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Special Policies Provide IP Insurance

Regular general liability coverage usually doesn't cover trademark cases

By CHRIS DRURY

Intellectual property assets comprise some of the most valuable assets a business can own. IP assets include patents, copyrights, trademarks, and trade secrets. Because of their high value and importance, businesses need to ensure that their IP assets are adequately protected. They must be able to defend against infringement suits and prevent others from infringing on their own IP rights. Insurance is an often overlooked tool that can assist businesses with managing risks and addressing their IP concerns.

Prior to 2001, businesses were sometimes able to obtain insurance coverage for certain types of IP claims under the "Advertising Injury" provisions of their commercial general liability (CGL) policies. The types of IP claims that were usually covered included claims for copyright, trademark, and trade dress infringement, as well as certain types of trade secret and unfair competition claims. Patent infringement claims were almost never covered under the CGL form. In 1998, the Insurance Services Office Inc. (ISO), the organization that promulgates standard insurance forms used by the insurance industry, started to reduce coverage for intellectual property claims under the CGL policy. It began by revising the 1998 form to reduce the scope of offenses that constituted "Advertising Injuries."

Then, in 2001, the ISO added specific language to the CGL form to exclude coverage for most types of IP claims. As a result, nearly all CGL policies written after the 2001 changes took place do not provide coverage for most types of IP claims. Some insurance companies responded to the reduction in coverage by offering specific insurance products that provide expanded coverage for IP claims.

This article discusses the types of IP claims that were sometimes covered under the standard CGL form, the changes made by the Insurance Services Office to reduce coverage for IP claims, and some of the insurance products now available to provide expanded coverage for IP related claims.

GCL Coverage

The standard CGL policy provides liability coverage in two sections. Coverage A provides coverage for "Bodily Injury and Property Damage Liability," while Coverage B provides coverage for "Personal and Advertising Injury Liability."

In 1986, the ISO revised the CGL policy form. Specifically, the 1986 CGL form listed a number of offenses that constituted an "Advertising Injury," which included "misappropriation of advertising ideas or style of doing business," and "infringement of copyright, title or slogan." The 1986 CGL form also required an insured to show that an offense was caused "in the course of advertising [the insured's] goods, products or services," in order to obtain coverage, but did not specifically define the word "advertising."

By its terms, the only category of IP claims covered by the 1986 CGL form were claims for copyright infringement that occurred during the advertising of an insured's goods, products or services. The 1986 form did not expressly provide coverage for trademark and trade dress infringement claims, yet insureds were sometimes able to obtain coverage by arguing that trademarks and trade dress were a type of advertising that fell within the coverage provision for "misappropriation of advertising ideas or styles of doing business."


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Insureds also relied on that language to obtain coverage for certain types of trade secret and unfair competition claims. In addition, some courts construed the term "infringement of copyright, title or slogan" broadly in order to find coverage for trademark and trade dress infringement claims. Although courts sometimes found coverage for copyright, trademark, and trade dress infringement claims, they routinely refused to find coverage for patent infringement claims under the 1986 CGL form.

Reduced Coverage

In response to the growing number of court decisions finding coverage for IP claims, the Insurance Services Office revised the CGL form in 1998 to reduce the coverage for certain types of IP claims. The new form specifically defined the term "advertising" as "a notice that is broadcast or published in the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters."

The 1998 form also eliminated coverage

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for claims for "misappropriation of advertising ideas or style of doing business," and "infringement of copyright, title or slogan." To replace this language, the 1998 form added coverage for claims arising out of "the use of another's advertising idea in your advertisement," and "infringement upon another's copyright, trade dress or slogan in your advertisement."

Under the revised language of the 1998 form, an insured needed to establish a connection between the alleged misconduct and the "advertising" activity in order to trigger coverage for advertising injuries. In addition, the fact that the 1998 form specifically extended coverage to certain claims of trade dress infringement, but was silent regarding claims of trademark infringement, supported arguments that the revised form was not intended to cover trademark infringement claims.

The Insurance Services Office revised the CGL form again in 2001 to further reduce coverage for IP claims. The 2001 form specifically excluded from coverage any advertising injury "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights." The changes to the 2001 form clearly show that insurers intended to exclude coverage for IP claims from the standard CGL policy.

New Products

As a result of the 2001 changes to the CGL form, insurance companies began offering specific insurance products to provide coverage for certain IP claims. Most of the products are focused on providing coverage for patent infringement claims, although some insurance companies allow insureds to purchase specific endorsements that provide coverage for copyright, trademark, and trade dress infringement claims. The three basis types of IP policies include:

- **Defense and indemnity insurance**. These policies provide defense coverage against infringement claims and pay damages in the event of liability. Defense costs are included within the policy limits and the policies are written on a claims-made basis. The policies usually have a high deductible and may require a minimum coinsurance participation by the insured. The annual premiums are also significant, with most premiums starting at $20,000.
- **Defense cost reimbursement insurance**. These policies only provide coverage for defense costs and do not pay for damages in the event of liability. The premiums and deductibles are less than those for defense and indemnity insurance and the policy limits are usually smaller as well. The policies are claims made and typically have a "recovery of costs" provision that requires the insured to reimburse the insurance company a pro rata share of any award of attorneys' fees and costs the insured obtains, up to the amount contributed by the insurance company.
- **Infringement abatement insurance.** Known as "enforcement" insurance, these policies are designed to reimburse the insured for legal expenses incurred in pursing an infringement action against an alleged infringer. The policies require the insured to reimburse the insurance company a pro rata share of any recovery obtained until the insurance company recovers 100 percent of the monies advanced.

Conclusion

Because of the changes to the standard CGL form, many businesses may not be covered against IP claims under their existing CGL policy. If the policy was issued after 1998, there is a significant chance that it does not provide coverage for most types of IP claims.

Most businesses would be wise to conduct an internal audit of their insurance policies to ensure proper coverage. If adequate coverage is in doubt, businesses should consult with an insurance agent and assess whether it would be prudent to purchase a specified insurance product to provide them with adequate coverage against IP claims.

In addition, most CGL policies provide coverage for an occurrence that takes place during the policy period. Therefore, if an IP related claim is asserted against a business, it is important to check the language of any old CGL policies to determine if they might provide a basis for coverage. ■