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Overview and Update: Commercial General Liability Coverage B Personal and Advertising Injury

Jonathan Viner
Prepared with **Daniel I. Graham, Jr.**
February 18, 2016



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Historical Overview

Evolution of Coverage Grant



HISTORICAL OVERVIEW: CG 00 01 11 88 CGL FORM

“Advertising injury”

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

“Personal injury”

- a) False arrest, detention or imprisonment;
- b) Malicious prosecution;
- c) 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 by or on behalf of its owner, landlord or lessor;
- d) 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
- e) Oral or written publication of material that violates a person's right of privacy.



HISTORICAL OVERVIEW: CG 00 01 12 07 CGL FORM

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

- a) False arrest, detention or imprisonment;
- b) Malicious prosecution;
- c) 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;
- d) Oral or written publication, in any manner, of material that slanders or libels a person or organization, or disparages a person’s or organization’s goods, products or services;
- e) Oral or written publication, in any manner, of material that violates a person’s right of privacy;
- f) The use of another’s advertising idea in your “advertisement”; or
- g) Infringing upon another’s copyright, trade dress or slogan in your “advertisement”.



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THE INSURING AGREEMENT: CGL FORM CG 00 01 12 07

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement
 - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages...
 - b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period...



THE INSURING AGREEMENT

Necessary Elements For Coverage

- The injury must arise out of one of the offenses enumerated in the definition of "personal and advertising injury"
- The "personal and advertising injury" offense must arise out of the named insured's business
- The offense must have been committed in the "coverage territory"
- The offense must have been committed during the policy period
- The suit must seek damages
- The "personal and advertising injury" must not otherwise be excluded



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ENUMERATED OFFENSES

False arrest, detention or imprisonment

- *Singer v. Colony*, 2015 WL 7720570

Malicious prosecution

- Litigation privilege
- Abuse of process

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

- Environmental claims? Generally no



ENUMERATED OFFENSES



Oral or written publication, in any manner, of material that **slanders** or **libels** a person or organization or **disparages** a person's or organization's goods, products or services



LIBEL / SLANDER / DISPARAGEMENT

A false statement about a third party that causes the third party damage

A false, denigrating statement about a third party's goods or services



\$1,000 less than NEC

GUARANTEED

Why pay more for less?

Samsung SyncMaster™ 770TFT

- 0.2mm pixel pitch
- 1280 x 1024 maximum resolution
- 160°
- 165 degree viewing angle
- 2x step color filter
- Advanced image scaling
- 1500D connector (ideal)
- USB option
- A3 aspect ratio
- Cabinet options
- **\$1999***

You wouldn't pay more for a run-down house in the swamplands when you could get the house of your dreams for \$1,000 less. Well, Samsung's 17" SyncMaster 770TFT flat panel monitor is the monitor of your dreams—for less than NEC's LCD1810 TFT. In fact, Samsung guarantees that your 770TFT purchase will be \$1,000 less than the market price of a comparable NEC product. And price isn't the only thing that sets the 770TFT apart. It outperforms NEC—while taking up less of your valuable desk space. So, why pay more for NEC when all you're getting is more plastic?

NEC MultiSync 1810

- 0.28mm pixel pitch
- 1280 x 1024 maximum resolution
- 165 degree viewing angle
- **\$2299***

*MSRP. Price subject to change without notice. © 2005 Samsung Electronics America, Inc. All rights reserved.

Take a look for yourself—you'll see the Samsung difference. **We guarantee it.**

For more information on how to claim your price guarantee, visit www.samsungusa.com or call 800-852-1382 and experience the superior performance of Samsung.

SAMSUNG DIGITAL
MONITORS & TABLETS

\$1,000 less than NEC

Why pay more for less?

You wouldn't pay more for a run-down house in the swamplands when you could get the house of your dreams for \$1,000 less. Well, Samsung's 17" SyncMaster 770TFT flat panel monitor is the monitor of your dreams—for less than NEC's LCD1810 TFT. In fact, Samsung guarantees that your 770TFT purchase will be \$1,000 less than the market price of a comparable NEC product. And price isn't the only thing that sets the 770TFT apart. It outperforms NEC—while taking up less of your valuable desk space. So, why pay more for NEC when all you're getting is more plastic?

