

Just how legal is your web site?

Have you ever wondered why so many websites that you visit have terms of use or disclaimers and policies on privacy and accessibility?

This article, which is addressed to businesses in England, discusses some of the more obvious things that you need to consider if the content of your web site is to be legal..

Is the Web a Law Free, Risk Free Zone?

The web is not a law free zone. Just consider the following list of some of the laws that could have an impact on the legality of the contents of your web site: the Copyright Designs and Patents Act 1988, the Trade Marks Act 1994, the Disability Discrimination Act 1995, the Data Protection Act 1998, the Consumer Protection (Distance Selling) Regulations 2000 and the Electronic Commerce (EC Directive) Regulations 2002.

The name of the last law in this list is a clue to why you cannot escape the burden of this legislation by fleeing from the United Kingdom to the Continent. It implements Directive 2000/31 (EC) of the European Parliament and Council that is designed to eliminate divergences between the laws of European member states that hamper the growth of electronic commerce.

The breach of some of the laws just listed can attract not just civil consequences, but also criminal penalties. For example, the effect of section 20 of the Copyright Designs and Patents Act 1988 is that publishing something on the web without the copyright owner's permission is a copyright infringement.

Quite apart from the civil remedies that the copyright owner has for the infringement, it also amounts to a criminal offence if, in publishing the work on the web, you knew or had reason to believe that, you were infringing copyright in that work. This offence renders you liable to fines or imprisonment.

Operating through a company or other corporate vehicle won't protect you from criminal liability since the broad effect of section 110 of the 1988 Act is that if you are or hold yourself out as responsible for managing the corporate vehicle and it commits the offence with your consent or connivance you too will be guilty and liable to be punished accordingly.

Basic Information

If your website has any commercial content, the basic information that you should put on it includes:

- your name;
- the geographic address where you are established;
- your details, including your email address, to make it possible for you to be contacted rapidly and to communicate with you in a direct and effective manner;

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- where you are registered in a trade or similar register available to the public, details of the register in which you are entered and your registration number or equivalent means of identification in the register;
- if the conduct of your business is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- if you exercise a regulated profession (e.g. solicitors, accountants etc.):
 - the details of any professional body or similar institution with which you are registered,
 - your professional title and the EU member state where that title has been granted,
 - a reference to the professional rules applicable to you in the EU member state in which you are established and the means to access them; and
- where you undertake an activity which is subject to value added tax, your VAT number.

If your website refers to prices, these need to be shown clearly and unambiguously and the website must say whether they include tax and delivery.

These requirements are set out in the Electronic Commerce (EC Directive) Regulations 2002, which is one of the four sets of regulations introduced in the United Kingdom to implement the European Union's Electronic Commerce Directive 2000/31 (EC).

The other three, which are all made under the Financial Services and Markets Act 2000, give effect to the Electronic Commerce Directive in the field of financial services.

It seems that a website whose only purpose is to inform its visitors may not be caught by the Electronic Commerce (EC Directive) Regulations 2002. The guidance issued by the Department for Business Innovation & Skills is that a website with "no commercial content" will not be caught.

If one accepts this then, depending upon its precise content, the website of a charity or members' organisation could fall outside the scope of the 2002 Regulations. Nevertheless, even if your website is the information only website of a charity or members' organisation or other "not for profit" organisation, the safest course must still be to comply with the 2002 Regulations to guard against the possibility that one day some commercial content could slip onto the site – for example, a paid for link to another site or an advertisement.

If the 2002 Regulations don't apply, other legislation may still oblige you to put information on your website. The Companies (Trading Disclosures) Regulations 2008 are an obvious example of such legislation.

Disability and Accessibility

Under the Disability Discrimination Act 1995 is unlawful for a provider of services (which includes a provider of "information services" such as a website) to discriminate against a disabled person.

It is irrelevant whether the service is provided for payment or without payment, which means that a website, even an information only website, is likely to be caught by the Disability Discrimination Act 1995. So, when commissioning a website or bringing it up to date, you should make sure that it is designed to the latest accessibility standards.

