

Dot-Com Litigation 101: Web Site Designers

by Jack Harari

Like the thousands who searched the Alaskan tundra for gold at the turn of the last century, many believe they will find the next great billion-dollar Internet invention. For the lucky few, it is smooth sailing from the time an agreement is reached with the Web developer. But for most, the Web design is delayed and launch deadlines are blown by mysterious bugs and HTML glitches. The day the Web site finally goes live, a cryptic message appears on the screen: "PAGE CANNOT BE DISPLAYED." The client's dreams have turned into a cyberspace nightmare.

Litigation Analysis

There are numerous legal pitfalls that may exist when a company makes the decision to hire a Web design and maintenance company. These legal pitfalls may interrelate with various lines of insurance.

General Contract Law. Any potential litigation analysis starts with the terms of the written service agreement. Under the law, agreements may be null and void if not put down 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? (Although progress reporting and testing can help provide safeguards to minimize these risks, often clients themselves have not implemented adequate monitoring schedules.) Did the designer provide the necessary backup, server redundancy and network capacity? Did the designer provide all promised phone and e-mail support? If the relationship between the parties begins to sour due to non-performance, then any data ownership, indemnification and termination provisions will become paramount.

Uniform Commercial Code (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

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

Tort 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 relaunch its Web site 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.

Damages

Various types of damages may be sought: liquidated damages, expectation damages, reliance damages, consequential damages, damage to reputation, lost profits and punitive damages. But what if these cannot be recovered from the Web site designer? Is insurance coverage available?

With respect to comprehensive general liability (CGL) policies, at least one court has held that data loss could be covered. In theory, this would permit a company to recover its Web site disaster under its CGL policies. In practice, however, 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. Since many general insurance policies exclude technology-related events from coverage, however, Internet insurance, such as computer software services, E&O policies, multimedia liability insurance, intellectual property risk management and breach of Internet security policies may be considered.

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—in addition to extensive review of a wide range of legal theories—can help ease the growing pains of the virtual business world. 