Take a look for yourself—you'll see the Samsung difference. **We guarantee it.**

Samsung SyncMaster™ 770TFT

- 0.26mm pixel pitch
- 1280 x 1024 maximum resolution
- 160 degree viewing angle
- 24 step color filter
- Advance image scaling
- 13W3 connector (dual)
- USB option
- 4:3 aspect ratio
- Optional speakers
- **\$1999***

* Estimated Street Price

NEC MultiSync 1810

- 0.28mm pixel pitch
- 1280 x 1024 maximum resolution
- 160 degree viewing angle
- **\$3229****

NEC is a registered trademark of NEC corporation
** Specifications and Price quoted from CDW Feb 2000

Why pay more for less?

You wouldn't pay more for a new-down loan in the marketplace when you could get the loan of your choice for \$1,000 less. Well, Samsung's 17" SyncMaster 770TFT has paid similar in the matter of your choice for less than NEC's 1810 1810 TFT. In fact, Samsung guarantees that your 770TFT purchase will be \$1,000 less than the market price of a comparable NEC product. And price isn't the only thing that sets the 770TFT apart. It outperforms NEC while taking up less of your valuable desk space. So, why pay more for NEC when all you're getting is more hassle?

Take a look for yourself - and see the Samsung difference. We guarantee it.

For more information on how to claim complete sales and registration, visit www.samsungusa.com or call 800-627-1327 and experience the superior performance of Samsung.

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LIBEL / SLANDER / DISPARAGEMENT

PBM Products, LLC v. Mead Johnson Nutrition Co.,
U.S.D.C., E.D. Va. Case No. 3:09-cv-00269

- “No other formula gives your baby a better start in life.”
- Enfamil LIPIIL® is “the only formula shown in published independent clinical studies” to “improve brain development” and “improve eye development.”

NICOLAIDES
 TRAP TROTT
 MICHAELES
 BULLIVANT LLP

LIBEL / SLANDER / DISPARAGEMENT

- Equating competitor's product to the insured's own, allegedly inferior product likewise could equate to disparagement. *JAR Laboratories LLC v. Great American*, 945 F.Supp.2d 937 (N.D. Ill. 2013)
- To implicate coverage, the false statement must reference the claimant, either expressly or, if by implication, necessarily, and merely selling another's goods as one's own is not disparagement. *Hartford v. Swift Distribution, Inc.*, 326 P.3d 253 (Cal. 2014)
- Therefore, selling an inferior product under the competitor's label, using competitor's labeling and product ID numbers, without any false "statements," is not disparagement. *Charter Oak Ins. Co. v. Maglio Fresh Food*, 979 F.Supp.2d 581 (E.D. Pa. 2013); see also *Bullpen Dist., Inc. v. Sentinel*, 584 Fed.Appx. 769 (9th Cir. (Cal.) 2014) and *Uretek (USA), Inc. v. Continental Cas. Co.*, 92 F.Supp.3d 589 (S.D. Tex. 2015)



LIBEL / SLANDER / DISPARAGEMENT

Note The "Of and Concerning" Requirement

- *Great Am. Ins. Co. v. Riso, Inc.*, 479 F.3d 158 (1st Cir. 2007)
- *BASF AG v. Great Am. Assur. Co.*, 522 F.3d 813 (7th Cir. 2008)
- *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Mead Johnson & Co. LLC*, 735 F.3d 539 (7th Cir. 2013)



ENUMERATED OFFENSES

Oral or written publication, in any manner,
of material that violates a person's
right of privacy



VIOLATION OF RIGHT OF PRIVACY

Common law “invasion of privacy” torts:

Intrusion upon
a person's
seclusion or
solitude or into
his private
affairs

Public
disclosure of
embarrassing
private facts
about a person

Publicity which
places a person
in a false light
in the public
eye

Appropriation,
for the
wrongdoer's
advantage, of a
person's name
or likeness



VIOLATION OF RIGHT OF PRIVACY

Intrusion upon a person's seclusion or solitude or into his private affairs

“(1) [A]n unauthorized intrusion or prying into the plaintiff's seclusion; (2) an intrusion that is offensive to a reasonable person; (3) the matter upon which the intrusion occurs is private [e.g., financial, medical, sexual intimate]; and (4) the intrusion causes anguish and suffering.”

