

## **KYANITE - Terms and Conditions**

*(Please ensure that you read and understand these conditions.)*

### **Section 1: Website Maintenance-and-hosting Packages, Technical Support etc.**

#### **1. Definitions**

- 1.1.** In this Agreement the following words and expressions shall have the following meanings:
- 1.1.1.** "downtime" means any service interruption in the availability to visitors of the Website;
  - 1.1.2.** "intellectual property rights" means patents, trade marks, design rights, applications for any of the foregoing, copyright, topography rights, database rights, rights in know-how, trade or business names and other similar rights or obligations, whether registerable or not in any country;
  - 1.1.3.** "KYANITE" means KYANITE CONSULTING LIMITED;
  - 1.1.4.** "IP address" stands for internet protocol address which is the numeric address for the server;
  - 1.1.5.** "ISP" stands for internet service provider;
  - 1.1.6.** "server" means the computer server equipment operated by KYANITE in connection with the provision of the Services;
  - 1.1.7.** "the Services" means web hosting, domain name registration, email, technical support, installation of hardware, installation and configuration of software and any other services or facilities provided by KYANITE.
  - 1.1.8.** "code" means any files, programs, scripts or other documents that comprise or add functionality to a website.
  - 1.1.9.** "spam" means sending unsolicited and/or bulk emails;
  - 1.1.10.** "virus" means a computer programme that copies itself or is copied to other storage media, including without limitation magnetic tape cassettes, memory chips, electronic cartridges, optical discs and magnetic discs, and, alters or corrupts data, causes damage to the user's files or creates a nuisance or annoyance to the user and includes without limitation computer programs commonly referred to as "worms" or "trojan horses";
  - 1.1.11.** "visitor" means a third party who has accessed the Website;
  - 1.1.12.** "Customer" means the party with whom KYANITE has an agreement under the terms of Clause 2. This is deemed to be the person named on the domain registration record and held with the relevant registrar, unless company details are specifically supplied in which case, these will be included on the domain registration record.
- 1.2.** Words denoting the singular shall include the plural and vice versa and words denoting any gender shall include all genders.
- 1.3.** Where headings of the clauses of this Agreement are inserted they are for convenience of reference only and are not intended to be part of or to affect the meaning or interpretation of this Agreement.

#### **2. Agreement**

- 2.1.** The following shall be deemed to signify a contractual agreement between the Customer and KYANITE and acceptance of these Terms and Conditions by the Customer:
- 2.1.1.** the Customer's signature, on an appropriate document presented by KYANITE, for approval for work to commence or an email from an appropriate email address stating that approval to commence has been given;
  - 2.1.2.** receipt of cheque, BACS, credit card or PayPal for payment, either in full or part, of an invoice issued by KYANITE.
  - 2.1.3.** the registering of a domain by KYANITE on behalf of the Customer at the Customer's written or emailed request;
  - 2.1.4.** the transfer of the Customer's domain to servers administered by KYANITE at the Customer's written or emailed request;
  - 2.1.5.** attendance on the Customer's site at the Customer's, or the Customer's representative's, request for the purpose of carrying out work required and detailed by the Customer or the Customer's representative.
  - 2.1.6.** for the purposes of invoicing, the annual maintenance-and-hosting package agreement starts, at KYANITE's discretion, on the date of registration or transfer of the associated domain name.
- 2.2.** Before such agreement, either party may withdraw from the project with immediate effect by notifying the other of their intent via email or in writing. It is the Customer's responsibility to obtain confirmation of receipt of their intent and, if this is not forthcoming, to contact KYANITE directly to confirm said receipt.

### **3. Intellectual Copyright**

- 3.1.** Original text and image content provided by the Customer remain the property, and responsibility, of the Customer.
- 3.2.** KYANITE will hold intellectual copyright of all source code including, but not limited to, HTML, PHP, ASP, VBS, JavaScript and ActionScript written by them to display the text and image content as part of a website design; together with any original images created for the Customer. All source code remains the property of KYANITE and, in the event of cancellation, will be retained by KYANITE – please note this means that, in the event of cancellation, the actual website design is not returned to the Customer only content supplied by the Customer.
- 3.3.** As a result, Customers who take out a combined maintenance-and-hosting package may not directly access web pages created for them by KYANITE, rather, any amendments required must be passed to and will be acted upon by KYANITE.
- 3.4.** Timescales for such amendments will normally be monthly (please refer to Clause 9).
- 3.5.** More frequent amendments may be undertaken at the discretion of KYANITE and charges for these will be negotiated on an ad hoc basis.
- 3.6.** Photographs taken by KYANITE on behalf of the Customer for the Customer's website remain the property of KYANITE unless purchased separately by the Customer.

