Media, Privacy and Defamation
Law Committee

THE EVOLUTION OF COVERAGE B

By Jim Holmes

As part of the annual Media & The Law Conference in Kansas City, the TIPS Media, Privacy & Defamation Law Committee will be presenting a panel discussing the history of Personal and Advertising Injury coverage under Commercial General Liability (“CGL”) policies. Tentatively titled “Now You See It, Now You Don’t,” the discussion will note how changes to CGL policies may have resulted in elimination or more restrictive coverage for internet and advertising injury activities.

As a prelude to that program, perhaps a quick review of personal and advertising injury coverage under CGL policies is in order.

The Broad Form Endorsement. In 1973, the Insurance Service Office (“ISO”) promulgated the Broad Form Comprehensive General Liability Endorsement. Expanding the traditional general liability coverages of “bodily injury” and “property damages,” the Broad Form Endorsement allowed for optional coverage for “all sums which the insured becomes legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies.”

“Advertising injury” was defined as “Injury arising out of an offense committed during the policy

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Welcome to the Spring 2014 Newsletter of the Media, Privacy, and Defamation Committee. This issue is devoted to topics that our top-notch panelists will address during a program our committee is sponsoring titled “Now You See It, Now You Don’t.” The program—which focuses on the dwindling coverage provided by Commercial General Liability policies even as non-media companies face increased exposure from advertising, social media, and other corporate communications—will take place on April 24, the afternoon before the 27th Annual Media & The Law Seminar, in Kansas City, Missouri. We hope to see you there, and many thanks to our authors, who contributed the great content you’ll find on the following pages.

Another date to remember: August 8, 2014, when our committee will sponsor a CLE program at the ABA Annual Meeting in Boston titled “Big Data, Privacy, and Publicity: The Class Action Landscape.”

Meanwhile, the committee is redoubling its efforts to grow membership, by reaching out to law students, underrepresented groups (such as members of the plaintiffs’ bar), and to our current members in hopes they will encourage their non-member colleagues to join, as well. If you find value in your membership, please tell others about the committee. And if there is anything we can do to make your membership more beneficial, please do not hesitate to let us know.

Sincerely,
Leita Walker, Chair
Recent changes to the Commercial General Liability Policy ("CGL") by the Insurance Services Office ("ISO") have widened the coverage gap for publishing and advertising exposures, which may force policyholders with social media, advertising and other content exposures to seek additional coverage through specialty insurance markets.

Last spring, ISO filed a new CGL form (CG 00 01 04 13) and coverage limiting endorsements that significantly narrow coverage for policyholders who rely upon their CGL form for publishing and advertising risks. This article will focus upon those that specifically impact coverage arising from an insured’s utterance or dissemination of content, which could include advertising, social media postings, informational content via website, press conferences or other forms of corporate expression. Policyholders should review all of the changes with coverage counsel and insurance professionals because the enhanced exclusions, in particular, may significantly increase an insured’s uninsured exposures.

These new changes clarify and amplify what the ISO has been signaling for some time - namely that the CGL policy’s Advertising and Personal Injury coverage is not intended to be the “go-to” coverage for the dissemination of media content, even when that content is incidental to a non-media business. Over the years, the ISO has been gradually narrowing coverage under COVERAGE B – PERSONAL AND ADVERTISING INJURY COVERAGE ("Coverage B"). This insuring agreement provides coverage for liability for non-media companies arising from personal and advertising injury, such as damage to a third party’s reputation or feelings. From the beginning, this coverage didn’t apply to media companies (in the words of CGL insurers, “Insureds in Media and Internet Type Businesses”), thus sending those insureds to the specialty media market that specifically provides coverage for perils arising from the gathering, creation, publication and distribution of media content. Coverage B has been significantly eroded with respect to coverage for intellectual property causes of action and claims arising from Internet activities. With the new revisions, the ISO has downsized coverage even further and will push many non-media companies into the specialty media liability market to adequately insure their incidental media exposures.

Whereas prior CGL form revisions focused upon limiting coverage for claims involving intellectual property, such as patent, trademark and copyright infringement, this version turns its attention to invasion of privacy relating to content and electronic data. Key is the following newly minted exclusion: Amendment of Personal and Advertising Injury Definition (CG 24 13 04 13 “Amendment”). The Amendment, while quite simple on its face, significantly limits coverage for policyholders under Coverage B. It states as follows:

With respect to Coverage B Personal And Advertising Injury Liability, Paragraph 14.e of the Definitions section does not apply.

The relevant paragraph deleted by the above Amendment is as follows:

V. DEFINITIONS

* * *

14. “Personal and advertising injury” means injury, including consequential “bodily injury” arising out of one or more of the following offenses:

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1 Michelle Worrall Tilton and Chad Milton are the Principals of Media Risk Consultants, LLC, an independent media liability insurance consulting firm.
Big Data, Privacy, and Publicity: The Class Action Landscape

Presented by the TIPS Media, Privacy and Defamation Law Committee

2014 ABA Annual Meeting
Friday, August 8, 2014
10:30 a.m. – 12:00 p.m.
Omni Parker Hotel
Boston, MA

Join us for this valuable program comprised of panelists who will discuss the growing number of privacy class actions, ranging from “Big Data” suits over security breaches and online behavioral advertising, to the big-dollar settlements under the Telephone Consumer Protection Act, to the right-of-publicity claims brought by athletes against the likes of the National Football League and video-maker EA Sports.

