

# LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

1050 SEVENTEENTH STREET, N.W., SUITE 800  
WASHINGTON, D.C. 20036-5514

(202) 508-1100

FACSIMILE (202) 861-9888

321 WEST 44TH STREET, SUITE 510, NEW YORK, NEW YORK 10036

(212) 850-6100 FACSIMILE (212) 850-6299

2112 WALNUT STREET, THIRD FLOOR, PHILADELPHIA, PA 19103

(215) 988-9778 FACSIMILE (215) 988-9750

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## THE GAP: INTELLECTUAL PROPERTY RISKS NO LONGER COVERED BY COMMERCIAL GENERAL LIABILITY POLICIES

*By Elizabeth C. Koch*

For many years businesses involved in the marketing and sale of products and services relied upon their Commercial General Liability (CGL) policies to provide them coverage for trademark, copyright and related claims. In particular, such claims generally have been covered under the CGL policy's "advertising injury" provisions. However, with the rewriting of the CGL policies in recent years, insurers have tightened considerably the scope of coverage for intellectual property claims. This change, together with the increase in exposure due to new channels of corporate communication, leaves businesses with a significant gap in their coverage.

Most CGL insurers use standard insurance forms provided by a national organization, Insurance Services Office (ISO). Beginning in 1976, ISO introduced successive editions of standard "advertising injury" coverage forms. The 1976 and 1986 versions of these forms were widely interpreted by courts to provide coverage – or at least a duty to defend – for a broad spectrum of intellectual property claims. Confusion over the advertising injury provisions has resulted in hundreds of coverage lawsuits and cost insureds millions of dollars.

For example, while trademark infringement was not itself a specifically-enumerated claim under the 1986 ISO form, numerous courts concluded that, at least for purposes of the duty to defend, trademark infringement fell within the coverage for misappropriation of an "advertising idea" or "style of doing business." Some courts also found trademark infringement to be within the covered offense of infringement of "title" or "slogan."

The vast majority of courts also required insurers to defend or indemnify claims for trade dress infringement – that is, claims arising out of a product's packaging and design. Under the 1986 ISO form, these courts typically found trade dress infringement claims to fall within the coverage for misappropriation of "style of doing business." Some courts even treated trademark or trade dress itself as "advertising."

Similarly, under the 1986 ISO form, claims for copyright infringement typically were covered, so long as the alleged infringement occurred in the broadly-defined "course of advertising [the policyholder's] goods, products or services."

Fast forward, and the CGL “advertising injury” coverage for intellectual property claims today looks substantially different and is much narrower. The 1998 and 2001 revisions to ISO’s policy forms, on which current CGL coverage continues to be based, significantly changed – and shrunk – coverage for intellectual property claims in a number of ways.

While the older forms often were held to provide coverage for trademark claims, the 2001 form specifically excludes liability for all trademark (other than trade dress) infringement claims. Because several jurisdictions had recognized trademark infringement as a potentially covered offense under the old CGL policies, the 2001 exclusion works a major reduction in coverage.

In addition, the older forms did not define the term “advertising,” and courts sometimes used expansive definitions to find coverage for intellectual property claims. By contrast, the 2001 form narrowly defines “advertisement” to include only “a notice broadcast or published to the general public or specific market segments . . . for the purpose of attracting customers or supporters.” Accordingly, many activities that could have been tied to a company’s promotional efforts or style of doing business (such as issuing a company newsletter) and thus might have been covered for intellectual property claims arising from that activity may now be outside of the policy’s protection.

The 2001 definition of advertisement also, for the first time, includes internet activity. Under the older policies, which were silent regarding websites, courts expansively treated website promotional material concerning the policyholder’s goods or services as advertising. The new definition limits coverage specifically just to “that part” of a website “that is about your products, goods or services for the purposes of attracting customers or supporters.” This means that many elements of a website, such as chatrooms, bulletin boards, and links to other sites, are not protected.

Finally, and perhaps most significantly, the new policy form requires a substantially closer causal nexus between the alleged infringement and the advertising. As noted above, for coverage to be triggered under the older policy forms, the alleged injury had to arise out of an offense committed “in the course of” a policyholder’s advertising, a loose standard that has been broadly defined by courts. Thus, for example, a court found coverage for a homebuilder’s alleged use of the claimant architect’s copyrighted design to build a home despite the fact that the only advertising activity involved was a sign on the front lawn of the home. The new policies, by contrast, contain language limiting coverage to offenses that occur “in the advertisement.” Thus, under the new ISO wording, it is not enough that a causal connection exists between an alleged infringement and the advertising; only infringements that occur “in” the advertisement itself are covered.

As a consequence of these substantial restrictions to the once expansive advertising injury coverage, companies now face significant intellectual property risks not covered by their CGL policies. To close this gap, businesses should consider purchasing specialty insurance products designed to cover these risks.