### **4. Customer's Responsibilities with Regard to Copyright**

- 4.1.** In situations where the Customer provides images, text, animations or any other artwork or content for their website or for other marketing purposes (including, but not limited to, business stationery and flyers), they are responsible for ensuring that this material does not infringe any copyright.
- 4.2.** Where a Customer claims affiliation or other association with an existing website this must be confirmed in writing or via email from the Customer. The current owner or operator of the associated website may also be contacted separately for their confirmation.
- 4.3.** Where a request to register a domain name that already exists with a different domain extension is made, the owner of the previously registered domain name may be notified of the registration request where practicable.
- 4.4.** Certain images provided by KYANITE during the course of website construction may have been purchased under licence from stock image suppliers. These images are generally only licensed for use on a single website and may not be used in publicity material. The Customer is legally responsible for ensuring that this does not happen. If the Customer requires the use of these images from the site for other purposes they should contact the relevant stock image supplier(s) for clarification of the licence terms.
- 4.5.** Charges made for royalty free, and other, images for use on the Customer's website will include the costs of downloading and manipulating them as, and if, required and of maintaining an account with the image supplier. This may mean the images cost more than if the Customer were to purchase them directly - therefore the Customer will be given the choice of purchasing such images or having Kyanite purchase them.

### **5. Customer's Responsibilities with Regard to Domain Names**

- 5.1.** Where a Customer requests that KYANITE register a specific domain name, it is the responsibility of the Customer to ensure that domain name does not conflict with an existing company name or trademark.
- 5.2.** KYANITE will offer advice, where required, on the selection of a suitable and acceptable domain name.
- 5.3.** Where KYANITE transfers a domain at the request of a Customer, it is the Customer's responsibility to ensure that, where required, all data on the existing domain is backed up or otherwise retained - this includes existing website pages and images, emails stored in a mailbox and accessed through a webmail or other service etc.

### **6. Registration Charges**

- 6.1.** Where a Customer has taken out a combined maintenance-and-hosting package, all on-going third party costs pertaining to the registration only of one .co.uk domain name shall be met, where necessary, by KYANITE for the duration of the agreement unless the Customer defaults on payment for the package.
- 6.2.** Domains registered by KYANITE on behalf of a Customer will be registered in the name of the Customer or the Customer's nominated representative. Therefore, for the duration of the agreement between KYANITE and the Customer, the Customer will, by default, retain ownership of the domain name.

### **7. Quotations**

- 7.1.** The price quoted to the Customer is based on the current price list and is for the work agreed on the quotation only.
- 7.2.** Quotations are valid for 30 days from the date of the quote.
- 7.3.** Should the Customer decide that changes are required after work on the website commences, then KYANITE will accept these changes with the provision that additional charges may have to be negotiated.

### **8. Website Review**

- 8.1.** The free website review offered on our website applies to UK based websites only. This does not limit it to .co.uk domains, only to websites belonging to UK-based companies or individuals.

## **9. Updates**

- 9.1.** All website maintenance-and-hosting packages provided and supplied by KYANITE include reasonable monthly updates.
- 9.2.** Updates submitted by clients for inclusion on, or amendment of, a website during one calendar month will normally be actioned as soon as possible but, at the latest, by the end of the first full week of the following calendar month.
- 9.3.** Updates submitted during the first week of a calendar month may or may not be actioned during that week at the discretion of KYANITE.
- 9.4.** Monthly updates do not accrue e.g. if the Customer does not request any updates for two months this does not entitle them to three times as many updates in the third month.
- 9.5.** Only content submitted in electronic format will count as suitable for inclusion in the reasonable monthly updates. Content submitted for the purpose of updating a website in other formats including, but not limited to, printed matter, audio recordings etc. will be subject to an additional charge dependent on the amount of content supplied and the format the content is supplied in. The Customer will be made aware of any additional charge and the update will only be undertaken with the Customer's prior agreement.

## **10. Upgrades**

- 10.1.** Should the Customer take advantage of additional features for their website at a later date, such additions will be charged as a one-off cost at the rate indicated in the current price list. The annual cost remains the same.

## **11. Future Support**

- 11.1.** The website is provided to and accepted by the Customer as a fully functioning, completed work. KYANITE will remain responsible for future support and maintenance for the duration of the agreement.
- 11.2.** Support is offered during normal office hours only (Monday to Friday, 9.00 a.m. to 5.00 p.m.).
- 11.3.** Where a customer modifies the code on their site directly, or allows a third party access to the site to modify the code, KYANITE will no longer offer support for issues relating to the code on the site nor offer services for maintaining or modifying that site.
- 11.4.** Where a bespoke application has been developed for a website by KYANITE, testing the application is the sole responsibility of the Customer. It is deemed that an application included with a website is functioning as required by the Customer when the site is put live at their request. KYANITE cannot therefore accept responsibility for issues resulting from any aspect of a bespoke application.
- 11.5.** Should KYANITE cease trading, a complete back up of each Customer's website data will be made available to them either as an Internet download via a link that will be forwarded to the email address held on file for the Customer. Please note that this does not include database or email data (please refer to Clauses 33.3 and 33.4).
- 11.6.** Where the Customer takes out a maintenance-and-hosting package, additional support for hardware and software belonging to the Customer is, at KYANITE's discretion and depending upon geographic location, offered at a discounted rate.

## **12. Search Engine Promotion**

- 12.1.** KYANITE is not responsible for the Customer's on-going web site promotion. Likewise, it is the Customer's responsibility to generate inbound links to their site through whatever link-exchange or other means they deem necessary. Should the Customer require their site to be promoted on an ongoing basis, a separate service must be requested and payment made as defined in the current price list. The order in which websites are ranked in the search results is controlled by the search engines. While KYANITE can optimise a Customer's site for this, KYANITE is unable to make any guarantees about the success of any search engine promotion activity. KYANITE will, of course, offer advice wherever possible.
- 12.2.** KYANITE is not responsible for the commercial performance or financial returns of a Customer's website.