Moderator:
Kelli Sager, Davis Wright Tremaine, Los Angeles, CA

Speakers:
Scott Kamber, KamberLaw LLC, New York, NY
Marc Rotenberg, President and Executive Director, Electronic Privacy Information Center (EPIC), Washington, D.C.
Heidi Salow, Vice President and Senior Privacy Officer, Thomson Reuters, Washington, D.C.
Aaron Van Oort, Faegre Baker Daniels, Minneapolis, MN

Subject to a series of complex exclusions, standard Commercial General Liability ("CGL") policies cover liability for damages because of “personal and advertising injury,” which is defined in the policy to include “injury . . . arising out of . . . [i]nfringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’” The policy defines “advertisement,” in turn, to mean “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 . . . including material placed on the Internet or on similar electronic means of communication . . . .”

One of the exclusions that applies to “personal and advertising injury coverage” is entitled “Unauthorized Use Of Another’s Name Or Product.” This exclusion eliminates coverage for damages because of:

“Personal and advertising injury” arising out of the unauthorized use of another’s name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another’s potential customers.

Although this exclusion has not been the subject of much coverage litigation thus far, two recent decisions - one from the Ninth Circuit Court of Appeals and another from the Eleventh Circuit Court of Appeals - illustrate that there are two competing interpretations of the scope of the “similar tactics” clause in this exclusion. The difference between the two interpretations is subtle, but could lead to dramatically different results depending on which interpretation is followed in a coverage action.

The first interpretation is that “similar tactics” means the use of another’s name or product in online electronic information or search terms similar to e-mail addresses, domain names or metatags, to mislead potential customers. See St. Luke’s Cataract & Laser Institute, P.A. v. Zurich American Insurance Co., 506 Fed. Appx. 970 (11th Cir. 2013) (unpub.). See also AMCO Ins. Co. v. Lauren Spencer, Inc., 500 F. Supp. 2d 721, 735-36 (S.D. Ohio 2007) (“similar” refers only to “email address, domain name or metatag”).

The second interpretation is that “similar tactics” means the use of another’s identifying information, similar to another’s name or product, in online electronic information or search terms similar to e-mail addresses, domain names or metatags, to mislead potential customers. See CollegeSource, Inc. v. Travelers Indemnity Co. of Connecticut, No. 10cv1428 (S.D. Cal. March 30, 2011) (unpub.), aff’d, 507 Fed. Appx. 718 (9th Cir. 2013) (unpub.).

Set forth below are summaries of the St. Luke’s and CollegeSource decisions, which address the meaning of “similar tactics,” as well as other key issues that relate to the interpretation and application of “unauthorized use” exclusions.

Tactics Involving the Use of Another’s Name or Product in Identifying Electronic Information Similar to Email Addresses, Metatags, or Domain Names


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EFFECTIVE STRATEGIES FOR INSURING REALITY TELEVISION SHOWS AGAINST PARTICIPANT CLAIMS

By: Sarah L. Cronin

Not so long ago, when unscripted (“reality”) television was in its infancy, people questioned whether these types of shows would be able to get insurance. Now, many years later, that question has been answered (yes!), but at what cost and what exactly will be covered?

Claims Brought by Participants

The claims brought by participants against producers and broadcasters of reality television shows are varied, ranging from a celebrity athlete who seeks an injunction to stop his ex-fiancée from discussing their past relationship on the reality television show Basketball Wives, to a cast member’s claim that he was wrongfully terminated after expressing concern that producers allegedly manipulated what was found in storage lockers on A&E’s Storage Wars, to a woman who claimed to have been traumatized after she was attacked by an “alien” (played by an actor in costume) on her way home from a party for the Sci-Fi Channel’s Scare Tactics. Typical claims brought by participants include defamation, invasion of privacy, infringement of the right of publicity, as well as bodily injury and negligent or intentional infliction of emotional distress.

The term “participant” includes both the people who voluntarily sign up to be a part of the show, as well as the people who became participants unknowingly and without prior consent. One of the biggest lessons in the litigation spawned by reality television is that the risk of claims from involuntary participants is often much greater than the risk from voluntary participants. This is in large part because involuntary participants by definition will not have signed a release prior to participating on the show. As a result, a producer may be in the position of attempting to get a release after an alleged tort has already occurred. As discussed further below, while releases will not prevent a participant from bringing a lawsuit, they can provide the production company or broadcaster with an effective affirmative defense. Production companies can expect to provide very detailed information about their plan for obtaining releases when applying for an insurance policy.