Guidelines and specifications have been published by the World Wide Web Consortium (W3C). The British Standards Institute has also published a guide to good practice in commissioning accessible websites. Whichever the guidelines or specifications you choose to adopt, make sure that they are the most recent ones.

If your website does not meet current accessibility standards you might, as an interim

measure, add an accessibility statement to it that explains how visitors to the site can adjust their browser settings to make it more legible. This may not, however, protect you against a claim under the 1995 Act as you are asking the disabled person to make adjustments when it is you, not the disabled person, that the Act asks to make reasonable adjustments!

The Equality Act 2010 received Royal Assent on 8 April 2010 but, at the time of writing this article, it had not yet been brought into force. Its main purpose is to harmonise and strengthen discrimination law and, among other things, it includes a restatement of the Disability Discrimination Act 1995. The 2010 Act is mentioned here as it might be the statute that applies by the time that you read this.

Copyright and Content

When considering the content of your website, your first concern must be to ensure that you own the copyright in it or, if you do not, that you have the necessary licence to use the content from the copyright owner.

When you ask someone to create the content for you, if they are your employee and they create it in the course of their employment, the copyright will belong to you unless the contrary has been agreed.

If you commission the content from someone who is not your employee then, unless the contract between you says otherwise, they will retain copyright in the content. So, you must ensure that any commissioning agreement contains an assignment of copyright in your favour or, at the very least, a licence to use the commissioned work that is satisfactory for your purposes.

Any agreement between you and someone that you commission to provide content for your website should contain the usual warranties in your favour including, in particular, one that the content is the original work of the person whom you have commissioned.

If you run a forum or bulletin board on your website, the copyright in each posting will belong to its author unless you ensure that the terms of use applicable to the forum or bulletin board include an assignment of copyright to you. Failing an assignment, the terms of use should include a licence in your favour in suitably broad terms. You should also use your terms of use for the forum or bulletin board on your website to seek to exclude or limit your liability for what the participants might post on it.

Links to Other Websites

In providing a link to another website without having obtained the consent of its owner you may, once again, be in breach of copyright. Depending on the circumstances, you may also be at risk of claims of trade mark infringement and passing off.

Why might the owner of a website object to a link to his website? Firstly, he may not welcome the association with your website that the link implies. Secondly, if your link bypasses the home page of the target website and thus any advertising on that page, it could deny its owner advertising revenue.

Some websites include terms of use that say that the licence to view the website does not permit the use of the website for commercial purposes or the linking of another website to it without prior consent. Such websites now also often include a contact address where a consent to link can be requested.

Terms of Use and Disclaimers

By publishing your website on the internet you have arguably given anyone who accesses it an implied licence to retrieve and display its content on their computer screen.

One reason for having terms of use on your website is to set out the limits on the licence that you are granting to a visitor to the site.

You might, for example, seek to confine a visitor to retrieving and displaying the website's content on their computer screen, to storing it on a storage device that it is not connected to a network and to printing a single copy for their own personal non-commercial use. You might also wish to make this licence subject to the visitor keeping intact the copyright and proprietary notices that are included in the contents.

Your terms of use might also usefully require prior written permission to have been obtained by a visitor before they use the contents of the website for any commercial purpose or create any link to the website from another site.

Even if you have no wish or need to restrict what visitors do with the contents of your website, it may still be prudent to include on the website a disclaimer that seeks to exclude or limit the liability that you might otherwise have as a result of making the website available, including any liability arising from a visitor's reliance on its content or on the content of any website to which it links or from any viruses that may be caught from using or accessing the website or even from any interruption in the website's availability.

Why Do You Need a Privacy Policy?

If your website collects personal data from those who visit it, then you will normally need to be registered with the Information Commissioner under the Data Protection Act 1998 and to comply with the eight data protection principles set out in Part 1 to Schedule 1 to that Act.

