



**A TELEVISION** control panel with monitors glowing in the background. The Internet and the drop in the cost of video production has made it easy for nearly every company to be in the media business as a means of distributing a company's message.

● **PROFESSIONAL LIABILITY**

# Stay Informed and Mind the Gap

**Companies face Internet marketing-related legal claims that their commercial general liability insurance policies no longer cover.**

**BY ELIZABETH C. KOCH AND JAY WARD BROWN**

In today's economy, virtually every company is in the publishing business. Even the archetypal widget manufacturer is generating and distributing editorial content through a burgeoning number of channels. Manufacturers, along with retailers and service businesses of all sizes, now communicate with potential customers, suppliers and business affiliates through websites, email marketing, blogs and social media networks. An increasing number of companies integrate their products and marketing material into television broadcasts, webisodes, podcasts, books and eBooks, films and other programming.

Add to these the traditional channels of corporate expression, press releases and press conferences, increasingly distributed by video over the Internet, live public appearances, and branding activities ranging from package design to sponsorship of annual charitable events, and there is little doubt that virtually every company, no matter what its stock-in trade, faces significant exposure to legal risks once considered problems

only for newspapers, television stations and advertising agencies.

While media companies have always had to purchase special insurance coverage for intellectual property and other risks arising from their publishing or broadcasting activities, in the past nonmedia companies could rely upon their commercial general liability policies to provide coverage for claims arising from their marketing activities.

Trademark, copyright and related claims generally were covered under the standard commercial general liability policy's "advertising injury" provisions. But carriers who sell commercial general liability policies in recent years have tightened considerably the scope of coverage for such claims, and the advertising injury provisions in policies simply are not designed to address the myriad newer forms of marketing in any event. Accordingly, many nonmedia companies now face a significant gap in their coverage for liability arising from their marketing and other media-related activities.

## **COMMERCIAL INSURERS HAVE TIGHTENED THE SCOPE OF COVERAGE, AND THE ADVERTISING INJURY PROVISIONS IN POLICIES SIMPLY ARE NOT DESIGNED TO ADDRESS NEWER FORMS OF ONLINE MARKETING.**

Most commercial insurers use standard policy forms provided by the Insurance Services Office. Beginning in 1976, ISO introduced successive editions of standard forms providing advertising injury coverage. Many of the court decisions that have granted coverage for intellectual property claims under the advertising injury provision involve the 1986 edition. That version provided coverage for four specific "offenses" if occurring in the "course of advertising (the policyholder's) goods, products or services":

- (a) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services;
- (b) Oral or written publication of material that violates a person's right of privacy;
- (c) Misappropriation of advertising ideas or style of doing business; or
- (d) Infringement of copyright, title or slogan.

This early iteration of the advertising injury provision has been widely interpreted by courts to provide coverage—or at least a potential for coverage sufficient to trigger the insurer's duty to provide a defense to the policyholder for a spectrum of intellectual property claims. For example, while trademark infringement is not itself specifically enumerated among the covered "offenses," courts have concluded that, at least for purposes of triggering the carrier's duty to defend its insured, trademark infringement does fall within the coverage for misappropriation of an "advertising idea" or "style of doing business," or for infringement of a "title" or "slogan."

The majority of courts also have required insurers using this version of the advertising injury provision to defend or indemnify claims for trade dress infringement—that is, claims arising out of a product's packaging and design as well as trade secret misappropriation.

In addition, courts have broadly interpreted the requirement in the 1986 version of the advertising injury provision that an offense occur in the "course of advertising (the policyholder's) goods, products or services." Thus, copyright or trademark infringement claims with even a tangential connection to an insured's actual advertising activities often have been found to be covered.

By 1998, having been repeatedly told by the courts that the 1986 provision afforded much broader coverage than they had intended, carriers caused ISO to dramatically rewrite the provision.

In 2001, just three years later, ISO introduced a further limitation on "advertising injury" coverage for intellectual property claims. This version of the commercial general liability form includes a new exclusion that first purports to eliminate *all*

### **Summary**

- In 2001, the Insurance Services Office added to the standard commercial general liability form exclusions for interactive online features that can figure prominently in advertising.
- Federal law gives some immunity to operators of online chat rooms and bulletin boards.
- Efforts by carriers to limit the scope of the advertising injury coverage have left many nonmedia companies with a coverage gap.

coverage for injury “arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.” But it then goes on to except from the exclusion (and thus to provide coverage for) “infringement, in your ‘advertisement,’ of copyright, trade dress or slogan.” Thus, beginning with the 2001 form, the standard commercial general liability policy now explicitly excludes coverage for *all* trademark and trade secret claims.

In contrast to the 1986 form’s broad coverage for intellectual property claims, as long as the alleged injury arose out of an offense committed “in the course of” a policyholder’s advertising, the 2001 revisions, now also limit coverage even for the three remaining covered types of intellectual property claims to those arising from material specifically contained in the policyholder’s advertisement. Accordingly, under the newer ISO wording, it is not enough that a causal connection exists between an alleged infringement and the advertising; carriers can be expected to argue that only infringements that occur “in” the advertisement itself are covered.

The 2001 edition of the form also, for the first time, specifically addresses Internet activity. Under the older policies, courts expansively treated online promotional materials concerning the policyholder’s goods or services as “advertising.” But, as revised by ISO in 2001, the standard form now provides that “advertisement” with respect to a website means only “that part” of a site “that is about your products, goods or services for the purposes of attracting customers or supporters.”