Insurance Policies Implicated

Media liability policies, which essentially provide errors and omissions insurance tailored to fit media companies, are often the first line of defense to claims by participants. These policies can be written either as production specific policies, or to cover the production company for a specified policy period. Media liability policies are typically written to protect entities against third-party liability resulting from claims for:

- Defamation;
- Invasion of privacy or infringement of right of publicity;
- Breach of implied-in-fact contract arising from idea submission claims;
- Copyright infringement;

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1 Sarah L. Cronin is an associate with Kelley Drye & Warren LLP’s Los Angeles office, who specializes in insurance coverage disputes for clients in a wide range of practice areas, including media and entertainment, professional liability, and construction, among others. Ms. Cronin would like to thank Michael J. O’Connor, co-chair of Kelley Drye & Warren LLP’s Insurance Recovery practice group, for his help in editing this article.


5 William Archer, Reality TV Shows Continue to Be Sued by Unwilling Participants and Wanna-be Producers, L.A. LAWYER, May 2012 (emphasizing that the most common claims brought against producers and broadcasters of reality television shows are creatures of state law).
• Trademark infringement; and
• Plagiarism, piracy, unauthorized use of names, and similar type claims.\(^6\)

Media liability policies tend to be less standardized than commercial general liability (“CGL”) policies, which typically use a standardized form. Consequently, a policyholder should never assume that a particular claim is covered by a media liability policy, rather, the policy should be carefully scrutinized during the underwriting process to determine what coverage is actually being purchased.

The other main source of coverage for participant claims is a CGL policy, which can provide coverage for claims that are excluded by a media liability policy, including:

• Bodily injury;
• Property damage; and
• Advertising injury.\(^7\)

A CGL policy can take the place of cast insurance in a reality television show and should be written to cover both bodily injury sustained by a participant, as well as a situation where a location, such as a lavish mansion, has been damaged by the resident participants during the filming of a show.\(^8\)

The interplay between the coverage available under a media liability policy, versus a CGL policy, was demonstrated in *Continental Cas. Co. v. Travelers Cas. Co.*\(^9\) The case concerned coverage for a complaint seeking damages for the shooting death of a participant on *The Jenny Jones Show*, after he revealed his secret same-sex crush on a co-participant.\(^10\) The CGL carrier had successfully defended Warner Bros. against claims for negligence, gross negligence, and willful and wanton conduct.\(^11\) The CGL carrier then sought equitable subrogation, reimbursement, and equitable contribution from the media liability carrier, arguing that the underlying complaint raised potential claims for invasion of privacy, intentional infliction of emotional distress and outrageous conduct.\(^12\) The California Court of Appeal disagreed, holding that the complaint lacked sufficient allegations to establish any of these potential claims existed or could have been stated in an amended pleadings.\(^13\)

In addition to media liability and CGL policies, other insurance policies may provide coverage for a participant claim. When faced with any claim, every policy in which a production company or broadcaster is an insured (and do not forget policies where the company is an “Additional Insured”) should be evaluated to determine whether there is a potential for coverage.

### Some Policy Language to Watch Out For During Underwriting

Policyholders should read through the definitions section of the policy carefully during the underwriting process to determine how the definitions affect coverage. For example, in some media liability policies the term “Business of the Insured” is a defined term.\(^14\) Where this is the case, the breadth of the definition can be used to either limit or expand coverage.\(^15\)

Also ask, is this a burning limits policy? A “burning limits” policy is one in which the defense costs covered by the policy reduce the policy limits that are available, e.g., if the policyholder incurs $200,000 in attorneys’ fees defending itself against a claim under a policy with a $1 million aggregate policy limit, there would only be $800,000 left to indemnify the policyholder for the claim. If the policy is written as a burning limits policy, consider adding an endorsement that changes the policy to one in which defense costs do not erode policy limits.

If an injunction is filed to stop your television show, are the attorneys’ fees you incur fighting that injunction covered? It is not uncommon for a person who alleges that their right of publicity has been infringed to bring

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7. *Appleman* § 7.06 (“The CGL policy is designed to provide the broadest coverage available to entertainment and sports businesses for liabilities involving bodily injury and property damage. Indeed, a number of the claims that entertainment and sports insureds commonly face may fall within a CGL policy’s coverage for bodily injury and property damage.”)


10. Id. at *3

11. Id.

12. Id. at *10-11.

13. Id. at *11.

14. *Appleman* § 8.03.

15. Id.
a lawsuit seeking an injunction to stop the show from airing. The costs associated with having to fight off an injunction can be significant and the policyholder should consider whether it wants those costs covered by insurance.

Finally, media liability policies often have very specific language with respect to when notice of a claim (or potential claim) must be given. Failure to abide by such provisions can defeat coverage and should be reviewed carefully and strictly complied with.

While there are many more issues that a policyholder will want to consider during the underwriting process, a broker that specializes in insuring reality television shows will be able to raise these issues for the policyholder’s consideration.

Exclusions to Coverage

The policyholder will also want to review the exclusions carefully and seek endorsements during the underwriting process to modify exclusions where necessary. For example, if you are filming a season of The Real World or Jersey Shore, you will want to make sure that there is not a “Liquor Liability” exclusion that could preclude coverage for any claim arising from an incident involving alcohol. Other exclusions found in media liability polices include exclusions for:

- “Bodily injury” or “property damage;”
- “False, misleading, deceptive or fraudulent statement in Advertising or Unfair Competition;”
- “Expected or Intended” injury;
- “Contractual liability;”
- “Employers liability;” and
- “Green light” exclusion.

