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eCommerce: Strategies for Success in the Digital Economy

**\*375 ECOMMERCE "STOREFRONT" DEVELOPMENT & HOSTING**

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## I. Introduction

Electronic commerce on the Internet's World Wide Web ("WWW") is growing at a remarkable pace. The complexity of websites, which are now used to market and sell services and goods to the public, is growing as fast as the technology that underlies the sites. At first, companies used the web simply as "brochureware," i.e., an electronic alternative to the brochures and written marketing material which they formerly mass-mailed or otherwise distributed. Now, however, businesses are realizing that the WWW holds the power to provide a direct link to the consumer, whether the consumer is an individual, a small company or a major corporation, located domestically or in a foreign country. Because of the global and unified nature of the Internet, and particularly the WWW, the website as a brochure is rapidly being replaced by the website that serves as an interactive "store" on the Internet.

One need not look far to identify companies with established sites on the WWW that have met with huge success. **\*378** Dell Computers, for example (<http://www.dell.com>), sells nearly \$16 million worth of goods a day through its web page, which amounts to \$5 billion in annual web page sales. The growth in business on the Internet is not only for large firms like Dell, however, as many smaller firms are finding opportunities for global sales and marketing. This brand of electronic commerce, or "eCommerce," presents its own particular brand of troubles for companies, as was recently demonstrated when the E-Bay auction site on the web (<http://www.ebay.com>) went down for nearly two days. The disruption in the online auctions caused E-Bay's stock price to drop 18% and E-Bay to forfeit millions of dollars in auction fees. For companies like E-Bay, Internet technology is a double-edged sword which both makes them a viable business and presents the risk of potentially disastrous business interruptions.

The road to creating a successful online store can be a difficult and confusing if one is unaware of the concepts and principles behind eCommerce. Once a business decides to stake its claim on the Internet, it immediately encounters numerous technical and legal issues. This outline and presentation attempt to

address a slice of those **issues** -- those related to the process of developing an **electronic commerce** website and its hosting. Although sample contract provisions are discussed and incorporated throughout this article, a **\*379** complete sample website development agreement is included as Appendix A at the end of the text.

## II. Build or buy?

An initial issue confronted by the business eager to stake its claim on the Internet is how to get there -- i.e., should the client build and host its own site or turn to outside expertise. At the core of the decision is whether the client wants to invest internal resources (both personnel and equipment) into website development and hosting, or buy that expertise from the growing number of hosts and developers.

### A. Hosting/Developing your own site

Developing a website entails creation of a design and conversion of that design into the language of the WWW. Of course, a plan also needs to be made to maintain and update the site. Hosting entails finding a home for the website on a server and establishing a presence on the Internet. This includes registering for a domain name and obtaining a reliable, high speed connection to the Internet. Deciding to develop and/or host one's own website involves many non-legal issues. In the end, the benefits of developing or hosting a site include:

- . Eliminating dependency on third-parties
- \*380**. Eliminating potential legal disputes and costs associated with contracting for services
- . Greater direct control over the website
- . Potentially greater responsiveness to immediately required changes to the site
- . Convenient access to server for maintenance and technical support.

The downside to hosting/developing your own site includes the cost of retaining the expertise and software to perform the task at hand, as well as the cost of the equipment and physical connection to the Internet to project your site into cyberspace.

### B. Hosting/Development by Third-Parties.

Everyone is getting into the website hosting and development business these days. Third-party development of a website is optimal for the beginners. The expertise of developers allows the client to achieve the desired look and feel with minimal loading times and effective links -- all of which have the opportunity to be approved before the developer is paid. Third-party hosting of a website is preferred when the client cannot or does not want to deal with obtaining fast, reliable connections to **\*381** the Internet, performing backups and running website activity reports.

Hosting a client site on a third-party server, whether the host is an Internet service provider ("ISP") or on one of the blossoming server "farms," has the following benefits:

- . Greater internal network security when the client's network is not physically connected to the Internet (although firewalls and other security systems can alleviate some of these issues)
- . Buying a level of service and connectivity without worrying about how to achieve those goals through personnel and equipment
- . Achieving cost savings when hosts reduce individual hosting costs by spreading expenses for connectivity and hardware among many users

If a client decides to select a third-party to host the website, it needs to carefully evaluate the potential candidates and, once a development firm is selected, draft a design and/or hosting agreement which protects the rights of both the client and the host. More detailed information concerning the contents of such agreements is set forth below.

Using an outside web development firm similarly purchases the expertise to design a world-class website without **\*382** incurring the costs of establishing that expertise in-house

### C. Colocation

Where will the files that constitute your electronic storefront reside? Where do you place those files, and in what server, to connect to the Internet? These are the questions that arise when a third-party physically hosts a business web server rather than locating the server geographically with the client. Colocation refers to the physical presence of servers in a third-party facility. Colocating a client's server at a third-party facility with dedicated, fast and secure Internet access can be economically beneficial to the client because:

- . The client can avoid the costs of equipment, maintenance and connection to the Internet
  - . Higher reliability colocation servers have a direct and short connection to the backbone router, yielding close to 100% uptime
  - . Many ISPs have battery backed up power with generator ties for continuous network operation even through power outages
  - . Faster network connectivity through direct internet connections
- \*383** . The skills required to guarantee availability of a website to all the potential customers on a continuous basis may not always be available to each individual business.

Frequently, third-party hosts have multiple corporate and business websites residing in servers sitting in racks at the colocation facility. The most basic colocation agreement provides for physical security and connectivity to the Internet for the client's server. That is, the client brings its physical hardware to the colocation facility and connects it to the facility's network which, in turn, is connected to an Internet backbone. In these basic agreements, the colocation facility will not undertake any changes or maintenance to the website itself.

Because of the convenience of having total access and control over the website, it is becoming more common for website developers to offer hosting services to the client, making colocation arrangements unnecessary. In these situations the hosting arrangements can be made part of the website development agreement.

If a colocation agreement for the basic level of service is required, the following issues should be addressed:

- . Physical security of servers (e.g., locks, 24-hour attendant, electronic monitoring devices)
- \*384** . Access security to the client files, i.e., protection from hackers
- . Responsibilities for providing hardware and server equipment, including server, connectivity cables and power sources
  - . Standards for uptime connectivity to the Internet, including specifications regarding speeds at which the colocation facility will connect to the Internet
  - . Client access to the physical servers for maintenance and upkeep, as well as Internet access (via FTP or other transfer method) to servers
  - . Power supply systems and back-up, or uninterruptable power supply (UPS) systems.
- Each of these issues should be addressed in a carefully drafted colocation agreement.

The disadvantage to colocation is that the server is not located physically at the client's operation. Remote management of the machine becomes an issue.

### III. Hosting and Development Agreement Issues

Assuming that a third-party is involved in the development or hosting of the site, numerous contract issues

will need **\*385** to be resolved. Specifically, parties developing an eCommerce site on the WWW need to be concerned principally about (i) website development and design agreements and (ii) hosting and operation agreements. Getting a store opened on the web involves three primary phases: development, operation and maintenance. The discussion that follows examines each of these phases in detail.

#### A. Hosting, System Redundancy and Other Technical Issues.

Assuming that the client intends to have its website physically reside on a third-party server, it will need to contract for hosting services. Frequently, the same company both develops and hosts a website, in which case hosting and development issues can be included within one agreement.

No matter how parceled out, significant issues related to hosting services include:

- . Up-time and availability of website to visitors
- . Access for site maintenance and hosting server preventive maintenance
- . Site data backup, preservation, and recovery together with "mirroring" the website to alternative servers in the event of a server failure
- . Traffic reporting
- \*386** . Site security and routing of data received through the site directed to the client
- . Backup systems in case of power failure
- . Availability and response time of technical support

One way to contract for these performance items is through the use of "service level requirements," or "SLRs." SLRs impose upon the host an obligation to perform at a certain predetermined and measurable level. How the SLR is met is up to the host -- the client simply expects that level of service. If the SLR is not met, certain penalties often apply and some limited amount of time to cure the SLR deficiency is provided.