While the Data Protection Act does not specifically require you to publish a privacy policy on your website, the first of the eight data protection principles is that personal data should be processed "fairly".

This means that certain information must be given to an individual whenever they are asked for personal data. A privacy policy and suitably drafted collection notices are the most convenient way to do this on a website.

In order to meet the fairness requirement you need, in particular, to make the individual aware of the identity of the data controller responsible for the personal data collected through the website, the purposes for which the data will be processed and any other information needed to make the processing "fair" – such as explaining any intended disclosures to third parties.

If your website, like many others, uses cookies to collect personal data, then to comply with the Privacy and Electronic Communications (EC Directive) Regulations 2003, the website will have to disclose its use of these, what they are used for and how the visitor can block them.

You also need to keep abreast of technical developments regarding cookies in case these require you to update your privacy policy's disclosures regarding them. For example, if your website uses "flash cookies", the usual information about the use of browser settings to block cookies will not be enough as flash cookies cannot be blocked in this way, but only by controls accessible via Adobe's website.

A setting likely to be of particular concern to visitors to your website is the one that allows a flash cookie to switch on their computer's web cam and microphone without warning them first!

Once the United Kingdom implements Directive 2009/136 (EC) of the European Parliament and the Council dated 25 November 2009, you may find that it is no longer enough to inform a visitor to your website about your use of cookies and how to block

them, you may, if browser settings are not enough to block them, actually need to seek consent for their use.

Selling Goods or Services on Your Website

If you use your website to engage in online, business to business contracting then, under the Electronic Commerce Regulations 2002, you must make sure that it provides the following information in a clear, easy to understand manner before an order is placed:

- the different technical steps to be followed to conclude the contract;
- whether or not the completed contract will be filed and whether it will be accessible;
- the technical means by which the customer can identify and correct any errors which they have made before they place the order;
- which language is to be used for the conclusion of the contract;
- whether you or the business you engage in are subject to any relevant codes of conduct and, if so, how the customer can access these electronically.

If you sell goods or services to consumers through your website, then the Consumer Protection (Distance Selling) Regulations 2000 probably apply. If they do the rules are broadly that the consumer must be given clear information about the goods or services offered. The information given must state:

- the supplier's name, and if payment is required in advance, his business address;
- an accurate description of the goods and services;
- information about prices which is clear and obvious and shows whether taxes and delivery/postage charges are included, as well as how long the price or offer remains valid;
- the arrangements for payment and delivery of goods or performance of services (if no date is specified, within 30 days of order);
- the right to a seven day cooling off period during which the consumer may cancel the order for any reason, unless the sale is covered by one of the exemptions, (who will be responsible for the cost of returning goods must be stated);
- if the consumer is to use a premium rate telephone number the cost of the call must be specified;
- the minimum duration of the contract in the case of a contract to supply goods or services continuously (e.g. mobile phone, cable or satellite television, gas or electricity) or recurrently (e.g. a monthly book club or CD club); and
- in advance if the supplier wants to offer substitute goods or services if those ordered are no longer available and that the cost of returning substitute goods will be borne by the supplier.

The same regulations provide that after making a purchase the consumer must be sent written confirmation of the order details, and in addition receive:

- information on how to cancel an order and a geographical address where the supplier can be contacted;
- information on the policy on returning goods and whether the consumer will be liable for the costs. (Refunds must be made within 30 days of the date the notice of cancellation is given);
- information on how and when to end a contract for the provision of a service, if there is no specified finish date or if the service lasts longer than a year e.g. gas or electricity supply, Internet Service Providers; and
- details of any guarantees, warranties or after-sales services if applicable (since 2003 suppliers are required, if the customer requests this, to supply full details in writing of any guarantee or warranty).

This information can be provided before or after the conclusion of the contract, but should at the latest be provided in good time during the performance of the contract or, in the case of goods not destined for delivery to a third party, at the latest at the time of delivery of the goods.