Common exclusions found in CGL policies include exclusions for:

- “Aircraft, auto or watercraft;”
- “Expected or intended” injury;
- “Contractual liability;”
- “Employers liability;”
- “Green light” exclusion.

This is by no means an exhaustive list of the exclusions that may affect coverage for a claim brought by a participant in a reality television show. Each exclusion should be reviewed carefully during the underwriting process to determine how it could affect coverage.

Participant Releases

When applying for insurance to cover the production and airing of a reality television show, the subject of releases will certainly be an issue. The insurer may ask: Are the participants informed of the show’s concept/format prior to signing the release? Are they filmed being informed of the concept/format of the show? Will any participant be filmed prior to signing the release? If a participant refuses to sign the release, will you still use footage of them? Will you blur their face? Will temporary participants (e.g., people in the background) sign releases? How are releases of persons under the influence dealt with? These questions highlight the case law that has developed around the enforceability of releases.

The business of insuring reality television has matured over the past decade. If an insurer knows the risk of a particular show, it can price it accordingly. In scripted television, the underwriters have the script to refer to. However, this is not the case with unscripted “reality” television. It is a formula for a lot that can go wrong.

As noted by Brian Kingman, Managing Director of Arthur J. Gallagher & Co.:

The business of insuring reality television has matured over the past decade. If an insurer knows the risk of a particular show, it can price it accordingly. In scripted television, the underwriters have the script to refer to. However, this is not the case with unscripted “reality” television. It is a formula for a lot that can go wrong. Underwriters will often work
with producers on specific language to include in the participant release. This is especially true for a show like *Fear Factor*, where participants are expected to eat bugs and scale mountains.\textsuperscript{22}

**The Basics**

In general, a written release extinguishes any obligation covered by the release’s terms, provided it has not been obtained by fraud, deception, misrepresentation, duress or undue influence.\textsuperscript{23} Generally, “the interpretation of a release or settlement agreement is governed by the same principles applicable to any other contractual agreement.”\textsuperscript{24} If the written release is not supported by consideration, it must be plain and explicit, and show the releasing party’s intent to extinguish the obligation.\textsuperscript{25} The drafter of the release should avoid ambiguities, since ambiguities in the releases will be construed against the drafter.\textsuperscript{26}

Under both California and New York law, courts allow releases for unknown claims, upon a showing of a conscious understanding that if injuries were suffered which had not yet manifested themselves, they too would be discharged by the release.\textsuperscript{27} A release can protect against liability for negligence, but only if the release is “clear, explicit and comprehensible.”\textsuperscript{28}

But releases can only get you so far. Under California law, releases for intentional torts, gross negligence, or violations of statutory law, are not enforceable.\textsuperscript{29} Case law in New York also similarly states that while “exculpatory agreements or covenants not to sue are recognized by the courts, under announced public policy they are ineffective to insulate the releasee from liability for negligence, willful or grossly negligent acts. So strong is this policy that it is applicable regardless of whether exemption of such conduct was within the parties’ contemplation at the time the agreement was executed.”\textsuperscript{30}

**Voluntary Participants**

In the best case scenario, the participant is provided with the release prior to their participation and has a clear understanding of what the show is about. In this situation, if something does go wrong, the release can provide a very effective defense to claims later brought by the participant. For example, when a plastic surgeon brought a lawsuit against the producers of the reality television show *Mob Wives*, the release he signed prior to his appearance was held to be a complete bar to his claims for defamation.\textsuperscript{31} The doctor’s claims were based on statements made by a cast member about a “full body lift” procedure performed by the doctor, describing the procedure as a “plastic surgery nightmare” and that she had “flat-lined” and “almost died.”\textsuperscript{32} The court found the release to be unambiguous, not the product of mistake or duress, and that the doctor had taken a certain risk in deciding to participate on the show.\textsuperscript{33}

**Hidden Camera Shows**

Sometimes the entertainment value of a show is derived from the participant not knowing that they are part of a show. This can be a risky proposition. In the early 2000s, there were a number of lawsuits brought by participants on “hidden camera” shows. In 2001, *Candid Camera* was sued after instructing a person to climb through a fake x-ray scanner at an airport.\textsuperscript{34} The participant claimed that he injured himself in the process and sued.\textsuperscript{35} A Los Angeles jury awarded the participant $2,600 in compensatory damages and $300,000 in punitive damages against the production company and the host of the show.\textsuperscript{36} In April 2002, a couple sued **MTV**
for a hidden-camera prank in which a fake dead body was planted in the couple’s Las Vegas hotel bathroom. In February 2003, the Sci-Fi channel’s Scare Tactics was sued for severe emotional damage after it sent an “alien” (played by an actor in costume) to accost a woman on her way home from a party in Los Angeles. These lawsuits demonstrate that hidden camera shows are some of the riskiest shows to produce, in large part because of the lack of a release.