## **13. Payment (Annual Combined Maintenance-and-hosting Packages)**

- 13.1.** Where a Customer has entered into an agreement for a combined maintenance-and-hosting package, an invoice, comprising the annual charge and any additional one-off costs as required, will be issued either on the date of KYANITE's next invoice run following completion of the website whether or not the website is put live, or, at KYANITE'S discretion on the date of KYANITE's next invoice run six weeks, or more, after the date of approval to commence. The address to which an invoice will be sent is that provided by the Customer. Payment is currently accepted by BACS transfer (where the Customer's bank is a member of the UK BACS service) or UK cheque in Pounds Sterling, unless otherwise agreed; or through PayPal (but this incurs a 4.5% surcharge and must be agreed by KYANITE before payment is made); or payment can also be taken via supported credit/debit cards over the telephone or via registration with the PayaTrader website. If a cheque is returned by the bank as unpaid for any reason, you will be liable for a "returned cheque" charge of £15 – this is to cover the associated charge made to KYANITE by the bank and the necessary administration to alert the Customer to the problem etc. If a card payment is returned by KYANITE'S provider for any reason, you will be liable for a charge of £25 – this is to cover the associated chargeback made to KYANITE by the provider. Annual charges for subsequent years will be invoiced on or prior to the anniversary of the approval for work to commence. Payment is accepted in GBP only.

- 13.2.** Where payment is made by a method that incurs an additional charge to KYANITE e.g. payments made from some overseas accounts, credit facilities etc., these charges are the responsibility of the customer. Where the Customer does not allow for this in their payment, KYANITE will pass on any charge to the Customer in the form of an additional invoice to the Customer.
- 13.3.** KYANITE does not generally accept payments in cash for a combined maintenance-and-hosting package. If the Customer pays in cash, then the Customer will become liable to an additional charge, equivalent to the bank charge on the cash transaction. The Customer will be invoiced for this amount.
- 13.4.** Invoices will be made out to the company or other name given by the Customer to KYANITE. Any discrepancies must be reported to KYANITE within seven days of receipt of the invoice so that a new invoice may be issued where appropriate. Failure by the Customer to do so, does not absolve the Customer from their legal obligation to pay any amount outstanding within the period specified in the payment terms.
- 13.5.** Although our standard websites are professionally designed to a high standard, we necessarily place reasonable restrictions on the amount of time that we can allocate to each design for the standard price. Ordinarily this will not be an issue but occasionally, where the Customer may require what KYANITE regard as an excessive quantity of modifications, we reserve the right to impose a one-off additional charge. The Customer will be made fully aware of this before any charges are applied and will have the option of cancelling the agreement with no charge, restricting the modifications requested or paying the surcharge to enable KYANITE to continue designing the site. In addition, the Customer's project may be moved into a status of "rotation" meaning that subsequent modifications to it will be done in turn, after work required for other projects already in the queue has been actioned. This may result in unavoidable delays to the Customer's project.

#### **14. Technical Support, Hardware/Software Installation and Configuration**

- 14.1.** Requesting technical support either verbally or by email or other communication methods is deemed to signify acceptance of these terms and conditions.
- 14.2.** Telephone support for technical issues unrelated to any maintenance-and-hosting or hosting-only packages is offered on the understanding that telephoning Kyanite and requesting support is deemed to signify acceptance of these terms and conditions. Telephone technical support is offered at a reduced rate relative to on-site technical support. An invoice for telephone technical support will only be issued where the issue concerned is resolved.
- 14.3.** Where a Customer enters into an agreement relating to technical support, hardware or software installation or configuration, an invoice will be issued on the next invoice run after completion of the works. Payment is currently accepted by BACS transfer or UK cheque in Pounds Sterling, unless otherwise agreed. If your cheque is returned by the bank as unpaid for any reason, you will be liable for a "returned cheque" charge of £15 – this is to cover the associated charge made to KYANITE by the bank and the necessary administration to alert the Customer to the problem etc.

#### **15. Payment Terms**

- 15.1.** Payment of any balance will be due within 30 days of the invoice date.
- 15.2.** Where payment is not received within 30 days then:
- 15.2.1.** for website maintenance-and-hosting or hosting-only packages, KYANITE reserve the right to remove material published to the website and replace it with a relevant message regarding non-payment of the invoice; associated services such as email will also be suspended. KYANITE is not obliged to send a reminder or notification of this action to the Customer. Subsequent annual invoices are due within 30 days of the invoice date. Non-payment of subsequent annual invoices is subject to the same actions as non-payment of the original invoice i.e. KYANITE reserve the right to remove material published to the website and replace it with a relevant message regarding non-payment of the invoice; in addition associated services such as email will be suspended. If website hosting and/or email services are suspended, a discretionary £24 charge may be applied for re-instatement of the website. Where the discretionary charge is applied, payment of this charge will be required before the website in question is re-instated. Please note that where the charge is paid by cheque, the site will not be re-instated until the cheque has cleared. KYANITE are not responsible for the loss of email messages deleted from the server as a result of the removal of email services – when email services are set up, Customers are advised of the required information to allow them to download email messages using a mail client program and should take advantage of this information to retrieve email messages from the server at regular intervals. KYANITE is not responsible for any issues arising from the removal of email services. Where payment is not made within the required period, KYANITE reserves the right to terminate the agreement with immediate effect.
- 15.2.2.** for technical support, hardware or software installation or configuration invoices, KYANITE, at their discretion, may issue one payment reminder.
- 15.2.3.** where payment remains outstanding KYANITE reserve the right to launch proceedings through Her Majesty's Courts & Tribunals Service for recovery of any outstanding monies. Expenses incurred by KYANITE and any Collection Agency, in the recovery and/or collection of outstanding fees will also be charged to the Customer.