Shea v. Winnebago County Sheriff's Office, 2014 WL 4449605 (N.D. Ill. September 10, 2014)



VIOLATION OF RIGHT OF PRIVACY

Public disclosure of embarrassing private facts about a person

“(1) [P]ublic disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern”

Arrieta v. County of Kern, 2014 WL 2801048 (E.D. Cal. June 19, 2014)



VIOLATION OF RIGHT OF PRIVACY

Publicity which places a person in a false light in the public eye

“(1) “[G]iving publicity to a matter concerning another”; (2) “that places the other before the public in a false light”; (3) the false light would be “highly offensive to a reasonable person” and (4) the defendant “has knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”

“[U]ninvited notoriety grounded in falsehoods”

Hogan v. Winder, 2014 WL 3827603 (10th Cir. August 05, 2014)



VIOLATION OF RIGHT OF PRIVACY

Appropriation, for the wrongdoer's advantage, of a person's name or likeness

“(1) [T]he defendant used the plaintiff's name or likeness; (2) the use of the plaintiff's name or likeness was for the defendant's own purposes or benefit, commercially or otherwise; (3) the plaintiff suffered damages; and (4) the defendant caused the damages incurred.”

Bartch v. American Family Mut. Ins. Co., 2014 WL 3260932 (D. Colo. July 08, 2014)



VIOLATION OF RIGHT OF PRIVACY

The Privacy Offense's Two Requirements

- (1) A publication of material
- (2) That violates a person's right of privacy



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VIOLATION OF RIGHT OF PRIVACY

Is There a Publication of Material?

- *Recall Total Infor. Mgmt. v. Federal*, 83 A.3d 664 (Conn. App. 2014); but compare *Travelers v. Portal Healthcare Solutions, LLC*, 35 F.Supp.3d 765 (E.D. Va. 2014)
- *National Union v. Coinstar*, 39 F.Supp.3d 1149 (W.D. Wash. 2014); *Defender Security v. First Mercury Ins. Co.*, 803 F.3d 327 (7th Cir. 2015)
- *OneBeacon America v. Urban Outfitters*, 21 F.Supp.3d 426 (E.D. Pa. 2014)



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VIOLATION OF RIGHT OF PRIVACY

SECRECY versus SECLUSION

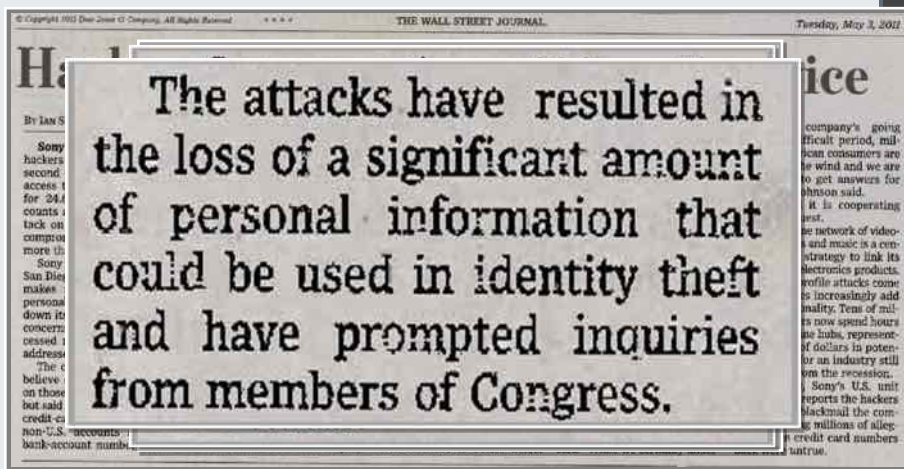
- Courts differ as to whether “right of privacy” means only those rights involving secrecy (such as privacy torts involving publication of embarrassing facts and false light publicity) or also those involving violation of right to be left alone (intrusion upon seclusion, appropriation of identity/persona/likeness)
 - Yes – *Westfield Ins. Co. v. Pinnacle Group*, 2015 WL 5884896 (S.D.W.Va.); *American States Ins. Co. v. Capital Associates of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004)
 - No - *OneBeacon America v. Urban Outfitters*, 21 F.Supp.3d 426 (E.D. Pa. 2014); *National Union v. Papa John’s*, 29 F.Supp.3d 961 (W.D. Ky. 2014); *Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307 (Ill. 2006)