**The Borat Lawsuits**

The creative format of a reality television show may not always allow for complete candor. This is often the situation when a participant signs a release thinking that they will be participating in one type of a show, but then ends up participating in a different type of show. An example of this format is the movie Borat: Cultural Learnings of American for Make Benefit Glorious Nation of Kazakhstan, from which a number of lawsuits were filed challenging the releases.

In *John Doe v. One America Prods., Inc.*, filed in Los Angeles Superior Court in November 2006, fraternity brothers brought a lawsuit after they were portrayed in the movie as being racist and sexist. They had signed releases while sober and then became intoxicated. The judge dismissed the action on an anti-SLAPP motion, since the plaintiffs’ claims for fraud, rescission of contract, common-law false light, statutory false light, misappropriation of likeness, and negligent infliction of emotional distress, were premised on the exhibition of the film, which was an exercise of the defendants’ free speech. The court did not mention the releases.

In *Johnston v. One America Prods., Inc.*, the producers never got the participant’s express permission to appear in the movie *Borat* – in other words, they never got a release. The court denied the producers’ motion to dismiss with respect to the claims for misappropriation of likeness for commercial gain, false light, and gross negligence.

In *Psenicska v. Twentieth Century Fox Film Corp.*, the plaintiffs all signed releases, however, there were allegations that one plaintiff was not able to read the release because he did not have his glasses, and one plaintiff claimed to have been rushed to sign the release. The terms of the release referred to it as a “documentary style . . . motion picture” for a “young adult audience,” waiving claims, and including a merger clause. The consolidated cases were dismissed, with the judge finding that there was no ambiguity in the phrase “documentary-style film,” there was no fraud in the inducement. The Second Circuit affirmed.

**A Cautionary Tale**

As discussed above, while Warner Bros. was ultimately successful in defeating a wrongful death claim related to the talk show *The Jenny Jones Show*, the initial $29 million jury verdict underscores the amount at stake when producing and airing television shows that do not use professional actors. The victim in the underlying case had signed a release to be on the show, which stated in pertinent part that, “I hereby release and forever discharge the producer … from all claims, demands and actions of every kind and nature … arising out of or in any way connected with this agreement.” Warner Bros. argued that parties can release ordinary negligence. A motion for summary judgment was denied before trial and a jury verdict of $29 million was awarded against Warner Bros. On appeal, however, the verdict was overturned on a 2-1 vote, finding that

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38 Id.
40 California allows a defendant to file a special motion to strike under California Civil Code of Procedure Section 425.16 (called an “anti-SLAPP” motion), which can provide an early dismissal of a lawsuit where the underlying conduct is in furtherance of the defendant’s free speech rights in connection with a public issue, and the plaintiff cannot show a probability of prevailing on the merits. *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 142-43 (2011).
42 Id. at *25.
43 2008 WL 4185752 at *1 (S.D.N.Y., Sept. 3, 2008, 07 CIV. 10972(LAP)).
44 Id. at *3.
45 Id. at *7 (emphasis added).
46 409 Fed. Appx. 368 (2d Cir. 2009).
49 Id.
there was no duty to protect against criminal conduct that was “not foreseeable” and unanticipated. The dissent disagreed, finding that defendants who produce “ambush” shows that can conceivably create a volatile situation should bear the risk of an explosive result “the show used lies, deceit, sensationalism… in order to orchestrate a grand surprise for the benefit of its audience and ratings…. Therefore, resolution by the jury was appropriate.”

Conclusion

Most insurers will require a reality television show to have a plan in place for obtaining releases from participants. What becomes trickier, however, is when the storyline of the show impacts when and how the releases are presented to the participants. To the extent a show plans on filming participants prior to having them sign a release, the show’s ability to obtain insurance could be severely compromised. While there are ways to limit the risk of participant claims, such as not pushing the envelope too far, it is important to understand what factors may impact whether a court will enforce the release in order for the production company and broadcaster to calculate the risk of certain creative decisions. In summary, the bottom line when it comes to releases in reality television shows is to have one (preferably signed before filming begins).

51 Id. at 498.
52 Id. at 515 (Murphy, P.J., dissenting).
period occurring in the course of the named insured’s advertising activities, if such injury arises out of libel, slander, defamation, violation of the right of privacy, piracy, unfair competition or infringement of copyright, title or slogan.”

Unlike the bodily injury/property damages form for which coverage was tied to the defined term “occurrence,” the coverage grant under the Endorsement was “offense” driven. However, several key terms were not defined in the Endorsement, including “advertising activities” and “unfair competition.”

The Endorsement excluded coverage for claims arising out of “infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof or in connection with goods, products or services sold, offered for sale, or advertised.”

**1986 Coverage Form.** In 1986, ISO revised the CGL policy (Form CG 00 01 11 85). The coverage grant for personal and advertising injury was moved from an endorsement into the policy form. Traditional bodily injury and property damage coverage remained, but was now listed as Coverage Part A. Personal and advertising injury became Part B.

The 1986 form modified the definition of “advertising injury” to enumerate those offenses for which coverage would be provided:

- 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;
- Oral or written publication of material that violates a person’s right of privacy;
- Misappropriation of advertising ideas or style of doing business; or
- Infringement of copyright, title or slogan.