**15.3.** An outstanding balance limit of £500 applies to all Customer accounts. Where a Customer's outstanding balance exceeds this limit, KYANITE will not undertake any further work for that Customer until the outstanding balance is paid in full.

**15.4.** In the event of a customer allowing invoices to become overdue on three separate occasions, or allowing an invoice to become overdue by more than three months, the agreement between Kyanite and that customer will be automatically terminated and 7 days notice of closure of the account will be served. This is a non-negotiable, irreversible action.

## **16. Links**

**16.1.** KYANITE reserves the right to display a link to the KYANITE website on any or all pages of a Customer's website. Such link(s) may include the following, or other, text: "Website Design and Hosting by Kyanite Consulting". The nature of the link(s) will be unobtrusive and its positioning will be such that it does not detract from the impact of the site as a whole.

## **17. Confidentiality**

**17.1.** Personal or business information (or any information relating to the Customer's organisation) revealed in confidence to KYANITE will remain confidential and will not be shared with any third party unless KYANITE is legally required to do so by such agencies as the police, BIS, HMRC etc.

## **18. Marketing**

**18.1.** KYANITE reserves the right to use graphical representations of any websites designed by KYANITE in marketing material produced by KYANITE. KYANITE reserves the right to use any written testimonials given to them by Customers in marketing material and campaigns. No private information will be made available nor will any information regarding the cost of specific websites.

## **19. Compliance with Ecommerce or Other Regulations**

**19.1.** KYANITE design websites in accordance with the Customer's specifications. It is the Customer's responsibility to ensure that the website and its content comply with current regulations, in particular with regard to the display of relevant Company details. KYANITE cannot accept responsibility for any failure to comply with regulations related to accessibility, selling online or regulations related to a specific business or trade. Where compliance related to any website or business is complex it may be necessary for the Customer to take legal advice from their company lawyer or other legal experts. The Customer is responsible for notifying KYANITE of any such compliance requirements. Amendments to a website to comply with new or existing regulations will not attract any additional charge except where extra functionality is required.

**19.2.** KYANITE's ecommerce module is based on a customised version of osCommerce, an open-source program.

**19.3.** Where further modifications to the – ecommerce module are required, these may be chargeable and, if so, a quote will be prepared for approval by the Customer prior to any work commencing.

## **20. Online Storage**

**20.1.** KYANITE provides hosting for files relating to the website associated with the domain only. All domains are regularly monitored to ensure that the allocated server space is not being used for online storage. Discovery of any such practice will result in immediate cancellation of the agreement together with suspension of access to the domains in question and removal of any files hosted there. Individual FTP file uploads are limited to 150Mb.

## **21. Hosting**

**21.1.** KYANITE do not provide domain registration and hosting services for third parties to sell on directly and any such practice will result in immediate cancellation of the agreement together with suspension of access to the domains in question and removal of any files hosted there. This applies to re-sale of so-called 'framed hosting' and to hosting of sites held on sub-domains or sub-folders of a domain purchased from KYANITE.

## **22. Domain Name Limitations**

**22.1.** At their discretion KYANITE will not accept domain name registrations for domain names that include words that could be deemed racially or otherwise intolerant, pornographic, or offensive in any way. Should such a domain be registered through KYANITE's online registration facility, the registration will be refused and the domain name deleted from our servers. In this event a refund will be made to the Customer.

## **23. Customers Responsibility for Content**

**23.1.** A Customer's website will only be made live on receipt of a specific instruction to do so in writing or by email.

**23.2.** It is the responsibility of the Customer to ensure that the content of the site is accurate and as required prior to their site going live. The Customer's site will be made available to them at a web location, password protected where necessary, for the purpose of checking the information, both textual and graphical on the site. The Customer will be deemed to have checked and confirmed the accuracy of the site content upon agreeing that the site should go live. It is also the responsibility of the Customer to ensure that the content of the site is accurate following subsequent updates to the site based upon information received from the Customer. Therefore, no responsibility is accepted by KYANITE for any eventuality arising out of inaccurate information on the Customer's website.

Please note that, although KYANITE may, if noticed during the course of a website's development, correct spelling and grammar in content provided by the Customer, correct spelling and grammar in content remain the responsibility of the Customer. Kyanite offer a proof-reading service where required but this attracts an additional, negotiable charge.

## **24. Hosting-only Packages**

**24.1.** Where a Customer purchases a hosting-only package, KYANITE is neither responsible for, nor provides free support for the content of the associated website. KYANITE is not responsible for managing issues relating to, nor any consequences of, any code or applications installed on the associated website nor does KYANITE offer free support for third party code installed on such domains, including such third-party scripts as may be provided by KYANITE from time to time. Third party code and applications are installed at the discretion of the Customer and any resulting issues or consequences remain the responsibility of the Customer. Code or applications that are deemed to be insecure will be restricted and/or removed. In addition, it is the Customer's responsibility to ensure that content on their website is not libellous or defamatory in any way and that their site complies with all relevant laws relating to website content. KYANITE may offer, at their discretion, support for issues arising as a result of third-party and/or Customer code at a cost agreed with the Customer.

