Intellectual Property 101 | issue 2

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Insuring Intellectual Property Claims

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Intellectual property litigation is quickly replacing defamation and invasion of privacy as the most serious – and expensive – threat to media companies. For this reason, OBPP has created a series of articles which will help educate our brokers about the new exposures faced by their clients as media-related companies are scrambling to meet the public's appetite for information, news and entertainment. This issue demystifys today's essential coverages and unveils why the typical CGL policy is inadequate to respond to increasing exposures. The next issue discusses the limited applicability of the defenses of "fair use" and "public domain."

When facing a suit for copyright, trademark or patent infringement, a primary concern for most defendants is whether insurance will cover the potentially staggering legal expenses and liability payment. Because a company's intellectual property is often a key business asset, threats against trademarks and copyrights cannot be left to chance. These valuable properties must be protected by the best coverage available.

Coverage for Patent Infringement. All policies are not created equal when it comes to covering intellectual property disputes. First, it is unlikely that *any* insurance, except a special patent policy, will extend to claims for patent infringement or for inducement to infringe a patent. Courts have consistently held that patent infringement is not a risk covered under comprehensive general liability ("CGL") policies. And, although media liability policies are specifically intended to cover intellectual property exposures, they typically exclude coverage for patent infringement claims. Media policies cover content – not the protected design that helped create it.

When a company has significant primary exposure arising from the design, development and licensing of inventions, careful consideration should be given to procuring patent insurance. That policy should provide coverage not only for the defense of an infringement action, but it should also reimburse an insured's cost of initiating an action as a plaintiff to enforce a patent. Note: patent policies are offered by only a small number of carriers. They tend to be very expensive and typically carry high self-insured retentions and co-insurance provisions.

The CGL Policy. Where an intellectual property policy is not part of the risk management arsenal, a defendant will often turn to the CGL contract, considered the "catch all" policy for business risk. ISO's form of CGL policy (2003 edition) does offer limited coverage for copyright, trademark or trade secret claims, as well as for "personal and advertising injury liability."[1] But CGL coverage is available only if the claim arises from the insured's advertising of its own products and services *and* the insured is not engaged in the media business. The relevant exclusion in the 2003 CGL policy is as follows:

> **Insureds in Media and Internet Type Businesses**
> "personal and advertising injury" committed by an insured whose business is:
> (1) Advertising, broadcasting, publishing or telecasting;
> (2) Designing or determining content of Web sites for others; or
> (3) An Internet search, access, content or service provider.
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> * * *
>
> For the purposes of this exclusion, the placing of frames, borders or links, telecasting or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.
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> * * *
>
> *ISO Properties, Inc., 2003*

This form also specifically excludes "personal and advertising injury" arising from electronic chatrooms or internet bulletin boards controlled by the insured, as well as unauthorized use of another's name in the insured's e-mail address, domain name or metatag. In other words, the CGL intellectual property cover extends only to the advertising activities of a non-media business through relatively traditional means. It's important to remember that the CGL policy may vary significantly in respect to coverage, depending on the ISO form number and any endorsements. Therefore, it is incumbent upon the risk manager to thoroughly review the coverage on an annual basis with a knowledgeable broker and to ask specific questions as to how the policy might respond to intellectual property exposures.

The Media Liability Policy. Because media companies are typically excepted from coverage under a CGL policy, specialty coverage is a necessity for those in the publishing, broadcasting and advertising businesses. Media liability policies have become an essential risk management tool for any company that creates, gathers and/or disseminates original or third party content – whether news, entertainment or marketing. And that is truer now than ever, as the sharp rise in America's appetite for content has been accompanied in recent years by a proliferation of infringement claims, especially copyright infringement.
Policy Terms. While the best media

liability forms offer coverage on an "open peril" or "all risk" basis, they will also enumerate specific perils such as copyright infringement, plagiarism, piracy and misappropriation of ideas, as well as infringement / dilution of trademark, trade dress or service mark. The clear goal is to leave as little room as possible for future disagreement over what the policy covers.

"Claim" and "loss" are critically important terms in the intellectual property arena, and the better policy forms will define them broadly. Specifically, the definition of "claim" should encompass any demand for equitable relief, such as a request for a temporary restraining order or other injunctive relief. If the definition of "claim" speaks only in monetary terms, then coverage may not be triggered for defense of injunctions, a fairly material gap. Note that insurance does not usually cover the costs of *complying* with an injunction (i.e., the costs of a recall, redistribution or correction); however, well-drafted policies will provide coverage for defense costs, which are often the lion's share of the exposure. Also, statutory damages, multiplied damages, and attorneys' fees may be awarded to a prevailing plaintiff in a copyright or trademark suit. It is important that the policy's definition of "loss" clearly address the insurer's intent in respect to all of the damage components that are ordinarily part of a plaintiff's recovery.

Exclusions. There are certain standard exclusions that limit coverage under media policies. As already mentioned, most media policies specifically exclude patent infringement. Also standard are exclusions for infringement claims brought by music licensing associations. The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and others may litigate on behalf of the musical artists, writers or composers they represent. These entities collect licensing fees for public performances and distribute royalties. The procurement of such licenses (by radio broadcasters, in particular) is considered a usual and ordinary cost of doing business, and is not therefore a liability risk that can be transferred to an insurer.

It should also be noted that media liability *advertiser* policies; i.e., coverage for companies that advertise their own products or services, specifically exclude coverage for trademark infringement. There is a perceived moral hazard in the provision of trademark coverage for an enterprise which might profit by creating marketplace confusion as to the origin of its goods or services. (For example: a brand leader like McDonald's would have no incentive to create confusion in the fast food market, but a new hamburger establishment named McDoogle's could try to capitalize on the well established McDonald's trademark.) In some instances, trademark coverage can be added back by endorsement for additional premium.

Claims Advantages. Beyond coverage terms, a specialty media insurance carrier also provides a definite advantage when intellectual property claims arise. Media insurers are far more likely than others to employ experienced counsel whose background and insight are often invaluable when complex litigation is at hand. Knowledgeable claims attorneys will have an important role to fill, both in the selection of an outside media defense counsel and in other decisions that will help manage legal expense (which can easily climb into the mid-six figure range).

Loss Controls. Because even the best specialty forms contain exceptions to coverage, it is crucial that media companies practice sound loss prevention techniques to better insulate themselves from expensive and time-consuming lawsuits. Companies must be vigilant in procuring and complying with licenses for non-original content, such as for music or film clips. Moreover, the creation of original content should be documented with a paper trail from inception. Companies also need to establish clear policies for dealing with unsolicited idea submissions from third parties, as these have proven fertile ground for subsequent misappropriation claims.

The next issue of ***Intellectual Property 101*** discusses the limited applicability of the defenses of "fair use" and "public domain."

[1] Coverage Part B of the 2003 CGL policy provides coverage for false arrest, detention or imprisonment; malicious prosecution, trespass, defamation, invasion of privacy, the use of another's advertising idea in your "advertisement" or infringing upon another's copyright, trade dress or slogan in your "advertisement."

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