The 1986 form defined “personal injury” as injury, other than “bodily injury,” arising out of one or more of the following offenses:

- False arrest, detention or imprisonment;
- Malicious prosecution;
- Wrongful entry into, or eviction of a person from, a room, dwelling or premises that the person occupies;
- 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; or
- Oral or written publication of material that violates a person’s right of privacy.

Not included in the list of enumerated offenses were “defamation,” “piracy” and “unfair competition.” Also eliminated was the exclusion for “infringement of trademark, service mark, or trade name.” However, the 1986 form still did not define “advertising activities.”

The 1986 form excluded coverage for oral or written publication of material if done by or at the direction of the insured with knowledge of its falsity; prior publication; breach of contract; the failure of goods, products or services to conform with advertised quality or performance; and any coverage for an insured whose business is advertising, broadcasting, publishing or telecasting.

**1998 Coverage Form.** The next major revision to personal and advertising injury coverage under a CGL policy took place in 1998 (CG 00 01 07 98). The 1998 form combined the definitions of personal and advertising injury to include:

- False arrest, detention or imprisonment;
- Malicious prosecution;
- The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- 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;
- Oral or written publication of material that violates a person’s right 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.”

The definition also allowed for the potential recovery for consequential bodily injury arising out of one of the enumerated offenses.
The 1998 form 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 of the exclusions from the 1986 form remained. Of note, the “business of the insured” exclusion was modified to except the enumerated claims of false arrest, malicious prosecution and wrongful eviction/entry (offenses a., b., and c., from the definition of “personal and advertising injury”).

**2001 Coverage Form.** The ISO 2001 form (CG 00 01 10 01) modified the Part B coverage in two major respects. The form now excluded coverage for “Infringement of Copyright, Patent, Trademark or Trade Secret” of “other intellectual property rights” but excepted from the exclusion “infringement, in your ‘advertisement,’ of copyright, trade dress or slogan.”

The definition of “advertisement” was modified to include “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. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.”

**2012 Coverage Form.** The most recent revision to personal and advertising injury coverage took place with ISO Form CG 00 01 04 13. While the definitions of “advertisement” and “personal and advertising injury” remain the same, the 2012 form now incorporates exclusions for (1) electronic chatrooms and bulletin boards and (2) TCPA/FACTA/CAN-SPAM/FRCA and other statutory claims relating to the “printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distributing of material or information” – both of which had been added to policies by endorsement.

**Intellectual Property** – The Broad Form Endorsement included a coverage grant for infringement of copyright, title or slogan but specifically excluded claims for infringement of trademark, service mark or trade name. In time, the coverage grant for copyright and slogan, replaced “title” with “trade dress” and added a test requiring that any alleged infringement occur in “your advertisement.” Further, the coverage grant for “piracy” (assumed to be a synonym for either copyright or plagiarism and not a crime on the high seas) was eliminated. The trademark exclusion was modified to exclude coverage for all intellectual property claims, except the enumerated offense of copyright, trade dress or slogan infringement in your advertising.

**Business Torts** – The original coverage grants for the undefined “unfair competition” was eliminated. Added to coverage was the grant for use of another’s advertising idea in your advertisement.

**Defamatory Torts** – Although the original coverage grant for “defamation” was removed, the coverage forms still afford coverage for the defamatory torts of libel and slander. Although the policy form still affords coverage for violation of right of privacy, recent ISO endorsements appear to restrict or eliminate the privacy coverage.

**Definitions** – The ISO forms now define “advertisement.” The first definition required “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.” That definition was later modified to include notices on the Internet as well as advertising portions of policyholder’s web-sites.

**The Lesson:**

While many still refer to the CGL policy as the “go to” policy for most businesses, it is important to realize that what had once been a very broad grant of coverage for personal and advertising injury claims under that policy is now focused. In fact, if the insured is in the business of advertising, broadcasting, publishing or telecasting, the coverage grant is very limited. Instead, most businesses which could face claims for infringement of intellectual property should consider securing coverage under media or other specialty policy forms.
ISO BROADENS PERSONAL...

Continued from page 4

* * *

e. Oral or written publication, in any manner, of material that violates a person’s right of privacy;

* * *

The Amendment eliminates coverage for invasion of privacy, which is a publishing and advertising peril. There are also a number of state and federal laws regulating the collection, use, storage and transmittal of personally identifiable information (“PII”). A cause of action for invasion of privacy may also accrue in this context, and it appears to be ISO’s intent to exclude coverage for claims arising from PII. Generally, invasion of privacy means the following four specific torts with respect to an oral or written publication of content:

1. Public disclosure of embarrassing private facts; where, for instance, a plastic surgeon’s advertisement showing “before and after” photographs of a patient discloses private facts, i.e. a new nose, without her permission;

2. Publicity placing an individual in a false light; where, for example, a politician says something false, but not defamatory, about his or her opponent;

3. Appropriation of an individual’s likeness for commercial advantage; such as where a retailer’s advertisement uses a customer’s photograph without consent to promote products or services;

4. Intrusion upon seclusion is an intentional physical, electronic or mechanical invasion of a person’s solitude or seclusion that is highly offensive to a reasonable person; such as where a tech school drone videotapes a neighborhood from the air – some of which includes footage of people sunbathing in their backyard – and posts the footage to a robotics class website in promotion of school activities.