**24.2.** Where the Customer purchases a hosting-only package and KYANITE installs, at the request of the Customer, a blog, forum, bulletin board or other content management system or script KYANITE is neither responsible for, nor provides free support for issues relating to that installation. KYANITE is not responsible for managing issues relating to, nor any consequences of, any plug-ins, scripts or other applications installed subsequently by the Customer nor does KYANITE offer free support for third party code installed on such domains. Third party code and applications are installed at the discretion of the Customer and any resulting issues or consequences remain the responsibility of the Customer. Code or applications that are deemed to be insecure will be restricted and/or removed. KYANITE may offer, at their discretion, support for issues arising as a result of such installations at a cost agreed with the Customer.

**24.3.** Where a Customer transfers, or requests that Kyanite transfers, a domain to KYANITE's servers and a website is currently hosted on that domain, the Customer is responsible for ensuring that, where required, backups are taken of the website files and associated databases, if appropriate, together with backups of email messages stored on a web-based email application before the domain transfer is initiated.

## **25. Resale**

**25.1.** KYANITE does not create websites for resale to third parties. All websites KYANITE design are for the sole use of the Customer for whom the site was originally designed.

## **26. Cancellation**

**26.1.** Either party can cancel the agreement by giving one month's notice to the other. Cancellation notices from the Customer should be in writing or by email (please refer to Clause 43.1 and Clause 27.1).

**26.2.** In the event of KYANITE cancelling the agreement, written notice will be sent to the address registered by the Customer with KYANITE at the commencement of the agreement or emailed to the email address held on file for the Customer. In this case, a calculation of maintenance-and-hosting or hosting-only charges based on the amount of days left until the next renewal date, less any amounts still due from the Customer, will be used to determine if any monies should be returned to the Customer. Should this calculation show monies still being due from the Customer, Kyanite reserve the right to launch proceedings through Her Majesty's Courts & Tribunals Service for recovery of the outstanding amount as specified in Clause 15.2.3.

**26.3.** Should the Customer wish to cancel at any point after commencement of the design process, they shall remain liable for the work that has already taken place and shall be invoiced accordingly.

**26.4.** No refunds are given for cancellation by the Customer part way through a year of either a maintenance-and-hosting or hosting-only package unless KYANITE has failed to provide those services as defined in these terms and conditions e.g. there has been an extended interruption to provision of the website (other than that caused by non-payment by the Customer of an overdue invoice).

- 26.5.** In the event of cancellation of a maintenance-and-hosting package by either party, and if required, all original text and images provided by the Customer will be returned to the Customer. Text will be returned in MS Word format; images will be returned in Windows Bitmap or JPEG/JPG format and both may be sent as email attachments where possible or by post on CD or similar media to the address registered by the Customer with KYANITE at the commencement of the agreement. Please note that all source code remains the property of KYANITE as specified in Clause 3.2.
- 26.6.** Where a Customer requests that a domain is transferred to another provider KYANITE will do so provided the necessary information is given to KYANITE by the Customer and providing that the domain and/or the Customer's agreement has not expired. If such information is not forthcoming from the Customer before the domain and/or the Customer's agreement expires, KYANITE will remove the Customer's package from their servers after said date of expiry. This will remove the files and services that constitute the website and any existing mailboxes. Once a domain transfer is requested, it is the Customer's and/or the new provider's responsibility to ensure such backups as are required, e.g. email messages, shall be made before the domain is transferred and/or the Customer's agreement expires. Associated hosting services including mailboxes will be removed before the IPS tag is changed (for a .uk domain) and before the transfer is requested (for any other top level domain). Once a domain transfer is requested, KYANITE accepts no liability for any loss of website traffic or emails as a result of the domain transfer either before or after the expiry date of the domain or before or after the expiry date of the Customer's agreement or before or after the date of cancellation of the agreement by the Customer.
- 26.7.** KYANITE do not offer domain management services where hosting is with a third party. If the Customer cancels their hosting package, KYANITE will take any reasonable steps to assist the Customer in transferring the Customer's domain to new hosting if required. A request by the Customer, or an agent acting for the Customer, to transfer a domain to another provider comprises a request to cancel their package in which case the terms relating to cancellation are applied. Associated hosting services including mailboxes will be removed before the IPS tag is changed (for a .uk domain) and before the transfer is requested (for any other top level domain). Once a domain transfer is requested, KYANITE accepts no liability for any loss of website traffic or emails as a result of the domain transfer either before or after the expiry date of the domain or before or after the expiry date of the Customer's agreement or before or after the date of cancellation of the agreement by the Customer.
- 26.8.** KYANITE operate a zero-tolerance policy regarding threats to its staff. Any such threat or implied threat from a Customer shall result in immediate cessation of the agreement and the Customer will be given fourteen days to find another provider.
- 26.9.** Cancellation of a maintenance-and-hosting package removes the entitlement to discounted support offered for existing Customers (please refer to Clause 11.6).
- 26.10.** In the event of a Customer cancelling a maintenance-and-hosting package when renewal is due, Kyanite will give fourteen days grace from the renewal date for the Customer to make any changes to their website as required e.g. to alert visitors to the fact that the website is closing down, moving etc.
- 26.11.** In the event of a Customer cancelling by default i.e. through refusal to pay their annual, or any other, invoice, failure to answer correspondence etc., KYANITE reserves the right to remove material published to the website and replace it with a relevant message regarding non-payment of the invoice. In addition, KYANITE reserves the right to maintain control of the domain name and hosting until any outstanding monies are paid.
- 26.12.** Written or emailed notice is required to de-activate a website before the renewal date and to waive the two weeks grace (please refer to Clause 26.6). Such notices must be sent to KYANITE in writing or by email (please refer to Clause 43.1 and Clause 27.1).

