

# Dot-Com Litigation 101: Website Designers

By Jack Harari, Esq.

Despite the recent downturn in the technology market, the internet continues to expand by the gigabyte. Like the thousands who searched the Alaskan tundra for gold at the turn of the last century, many believe they possess the next great billion-dollar internet invention. Armed with new business ideas, entrepreneurs register domain names and hire web design companies.

For the lucky few, it is smooth sailing from the time an agreement is reached with the web developer. However, most businesses who contact our law firm do not experience such internet bliss. Before the laser-print is dry on the agreement problems arise, delays occur. The web design is delayed and launch-deadlines are blown by mysterious “bugs” and “html glitches.” The day the website finally goes live, the unimaginable has occurred: a cryptic message appears across the internet, “PAGE CANNOT BE DISPLAYED.” Our client’s dreams have turned into a cyberspace nightmare. To businesses, this scenario is all too familiar, and can mean only three things: money, money, money.

This article surveys the legal pitfalls that may exist when a company makes the decision to hire a web design/maintenance company. The discussion will highlight potential risks under general contract law, the Uniform Commercial Code, and emerging tort law. These legal pitfalls may interrelate with various lines of insurance.

Any potential litigation analysis must start with the terms of the written service agreement. Under the law, agreements may be null and void if not in writing. A number of questions emerge when looking at the agreement: Did the designer meet the description of services and the test-and-launch dates? One of the most frequently litigated areas involves the failure of the website developer to provide timely performance. Although progress reporting and testing can help provide safeguards to minimize these risks, often the clients themselves may have been remiss in implementing an adequate monitoring schedule. Did the designer provide the necessary backup, server redundancy, and network capacity? Did the designer provide all promised phone and email support? If the relationship between the parties begins to sour due to nonperformance, then any data ownership, indemnification, and termination provisions will become paramount.

Aside from contract rights, companies wishing to bring legal action against web developers should look to the UCC. Case law has held that the exchange of certain web-related services falls under the UCC. This interpretation of the law potentially affords businesses a number of warranty rights, including express warranties, implied warranties, and warranties of fitness for a particular purpose. The advantage of a cause of action in

warranty law is that it is not necessarily restricted by the actual terms of the written agreement.

The final area of law to review is negligence law. Aside from the general claim of negligence, there are two other theories to consider. A claim of “tortious interference with contract” may apply where a company deliberately withholds data files that are necessary for the online business to re-launch its website with another provider. In addition, a recently emerging theory of liability called “computer malpractice” extends the basic duty of professional malpractice to those that hold themselves out as computer “specialists.”

Various types of damages may potentially be sought under the above legal principles: liquidated damages, expectation damages, reliance damages, consequential damages, damage to reputation, lost profits, and punitive damages. If the damages can not be recovered from the website designer, a related question is whether insurance coverage is available

With respect to Comprehensive General Liability (CGL) policies, at least one court has held that data loss could be covered by traditional insurance policies. In theory, this would permit a company to recover for their website “disaster” under their CGL policies. In practice, such claims are often limited by policy terms such as the “advertising injury” provisions, which may restrict coverage to “named perils.” Additionally, business interruption insurance policies, Directors and Officers policies, and general Errors and Omissions (E & O) policies may be applicable. However, many general insurance policies exclude technology related events from coverage. As a result, one must consider emerging lines of “internet insurance,” such as Computer Software Services E & O policies, Multimedia Liability Insurance, Intellectual Property Risk Management, and Breach of Internet Security policies.

In short, the developing arena of internet-related litigation has created much uncertainty in the business world. Careful legal drafting and review of web design/maintenance documents at the outset can help a business avoid many of the pitfalls described above, and can serve as the first weapon in the arsenal of litigation that might be necessary. The practitioner is strongly urged to review a wide range of legal theories of liability, as the body of law that is emerging is changing as rapidly as the technology that underlies it. So as companies set sail for this new world of internet opportunities, they should be cautioned that it is a dangerous web out there.