Carefully drafted contract provisions can sometimes eliminate the uncertainty surrounding each of these issues and provide guidance to the parties to ensure expectations are met. As a starting point, a general contract provision that makes the host comply with industry standards as well as nearly continuous (or continuous if you can negotiate such a term) up-time or site availability would look something like the following:

**Standards.** HOST's hosting standards shall conform to applicable industry standards. HOST shall provide the website with (a) continuous, full, and unrestricted connection to the **\*387** Internet for approximately twenty-four (24) hours each day excepting necessary site maintenance and Internet performance issues outside the reasonable control of HOST, and (b) regular routing and other systems administration and support services necessary to maintain such continuous, full and unrestricted connection.

This provision allocates responsibility to the host to make sure the technical connection between the client's site and the Internet community is alive and viable on as nearly a 24 x 7 basis as possible. When a site is used for commerce activities, as opposed to brochureware, continuous connectivity and up-time is critical.

Similarly, a general provision in the contract should squarely allocate hosting-related maintenance issues to the host:

**Maintenance.** HOST will provide all hosting-related maintenance for sites hosted on an on-going basis. This includes backups, server maintenance, and troubleshooting. This type of maintenance, which includes technical hosting-related issues, should be distinguished from design maintenance, which affects the content of the site and which is dealt with through a separate agreement.

**\*388** The backing-up or preservation of data is extremely important to the client. It may become necessary, in the event of a server failure or hard drive crash, to resurrect a website from preserved copies. The client

should insure that the host is backing up the site data on a regular basis on secure back-up devices. A contract provision such as the following allocates the back-up duties to the host:

Site Backup. HOST will provide daily and permanent backups. All data shall be backed up daily to two locations--network storage and DAT. The DATs shall be stored off-site in a fire-proofed, secure tape library. The network data shall be stored for three weeks, and is available for content replacement. HOST shall also maintain a development environment copy of web data for rapid content replacement. HOST shall make this content available to client upon request.

Provisions like this establish timetables for the back-up of data and the medium to be used to store the data. The client may want a contract provision requiring the host or developer to provide regular archival copies of all website pages, components, and developed materials to the client. This would allow the client to avoid having its website "turned off" by an irate host and makes the site immediately portable to a new host.

**\*389** Critical to a client's site development and realization of value from a website is accurate data concerning visitors to the site. Traffic data allows for targeted marketing of goods and is a continuous source of feedback concerning the use made of the site by visitors. The host should provide sophisticated traffic reporting to the client, as set forth in this sample contract provision:

Traffic Reporting. HOST will configure its web servers to capture standard visitor log information needed to provide detailed traffic/site-performance reports for Client websites. At Client's request, HOST can provide multiple and targeted reports. HOST can also help interpret the reports and make recommendations to Client based on the reports. Traffic reporting services are billed as standard maintenance.

More specific traffic reporting requirements can be negotiated if warranted.

Another vital issue is site security. Hackers and crackers make money and sport out of invading Internet websites, including the sites of many businesses. While no system of site security is perfect, a contract provision in the hosting agreement can require the host to take all reasonable measures to ensure the security of the site:

**\*390** Security. HOST shall take all reasonable measures to prevent unauthorized access to Client sites hosted by HOST, and any databases or other sensitive material generated from or used in conjunction with website. HOST shall immediately notify Client of any known security breaches or holes.

If a client's site has special security concerns or if the parties want to spell-out in more particularity the specific security precautions to be taken, those terms can be included in the agreement. This may be essential for businesses that depend upon hosts to transmit, in a secure fashion, data received through the website from customers, including credit card numbers and other personal and exploitable information. If the eCommerce site has this need, it should investigate the secure transmission capabilities presented by SSL ("Secure Sockets Layer") and SET ("Secure Transactions Standard"). The latter are considered generally more secure while the former is easier to implement and more prevalent.

## B. Development Activities and Levels of Service for the Website.

Many clients resolve the business decision concerning development of a website in favor of utilizing third-party resources. That decision, while frequently most practical and advantageous to the client organization, **\*391** generates a host of potential problems concerning the actual development of the website and management of the relationship between the client and developer. These problems are often exacerbated by the client's demand that a site be developed and launched in a short period of time. When the site serves as a portal for business activities, the client can suffer significant detrimental economic consequences when site development falls behind projected or promised schedules.

In an effort to anticipate these problems and protect the client or developer, contract provisions should be negotiated into a development agreement which (i) allocate responsibilities between client and developer, (ii) establish performance or service level requirements and (iii) establish development timetables.

An initial and fundamental issue in website development is who calls the shots with respect to creative decisions in website building: the client or the developer. To give final and complete authority to the client, one could use a contract provision similar to the following:

**Creative Control.** The parties acknowledge that Client possesses final creative control over all content including that created by DEVELOPER. Without limiting the foregoing, Client reserves the right **\*392** to require DEVELOPER to delete or modify any portion or portions of DEVELOPER's work that in Client's sole discretion are contrary to or conflict with Client's policies or plans. This provision gives complete and total authority to the client for the content of the website.

Once past the initial issue concerning who controls development decisions, important issues arise concerning development timetables and meeting development deadlines. For example, a developer will not want to be penalized because development falls behind schedule as a result of the client failing to provide approvals or materials which are required for the developer to complete its work. Materials from the client that would be necessary for site development range from client artwork and graphics to sophisticated catalog or product data. Additionally, clients sometime require that the developer make use of legacy computer systems or databases to populate electronic commerce web pages. Thus, a developer would likely want the protection afforded by a contract clause similar to the following:

**Delivery of Client Original Materials.** Client will provide DEVELOPER with all Client Original Materials in a format specified by DEVELOPER according to any schedules set forth in Project Schedules. **\*393** Delays in delivery of Client Original Materials will cause a delay in the project and may increase development costs. At Client's request and cost, DEVELOPER will convert, develop or produce Client materials in specified format.

Similarly, the developer will likely want to insure that the client devotes sufficient support to the development project. A contractual provision addressing this issue, requiring a dedicated staff contact, is as follows:

**Client Staff Contact.** Client shall, in its sole discretion, select one staff member to devote a portion of his or her job to serving as the primary contact with DEVELOPER to facilitate content delivery and promotional activities.

If a website development project is particularly complex, large or important, additional staffing and resource guarantees may be warranted, including:

- . The client may require the developer to identify the specific staff members assigned to the project and the percentage of time they will devote exclusively to the project
- . The client may also want the right to designate or approve staffing for the project

**\*394** . Both parties should insure that senior project contacts, at a level above support staff contacts, are designated by both sides with decision-making authority

Read together, these contract provisions allocate certain responsibilities to the client which are crucial to website development. The developer's duties are discussed below.

### C. Development Pricing, Updates and Support.

How do you determine the cost of developing a website? What happens when the client needs an immediate update to the site in the middle of the day? How are changes to the site priced on an ongoing basis? These issues should be confronted in the initial development agreement or through a supplemental agreement concerning site updates and maintenance.

**Development.** The design specifications and goals of the website will drive its development cost and timetable. The parties should contract for a methodology to establish costs for development and updating of

the site, including costs and budgets. Websites thrive on their dynamic quality, which means constant and quick changes, posting of new information, and regular updates. To the extent possible, the client and developer should agree up-front how both initial development and incremental changes will \*395 happen and how they will be charged and accounted for.

One way to contract to achieve this goal is to include within the development agreement, or as a separate contract, a "retainer" clause that obligates the developer to provide a fixed number of hours of development time for updates, revisions and maintenance per month. Thus, the development agreement might contain a section like the following:

#### 1. Retainer Arrangement (Maintenance, Updates, and Ongoing Service)

This Retainer section of the agreement shall apply only if DEVELOPER provides maintenance, updates, and ongoing services as specified in a Project Schedule attached as an Addendum to this agreement. Retainer Arrangements are structured and intended to provide the most responsive, highest-quality and highest-value service to DEVELOPER's clients.

a. Initial Scheduled Maintenance Hours and Retainer Rate. As of the Retainer Start Date, DEVELOPER agrees to provide Client with a predetermined number of hours of site maintenance and update services per month (Scheduled Monthly \*396 Maintenance Hours) at a predetermined rate (Retainer Hourly Rate).

b. Retainer Term. The Retainer Arrangements shall be effective for the period of time indicated on the Retainer Agreement.

c. Scheduled Monthly Maintenance. Client may adjust the number of scheduled monthly maintenance hours. Adjustments to the number of Scheduled Monthly Maintenance Hours are effective the first day of the following month's billing cycle.

d. Unused Development Hours. All unused development hours will be credited to the following month.

e. Additional Development Hours. DEVELOPER agrees, pending schedule availability, to provide unlimited additional maintenance and update hours (above the monthly scheduled maintenance) at the Retainer Hourly Rate.