SONY PLAYSTATION CASE STUDY



SONY PLAYSTATION CASE STUDY



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SONY PLAYSTATION CASE STUDY

- Sony suffered one of the largest internet security breaches in history
- Sony reported that consumer data had been potentially compromised (full names, birthdates, online IDs, email addresses, passwords, home addresses, purchase histories)
- 67 class action lawsuits were filed



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SONY PLAYSTATION CASE STUDY

Sony's Alleged Wrongful Conduct

- Failure to use reasonable care to secure customers' sensitive personal information
- Storing sensitive data in plain, unencrypted text
- Failure to use secure data processing and storage procedures, security software, and firewalls
- Failure to promptly notify customers of security breaches
- Failure to remedy security deficiencies after learning of vulnerabilities



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SONY PLAYSTATION CASE STUDY

Allegations of Privacy Right Violations

"As a direct and proximate result of Defendants' acts and omissions... Plaintiff and the Class have suffered damages including, but not limited to, invasion [of] privacy..."



SONY PLAYSTATION CASE STUDY

Vague, Conclusory Allegations of "Publication"

"Defendants violated 18 U.S.C. § 1030(a)(5)(A)(i) by knowingly causing or allowing the transmission of Plaintiffs' personal information."



SONY'S POSITION

- The "release" of personal account information to the hackers without safeguards against future distribution was "publication" within the meaning of the privacy offense
- The privacy offense applies to any publication that allegedly invades privacy and arises out of the insured's business



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SONY'S POSITION

- Policy language:
 - The absence of specific language in the privacy offense shows that it applies broadly
 - The privacy offense applies to any publication that is related to SCA's business
 - The words "publication in any manner," contained in the offense, mean that anyone can commit the publication
 - Courts find coverage under the privacy offense for "new business practices," such as sending unsolicited facsimiles and using electronic devices to monitor employee conversations



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INSURERS' POSITION

Personal and advertising injury
applies to purposeful acts
committed

by the insured



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INSURERS' POSITION

The hackers' act of illegally accessing and stealing personal account information is not "publication" within the meaning of the offense.

Supported by cases interpreting "publication" in the offense, and by cases examining liability for data theft under statutes with a "publication" component

Worix v. MedAssets, Inc., 857 F.Supp.2d 699 (N.D. Ill. 2012) - defendant's alleged failure to safeguard stolen data was not akin to "knowingly divulging" data under Stored Communications Act, 18 U.S.C. § 2702(a)(1).)



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INSURERS' POSITION

Policy language does not support the position that the privacy offense applies to wrongful acts committed by third-parties

- Offenses were revised to specify the types of torts covered, not who must commit the tort
- The words "publication in any manner" describe the type of publication (e.g. print, electronic, oral), not the entity doing the "publication"



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SONY PLAYSTATION CASE STUDY

Trial Court Summary Judgment Ruling

- The invasion of privacy offense is not implicated because the Personal and Advertising Injury offenses require that the insured, and not a third party, commit the offense in order for coverage to apply
- The “publication” did, in fact, occur, when the information from the PlayStation Network servers was released to the hackers, but such publication was not committed by Sony
- The court recognized that Sony had attempted to keep the information secure, even though it was unsuccessful



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THE VIOLATION OF PRIVACY OFFENSE

- Current/emerging issues “in the news”
 - Monitoring of emails and texts by communications carriers
 - Extraction of information from emails, text and/or use of internet/social media and using it to conduct targeted marketing or to sell information to third parties for that purpose
 - Embedding hidden code in software sold to others that permits insureds to monitor and record usage or internet access/searching for marketing and other purposes
 - Violation of wiretap, “pen register” and similar statutes (e.g. federal Computer Fraud and Abuse Act) to trace, record and/or decode a third-party’s communications, location, IP address
 - Identity theft claims, hacking claims



VIOLATION OF RIGHT OF PUBLICITY



VIOLATION OF RIGHT OF PUBLICITY

- Right of Publicity refers to right to control use of one's image, identity, persona
 - Bob Marley's face on sweatshirts unauthorized by his estate
 - Michael Jordan's name, jersey number, Air Jordan-type shoes in an advertisement for a grocery store
 - Phil Mickelson's name on an ad for a golf club
 - A waitress' photo on a billboard for the restaurant
- Claim arising out of unwanted publicity/wish to be left alone
- Claim arising out of violation of right to profit from use of personality, image and name cultivated through celebrity
- *Aroa Marketing v. Hartford*, 130 Cal.Rptr.3d (Cal. Ct. App. 2011)