## **27. Customer Contact Details**

- 27.1.** It is the Customer's responsibility to ensure that KYANITE is kept informed of any changes to the Customer's contact details. All correspondence, including invoices and reminders, will be sent to the last known email or postal address and it will be assumed that these have been received accordingly. Where KYANITE have been sent details of new email addresses associated with the Customer's domain it will be assumed that, unless otherwise informed, this will be the Customer's contact email. In addition, it is the Customer's responsibility to add email addresses used by KYANITE to the Customer's email safe-senders lists, or to check their junk email folders, to ensure communications are not disrupted by spam checking software.

## **28. Website Hosting-only Package**

- 28.1.** The Customer wishes to upload data that will be hosted on KYANITE's servers and made accessible via the Internet.
- 28.2.** KYANITE provides web hosting services and has agreed to host the Customer's data upon the following terms and conditions.

## **29. Duties**

- 29.1.** KYANITE shall provide to the Customer the Services specified in their order subject to the following terms and conditions.

**29.2.** The Customer shall upload the website and the software used in the website which is owned by the Customer, or licensed to him by a third party or KYANITE ("the Customer Software"), in a format specified by KYANITE.

### **30. Payment for Hosting-only Packages**

**30.1.** Payment is normally via PayPal although it is not necessary to create or have already created a PayPal account to pay through PayPal - payment methods at PayPal (without an account) include credit and debit cards.

**30.2.** The Charges are inclusive of VAT.

**30.3.** KYANITE does not provide credit facilities.

**30.4.** KYANITE does not generally accept payments in cash for a combined maintenance-and-hosting package. If the Customer pays in cash, then the Customer will become liable to an additional charge, equivalent to the bank charge on the cash transaction. The Customer will be invoiced for this amount.

**30.5.** From time to time KYANITE may make enquiries on the Customers company, proprietor or directors of the Customers company with credit reference agencies. These agencies may record that a search has been made and share this information with other businesses.

**30.6.** Pro-rata refunds will not be issued for yearly services that are cancelled before the end of the year.

**30.7.** All services will renew until cancelled by the Customer. KYANITE emails the Customers primary email address prior to renewal of services, it is the Customers responsibility to cancel services prior to renewal as no refund can be made once renewal has occurred. Customers must notify us at least 30 days before a service is renewed if they wish to cancel that service.

### **31. IP Addresses**

**31.1.** KYANITE shall maintain control and ownership of any IP address that is assigned to the Customer as part of the Services and reserves the right in its sole discretion to change or remove any and all IP addresses.

**31.2.** Where KYANITE changes or removes any IP address it shall use its reasonable endeavours to avoid any disruption to the Customer.

### **32. Software Licence And Rights**

**32.1.** If the Customer requires use of software owned by or licensed to KYANITE ("KYANITE's software") in order to use the Services, KYANITE grants to the Customer and its employees, agents and third party consultants and contractors, a royalty-free, world-wide, non-transferable, non-exclusive licence to use KYANITE Software in object code form only, in accordance with the terms of this Agreement. For the avoidance of doubt, this Agreement does not transfer or grant to the Customer any right, title, interest or intellectual property rights in KYANITE Software.

**32.2.** The Customer undertakes that they will not himself or through any third party, sell, lease, license or sublicense KYANITE Software or Domains.

**32.3.** KYANITE may make such copies of the Customer Content as may be necessary to perform its obligations under this Agreement, including back up copies of the Content. Upon termination or expiration of this Agreement, KYANITE shall destroy all such copies of the Content and other materials provided by the Customer as and when cancellation is requested by the Customer.

### **33. Service Levels And Data Backup**

**33.1.** KYANITE shall use its reasonable endeavours to make the server and the Services available to the Customer 100% of the time but because the Services are provided by means of computer and telecommunications systems, KYANITE makes no warranties or representations that the Service will be uninterrupted or error-free and KYANITE shall not, in any event, be liable for interruptions of Service or downtime of the server.

**33.2.** KYANITE carries out backups of web pages for use by KYANITE in the event of systems failure. KYANITE do not provide data restoration facilities for individual Customers. Even though every effort is made to ensure data is backed up correctly KYANITE accepts no responsibility for data loss or corruption.

**33.3.** Databases created by the customer or by KYANITE are not backed up by KYANITE – a facility exists for customers to back up any databases as and when required.