Spending prescribed development hours can be planned through a set of project \*397 schedules which serve as a part of the development agreement. These schedules can be provided for in the agreement and, as an example, can be defined as follows:

Project Schedules. Project Schedules contain the scope, cost estimate and time line related to the initial and ongoing projects governed by this Agreement. Project Schedules must be approved by both DEVELOPER and Client. Project Schedules may specify the terms of initial development projects, special development projects, maintenance retainer arrangements, hosting, and consulting projects.

Once the project schedule is defined, the development agreement can specify the manner in which the work on the site will be done by the developer, incorporating the project schedule previously defined.

The following are sample provisions that might be contained in a development agreement to implement the concept defined by the project schedules:

Best Estimates. DEVELOPER will provide its best cost estimate of the hours and costs of production, based on the current specifications outlined in the Project Schedules.

Time Line. DEVELOPER shall make all reasonable efforts to meet deadlines and perform all tasks within the time lines set forth in the Project \*398 Schedules. DEVELOPER's obligations with respect to meeting time lines are subject to delays caused by Client or third parties.

Changes to Scope, Estimate and Time line. Should, at Client's request, the specifications set forth in the Project Schedule (i.e., scope, estimate, time line) of the project change during development, Client and

DEVELOPER will work together to arrive at a mutually acceptable revised set of specifications. These provisions provide protection for delays in development when the developer has taken "reasonable" efforts to meet timetables. The parties may also want to agree upon a procedure for approving any changes to the scope of work or project schedule. This might be accomplished through a secure extranet connection between the parties or other work-flow automation procedure.

An alternative, of course, to an "estimation" methodology is a fixed-fee contract. That is, the parties can agree that a website with certain specifications will be built and deployed for a fixed-price. If this route is selected, the parties should be very careful about specifying the precise requirements for the website. Significant disputes can arise over the scope of the project and the work to be performed by the developer. The specifications for the website should be, **\*399** to the extent possible, demonstrably measurable and objective. The difficulty in contracting for a fixed-fee project is obvious.

The developer and client will also want to build into the agreement payment provisions. The developer, for example, may want a deposit before investing work in a project, and thus seek the following contract provision:

**Deposit.** Any deposit amounts are set forth in the Project Schedules. Services begin upon receipt of deposit.

As noted above, the project schedule will set forth the major milestones in site development and required targets. The project schedule will also likely be the vehicle for the parties to establish payment schedules, as noted in the following contract provision:

**Payment for Services.** Payment schedules are set forth in Project Schedules. Payment is due on or before the date indicated on the Project Schedules. If a Project Schedule does not specifically set forth a payment schedule, DEVELOPER shall invoice Client for services on a monthly basis for services rendered during the previous month. Payment will be due thirty (30) days from the date of the invoice.

**\*400** In some instances, the actual development time spent by the developer will be different from that contemplated in the agreement. In that event, some mechanism for resolving this difference needs to be in place, like the following:

**Reconciling for Actual Hours.** If actual service hours differ from estimated development hours by more than 20% at any point during the term of the Agreement, DEVELOPER will, at the option of Client, (1) make adjustments to the Project Schedule in question to better reflect the actual time spent, or (2) issue an invoice to reconcile the account. In either case, payment will be due thirty (30) days from the date of invoice.

This provision, obviously, makes the client pay for the development hours in the end, while allowing the client to choose to have the project schedule modified to take into account the unanticipated expenditure of time.

**Support.** The parties can agree that the developer/host will provide regular support to the client. If immediate reaction to issues is important, the development/host agreement should contain a clause like the following:

**Help Desk Support.** DEVELOPER shall provide telephone help line support during regular business hours, staffed by personnel who have the **\*401** knowledge to assist Client in resolving problems related to the services performed by DEVELOPER.

It may be that a particular client demands or needs 24 support, in which case the contract should provide for that support and the parties will need to negotiate the cost.

Beyond those immediate and perhaps minor problems, the client will likely want to know that a particular person at the developer's shop is watching over the site and available for consultation and changes when needed. This can be provided for in the contract through a provision such as this:

**DEVELOPER Account Director.** DEVELOPER shall, in its sole discretion, select one staff member to devote

a portion of his or her job to serving as the primary contact with Client to facilitate project direction and coordination.

These provisions, read together, establish a cadre of support at the developer's office to assist the client with the site.

#### D. Acceptance Testing.

Once development is underway, and a functional website exists, the site must be put through its paces to determine if it meets the client's specifications. Often no payment from the client to the **\*402** developer is due unless the website passes what is commonly referred to as "acceptance testing." Contract clauses usually allow the client to have a period of time in which to test the website. The acceptance testing can be provided for in the development agreement and may make payment for services contingent on the site meeting specifications under normal operating conditions residing on the anticipated host server.

Depending upon the client's needs and the sophistication of the website, the acceptance testing specifications can become very complex and detailed. Specifications may include the following:

- . Speed at which web page's load
  - . Responsiveness of internal site search engines and other interactive site features that depend upon scripts and back-end server functionality
- . Cross-platform (e.g., Netscape vs. Internet Explorer) compatibility of the website
- . Quick transmission and output of data submitted to the site via forms
- . Security of data submitted through the site
- . Effective hyperlinks to other sites

Acceptance testing is the client's opportunity to measure the developer's **\*403** performance and ensure specific requirements are satisfied. Those specifications that fall short of the stated standards shall be corrected at this stage.

Of course, the developer may want the contractual right to cure any defects identified by the client so that the defects are not considered a material breach of a contract. This right should not be unlimited as to time, however, and the contract clause should require the developer to work in a timely manner, within stated time guidelines, or require the developer to work with the client to establish a timetable to fix specific problems.

#### E. Platform Specifications.

Another issue that should be contemplated and spelled-out in the development agreement is the technical specification for the platform, i.e., the type of computer or operating system, on which the website will operate. This is important because the client needs to ensure, to the maximum extent possible, that its site is portable to another server, another host and another developer. Thus, the agreement should specifically identify the technical platform design to be used by the developer, including whether the design will be based upon standard HTML scripting, server-side enhancements, Lotus Notes or Domino-based design, or other platform specifications. Although **\*404** these technical issues are beyond the scope of this presentation, it is important to emphasize that, from a legal rights perspective, the client and developer should cooperate to specify the nature of the site design.

#### F. Rights to User Data

One of the most valuable assets a business garners from its website is information about the users or visitors to the site. Web hosting firms can generate traffic or activity reports based on a variety of criteria, such as monthly hits, user sessions, average number of hits per day, or most requested page. One source of

this data is the simple and raw-form server logs kept by the website host about visitors. This information might be further distilled by the host into traffic reports of varying sophistication. A hosting agreement should allocate the rights to this data to the client and restrict dissemination of the data to other parties by the host.

Web development, web hosting, co-branding and outsourcing agreements universally should have provisions inserted which assign to the client all the rights to the user data. The client should treat user data as a valuable trade secret and protect it as such. To this end, the client should ensure that the host/developer will treat the data confidential and not disclose any information resulting from the site to any third-party.

**\*405** It is becoming more common for co-branders or outsourced providers to request sharing arrangements for user data. In other words, these parties have realized the value of tracking user data and thus want access rights to it. Thus, if a website outsources e-mail services, chat boards or search engine services, it may confront a partner who desires access to user data. The client should protect the competitive advantage this data presents.

#### G. Online Promotion

Getting the site on the Internet and functional is just the first step in getting a business up and running on the Internet. The site's value is only as great as the level of visitation it receives. To facilitate use of the site by customers, several steps can be taken to promote the site online. Not only is the client interested in promoting its site, the developer and host have an interest in promoting their services as well.