Furthermore, also in 2001, ISO added to the standard commercial general liability form an explicit exclusion for certain interactive online features that can figure prominently in advertising. The exclusion removes all coverage for claims “arising out of an electronic chatroom or bulletin board that the (insured) hosts, owns or over which the (insured) exercises control.” Unhelpfully, the terms “chatroom” and “bulletin board” are not defined in the policy form, but general technical literature tends to define the former broadly as consisting of systems for synchronous online conferencing, and the latter as consisting of systems in which multiple users may access a server to upload or download communications to or from other group members.

While federal law gives some immunity to operators of such forums, carriers apparently wish to avoid coverage for all potential liability that might be incurred by an insured for the words of third parties, such as customers who post to a bulletin board or chatroom operated by a company as a marketing tool, or any response an insured company might post in such forum.

As these earliest forms of social media have evolved into blogs,



## **NONMEDIA COMPANIES OFTEN ASSUME THAT THEIR POLICIES PROVIDE COVERAGE FOR CLAIMS ARISING FROM THEIR ROUTINE ADVERTISING AND MARKETING ACTIVITIES. THAT WAS WELL-FOUNDED FOR ALMOST TWO DECADES, AS COURTS BROADLY CONSTRUED OLDER VERSIONS OF THE STANDARD GENERAL LIABILITY FORM. THAT IS NO LONGER TRUE.**

Facebook, Twitter and others, an absence of guidance from the courts means uncertainty as to how and when a carrier will invoke this exclusion in connection with online marketing activities that involve any degree of interactivity.

Finally, the 2001 form also includes an exclusion for claims arising from the “unauthorized use of another’s name or product in the (insured’s) email address, domain name or metatag, or any other similar tactics to mislead another’s potential customers.” Setting aside the question of what online branding might be swept into the exclusion for “similar tactics,” the use of trademark terms in metatags in online advertisements is an unsettled area of current law, and one for which underwriters do not want to have to pay the defense costs required to clarify.

While courts are still sorting out the full implications of these changes in “advertising injury” coverage, the practical impact is clear. Many of the activities tied to a company’s general promotional efforts, branding or style of doing business that once were covered against intellectual property claims now fall outside of the coverage afforded by the current standard commercial general liability form.

For example, with these new limitations, no coverage typically is provided under policy forms for copyright infringement arising out of text, photographs or other content posted on a company’s website, blog, or other electronic communication unless the allegedly infringing material is contained within what is demonstrably an “advertisement” for the policyholder’s own product or service. Such uninsured claims are increasingly common. Many companies use generic photos on their websites in areas that are not actually part of a specific product advertisement. Is there a cityscape or an industrial image on your company’s home page? Professional stock photo houses increasingly use watermarking technology to enable them to locate unauthorized online copies of their works, and a whole

cottage industry has sprung up among legal service vendors who will bring claims on behalf of the photo houses.

Furthermore, the unauthorized use of a photograph downloaded from the Internet, even from a free site, infringes the copyright in the photograph regardless of the intent of the user, and a company is liable for such unauthorized reproduction by its employees, contractors or web designers. Carriers using the most recent policy form can be expected to deny coverage for infringement claims that arise from photographs that are not in an online advertisement.

Similarly, companies increasingly are facing trade dress claims arising out of the general look and feel of their websites, social media pages, or other online marketing communications. If the color scheme, visual design, navigation elements such as buttons, boxes, menus and hyperlinks, or overall impact of Flash and other technology on the site or page are too similar to that of another business’ site, liability can result. Because trade dress claims are now expressly excluded under the newer forms except to the extent they arise from material “in” an “advertisement,” companies who are on the receiving end of a complaint alleging trade dress infringement of a website are unlikely to be provided even a defense by their carrier.

Another type of claim commonly faced by nonmedia companies arises out of comparative advertising: marketing your product as being the fastest, most effective, or safest of its kind. Whether appearing in a traditional advertisement, on your website, a blog or in a posting on a social media site, specific factual assertions of this kind may elicit claims by one of your competitors under the federal Lanham Act or similar state statutes for false or misleading statements constituting unfair competition. Unless your marketing is specifically directed at a particular competitor, such unfair competition claims would not be covered under the policy’s current advertising injury provisions.

Product packaging presents another set of claims for which the current standard form typically will not provide coverage. When the box or other packaging for a product too closely resembles the look and feel of a competitor’s product, liability for trade dress infringement can result. Under the older policy provisions, courts routinely found that product packaging fell within the broadly defined “course of advertising” and thus that claims arising from packaging were covered under the “advertising injury” provisions. But because a product’s packaging is not, itself, an advertisement, under the new policy language, there almost certainly would be no coverage for such a claim. And that brings us back to photographs. Using an image of a person on a product label without permission from him or her may lead to a publicity rights claim, and under the current version of the form, carriers can be expected to argue that there is no coverage for such a matter.

There has been a tendency on the part of nonmedia companies to assume that their commercial general liability policies provide broad coverage for claims arising from their routine advertising and marketing activities, including particularly intellectual property claims. That assumption was well-founded for almost two decades, as courts broadly construed older versions of the standard form. What was true then, however, is no longer true today. A conscious effort by carriers to limit the scope of the advertising injury coverage under their policies, coupled with the burgeoning exposure to intellectual property claims arising from the new channels of marketing, have left many nonmedia companies with a gap between their expectations as to what claims will be insured and what their policy actually covers.

Prudent risk managers and others responsible for risk protection are well-served to discuss with their insurance brokers the exposure their companies face in these areas, and the products that are available in the marketplace to supplement coverage.

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