There are new changes to Coverage B that expand exclusions for companies that gather and/or disseminate certain types of content, notably commercial and personal information.

Exclusion p: Recording And Distribution Of Material Or Information In Violation Of Law, which was previously entitled, “Distribution Of Material In Violation Of Statues,” has been broadened to exclude coverage for “Personal and advertising injury” that violates or is alleged to have violated the following laws:

2. Exclusions

This insurance does not apply to:

* * *

p. Recording And Distribution Of Material Or Information In Violation Of Law

“Personal and advertising injury” arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FRCA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

* * *

Item(3) is a new exclusion, and Item(4) is an expansion of the previous exclusion by including “addresses,” “prohibits or limits” and “printing, dissemination, disposal, collecting, recording, or recording, of material or information.” The previous version of this exclusion applied to the “sending, transmitting, communicating or distribution” of material or information. This exclusion also appears in its entirety in COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY.

Additionally, Exclusions, 2. b. and c. of Coverage B have been broadened to add “in any manner” as follows:

2. See COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY wherein A.2. Exclusions p. Electronic Data provides that harm from breaches of data bases is not “property damage” and therefore not subject to coverage.
**b. Material Published With Knowledge Of Falsity**

“Personal and advertising injury” arising out of oral or written publication, *in any manner* (emphasis added) of material, “if done by or at the direction of the insured with knowledge of its falsity.

c. **Material Published Prior to Policy Period**

“Personal and advertising injury” arising out or oral or written publication, *in any manner* (emphasis added), of material whose first publication took place before the beginning of the policy period.

The above changes clarify that the “oral or written publication” of content or matter may also be electronic and thereby barred from coverage. While this change is consistent with the definition of “Personal and advertising injury” as set forth in SECTION V-DEFINITIONS, 14. d., e. wherein “in any manner” follows “oral or written publication,” the overall impact of this change has been to broaden the two exclusions.

The newly broadened exclusions and the new Amendment excluding coverage for privacy causes of action indicate that CGL insurers are particularly concerned about covering data privacy and network security actions arising from the misuse of personal identifiable information. In ISO’s attempt to exclude these perils, coverage for “garden variety” privacy actions relating to reputational harm and hurt feelings consistent with personal and advertising injury actions has been thrown out with the proverbial bath water. The full reach of the new Amendment will have to await judicial review before we fully understand its coverage implication. In the interim, coverage professionals and policyholders are left to wonder about its breadth and how it will be applied by insurers.

The Amendment may cause coverage headaches for insurers. A number of covered torts under the CGL - especially those involving reputation or emotional distress - overlap with and are often intertwined with invasion of privacy. Defamation, in particular, is often pled in combination with invasion of privacy, which will create coverage dilemmas for insurers that utilize this endorsement. Whenever an insurer does not provide full coverage for causes of action raised against the insured, a conflict of interest exists between the economic and litigation interests of the parties to the insurance contract. In some states, such as California, the insurer is obligated to retain coverage or monitoring counsel for the insured at its own expense or allow the insured to retain counsel and control the defense. While every claim must be evaluated on a case-by-case basis, it is foreseeable that many CGL insurers will choose to waive the reservation – and avoid paying for two sets of counsel.

Earlier restrictions on coverage for content and its dissemination by insureds remain in the new form, continuing ISO’s push to the specialty markets, including the following:

- Claims for infringement of intellectual property (patent, copyright, trademark and trade secrets) are excluded – except for copyright (and trade dress or slogan) infringements which appear in the insured’s advertising only.

- Website content that is not “about” the insured’s products or services is not considered “advertising” and not subject to coverage.

- There is no coverage for chat rooms or electronic bulletin boards the insured hosts, owns, or over which the insured exercises control. The nomenclature, “chat rooms and electronic bulletin boards” is clearly antiquated, but would likely include social media commentary and web postings. A key component of the exclusionary language is the requirement that the insured host, own or exercise control. Facebook, Twitter and other social networking sites are hosted and owned by third parties. That said, an insured with social media accounts has some control over access and the type of information that is shared with third parties, which could raise a coverage conundrum with respect to postings on the insured’s social media accounts. This exclusion would probably not apply to offending postings made by the insured on a third party’s site.

- There is no coverage for trespass unless committed by or on behalf of a property owner, landlord or lessor, thus virtually eliminating coverage for information gathering activities.
With these new revisions, the ISO has once again signaled that any non-media insured that disseminates media content will not be adequately covered for media perils under Coverage B. Any company that gathers or disseminates content— including the gathering, storage and use of PII— should discuss the form changes with an experienced insurance professional and consider additional coverage through the media liability or other specialty market.

Dr. James Sanderson, developed an oculoplastic surgery practice for St. Luke’s Cataract and Laser Institute (“St. Luke’s”). To promote the practice, Sanderson worked with St. Luke’s to develop a website that provided information about St. Luke’s and Sanderson. St. Luke’s also registered several domain names, including LASERSPECIALIST.com, for the website.