Search Engines. Submitting a site to be registered with search engines is currently the most popular method of free advertising on the web. Search engines (e.g., Infoseek, Excite and Yahoo!) check against their database of web documents and return the best matches for the entered query. The developer is frequently contractually obligated to develop and implement a strategy to register the website in Internet search **\*406** engines. Developers can be required to revisit the search engine registration at regular intervals, test the visibility of the site among major search engines, ensure the content of the website is strategically traced, the proper choice and strategic placement of meta tags, and resubmit those previous registrations that "didn't work" to keep your site at the top of the list.

Co-branding & Outsourcing. Another potentially useful marketing strategy is co-branding, which is becoming increasingly popular in eCommerce. The reason is simple -- the integrated nature of cyberspace begs for the cooperation of partners in the electronic commerce arena.

What is co-branding? Simply put, it's when two, non-competing providers of services or goods combine to offer integrated services that leverage the benefits of each component. In traditional commerce co-branding may be found when, for example, your favorite potato chip manufacturer teams up with a popular barbecue sauce to make co-branded, barbecue-flavored potato chips. Instances of co-branding and solicitation of co-branding abound in electronic commerce. For example, it is quite common to visit websites which rely on services offered by other sites, such as the integration of MapQuest ([http:// www.mapquest.com](http://www.mapquest.com)) driving directions into a site identifying business store locations. Other examples **\*407** include the use of third-party electronic mail services to give customers visiting your site mail capability.

Closely related to co-branding is the concept of outsourcing. Outsourcing, as that term applies in the context of electronic commerce, is where a web page owner relies upon a third-party for certain web page services. For example, a client may want to use a third-party's email server to provide email for the client's customers through the client's website.

Similar legal issues arise in both the co-branding and outsourcing situation, and contracts relating to these issues should include provisions that:

- . Establish the scope of the rights of the parties to use each other's logo or trademark
- . Determine whether the parties have the right to continue to market the co-branded service upon termination of their agreement
- . Fix the outsourcing company's obligation to provide its outsourced services to the client, including maintenance, and provisions for downtime or systems failures
- . Allocate the potential liability of the parties for each other's conduct in the co-adventure, including potential indemnification

**\*408** Most of these issues can be resolved in a negotiated agreement between the parties.

Developer's Self-Promotion. Online promotion is a two-way street. Not only does the client want its site to be marketed on the WWW, the developer similarly hopes to gain advertising and prestige from his work for the client. Thus, notwithstanding any allocation between the developer and the client of the property rights of various pieces of the site, the developer will frequently want to be able to use the developed website for advertising to prospective clients. This enures to the benefit of the client because, presumably, the developer wants the client's website to be a showcase and won't attach its logo to anything it thinks might reflect negatively on its own services. Developers thus frequently request provisions like the following in development agreements:

Limited Portfolio License. DEVELOPER reserves the right to use the Client's name, logo and trademarks, and any work produced for the Client by DEVELOPER in advertisements, or other publicly distributed materials describing the fact that Developer is or has performed services for Client under this Agreement and nature of such services. DEVELOPER agrees that if it uses Client's copyrighted material, Developer must also use Client's copyright notice.

**\*409** Credit. DEVELOPER is to be given a clear credit with hypertext link at the foot of Client's Site home page for as long as DEVELOPER's Developed Materials, in whole or in part, are used in any capacity on the Client's Site.

The limited nature of these promotional requests will frequently not meet an objection.

## H. Ownership

A tension exists between the website developer and client over the ownership of various aspects of the site and development. The client needs to contract to retain ownership of the website and all its components so that the site is portable to a different host and transferable to a new development team should the need arise. The developer, on the other hand, wants to make sure that its intellectual property -- the design process, methodology and design tools -- remains his own. Most development agreements attempt to resolve these tensions.

Ownership of data or information is relevant to four primary categories of data: (i) client original materials, developed by the client and provided to the developer for use in developing the website; (ii) "stock" or preexisting material used in the development of the website; (iii) the developer's work product, which includes the website **\*410** pages, developed back-office scripts and other material created during site development; and (iv) data generated from site users or visitors during the time period that the site is online. The developer and client should attempt to anticipate the potential ownership disputes which may arise within each category of information and contract around these potential issues.

With respect to the first category of data -- client original materials -- some straight-forward contract provisions which clearly indicate that the client retains all ownership of original material may be used:

Client Ownership & Copyright. The Client retains exclusive rights to and ownership of all materials that

it owns notwithstanding that it may, at its discretion, provide these materials to the Developer for use in developing the website. The Client's logos and copyrighted materials remain the registered trademarks and sole property of Client.

Ultimately, of course, the developer will take the client materials, use its own skills and resources, and convert the original data into a website. A question may then arise concerning who owns the fruits of the developer's labor -- the client or the developer. A contract provision which transfers ownership of \*411 the end product to the client might look something like this:

**Client Ownership of Developed Materials.** Developed Materials produced by DEVELOPER for Client shall become and remain the sole property of Client, including but not limited to the content of the website as a whole, as a compilation or a collective work, and all related marketing and promotional materials, other than any rights specifically owned or reserved by DEVELOPER in accordance with this Agreement. In order to effect the transfer of all such rights to client, DEVELOPER hereby assigns and transfers to Client, its successors and assigns, all right, title, and interest, including but not limited to copyright, patent and all rights subsumed thereunder, that DEVELOPER may have or hereafter acquire under this Agreement in and to the Developed Materials, content and related materials, including without limitation those graphics and artworks created by DEVELOPER for the website, except with respect to Programming and Stock Materials. Nothing hereunder shall prevent Client from reusing or modifying the Developed Materials, including any materials, services, data or engineering delivered or produced hereunder, excluding the Programming and Stock Materials in any fashion including but not limited to \*412 derivative works. Client's logo, trademarks, service marks, and trade names are and shall remain the sole and exclusive property of Client and DEVELOPER shall make no use of them without the prior written permission of Client, which may be granted or withheld at its sole discretion. DEVELOPER shall acquire no right, title or interest of any kind in Client's Developed Materials and/or content and or trademarks as a result of this Agreement.

This provision incorporates three defined terms: (i) Developed Materials (ii) Programming and (iii) Stock Materials. Developed Materials belong to the client, while Programming and Stock Materials remain property of the developer or the entity that has property rights in the original material. In any event, each of these terms should be defined and set forth in the contract similar to the following:

**Developed Materials.** All final product images, scripts, computer code (including HTML), procedures, copy, graphics, photos, sound files, and video files originally developed by DEVELOPER to be incorporated into the website.

**Stock Materials.** All text, photos, graphics, recordings, or other materials of any kind and nature, other than Client Original Materials, Developed Materials, \*413 and/or Programming originally developed by DEVELOPER or licensed by DEVELOPER for general use by DEVELOPER in the Developed Materials for its clients.

**Programming.** All programs, routines, subroutines, computer code, procedures, scripts, software designs, database designs, or other computer programming not developed exclusively for the Developed Materials.

In addition, the parties should insure that, to the extent the developer uses independent contractors to design code or graphics, those contractors have assigned all their intellectual property rights in that work to the developer, who in turn has assigned the rights to the client. Thus, provisions should be included in the agreement in which developer may warrant that it will obtain, and has obtained, all necessary rights to assign the intellectual property interests over developed work to the client. This can be accomplished by requiring the developer to warrant and agree that it is performing its work in a "work for hire" context and that it has obtained similar agreements from any contractors so that copyrights are properly assigned to the client.

Another potential problem arises when the client provides the developer with client-owned material for site development. This might include \*414 pictures, text or other pre-existing data. In many situations this shared data may contain proprietary or confidential information. A contract provision which will provide

some security concerning this data might be as follows:

Client Proprietary Information. DEVELOPER acknowledges that certain of the Client Original Materials and the documents and information provided to DEVELOPER by Client pursuant to this Agreement contain valuable, proprietary and/or confidential information and trade secrets of Client ("Client Proprietary Information"). Neither DEVELOPER nor any of its owners, officers, employees, subcontractors or other agents, shall, during or after the termination of this Agreement, directly or indirectly: (i) divulge, disclose or communicate to any person, entity, firm, corporation or any other third- party (except to the extent necessary or appropriate in the course of performing its obligations pursuant to the terms and provisions of this Agreement) any Client Proprietary Information, or (ii) utilize for its personal benefit or for the benefit of any person or entity other than Client any Client Proprietary Information. It shall not be a breach of this Agreement for Developer to disclose Client Proprietary Information if compelled \*415 to do so under law, in a judicial or other governmental investigation or proceeding provided Client has been given prior written notice and Developer has sought all available safeguards against widespread dissemination. Upon the termination of this Agreement for any reason, DEVELOPER shall promptly return to Client all Client Proprietary Information, Client Original Materials and all Developed Materials.