PERSON'S RIGHT OF PRIVACY

- Typically, claims by business organizations (corporations, partnerships, LLCs, etc.) are not claims involving a “person’s” privacy rights for purposes of this offense
 - *Sportsfield Specialties, Inc. v. Twin City Fire Ins. Co.*, 116 A.D.3d 1270 (N.Y. App. Div. 2014)
 - *Nationwide Mut. Ins. Co. v. Gum Tree Property Mgmt., LLC*, 597 Fed.Appx. 241 (5th Cir. (Miss.) 2015)



ENUMERATED OFFENSES

The use of another’s advertising idea in your “advertisement”



USE OF ANOTHER'S ADVERTISING IDEA...

Revised from “misappropriation of advertising ideas or style of doing business” (pre-1998 CGL forms)

Two Requirements:

1. The use of another's “advertising idea”
2. In the named insured's “advertisement”

ADVERTISING IDEA

“Any idea or concept related to the promotion of a product to the public”

“An idea about the solicitation of business and customers”

“An idea for advertising that is ‘novel and new,’ and ‘definite and concrete,’ such that it is capable of being identified as having been created by one party and stolen or appropriated by another”



USE OF ANOTHER'S ADVERTISING IDEA...

Trademark: A word, symbol or design that identifies the source of a good.



USE OF ANOTHER'S ADVERTISING IDEA...

Service Mark: A word, symbol or design that identifies the source of a service



USE OF ANOTHER'S ADVERTISING IDEA...

Los Angeles Times | BUSINESS Apple sues Amazon over 'Appstore' name, alleging trademark infringement



Apple has filed a lawsuit against Amazon accusing the Web retail giant of trademark infringement over the name "app store."

"Recently, Amazon has begun improperly using Apple's APP STORE mark in connection with Amazon's mobile software developer program," Apple said in its complaint. "Amazon has also taken actions which, on information and belief, evidence Amazon's intent to improperly use Apple's mark in connection with Amazon's mobile software download service. Amazon's present and intended uses are unauthorized and unlawful."

USE OF ANOTHER'S ADVERTISING IDEA...



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PATENT INFRINGEMENT & "ADVERTISING IDEA"

PATENT

A property right the U.S. Patent and Trademark Office grants to an inventor to exclude others from making, using, offering for sale, selling or importing the invention.



PATENT INFRINGEMENT & "ADVERTISING IDEA"

**Amazon.com Intern.,
Inc. v. American
Dynasty Surplus
Lines Ins. Co.,**

120 Wash. App. 610, 85 P.3d
974 (Wash. Ct. App. 2004)
(Washington law)

**Hyundai Motor America
v.
National Union Fire Ins.
Co. of Pittsburgh, Pa.,**

600 F.3d 1092 (9th Cir. 2010)
(California law)

**Discover Financial
Services LLC v.
National Union Fire Ins.
Co. of Pittsburgh, Pa.,**

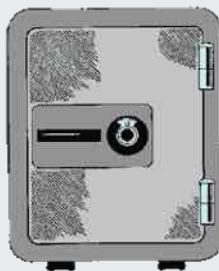
527 F. Supp. 2d 806 (N.D. Ill.
2007)
(Illinois law)

**Dish Network Corp. v.
Arch Specialty Ins. Co.,**

659 F.3d 1010 (10th Cir.
2011)
(Colorado law)



TRADE SECRETS



TRADE SECRET & “ADVERTISING IDEA”

- [A]ny formula, pattern, device or compilation of information which is used in one’s business
- Formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

Restatement of Torts § 757, Comment. b (1939).



TRADE SECRET & “ADVERTISING IDEA”

Information that:

- (i) Derives independent economic value, actual or potential, from not being generally known or readily ascertainable
- (ii) Is the subject of reasonable efforts to maintain its secrecy.

Uniform Trade Secrets Act (the “UTSA”)



TRADE SECRET & “ADVERTISING IDEA”

***Liberty Corporate
Capital Ltd. V. Security
Safe Outlet***

577 Fed.Appx. 399
(6th Cir. 2014)

(Kentucky law)

***Sentex Systems, Inc. v.
Hartford Acc. & Indem.
Co.,***

882 F. Supp. 930 (C.D. Cal.
1995), aff'd, 93 F.3d 578 (9th
Cir. 1996)

(California law)

***Pennsylvania Pulp &
Paper. Nationwide Mut.
Ins.,***

100 S.W.3d 566 (Tex. Ct.
App. 2003)

(Texas law)

***Air Engineering, Inc. v.
Indus. Air Power, LLC,***

2013 WL 28271 (Wis. Ct.
App. 2013)

(Wisconsin law)



ENUMERATED OFFENSES

Infringement of another's ...