After resigning from St. Luke’s, Sanderson opened his own practice and re-launched the LASERSPECIALIST.com website with content that was virtually identical to the website created for St. Luke’s. Upon realizing that Sanderson was using the LASERSPECIALIST.com domain name and content, St. Luke’s registered its copyright for the site and sued Sanderson for wrongful use of the content, layout, and design of the LASERSPECIALIST.com website.

Sanderson and St. Luke’s settled the case and requested coverage from Sanderson’s CGL insurer, which denied coverage based on an “unauthorized use” exclusion that eliminated coverage for damages because of “‘personal and advertising injury’ arising out of the unauthorized use of another’s name or product in [Sanderson’s] e-mail address, domain name or metatag, or any other similar tactics to mislead another’s potential customers.”

The district court agreed with the insurer, holding that Sanderson’s wrongful use of the content, layout and design of the LASERSPECIALIST.com website “arose from Sanderson’s unauthorized use of the St. Luke’s domain name [or similar tactic] to mislead potential St. Luke’s customers. . . .” See id. at 974-75.

The appellate court reversed, citing three reasons why the “unauthorized use” exclusion did not eliminate coverage for St. Luke’s claim. First, Sanderson’s use of St. Luke’s content from the LASERSPECIALIST.com website “is not the same thing as the use of ‘another’s name or product’” and “Sanderson used the content for his own website, rather than in an ‘e-mail address, domain name or metatag.’” Id. at 976.

Second, Sanderson’s use of copyrighted material on his website was not a “similar tactic,” as the term is used in the “unauthorized use” exclusion, because the exclusion only “discusses the use of another’s ‘name or product,’ not any material belonging to another.” Id. Moreover, the exclusion applies only to conduct such as the use of another’s name or product in an email address, domain name, or metatag,” which is a misleading way to divert customers to a website. See id. The unauthorized use of another’s content on a webpage, without more, “does not implicate these same concerns.” See id. As such, the court declined to read the “similar tactics” phrase broadly as a “catch-all exclusion for the use on the internet in any way of material belonging to another.” Id.

Third, Sanderson’s unauthorized use of content from the LASERSPECIALIST.com website did not “arise out of” Sanderson’s “unauthorized use of St. Luke’s name or product in a . . . domain name . . .” because Sanderson’s use of St. Luke’s website content did not “flow from” or “grow out of” Sanderson’s use of LASERSPECIALIST.com domain name, and a “causal connection between Sanderson’s use of copyrighted content and his use of St. Luke’s domain name was required for the ‘unauthorized use’ exclusion to apply.” See id. at 978.
Tactics Similar to the Use of Another’s Name or Product in Connection with Identifying Electronic Information Similar to Email Addresses, Metatags, or Domain Names


CollegeSource tendered the claim to its CGL insurer, which denied coverage for several reasons, including that an “unauthorized use” exclusion eliminated coverage. See id. at p. 7. Similar to the “unauthorized use” exclusion at issue in St. Luke’s, the exclusion in CollegeSource’s policy eliminated coverage for damages because of “personal and advertising injury’ arising out of the unauthorized use of another’s name or product in [CollegeSource’s] e-mail address, domain name or metatag, or any other similar activities to mislead another’s potential customers.” Id. at p. 5.

CollegeSource’s insurer contended that the use of A-1’s domain name “collegetransfer” in its domain name and substitution of “.com” for “.net” constituted either “the unauthorized use of another’s name or product in your . . . domain name” or “similar activities that mislead another’s potential customers.” See id. at pp. 9-10. According to the insurer, using another’s domain name and changing the extender (“.net” to “.com”), is a similar, if not identical, activity to using another’s “name or product name” in your domain name.” As the insurer argued, an “ordinary person” would construe the claim against CollegeTransfer as alleging the “unauthorized use of another’s name . . . in your . . . domain name.” Id. at p. 10.

In response, CollegeSource argued that the “unauthorized use” exclusion did not apply for two reasons. First, A-1 does not sell a product named “college transfer” or “collegetransfer.com,” and it is not named “college transfer” or “collegetransfer.com,” so the first part of the exclusion did not apply. Second, “collegetransfer” by itself is not a domain name, and the exclusion does not apply to the use of “a similar domain name.” See id. at pp. 9-10.

The court disagreed with the insurer’s first argument, holding that because CollegeSource did not specifically use A-1’s name or product in its domain name, CollegeSource’s use of the words “collegetransfer” in its domain name did not constitute the “unauthorized use of [A-1’s] name or product” in its domain name. See id. at p. 20. However, the court found that the second part of the “unauthorized use” exclusion eliminated coverage because CollegeSource’s use of A-1’s trademarked domain name is an activity that is similar to the “unauthorized use of [A-1’s] name or product,” and “to find otherwise would render the ‘similar activities’ clause of the unauthorized use exclusion meaningless.” See id. at pp. 21.
## 2014 - 2015 TIPS CALENDAR

### May 2014

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