#### I. Warranties.

Critical to the website development agreement, particularly when the site is to be used as an electronic storefront, are warranties regarding performance and specifications. A general warranty statement ensuring that the product is delivered in good operational condition and allows for continuing corrections and modifications, might provide as follows:

Basic Warranty. If DEVELOPER develops materials for Client as outlined in a Project Schedule, DEVELOPER will provide Client with maintenance of Developed Materials, including minor corrections/alterations for a period of 90 days after acceptance [i.e., after testing] of Developed Materials. This warranty shall become void if any changes are made to the Developed Materials by any person or entity other than \*416 DEVELOPER except those changes authorized and inspected by DEVELOPER.

Of course, the client may want a more specific warranty of the condition of the developed material. These warranties often make reference to general industry standards, requiring a state of the art standard in the website development. A sample provision of this type of warranty follows:

Developer warrants that all of Developer's development and web services will be provided in a professional, technically competent, and timely manner. DEVELOPER represents that it has all necessary equipment, and that it is staffed and administratively supported, in a manner sufficient to fulfill DEVELOPER's obligations under this Agreement. DEVELOPER represents that the website will be capable of access by authorized users as is typical and usual for a website for the Internet. DEVELOPER acknowledges that the features described in this Agreement and its attached schedules are integral features of the website and must function in a reliable and effective manner.

Breach of this warranty could potentially give rise to a claim for damages against the developer.

\*417 In addition to a general warranty of fitness for the purpose for which it is designed, specific warranties relating to common issues might also be included in the agreement. For example, one threat to a website is computer viruses or invasion of the site by hackers. Accordingly, a warranty provision like the following might be included in the development agreement:

Computer Viruses and Security. During and after the term of this Agreement, DEVELOPER represents and warrants that the Developed Materials shall not contain any virus, timer, clock, counter, backdoor, or other limiting design, or routine that could erase data or programming, create the potential for a breach of security or confidentiality, or cause Developed Materials or any hardware or software used with the same to become inoperable or otherwise incapable of being used in the full manner for which it was designed.

This warranty also prohibits the developer from inserting disabling code into the website as a counter to

nonpayment or dissatisfaction with the client.

Other emerging issues, such as the now-infamous Year 2000 problem, can also be contemplated by clause like this:

**\*418** Year 2000. DEVELOPER represents and warrants that the Developed Materials will operate accurately and will not abruptly end, provide invalid or incorrect results, or cause any problems related to any "Year 2000" issues and will, without interruption or manual intervention, continue to operate consistently and in accordance with its specifications and/or functionality and performance requirements when used during operation prior to, on, or after January 1, 2000, or when given a valid date containing century, year, month and day.

From the developer's perspective, it wants to make sure that all these warranties don't run it into bankruptcy in the event something goes wrong with the site. Accordingly, the developer, particularly when developing electronic commerce sites, will likely want to place remedy limitation provisions into the development agreement. An example of such a provision follows:

Remedies. DEVELOPER further warrants that it will correct any errors or omissions made by DEVELOPER in the performance of its services under this contract within three (3) business days of receiving notice of errors or omissions. Regardless of whether any remedy set forth herein fails of its essential purpose, in no event will DEVELOPER be liable to the Client for any **\*419** special, consequential, indirect or similar damages, including any lost profits or lost data arising out of the use or inability to use the Developed Materials or any data supplied therewith even if DEVELOPER or anyone else has been advised of the possibility of such damages, or for any claim by any other part. In no case shall DEVELOPER's liability exceed the purchase price of the services enumerated in this contract.

This clause achieves several goals. First, it allows the developer an opportunity to fix the problem. This escape hatch inures to the benefit of the client because, in the end, the client desires a fully functional website. Second, this clause attempts to limit all potential liability of the developer to, at maximum, the amount of the services under the agreement. It similarly excludes client remedies for consequential damages or lost profits -- a potentially drastic set of damages in the field of electronic commerce websites.

## J. Termination and Migration Assistance

Development Agreements. Development agreements might terminate for a number of reasons. The client might wish the right to terminate the agreement if the developer is unable to deliver the website, as specified in the agreement, at the contractual delivery date. A **\*420** provision that deals with delivery date termination is as follows:

Termination for Failure to Deliver. Client, by written notice to Developer within thirty (30) days after the Delivery Date, may terminate this Agreement if the actual installation of the site in fully operational condition does not occur on or before the Delivery Date, unless otherwise mutually agreed.

The parties would have previously agreed to the defined term "Delivery Date," and provide for acceptance testing for some period of time following the delivery date. The client might also need the right to terminate the agreement if the website, when delivered, does not meet specifications.

The developer, on the other hand, will likely want the right to terminate the agreement for non-payment of development fees. The developer thus might try to insert into the agreement the following clauses:

Termination. In the event of a material breach of this Agreement, the non-breaching party shall give written notice clearly specifying the material breach to the breaching party and such non-breaching party shall have the right to terminate this Agreement upon written notice to the breaching party if such material breach is not cured within **\*421** 30 days of such initial written notice. Failure to pay constitutes a material breach of this agreement, except when Client withholds payment after notification and before adequate remedy of a material breach of this agreement by DEVELOPER.

This clause builds into it a right to cure on behalf of the developer and then, if the defect is cured and payment is still not forthcoming from the client, the right to terminate.

The developer may also want to terminate the Agreement in the event of any third-party claim, suit or other legal or administrative action against the Developer arising out of Developed Materials or any other priority client materials which are not dismissed within a short time period after initiation.

In certain situations the client may want the right to terminate the development agreement for any reason, with or without cause, at any time. Such a provision will also require the parties to negotiate a means to resolve outstanding amounts owed to each other and, particularly if the development is being done under a fixed-fee arrangement, a method by which to determine how much, if any, of the fixed fee is owed to the developer.

Hosting Agreements. For one reason or another, not every hosting agreement will last forever or the client may desire to **\*422** transfer its website to another host or bring it in-house to manage it itself. Assuming that the client and host have appropriately allocated ownership rights with respect to the website, the issue surrounding termination and migration are the process, not the right to accomplish the transfer.

Issues which the parties will need to address in a hosting contract related to termination and migration include the following:

- . Preventing termination of hosting services and web access until the files are successfully transferred to a new host
- . Smooth transition of contact information provided to the domain name registration authority, if the host has registered itself as the technical contact, so that the client can maintain uninterrupted name registration
- . Provision of regular (weekly or daily) complete copies of all website files to the client so that the client can reproduce its site on another host if necessary
- . The client's right to have the site up and fully functional during the pendency of any disputes. This could be potentially enforceable by injunctive relief if necessary

**\*423** Remember, however, that the host's interests upon termination are usually full payment of any outstanding obligations while the client's interest is the smooth transfer of its site and domain registration to a new host. Each side's interests will need to be negotiated in this agreement.

## K. General Contract Terms

After slogging through the contract terms of specific importance to a hosting or development agreement, it would be easy to forget some of the more fundamental provisions common to most contracts:

- . The parties should contract for the applicability of a specific state's law to any disputes arising under or from the hosting or development agreement. Development and website hosting need not necessarily occur in the same state where the client is incorporated, for example, or otherwise resides. Thus, the need for a contract term to insure that the state's law that the parties expect to govern the agreements will in fact control

- . Some parties may choose to include in a development or hosting agreement an alternative dispute resolution clause. The benefits to resolving disputes in a binding fashion outside the judicial system are many and, given that, some parties prefer to require arbitration **\*424** of disputes before entities like the American Arbitration Association. For this reason, the client or developer should consider insertion of an alternative dispute resolution clause in the contract

- . The parties will likely want each other to agree to maintain any materials or work arising under the development or hosting agreement strictly confidential. This would encompass website user data, trade secrets and developer's own proprietary methodology or procedures

- . The parties should explicitly stipulate that the developer or host is an independent contractor and not an

employee of the client

- . The client may want a contract provision requiring the developer or host to have insurance to cover various contingencies that might arise from website development or hosting

- . Common contract terms, such as one declaring that "time is of the essence" under the agreement or that the contract is a "complete integration" of all the parties' agreements might be useful

- . Another potentially helpful term is one that attempts, to the extent the state governing law would allow its enforcement, to require any \*425 modifications or amendments to the agreement to be in writing

- . A statement by the developer or host that it warrants that it is, and will remain, in compliance with all applicable laws

Additionally, Force Majeure, severability, compliance with law, independent contractor and no third-party beneficiary provisions are prudent. Although generally beyond the scope of this article, it is clear that lawyers representing clients and developers ought to remember all basic contract provisions even when drafting these highly technical agreements.