Copyright

Trade
Dress

Slogan

...in your “advertisement.”



INFRINGEMENT OFFENSE

Copyright

- A form of protection provided to the authors of “original works of authorship” (literary, dramatic, musical, artistic, and other intellectual works)



INFRINGEMENT OFFENSE

Trade Dress

- Overall product image – color combination, texture, graphics, or even particular sales techniques.



USE OF ANOTHER'S ADVERTISING IDEA...



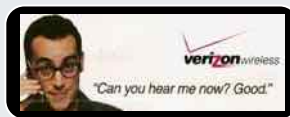
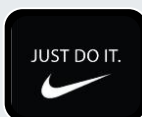
In an Oct. 28, 2010, complaint, Coca-Cola had accused PepsiCo of copying the packaging for Trop50 from its Simply line of fruit juices, which are sold in carafe-style bottles that have tapered necks and oversized green caps.

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INFRINGEMENT OFFENSE

Slogan

- A "brief attention-getting phrase used in advertising or promotion"



INFRINGEMENT OFFENSE

- Trade Dress Infringement
 - Courts occasionally conclude that a trademark infringement claim also involves trade-dress infringement and invokes the “advertising ideas” offense. *E.S.Y. Inc. v. Scottsdale*, 2015 WL 6164666 (S.D. Fla.)
 - Trade Dress pertaining to a website (“web dress”) has been recognized, but not every imitation of some aspect of another’s website involves infringement of trade dress (*Test Masters v. State Farm*, 791 F.3d 561 (5th Cir. (Tex.) 2015)
 - No potential coverage for claims arising out of insured’s illegal use of claimants cellphones, even though claimants owned protected trade dress of phones. *AU Electronics, Inc. v. Harleysville Group, Inc.*, 82 F.Supp.3d 805 (N.D. Ill. 2015)



INFRINGEMENT OFFENSE

- Slogan Infringement – must involve something more than a trademark – not the name of the product, but something in addition to the name, used to promote it.
 - *Selective Ins. Co. of America v. Smart Candle, LLC*, 781 F.3d 983 (8th Cir. (Minn.) 2015) (“Smart Candle” mark was trademarked name for the product; despite descriptive nature of mark, it was not a slogan)
 - *Street Surfing, LLC v. Great American E&S Ins. Co.*, 776 F.3d 603 (9th Cir. (Cal.) 2014) (“Streetsurfer” not a slogan where not used separately to promote company of same name)
 - *Hudson Insurance Co. v. Colony Insurance Co.*, 624 F.3d 1264 (9th Cir. 2010) (“Steel Curtain” slogan for NFL team; duty to defend claim involving counterfeit footballs)



ADVERTISING NEXUS

“Advertisement” means 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 purposes of the definition:

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

b. regarding websites, only that part of a website that is about your goods, products or services for the purpose of attracting customers or supporters is considered an advertisement.



ADVERTISING NEXUS

- What is “Advertisement”
 - Product is not necessarily “advertisement” for itself (*U.S.F.&G. v. Ashley Reed*, 43 F.Supp.3d 271 (S.D.N.Y. 2014) (app. pending) BUT courts have found otherwise. *Street Surfing, supra*.
 - Merchandising – e.g., mode of product display – has been found to be “advertisement”. *Creation Supply, supra* (markers); *E.S.Y., supra* (hang tags); *Mid-Continent Cas. Co. v. Kipp Flores Architects*, 602 Fed.Appx. 985 (5th Cir. (Tex.) 2015) (model home built per copyrighted specs)
 - Must involve the “public” or a “market segment.” *Rombe Corp. v. Allied Ins. Co.*, 28 Cal.Rptr.3d 99 (2005) (presentation to select group of customers wasn’t “advertisement”)



ADVERTISING NEXUS

- *Selective Ins. Co. v. Creation Supply, Inc.*, 2015 IL App (1st) 140152-U (display of merchandise was “advertisement”, thus trade dress infringement by product itself satisfied nexus)
- *Erie Ins. Exch. v. Compeve*, 32 N.E.3d 160 (Ill. App. 2015) (copyright-infringing software code not allegedly used in insured’s advertisement)
- *Street Surfing, LLC v. Great American E & S Ins. Co.*, 752 F.3d 853 (9th Cir. 2014) (affixing logo to product satisfies causal nexus)



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THE INSURING AGREEMENT: CGL Form CG 00 01 12 07

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement
 - a. We will pay those sums that the insured becomes legally obligated to pay **as damages** because of “personal and advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” **seeking those damages** ...