**33.4.** Webmail data, email messages, folders are not backed up by Kyanite nor is there a facility in the Webmail application for backing up data, email messages or folders – it is the Customer's responsibility to ensure that, where required, offline copies are kept of email messages and associated information that are deemed, by the Customer, to be important. KYANITE recommend the use of an email client such as Microsoft Outlook to download messages from the mail server to a local PC where backups can easily be managed.

### **34. Acceptable Use Policy**

**34.1.** The website and use of the Services may be used for lawful purposes only and the Customer may not submit, publish or display any content that breaches any law, statute or regulation. In particular the Customer agrees not to:



- 34.1.1.** use the Services or the website in any way to send unsolicited commercial email or "spam", or any similar abuse of the Services;
- 34.1.2.** send email or any type of electronic message with the intention or result of affecting the performance of any computer facilities;
- 34.1.3.** publish, post, distribute or disseminate defamatory, obscene, indecent or other unlawful material or information, or any material or information which infringes any intellectual property rights (for the avoidance of doubt this includes licensed software distributed as Warez), via the Services or on the Website;
- 34.1.4.** threaten, abuse, disrupt or otherwise violate the rights (including rights of privacy and publicity) of others;
- 34.1.5.** engage in illegal or unlawful activities through the Services or via the Website;
- 34.1.6.** make available or upload files to the website or to the Services that the Customer knows contain a virus, worm, trojan or corrupt data; or
- 34.1.7.** obtain or attempt to obtain access, through whatever means, to areas of KYANITE's network or the Services which are identified as restricted or confidential. This includes leaving your home directory whilst using SSH access to servers.
- 34.1.8.** operate or attempt to operate IRC bots or other permanent server processes.
- 34.2.** The Customer has full responsibility for the content of the Website. For the avoidance of doubt, KYANITE is not obliged to monitor, and will have no liability for, the content of any communications transmitted by virtue of the Services.
- 34.3.** If the Customer fails to comply with the Acceptable Use Policy outlined in Clause 34.1 KYANITE shall be entitled to withdraw the Services and terminate the Customer's account without notice.

### **35. Alterations And Updates**

- 35.1.** All alterations and updates to the website made by the Customer shall be using the online account management facility, FTP access or SSH access where available. The Customer will be issued with a user name and password in order to access the account where agreed. The Customer must take all reasonable steps to maintain the confidentiality of this user name and password. If the Customer reasonably believes that this information has become known to any unauthorised person, the Customer agrees to immediately inform KYANITE and the password will be changed.

### **36. Artwork**

- 36.1.** Where KYANITE provides or prepares artwork for the Customer, it is the Customer's sole responsibility to proof the finished artwork and to ensure it meets the Customer's requirements before using the artwork in any subsequent projects including, but not limited to, printing, electronic circulation or other means of publishing.
- 36.2.** No responsibility is accepted by KYANITE for any eventuality arising out of inaccurate information on the artwork provided.

### **37. Warranties**

- 37.1.** The Customer warrants and represents to KYANITE that KYANITE's use of the Content or the Customer Software in accordance with this Agreement will not infringe the intellectual property rights of any third party and that the Customer has the authority to license the Content and the Customer Software to KYANITE as set out in Clause 32.2.
- 37.2.** All conditions, terms, representations and warranties that are not expressly stated in this Agreement, whether oral or in writing or whether imposed by statute or operation of law or otherwise, including, without limitation, the implied warranty of satisfactory quality and fitness for a particular purpose are hereby excluded. In particular and without prejudice to that generality, KYANITE shall not be liable to the Customer as a result of any viruses introduced or passed on to the Customer.

### **38. Indemnity**

- 38.1.** The Customer agrees to indemnify and hold KYANITE and its employees and agents harmless from and against all liabilities, legal fees, damages, losses, costs and other expenses in relation to any claims or actions brought against KYANITE arising out of any breach by the Customer of the terms of this Agreement or other liabilities arising out of or relating to the Website.

### **39. Limitation Of Liability**

- 39.1.** Nothing in these terms and conditions shall exclude or limit KYANITE's liability for death or personal injury resulting from KYANITE's negligence or that of its employees, agents or sub-contractors.
- 39.2.** The entire liability of KYANITE to the Customer in respect of any claim whatsoever or breach of this Agreement, whether or not arising out of negligence, shall be limited to the charges paid for the Services under this Agreement in respect of which the breach has arisen.
- 39.3.** In no event shall KYANITE be liable to the Customer for any loss of business, loss of opportunity or loss of profits or for any other indirect or consequential loss or damage whatsoever. This shall apply even where such a loss was reasonably foreseeable or KYANITE had been made aware of the possibility of the Customer incurring such a loss.