#### L. Domain Name Registration

Domain names can mean everything for an eCommerce business on the Internet. Although the broad concept of domain name registration and related trademark and intellectual property issues surrounding this subject are beyond the scope of this presentation, some basic concepts out to be kept in mind.

The first step in establishing a presence on the Internet is to select and register a second-level domain name for the website. A domain name is a unique electronic address, known as a Universal Resource Locator ("URL"), which is owned by a single person or entity that identifies a World Wide Web \*426 site as well as an e-mail address. Second-level domain names precede top level COM, ORG, NET, and EDU domains (e.g. www. [secondleveldomain] .com) and are registered by the Internet Network Information Center ("InterNIC"), which has been administered by Network Solutions, Inc. ("NSI") under contract from the National Science Foundation since 1993. Registration of a domain name may be accomplished by visiting NSI's website at [http:// www.networksolutions.com](http://www.networksolutions.com).

As second-level domain names are registered on a "first come, first served" basis, it is advisable to register second-level domains with NSI immediately, if the name is available. Domain name availability may be determined by searching the WHOIS database at NSI's website. If the domain name is available, it should be registered immediately so as to reserve the right to use the domain name.

It is then advisable that a full U.S. trademark availability search be conducted to ensure that there are no federal registrations that may inhibit the use of the registered domain name should the federal registrant object to the use of the registrant's trademark as a domain name. If the trademark search reveals a valid federally registered trademark that is identical to the registered domain name, one of two courses of action may be taken: (1) abandon the domain name; or (2) approach \*427 the federal registrant for permission to use the mark as a domain name. If there are no identical federally registered trademarks, the domain name registrant may use the mark as the Internet address. Further, as domain names also function as trade or service marks, the domain name may be entitled to federal registration with the United States Patent and Trademark Office provided the requirements of that office are met.

#### III. Hosting Entity's Liability for Seller's Content

The potential liability resulting from violating the intellectual property rights of a third-party must be contemplated and addressed in any development/host agreement. Potential issues include copyright and trademark violation, as well as claims for defamation. The law surrounding these issues as they specifically

apply to websites is continuing to develop. These issues are, in large part, beyond the scope of this article and presentation. For purposes of drafting hosting and development contracts, however, certain issues should be kept in mind.

#### A. General Legal Risks

Developers and clients must take care not to overlook traditional legal risks of advertising or otherwise doing business in cyberspace such as \*428 defamation, invasions of privacy, unfair trade or deceptive practices, copyright, patent and trademark infringement.

**Regulations.** Websites must comply with the same regulations as print or television media, including, for example, the Federal Trade Commission Act. Web content, like any other media content, must be truthful and not misleading. Depending upon the industry, there may be other applicable regulations to which a client must adhere. Thus, it is important for the developer to obtain indemnification for such non-compliance and for the client to make sure that it considers the legal issues surrounding its business advertising.

**Defamation.** The possibility that defamatory statements might be made by a client on its site exists, and the host or developer of a website must take steps to limit its potential liability for the conduct of the client.

The Communications Decency Act of 1996 provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." See 47 U.S.C. §230 (c) (1). A relatively recent decision from the United States Court of Appeals for the Fourth Circuit broadly construed this provision to eliminate America Online's liability for messages on its message boards containing \*429 allegedly defamatory statements. See *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997).

This broadly construed provision of the CDA may immunize hosts from much liability resulting from any defamation that occurs and the case law on this subject should be closely monitored. Notwithstanding this statute, however, the host should be careful to request indemnification for defamatory conduct of web site owners. A sample provision is included below.

**Copyright.** The Internet has revolutionized the creation, reproduction and dissemination of information. This has opened the door to various issues of copyright infringement. Claims against ISPs and other online service companies involve liability for alleged contributory copyright infringement as a result of third party's use of a website or online service. These claims are based on an ISP or other hosting entity's provision of services or equipment if it knew or should have known of the infringement. This position has received some support in the courts. Thus, in the case of a development agreement, the developer should be aware of this issue and, in addition to investigating into reported claims of infringement, incorporate language in its agreement to protect itself from such claims to the extent possible. This can be accomplished with the inclusion of appropriate language in \*430 its remedies, disclaimers, and limitation of liability provisions. However, obtaining indemnification specifically addressing copyright infringement is extremely critical. Examples of provisions which would accomplish this are set forth below.

**Trademark.** Other than domain name issues, developers should be aware of other trademark infringement claims. These claims against the ISP or other online service companies for content contained in websites that it has developed and/or hosted for other third parties should also be guarded against in an indemnification section.

#### B. Contract Provisions Allocating the Risk.

The parties should address who is liable for violations of intellectual property rights. Transferring the liability for infringing the intellectual property of a third-party or for defamation to the developer/host with respect to their conduct can be achieved through a warranty provision like the following:

DEVELOPER represents and warrants without limitation of time that its services provided hereunder and materials created as contemplated hereunder and the exercise of any rights granted herein do not, and will not in the future, constitute defamation of any person, firm or \*431 corporation, or violate or infringe the trademark, trade name, copyright, patent, literary, artistic, dramatic, personnel or other property rights of any person, firm or corporation, including the right of privacy or publicity, and shall not violate the trade secrets or other confidential information of any person, firm or corporation. Developer will take reasonable steps to ensure that its representations and warranties herein remain accurate and complete at all times, including obtaining any necessary rights (by way of purchase, license or otherwise) to fulfill obligations of this provision.

Similar provisions should be included which insure that the developer has:

- . Given the client a nonexclusive, royalty-free license to use in perpetuity in original and derivative works any stock materials, together with a right to sublicense and/or transfer such interests

- . Represented and warranted that it owns or has the right to grant a license to the client of any copyrighted materials used in the website

- . Agreed to indemnify the client for any liability resulting from its \*432 breaches of any copyright, trademark or other violation of law or rights of third-parties

Breaching these representations and warranties, by causing the website to violate any of these bundled rights, would allow for a claim against the developer for breach of warranty.

A sample provision protecting the host and developer from the client's violation of intellectual property rights might provide as follows:

Indemnification by Client. Client shall indemnify, defend and hold harmless Developer and its respective affiliates from and against all claims, suits, liabilities, losses, damages and expenses (including reasonable attorney's fees) that may be incurred by any of them by reason of: (a) the infringement or violation by the Client's marks or Client-supplied or owned information contained in its website of any copyright, patent, trademark, or other proprietary right of a third-party; (b) any claims or suits by third parties arising from the services performed by Developer including claims arising by the use or inability to use the website; claims arising out of the hypertext links from the website to other sites at the client's request; alleged errors or \*433 omissions of any kind contained in the Website; any delay, failure or error in the creation or transmission of orders of products through the use of the website; alleged fraud, misrepresentation, breach of warranty or product liability claim resulting from the solicitation or sale of any goods or services through the use of the website; or (c) any claim that the use of the website (including but not limited to the compilation and use of customer profiles, usage, navigational and transactional data and similar informational data) libels, defames or invades any right of privacy of any third-party.

Developers should seek such reasonable yet crucial provision to minimize their risks. Remedy, disclaimer and limitation of liability language should be appropriately modified as well to obtain as much protection for the developer against its client's conduct on the website as well as the website's content.

#### \*434 APPENDIX A

#### SAMPLE DEVELOPMENT/HOSTING AGREEMENT

This Agreement (the "Agreement") is made as of the "Effective Date" listed below by and between DEVELOPER, a privately-owned Illinois corporation with its principle offices located at Chicago, Illinois 60610 ("DEVELOPER") and the client listed below.

effective Date: \_\_\_\_\_

client Contact: \_\_\_\_\_

client Name \_\_\_\_\_

client Address: \_\_\_\_\_

This contract is organized to support DEVELOPER services detailed in Project Schedules attached to this Agreement as Addenda.