DAMAGES

The terms “damages” is not defined.

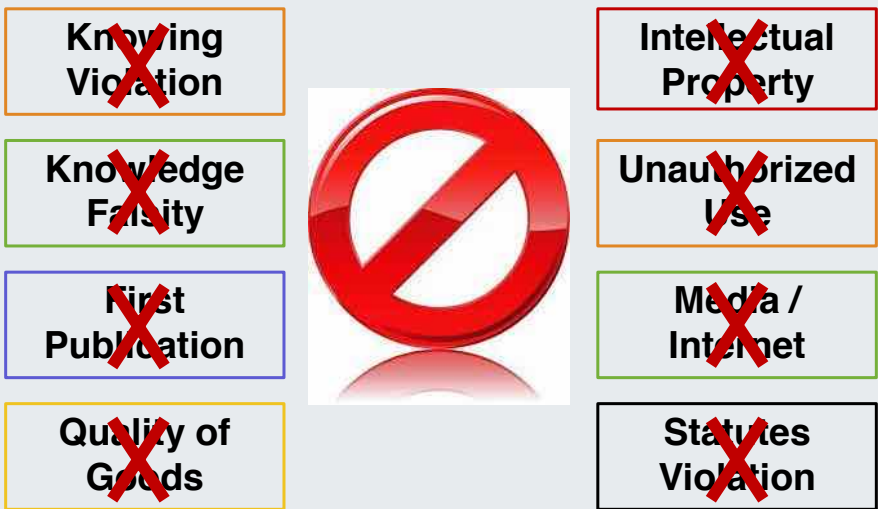
“Damages” in the context of “personal and advertising injury” claims has been construed to encompass a wide assortment of relief:



OVERVIEW



EXCLUSIONS



EXCLUSIONS: KNOWING VIOLATION OF RIGHTS



Excludes coverage for “personal and advertising injury” caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict “personal and advertising injury”...

- *Travelers v. Schur*, 2015 WL 7571821 (E.D. Va.) (potential liability for negligent or reckless defamation, even though knowledge of falsity was alleged); *E.S.Y., supra* (same)
- *Sletten & Brettin Orthodontics v. Continental Cas. Co.*, 728 F.3d 931 (8th Cir. (Minn.) 2015) (alleged intent to injure incorporated into each count of claim alleging insured used another’s computer to knowingly post false statements)



EXCLUSIONS: KNOWLEDGE OF FALSITY



Excludes coverage for “personal and advertising injury” arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

- *Atlantic Mut. Ins. Co. v. Terk Technologies Corp.*, 309 A.D.2d 22, 763 N.Y.S.2d 56 (1st Dep’t 2003)
- *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179 (11th Cir. 2002)
- Holdings similar to Knowing Violation of Rights exclusion



EXCLUSIONS: FIRST PUBLICATION



Excludes coverage for “personal and advertising injury” arising out of the oral or written publication of material whose first publication took place before the beginning of the policy period.

- *Kim Seng Co. v. Great American Ins. Co. of New York*, 101 Cal. Rptr. 3d 537 (Cal. Ct. App. 2009); *Street Surfing, supra*. (focus is on injurious material)
- Exclusion applies to all of the offenses, not just those referencing publication. *Ashley Reed Trading, supra*.



EXCLUSIONS: QUALITY OF GOODS



Excludes coverage for “personal and advertising injury” arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your “advertisement.”

- *General Star Indem. v. Driven Sports, Inc.*, 80 F.Supp.3d 442 (E.D.N.Y. 2015) (claim premised on statements solely concerning quality/ingredients of insured’s own product; fact that competitor was injury did not preclude exclusion’s application)



EXCLUSIONS: INTELLECTUAL PROPERTY



Excludes coverage for “personal and advertising injury” arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights, except that such other intellectual property rights do not include the use of another’s advertising idea in your “advertisement” and the exclusion does not apply to infringement, in your “advertisement,” of copyright, trade dress or slogan.



