

Hidden Insurance Coverage For An Intellectual Property Claim

By Jeffrey M. Kaden Esq.

It can indeed happen—the receipt of a letter demanding that your business immediately “cease and desist” selling a particular product or using a particular name. The letter may also demand an unspecified amount of monetary damages.

Those who have been sued for copyright or trademark infringement know how expensive and time consuming such a legal distraction to their business can be. The legal fees begin immediately, and monetary settlements can put a significant dent in any business pocketbook. While this is certainly an unfortunate predicament, there are options. One of the best options, which many companies do not even realize they have until far too late, is their business insurance policy.

Commercial General Liability (“CGL”) Insurance

Coverage for copyright and trademark infringement claims can often be found in the most common type of liability insurance, known as Commercial General Liability (“CGL”) insurance. CGL insurance is frequently marketed as part of a comprehensive package of insurance, and, depending on the size of the business, is relatively inexpensive.

A typical CGL insurance policy contains coverage for damages arising out of “Advertising Injury.” “Advertising Injury,” as defined in most CGL policies, includes coverage for claims of “infringement of copyright, title or slogan” occurring within the course of advertising one’s goods. Since most products and names are present in one form of advertising or another, a claim by a third party for copyright and/or trademark infringement may well be covered by your CGL policy.

When confronted with a claim of infringement, having insurance coverage provides alternatives that may not otherwise be available. Most importantly, CGL insurance will provide the financial means to pursue a defense to the infringement accusation—even against a competitor with far greater financial resources. Indeed, having insurance coverage can truly level the playing field. Insurance coverage will provide the financial support that is often necessary to settle the matter quickly and fairly, while avoiding severe distractions and disruptions to conducting one’s business.

Insurance Company Obligations

Insurers have two obligations under CGL poli-

cies, as they do under almost all types of policies. The first is the duty to indemnify: to pay on behalf of the insured all financial sums the insured is obligated to pay as damages. The second obligation is the duty to defend: to pay for the insured’s defense of the legal action, including attorney fees. The duty to defend is “legally” broader than the duty to indemnify, and is triggered even if the claim is only “potentially” covered by the insurance policy. For example, even if an exclusion, such as for alleged “intentional acts,” is asserted, this will not discharge the insurance carrier’s duty to defend, and the insurance carrier must still provide (pay for) a defense to the insured.

To be entitled to these valuable benefits, certain immediate steps must be taken.

Prompt Notice Must Be Given

The first thing that must be done after receiving notice of a claim of infringement is to determine if CGL insurance exists, and if it does, to immediately tender the claim. It is usually best to have an attorney do this, since it is critical that the insurance carrier be promptly provided with the proper notice. Every insurance policy has a provision that requires the insured to provide the insurance carrier with prompt notice. Failure to provide such notice will often result in the denial of insurance coverage.

If it is decided to handle the submission of the claim internally within the business, then it is very important to know that not all insurance agents are authorized by insurance carriers to accept notice of a claim. Therefore, it is always best to tender the claim directly to the insurance carrier as well as the broker.

Be Persistent

Because insurance companies do not handle copyright and trademark infringement claims on a daily or routine basis, they will normally take a month or more to respond to a request for coverage. Usually, the third party making the infringement claim is not willing to suspend its demands while waiting for a coverage decision. This may create a difficult situation; the insured is obviously unsure as to whether the suitable financial resources will be available to fight the claim. Moreover, a claim cannot be settled, even early on, without the insurance company’s involvement and consent; to do so would likely violate the terms of the policy and the carrier will then have no obligation to pay the settlement.

Therefore, some degree of tenacity and per-

sistence is needed in order to urge the insurance carrier to provide coverage. Such persistence will likely lead to a more favorable decision by the carrier—it’s just easier for the insurance carrier to grant coverage than to come up with a reason why the claim should be denied. Further, most insurance carriers are concerned that a claim might be made for bad faith on the part of the carrier if prejudice to the insured takes place due to the carrier’s failure to provide a prompt decision.

Sometimes the initial coverage decision may not be favorable. It is not unusual for insurance companies to deny infringement coverage claims in the first instance based on one or more exclusionary provisions in the policy. They may also deny the claim on the ground that it does not fit within the definition of “Advertising Injury.” More often than not, such an initial denial can be overcome through strong argument of the facts and the law to the insurance company. In such circumstances, it is probably best to seek the assistance of a competent intellectual property attorney.

The Benefit Of Coverage

Once coverage has been secured, all of the attorney’s fees that were incurred from the date of tender of the claim will be paid directly by, or recovered from, the insurance carrier. In addition, if the asserted claim is not defended successfully, most CGL policies have liability limits, which are sufficient to cover any significant damage award. While any claim for copyright or trademark infringement will obviously greatly interfere with the conduct of business, it is indeed comforting to know that, when confronted with a such a claim, the financial burden may be eased or even eliminated by seeking coverage under one’s Commercial General Liability insurance policy.

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If you have any questions regarding copyrights, trademarks, or intellectual property in general, address them to Gottlieb, Rackman & Reisman by fax at (212) 684-3999 or e-mail at info@grr.com, and they will be answered directly. You may also request a copy of an intellectual property Primer by calling (212) 684-3900. And don’t forget to visit the firm’s web site at <http://www.grr.com>.