### 1. Definitions

1.1. Client Original Materials. Any text, photos, graphics, recordings, software, documentation, or other materials made available to DEVELOPER by Client for use in development or publication of Developed Materials.

1.2. Developed Materials. All final product images, scripts, computer code (including HTML), procedures, \*435 copy, graphics, photos, sound files, and video files originally developed by DEVELOPER to be incorporated into the Developed Materials.

1.3. Programming. All programs, routines, subroutines, computer code, procedures, scripts, software designs, database designs, other computer programming not developed exclusively for the Developed Materials.

1.4. Stock Materials. All text, photos, graphics, recordings, or other materials of any kind and nature, other than Client Original Materials, Developed Materials, and/or Programming as defined in Section 1.1-1.3 above, originally developed by DEVELOPER or licensed by DEVELOPER for general use by DEVELOPER in the Developed Materials for its clients.

1.5. Project Schedules. Project Schedules contain the scope, cost estimate and time line related to the initial and ongoing projects governed by this Agreement. Project Schedules must be approved by both DEVELOPER and Client. Project Schedules may specify the terms of initial development projects, special development projects, maintenance retainer arrangements, hosting, and consulting projects.

### \*436 2. Term of the Agreement

2.1. Renewal and Termination. This Agreement shall be effective until December 31, 1999. The Agreement may be renewed for successive one-year periods by express, written agreement of the parties.

2.2. Early Termination. In the event of a material breach of this Agreement, the non-breaching party shall give written notice clearly specifying the material breach to the breaching party and such non-breaching party shall have the right to terminate this Agreement upon written notice to the breaching party if such material breach is not cured within 30 days of such initial written notice. Failure to pay constitutes a material breach of this agreement, except when Client withholds payment after notification and before adequate remedy of a DEVELOPER material breach of this agreement.

2.3. This Agreement replaces and supersedes any prior Development and Service Agreement between DEVELOPER and Client.

### 3. General DEVELOPER Responsibilities

3.1. Best Estimates. DEVELOPER will provide its best cost estimate of the hours and costs of production, based on the current specifications outlined in the Project Schedules.

**\*437** 3.2. Time Line. DEVELOPER shall make all reasonable efforts to meet deadlines and perform all tasks within the timeliness set forth in the Project Schedules. DEVELOPER's obligations with respect to meeting timeliness are subject to delays caused by Client or third parties.

3.3. Changes to Scope, Estimate and Time line. Should, at Client's request, the specifications set forth in the Project Schedule (i.e., scope, estimate, time line) of the project change during development, Client and DEVELOPER will work together to arrive at a mutually acceptable revised set of specifications.

3.4. Help Desk Support. DEVELOPER shall provide telephone help line support during regular business hours, staffed by personnel who have the knowledge to assist Client in resolving problems related to the services performed by DEVELOPER.

3.5. DEVELOPER Account Director. DEVELOPER shall, in its sole discretion, select one staff member to devote a portion of his or her job to serving as the primary contact with Client to facilitate project direction and coordination.

#### **\*438** 4. General Client Responsibilities

4.1. Delivery of Client Original Materials. Client will provide DEVELOPER with all Client Original Materials in a format specified by DEVELOPER according to any schedules set forth in Project Schedules. Delays in delivery of Client Original Materials will cause a delay in the project and may increase development costs. At Client's request and cost, DEVELOPER will convert, develop or produce Client materials in specified format.

4.2. Client Staff Contact. Client shall, in its sole discretion, select one staff member to devote a portion of his or her job to serving as the primary contact with DEVELOPER to facilitate content delivery and promotional activities.

#### 5. Hosting

This Hosting section of the Agreement shall apply only if DEVELOPER provides Hosting services as specified in a Project Schedule attached as an Addendum to this Agreement.

5.1. Maintenance. DEVELOPER will provide all hosting related maintenance for sites hosted on an on-going basis. This includes backups, server maintenance, and troubleshooting.

**\*439** 5.2. Site Backup. In order to accommodate the special needs of some Clients (e.g., law firms), DEVELOPER has developed a unique and comprehensive backup process (Advanced Data Preservation System™). DEVELOPER will provide daily and permanent backups. All data is backed up daily to two locations-- network storage and DAT. The DATs are stored off-site in a fire-proofed, secure tape library. The network data is stored for three weeks, and is available for content replacement. DEVELOPER also maintains a development environment copy of web data for rapid content replacement. DEVELOPER will make this content available to client upon request.

5.3. Traffic Reporting. DEVELOPER will configure its web servers to capture standard visitor log information needed to provide detailed traffic/site- performance reports for Client websites. At Client's request, DEVELOPER can provide multiple and targeted reports. DEVELOPER can also help interpret the reports and make recommendations to Client based on the reports. Traffic reporting services are billed as standard maintenance.

5.4. Standards. DEVELOPER's hosting standards shall conform to applicable industry standards. DEVELOPER shall provide the website with (a) **\*440** continuous, full, and unrestricted connection to the Internet for approximately twenty-four (24) hours each day excepting necessary site maintenance and Internet performance issues outside the reasonable control of DEVELOPER, and (b) regular routing and other systems administration and support services necessary to maintain such continuous, full and unrestricted connection.

5.5. Security. DEVELOPER shall take all reasonable measures to prevent unauthorized access to Client sites hosted by DEVELOPER, and any databases or other sensitive material generated from or used in conjunction with website; and DEVELOPER shall notify Client of any known security breaches or holes.

## 6. Retainer Arrangement (Maintenance, Updates, and Ongoing Service)

This Retainer section of the agreement shall apply only if DEVELOPER provides maintenance, updates, and ongoing services as specified in a Project Schedule attached as an Addendum to this agreement. Retainer Arrangements are structured and intended to provide the most responsive, highest-quality and highest-value service to DEVELOPER's clients.

6.1. Initial Scheduled Maintenance Hours and Retainer Rate. As of the Retainer Start Date, DEVELOPER agrees **\*441** to provide Client with a predetermined number of hours of site maintenance and update services per month (Scheduled Monthly Maintenance Hours) at a predetermined rate (Retainer Hourly Rate).

6.2. Retainer Term. The Retainer Arrangements shall be effective for the period of time indicated on the Retainer Agreement.

6.3. Scheduled Monthly Maintenance. Client may adjust the number of scheduled monthly maintenance hours. Adjustments to the number of Scheduled Monthly Maintenance Hours are effective the first day of the following month's billing cycle.

6.4. Unused Development Hours. All unused development hours will be credited to the following month.

6.5. Additional Development Hours. DEVELOPER agrees, pending schedule availability, to provide unlimited additional maintenance and update hours (above the monthly scheduled maintenance) at the Retainer Hourly Rate.

## 7. Client Payment Responsibilities

7.1. Deposit. Any deposit amounts are set forth in the Project Schedules. Services begin upon receipt of deposit.

**\*442** 7.2. Payment for Services. Payment schedules are set forth in Project Schedules. Payment is due on or before the date indicated on the Project Schedules. If a Project Schedule does not specifically set forth a payment schedule, DEVELOPER shall invoice Client for services on a monthly basis for services rendered during the previous month. Payment will be due thirty (30) days from the date of the invoice.

7.3. Reconciling for Actual Hours. If actual service hours differ from estimated development hours by more than 20% at any point during the term of the Agreement, DEVELOPER will, at the option of Client, (1) make adjustments to the Project Schedule in question to better reflect the actual time spent, or (2) issue an invoice to reconcile the account. In either case, payment will be due thirty (30) days from the date of invoice.

7.4. Payment for Expenses. Client is responsible for all pre-approved expenses related to shipping, handling and freight charges for all materials shipped by or at the direction of Client to be used in the production of Client's Site. Client is also responsible for pre-approved expenses directly related to the development services rendered, including, but not limited to, travel, travel related expenses **\*443** presentation materials, special hardware/software requirements, and content/data purchases. DEVELOPER shall invoice Client for all reasonable and pre-approved expenses on a monthly basis for expenses incurred during the previous month. Payment will be due thirty (30) days from the date of the invoice.