#### **40. Term And Termination**

- 40.1.** This Agreement will become effective on the date the service is ordered and shall continue until terminated by either party in writing of its intention to terminate the Agreement.
- 40.2.** KYANITE shall have the right to terminate this Agreement with immediate effect by notice in writing to the Customer if the Customer fails to make any payment when it becomes due.
- 40.3.** Either party may terminate this Agreement forthwith by notice in writing to the other if:
  - 40.3.1.** the other party commits a material breach of this Agreement and, in the case of a breach capable of being remedied, fails to remedy it within a reasonable time of being given written notice from the other party to do so; or
  - 40.3.2.** the other party commits a material breach of this Agreement which cannot be remedied under any circumstances; or
  - 40.3.3.** the other party passes a resolution for winding up (other than for the purpose of solvent amalgamation or reconstruction), or a court of competent jurisdiction makes an order to that effect; or
  - 40.3.4.** the other party ceases to carry on its business or substantially the whole of its business; or
  - 40.3.5.** the other party is declared insolvent, or convenes a meeting of or makes or proposes to make any arrangement or composition with its creditors; or a liquidator, receiver, administrative receiver, manager, trustee or similar officer is appointed over any of its assets.
  - 40.3.6.** Any rights to terminate this Agreement shall be without prejudice to any other accrued rights and liabilities of the parties arising in any way out of this Agreement as at the date of termination.
  - 40.3.7.** On termination all data held in the Customers account will be deleted.

#### **41. Assignment**

- 41.1.** KYANITE may assign or otherwise transfer this Agreement at any time.
- 41.2.** The Customer may not assign or otherwise transfer this Agreement or any part of it without KYANITE's prior written consent.

#### **42. Force Majeure**

- 42.1.** Neither party shall be liable for any delay or failure to perform any of its obligations if the delay or failure results from events or circumstances outside its reasonable control, including but not limited to acts of God, strikes, lock outs, accidents, war, fire, the act or omission of government, highway authorities or any telecommunications carrier, operator or administration or other competent authority, the act or omission of any Internet Service Provider, or the delay or failure in manufacture, production, or supply by third parties of equipment or services, and the party shall be entitled to a reasonable extension of its obligations after notifying the other party of the nature and extent of such events.

#### **43. Severance**

- 43.1.** If any provision of this Agreement is held invalid, illegal or unenforceable for any reason by any Court of competent jurisdiction such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if this Agreement had been agreed with the invalid illegal or unenforceable provision eliminated.

#### **44. Notices**

- 44.1.** Any cancellation notice to be given by either party to the other should be either in writing and sent to the address, supplied on commencement of the agreement, of the other party or such other address as either party may from time to time have communicated to the other or by email and sent to the email address, supplied on commencement of the agreement, of the other party or such other email address as either party may from time to time have communicated to the other. Please note that obtaining and retaining proof of sending is advisable.

#### **45. Entire Agreement**

- 45.1.** This Agreement contains the entire Agreement between the parties relating to the subject matter and supersedes any previous agreements, arrangements, undertakings or proposals, oral or written. This Agreement may be updated without notice.

#### **46. Governing Law And Jurisdiction**

- 46.1.** This Agreement shall be governed by and construed in accordance with the law of England and the parties hereby submit to the exclusive jurisdiction of the English courts.

#### **47. Domain Name Registration**

- 47.1.** Domain names are not deemed to be successfully registered until they appear in the relevant whois database of the top level domain name registrar. In the event that a domain name is unavailable when KYANITE attempts to register it, KYANITE will provide a full refund for that domain name.
- 47.2.** Please refer to Section 1 of these terms and conditions for additional information relating to Customers who take out a combined Website Maintenance-and-hosting package.

#### **48. Scripting**

**48.1.** KYANITE are not responsible for Customer programming issues other than ensuring that programming languages such as Perl, PHP and ASP are installed and functioning on the web hosting system.

#### **49. Privacy**

**49.1.** To protect your privacy KYANITE will not distribute your details to third parties, unless required to do so by law or by an agency undertaking a criminal investigation such as HMRC, BIS etc.

**49.2.** Telephone calls to Kyanite may be recorded or monitored for quality purposes. Any recordings made will not be distributed to third parties, unless required to do so by law or by an agency undertaking a criminal investigation such as HMRC, BIS etc.

#### **50. Data Transfer**

**50.1.** Web hosting accounts are prohibited from hosting file distribution websites (including but not limited to music, video and software), adult content orientated websites, hosting banners, graphics or CGI scripts for other websites, storing pages, files or data as a repository for other websites or personal computers, giving away web space under a domain, sub domain or directory.

#### **51. Server Usage**

**51.1.** Should your account use more than 5% of the servers processing power and as a result have a detrimental effect on other Customers, KYANITE will discuss with you alternative solutions for your hosting requirements.

#### **52. Email Newsletter**

**52.1.** KYANITE communicates with its Customers via email and as such Customers agree to receive by email our regular newsletter which contains amongst other things changes to our terms and conditions, updates to our products & features and special offers. If a Customer does not wish to receive such communications they can request in writing or by email that they be removed from any mailing lists.

#### **53. Web Space Usage**

**53.1.** Unlimited web space is available for genuine web site content; content must be linked into web pages. Customers are prohibited from using the server as a file/backup repository. Customers are expected to employ good house keeping when maintaining their account.

#### **54. Mail Boxes**

**54.1.** Mail boxes not accessed for 100 days or more will be deleted from the system.

#### **Notes:**

- Should KYANITE waive any of these terms on an individual basis, this shall not affect the validity of the remaining clauses or commit KYANITE to waive the same clause on any other occasion.
- Unless otherwise specified, any costs mentioned in these terms and conditions are exclusive of VAT where applicable.
- By agreeing to these terms and conditions your statutory rights are not affected.
- KYANITE reserves the right to change or modify any of these terms or conditions at any time. Should clarification of any of the above be required please contact KYANITE.
- These terms and conditions were last updated on 19-Feb-2015.

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