EXCLUSIONS: INTELLECTUAL PROPERTY



- *Basalite Concrete Products, LLC v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 615 Fed.Appx. 894 (9th Cir. 2015) (trademark infringement; rejecting insured’s argument the allegations potentially involved trade dress infringement)
- *U.S. Fire Ins. Co. v. Cyanotech Corp.*, 2013 WL 5755338 (D. Hawaii Oct. 23, 2013) (patent infringement)
- *Liberty Corporate Capital Ltd. v. Security Safe Outlet, Inc.*, 937 F.Supp.2d 891 (E.D. Ky. 2013), aff’d, 2014 WL 3973726 (6th Cir. 2014) (trade secret customer list)
- *Alterra Excess v. Snyder*, 184 Cal.Rptr.3d 831 (Cal. Ct. App. 2015) (right-of-publicity claim)
- *Foliar Nutrients, Inc. v. Nationwide Agribusiness Ins. Co.*, 2015 WL 5595523 (M.D. Ga.) (d/n/a to preclude duty to defend because of alleged disparagement independent of alleged patent infringement)



EXCLUSIONS: UNAUTHORIZED USE OF ANOTHER'S NAME...



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.

St. Luke's Cataract and Laser Institute, P.A. v. Zurich American Ins. Co., 506 Fed.Appx. 970 (11th Cir. (Fla.) 2013) (wrongful copying of another's website contents, layout and design did not involve unauthorized use of email address, domain name or metatag; exclusion did not apply)



EXCLUSIONS: MEDIA & INTERNET BUSINESS



Excludes coverage for "personal and advertising injury" committed by an insured whose business is (1) advertising, broadcasting, publishing or telecasting, (2) designing or determining content of websites for others or (3) an Internet search, access, content or service provider. But it does not apply to offenses of false arrest, detention, imprisonment, (malicious prosecution) or wrongful eviction/entry/invasion.

Dish Network Corp. v. Arrowood Indem. Co., 772 F.3d 856 (10th Cir. (Colo.) 2014) (insured's business was sale and provision of satellite television services; exclusion precluded coverage for patent infringement claims)



EXCLUSIONS: VIOLATION OF STATUTES EXCLUSION



Excludes coverage for “personal and advertising injury” arising directly or indirectly out of any action or mission 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) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.



EXCLUSIONS: VIOLATION OF STATUTES EXCLUSION

- Precludes coverage for named and un-named statutes
 - *Interline Brands, Inc. v. Chartis Specialty Ins. Co.*, 749 F.3d 962 (11th Cir. (Fla.) 2014) (no coverage for TCPA claims)
 - *National Union v. Coinstar, Inc.* 39 F.Supp.3d 1149 (W.D. Wash. 2014) (claims under state Video Rental Privacy Act)
- Might also operate to preclude coverage for non-statutory causes of action, particularly where those causes of action can't be proven without simultaneously proving violation of statute within exclusion
 - *Emcasco Ins. Co. v. CE Design Co.*, 784 F.3d 1371 (10th Cir. (Okla.) 2015) (conversion); *G.M. Sign v. State Farm*, 18 N.E.2d 70 (Ill. App. 2014) (conversion, consumer fraud)
 - Not all courts are convinced: *Nationwide Mut. Ins. Co. v. Harris Med. Assocs., LLC*, 973 F.Supp.2d 1045 (E.D. Mo. 2013)



OVERVIEW

Historical
Overview

The
Insuring
Agreement

Enumerated
Offenses

Damages

Exclusions

Practical
Considerations



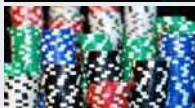
PRACTICAL CONSIDERATIONS



- Complex and Protracted (Costly) Underlying Litigation



- Aggressive Competitors



- High Stakes Outcome



- Expert Intensive



LIABILITY AND COVERAGE CHECKLIST

Relevant Information

- Pleadings, discovery materials, deposition transcripts and summaries
- Identification of all advertising materials at issue (dates, medium, etc.)
- Defense counsel liability evaluation
- Expert reports including damage analysis
- All potentially implicated insurance policies
- Contracts and agreements (insurance procurement and indemnity provisions)



Questions?

Thanks

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