Are You Covered? Insurance for Intellectual Property Claims

Client Advisories

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Your General Liability Policy May Be Enough. Then Again, It May Not.

INTRODUCTION

A company's intellectual property ("IP") is often its most important corporate asset -- one which it must aggressively protect. As a defendant in an IP litigation, your company may be faced with significant defense costs and the prospect of a judgment that could eviscerate working capital. In such situations, it is critical to understand the existence and extent of insurance coverage that may protect your company from financial ruin.

Although specialized IP insurance is available, many companies maintain only comprehensive general liability (CGL) coverage. Standard CGL policy language has evolved in recent years in response to jockeying between policyholders and insurers over the degree to which such policies cover IP-related claims. Therefore, it is important for executives to know what their policy says, to understand the IP coverage implications and to evaluate whether special IP insurance is warranted.

Generally speaking, the typical CGL policy provides coverage for claims of "bodily injury," "property damage" and "personal and advertising injury" that occur during the policy period. At first glance, such phrases do not appear to apply to the most common types of IP claims (i.e., trademark, trade dress, copyright and patent infringement). And, in fact, most insurers will deny coverage for such claims as being beyond the scope of a CGL policy.

However, with the ever-increasing costs of IP litigation over the last 20 years, policyholders (and their counsel) have mounted vigorous challenges to insurers' narrow interpretation of policy terms in an effort to expand the scope of available coverage. Consequently, as discussed below, an extensive body of case law has developed that has somewhat clarified the applicability of CGL policies to certain IP claims.

"ADVERTISING INJURY" UNDER CGL POLICIES

Policyholders seeking coverage for IP claims principally look to what is known as the "advertising injury" section of the CGL policy. Most insurers utilize standard "advertising injury" forms compiled and published by an independent entity called the Insurance Services Office, Inc. ("ISO").

Generally speaking, the 1986 ISO form provides coverage for specific "advertising injury" offenses, including: "misappropriation of advertising ideas or style of doing business" and "infringement of copyright, title or slogan."

In 1998, ISO amended its CGL form so that "advertising injury" was limited to injuries arising out of "infringement upon another's copyright, trade dress or slogan in your 'advertisement'" and "use of another's advertising idea in your 'advertisement.'" Further, ISO for the first time expressly defined "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters."

Most significantly, in 2001, ISO introduced an expansive exclusion for "advertising injury" arising out of "copyright, patent, trademark, trade secret, or other intellectual property rights." However, this exclusion expressly notes that it does not apply to "infringement, in your 'advertisement,' of copyright, trade dress or slogan."

Finally, in response to the ever-growing use of the Internet for advertising purposes, the 2001 ISO form refined its definition of "advertisement" to include "material placed on the Internet or on similar electronic means of communication" and, with respect to websites, limited the definition to include "only that part of a website that is about your goods, products or services for the purposes of attracting customers or supporters..."

In interpreting these various policy forms, the majority of courts have historically looked to three issues to determine if an insured is entitled to coverage under its CGL policy for an IP claim: (1) does the plaintiff allege an "advertising injury" (i.e., one of the policy's enumerated offenses); (2) was the defendant engaged in "advertising" during the policy period when the alleged "advertising injury" occurred; and (3) is there a causal connection between the alleged injury and the "advertising."

APPLICATION TO IP CLAIMS

Under the various ISO forms, trademark is either expressly excluded or is not referenced at all. To obtain coverage when the CGL policy is silent as to trademark infringement, a policyholder must establish that the trademark claim falls within one of the enumerated offenses. The majority of courts have interpreted the pre-1998 ISO form to provide coverage for trademark infringement as a "misappropriation of an advertising idea or style of doing business." Several recent cases have also held that trademark infringement constituted the "use of another's advertising idea" under the 1998 ISO form.

Of the common IP claims, trade dress infringement has been most widely recognized as falling within the "advertising injury" coverage of CGL policies -- most often as a "misappropriation of advertising ideas and style of doing business." Further, given the nature of trade dress infringement claims, the causal nexus between "advertising injury" and "advertising activity" is almost a foregone conclusion.

Under the pre-1998 ISO forms, courts regularly recognized coverage for copyright claims because the enumerated advertising offenses expressly included "copyright infringement." With respect to the newer ISO forms, the coverage determinations are largely dependent on the causal connection to the defendant's advertising activity.

The courts have generally rejected policyholder arguments that the advertising injury provision of the CGL policy covers claims of patent infringement. Coverage is typically not afforded because such a claim does not often occur in the course of advertising activities. However, the Ninth Circuit Court of Appeals recently determined, under California law, that an insurer had a duty to defend its policyholder against an underlying claim for patent infringement because the claim potentially falls within the "misappropriation of advertising ideas" definition of "advertising injury. *See Hyundai Motor America v. National Union Fire Ins. Co.*, 600 F.3d 1092 (9th Cir. 2010).

CONCLUSION

Over time, insurers have responded to judicial interpretations *expanding* coverage for IP claims by revising their CGL policy forms to expressly e**xclude** the vast majority of such claims. For this reason, in assessing the availability of coverage, it is critical to know which policy form is contained in your company's CGL policy (including older policies that may apply to a claim). Moreover, it is essential that businesses proactively review their policies to determine if any gaps in coverage exist. Given the erosion of coverage for IP claims under standard CGL policies, businesses should also explore, if warranted, the pros and cons of purchasing specialized insurance products designed to provide coverage for IP claims.

If you are interested in an IP claims insurance audit for your business, or have other IP-related issues or questions, please contact Trevor Cooney, Partner in Archer's Intellectual Property and Insurance Law Practice Groups, at (856) 616-2681 or tcooney@archerlaw.com.

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