If you use your website to provide internet-based premium rate services, you are required to comply with the code of practice of the Independent Committee for the Supervision of Standards for Telephone Services (ICSTIS).

ICSTIS is the organisation that regulates the content and promotion of premium rate services within the United Kingdom.

The Advertising Standards Authority has a code of practice that includes advertisements using the web. It covers advertisements in pre-paid space, advertising content in commercial emails and advertising content in spam.

International Aspects

You cannot investigate the laws of every country from which someone might access your website, so your website's terms of use or disclaimer should make it clear to which countries your website is addressed and try to put on anyone who visits the website from elsewhere the onus of complying with the local laws that apply to them.

If you are established in the United Kingdom and a visitor to your website is accessing it from another European Economic Area (EEA) member state the effect of the implementation of the Electronic Commerce Directive 2000/31 (EC) in that member state should ensure that, if your website complies with the laws in the United Kingdom, it need not comply with the laws in that other EEA member state. You do not, however, necessarily have similar comfort when someone accesses your website from outside the EEA.

Choice of Law and Jurisdiction

If you are based in England, you will almost certainly want to subject the relations between you and the visitors to your website to English law and to the jurisdiction of the English courts, in which case your website's terms of use or disclaimer, should include express choices to that effect.

But taking these steps will not necessarily be wholly effective. For example, under the regulation known as Rome I (Regulation (EC) 593/2008 on the law applicable to contractual obligations), subject to what is said below, the general rule is that if you are a professional and, in the exercise of your trade or profession you conclude a contract with a consumer, the contract will be governed by the law of the country where the consumer has his habitual residence. In this context a "consumer" is a natural person who concludes the contract for a purpose which can be regarded as being outside his trade or profession.

For this general rule protecting consumers to apply, however, you either need to pursue your commercial or professional activities in the country where the consumer has his habitual residence or by other means (such as the operation of your website) you need to direct those activities to that country or to several countries including that country.

It is therefore possible that the rule will not apply if your website is an information only website that is not directed at the consumer's country or to several countries including that country. The rule is, however, very likely to apply if you sell goods or services to consumers through your website instead of, for example, directing enquiries received through your website to your local agent or distributor.

In the case of business to business transactions through your website, subject to a few qualifications and exceptions that need not detain us here, Rome I generally leaves the parties free to agree the law that is to govern the contract between them.

The regulation known as Rome II (Regulation 864/2007 (EC) on the law applicable to non-contractual obligations), only allows parties to submit non-contractual obligations to the law of their choice by an agreement freely negotiated before the event if all the parties to

the agreement are pursuing a commercial activity. If not all the parties are pursuing a commercial activity, such an agreement can only be entered into after the event giving rise to the damage has occurred.

This makes one wonder what adverse effect Rome II might have on your attempts to rely on your website's terms of use or its disclaimer to exclude or limit your non-contractual liability (for example in negligence) to an overseas visitor to your website.

Council Regulation 44/2001 (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters lays down the general rule that parties one or more of whom is domiciled in an EU member state (which, for these purposes, does not include Denmark) are free to agree that the courts of a particular member state shall have jurisdiction to settle any disputes in connection with a particular legal relationship.

This general rule is, however, subject to exceptions and qualifications including, in particular, some that apply to insurance, consumer and employment contracts. So, for example, if your contract is with a consumer he may bring proceedings in the courts of the member state in which you are domiciled or in those of the place where he is domiciled, while you may only bring proceedings against him in the courts of the member state where he is domiciled.

Conclusion

An article such as this cannot offer an exhaustive description of what it takes for a website to be legal but, in explaining why so many websites have terms of use, disclaimers, privacy policies and accessibility policies, it should have alerted you to some of the ways in which the law can impinge on the contents of a website and on the importance of obtaining appropriate and timely legal and other professional advice before setting up or updating a website. This article should also have made you aware of just how essential it is, given the continuous developments in technology and in the law, to review regularly the legality of your website.

