the State becomes aware that any of the works on the site, as delivered to the State by the Contractor, infringes a right contrary to the provisions of this agreement, the State may, in its discretion, act as follows:

(a) require the Contractor to act as provided in clause 1.5.1 above, mutatis mutandis;

(b) replace the infringing work with a lawful work or obtain a licence lawfully to use the work, and the Contractor shall indemnify the State for its reasonable expenses further thereto.

1.5.3 The provisions of this clause shall not derogate from any other power vested in the State pursuant to this agreement or by law with regard to the use of infringing works on the site contrary to this agreement, including the right to compensation on account of a breach

of this agreement or
to an indemnity in accordance with the provisions of this agreement.

1.5.4 The provisions of this clause shall continue in effect after the termination of this agreement.

Section 2 - Performance By The Contractor And Its Employees

2.1 The Contractor shall not employ sub-contractors in the performance of this agreement and only it and its employees shall be authorised to perform any work or do any act pursuant to this agreement.

2.2 The Contractor shall have written contracts of employment with its employees who are engaged in the performance of this agreement, which shall secure the Contractor's ability to comply with the terms of this agreement and enable the Contractor to assign or waive any right pursuant to this agreement. For the avoidance of doubt, the said agreements shall include an express waiver of the emplo' moral rights, if any, in the works which they create in the scope of this agreement. Further, the said agreements shall also place the employees under a duty to safeguard the confidentiality of information belonging to the State, which is to be kept confidential pursuant to this agreement or by law.

2.3 For the performance of the Contractor's obligation pursuant to this clause, it shall suffice if each such employee reads this agreement and signs it in the appropriate place, against his legible name and the date of signature.

2.4 The Contractor's employees' obligations pursuant to this clause shall continue in effect even after the termination of this agreement or after the labour relationship between the Contractor and any of its employees comes to an end.

Section 3 - Warranties

3.1 Conflict Of Interest

The Contractor warrants that it has no conflict of interest and does not envisage any conflict of interest concerning the performance of this agreement. The State of Israel acknowledges

that the Contractor engages in the design and construction of other World Wide Web sites for other customers and provided that such does not impair or clash with the development of the site pursuant to this agreement, such shall not be deemed a breach of this clause.

3.2 Ownership

The Contractor warrants that -

- (a) save as regards existing works, it is and shall remain sole owner of all the works used by it in the design and construction of the site pursuant to this agreement;
- (b) it has and shall retain full power and authority to assign or waive rights in connection with the works which constitute the site and the whole of the site, as required pursuant to this agreement, and to grant or assign licences to use existing works, as obliged pursuant to this agreement;
- (c) none of the works constituting the site, other than existing works, shall be published in such a manner as to cause the loss of copyright in them;
- (d) the site, together with all the works in it, including existing works, does not and shall not infringe any patent, copyright, trademark, trade secret or any other intellectual property right and shall not infringe any right of privacy or similar right of any person or entity; and that the Contractor is not aware of any claim which is pending or threatened against it or any third party in respect of such infringement as aforesaid.

3.3 Implementation In Accordance With The Provisions Of This Agreement And Repairs

3.3.1 The Contractor warrants and undertakes that:

- (a) the site, including its works, will be designed and constructed to a high professional standard;
- (b) the site, including its works, will function properly with the usual browsers;

(c) the site, including its works, will be designed and built in accordance with the provisions of this agreement;

(d) the Contractor shall perform this agreement subject to the provisions of law.

3.3.2 The Contractor shall remedy any defect contrary to its foregoing warranties and obligations:

(a) within four hours, if the defect prevents the use of the site; other repairs shall be made within 24 hours, excluding Sabbaths and public holidays;

(b) every repair shall be at the Contractor's sole expense;

(c) the Contractor's warranty pursuant to this clause shall extend for a period of ___ years from the State's acceptance of the site;

(d) the Contractor's warranty for repairs pursuant to this clause does not include links which change over time, pages that become obsolete over time, content that becomes outdated over time or other changes that do not derive from a defect in the Contractor's work;

(e) the provisions of this clause shall continue in effect after the termination of this agreement.