## 8. Warranty

8.1. Basic Warranty. If DEVELOPER develops materials for Client as outlined in a Project Schedule, DEVELOPER will provide Client with maintenance of Developed Materials, including minor corrections/alterations for a period of 30 days after delivery of Developed Materials. This warranty shall

become void if any changes are made to the Developed Materials by any person or entity other than DEVELOPER except those changes authorized and inspected by DEVELOPER. DEVELOPER further warrants that:

8.1.1. That all of DEVELOPER's development and web services will be provided in a professional, technically competent, and timely manner. DEVELOPER represents that it has all necessary equipment, and that it is staffed and administratively supported, in a manner sufficient to fulfill DEVELOPER's obligations under this \*444 Agreement. DEVELOPER represents that the website will be capable of access by authorized users as is typical and usual for a website for the Internet. DEVELOPER acknowledges that the features described in this Agreement and its attached schedules are integral features of the website and must function in a reliable and effective manner.

8.1.2. DEVELOPER's services provided hereunder and materials created as contemplated hereunder and the exercise of any rights granted herein will not constitute defamation of any person, firm or corporation, or violate or infringe the trademark, trade name, copyright, patent, literary, artistic, dramatic, personal or property rights of any person, firm or corporation including the right of privacy or publicity and shall not violate the trade secrets of any person, firm or corporation.

8.2. Computer Viruses and Security. During and after the term of this Agreement, DEVELOPER represents and warrants that the Developed Materials shall not contain any virus, timer, clock, counter, backdoor, or other limiting design, instruction, or routine that would erase data or programming, create the potential for a breach of security or confidentiality, or cause Developed \*445 Materials or any hardware or software used with the same to become inoperable or otherwise incapable of being used in the full manner for which it was designed.

8.3. Year 2000. DEVELOPER represents and warrants that the Developed Materials will operate accurately and will not abruptly end or provide invalid or incorrect results during operation prior to, on, or after January 1, 2000, or when given a valid date containing century, year, month and day.

8.4. Remedies. DEVELOPER further warrants that it will correct any errors made by DEVELOPER in the performance of its services under this contract within three (3) business days of receiving notice of any errors. Regardless of whether any remedy set forth herein fails of its essential purpose, in no event will DEVELOPER be liable to the Client for any special, consequential, indirect or similar damages, including any lost profits or lost data arising out of the use or inability to use the Developed Materials or any data supplied therewith even if DEVELOPER or anyone else has been advised of the possibility of such damages, or for any claim by any other part. In no case shall DEVELOPER's liability exceed the purchase price of the services enumerated in this contract.

#### **\*446 9. Ownership and Credit**

9.1. Client Copyright. The Client's logos and copyrighted materials remain the registered trademarks and sole property of Client.

9.2. Client Ownership of Developed Materials. Developed Materials produced by DEVELOPER for Client shall become and remain the property of Client. Client is and will be the owner of the Developed Materials, including but not limited to the content of the website as a whole, as a compilation or a collective work, and all related marketing and promotional materials, other than as specifically owned or reserved by DEVELOPER in accordance with this Agreement; therefore, DEVELOPER hereby assigns and transfers to Client, its successors and assigns, all right, title, and interest, including but not limited to copyright and all rights subsumed thereunder, that DEVELOPER may have or hereafter acquire under this Agreement in and to the Developed Materials, content and related materials, including without limitation those graphics and artworks created by DEVELOPER for the website, except with respect to Programming and Stock Materials. Nothing hereunder shall prevent Client from reusing the Developed Materials, including any materials, \*447 services, data or engineering delivered or produced hereunder, excluding the Programming and Stock Materials. Client's logo, trademarks, service marks, trade names are and shall remain the sole and exclusive property of Client and DEVELOPER shall make no use of them without the prior express written permission

of Client, which shall be in its sole discretion. DEVELOPER shall acquire no right, title or interest of any kind in Client's Developed Materials and/or content and or trademarks as a result of this Agreement.

9.3. Creative Control. The parties acknowledge that Client possesses final creative control over all content including that created by DEVELOPER. Without limiting the foregoing, Client reserves the right to require DEVELOPER to delete or modify any portion or portions of DEVELOPER's work that in Client's sole discretion are contrary to or conflict with Client's policies or plans.

9.4. Limited Portfolio License. DEVELOPER reserves the right to use the Client's logo and trademarks, and any work produced for the Client by DEVELOPER strictly for promotional use only, both in printed and online portfolio formats.

~~\*448~~ 9.5. Credit. DEVELOPER is to be given a clear credit with hypertext link at the foot of Client's Site home page for as long as DEVELOPER's Developed Materials, in whole or in part, are used in any capacity on the Client's Site.

9.6. Client Proprietary Information. DEVELOPER acknowledges that certain of the Client Original Materials and the documents and information provided to DEVELOPER by Client pursuant to this Agreement may contain valuable, proprietary and/or confidential information and trade secrets of Client ("Client Proprietary Information"). Neither DEVELOPER nor any of its owners, officers, employees or other agents, shall, during or after the termination of this Agreement, directly or indirectly: (i) divulge, disclose or communicate to any person, entity, firm, corporation or any other third- party (except as necessary or appropriate in the course of performing its obligations pursuant to the terms and provisions of this Agreement) any Client Proprietary Information or (ii) utilize for their personal benefit or for the benefit of any person or entity other than Client any Client Proprietary Information. Upon the termination of this Agreement for any reason, DEVELOPER shall promptly return to Client all Client Proprietary Information, Client ~~\*449~~ Original Materials and all Developed Materials.

## 10. Time

Time is of the essence hereunder.

## 11. Best Efforts

Each party is bound to use due diligence and best efforts to perform its required tasks under this Agreement.

## 12. Entire Agreement.

This Agreement and Project Schedules/Addenda constitute the entire agreement between the parties; it is intended as a complete and exclusive agreement, and it supersedes all prior agreements, understandings and representations. DEVELOPER and Client may agree to new terms and amendments for insertion into agreement, when approved in writing by DEVELOPER and Client. The Agreement shall not be varied except by written agreement signed by DEVELOPER and Client.

## 13. Notices.

Any notices required to be given shall be in writing and addressed to Client as described in the beginning of this Agreement and to DEVELOPER as follows:

DEVELOPER [ADDRESS]

~~\*450~~ with copy to:

DEVELOPER'S ATTORNEY [ADDRESS]

## 14. Survival.

All provisions of this agreement which by their nature must survive termination in order to achieve the fundamental purposes of this agreement, including but not limited to Agency of Record, Limitation & Liability and Remedies shall survive any termination of this agreement.

15. Governing Law.

This Agreement shall be governed by the laws of the State of Illinois.

IN WITNESS WHEREOF, Client and DEVELOPER have each caused this instrument to be executed by their respective duly authorized officers/employees on the date set forth below.

DEVELOPER Client

By: \_\_\_\_\_ By: \_\_\_\_\_

Its: \_\_\_\_\_ Its: \_\_\_\_\_

Date: \_\_\_\_\_ Date: \_\_\_\_\_

**\*451 DEVELOPMENT AGREEMENT ADDENDUM**

Project Schedule/Description

DEVELOPER will provide account direction, graphic design, development, page production, online marketing, and related web development services in support of the Jenner Internet, intranet and extranet initiatives. DEVELOPER will work with Jenner and with the Jenner Account Coordinator to prioritize development and most effectively allocate resources to the projects. The following cost summary summarizes Jenner's initial commitment. This agreement replaces (supersedes) the firm's original web development agreement with DEVELOPER.

On-going Costs (Retainer Arrangement):

Advanced Hosting Cost \$\_\_\_\_/month

Scheduled Monthly \_\_\_\_

Retainer Hourly Rate \$\_\_\_\_/hour

Additional Hours Rate \$\_\_\_\_/hour

Retainer Start Date \_\_\_\_\_

Retainer commitment \_\_\_\_\_

DEVELOPER Client

By:\_\_\_\_\_ By:\_\_\_\_\_

Its:\_\_\_\_\_ Its:\_\_\_\_\_

Date:\_\_\_\_\_ Date:\_\_\_\_\_

END OF DOCUMENT