AKO POLICYHOLDER ADVISOR
The Policyholder Law Firm
Volume 7 Number 11 www.andersonkill.com November 1998

Internet and Electronic Commerce Risks:

Advertising Injury Insurance Coverage Provides Protection

John B. Berringer
Joshua Gold

Cyberspace is expanding rapidly as businesses, governments, organizations and individuals transmit and receive more and more information over the Internet. But, as already evidenced by numerous lawsuits commenced nationwide, Cyberspace presents significant risks for those communicating and transacting business over the Internet. Insurance may provide protection.

One very important source of potential protection from Internet related claims is the advertising injury coverage often sold under comprehensive or commercial general liability ("CGL") insurance policies. CGL insurance policies frequently provide insurance coverage for claims stemming from the policyholder's advertising activities, which involve claims of "libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan."

Recent New York Advertising Injury Insurance Coverage Decisions

Advertising injury insurance coverage has been the subject of dispute in recent court decisions. New York County Supreme Court Justice Barry Cozier, in *Sidney Frank Importing Co., Inc. v. Farmington Casualty Co.* (N.Y. Sup. Ct., N.Y. Cty June 29, 1998) held that the policyholders were entitled to advertising injury insurance coverage for their defense costs for trade dress infringement and unfair competition claims. In ruling for the policyholder, Justice Cozier found that the complaint in the underlying action alleged injury arising out of misappropriation of "advertising ideas or styles of doing business." As such, the court held that the complaint's allegations "may be considered to rationally fall within policy coverage."

In another New York decision, *1165 Broadway Corp. v. Public Service Mutual Insurance Co.* (N.Y. Sup. Ct. 1997), the court held that the policyholder-landlord was not covered under the "advertising injury" and "personal injury" provisions when the landlord was sued by several clothing and accessories manufacturers for failing to take steps to prevent its tenants from manufacturing counterfeit goods in violation of the federal trademark laws. The insurance policy provided coverage for "advertising injuries" committed in the course of advertising the policyholder's goods, products or services. The policy further defined advertising "offenses" to include "misappropriation of advertising ideas or style of doing business" and "infringement of copyright, title or slogans." Without any discussion of whether the counterfeiting constituted an "offense," the court concluded that the conduct in question was not committed in the course of the *landlord's* advertising of its own goods, products or services. To the contrary, "all of the claims arose out of the advertising or other activities of the plaintiffs' tenants."

Federal Court Decisions Demonstrate "Advertising" is a Broad Concept

The New York court's decision in *1165 Broadway Corp.* can be contrasted with the decision in *Energex Systems Corp. v. Fireman's Fund Ins. Co.* (S.D.N.Y. 1997). In that federal court case, the policyholder was in the business of rebuilding batteries and power packs, including products manufactured by Anton/Bauer. In a direct mailing to its customers, the policyholder forwarded a price list, which included a depiction of rebuilt Anton/Bauer power packs. After Anton/Bauer

sued for, among other things, patent and trademark infringement, the policyholder sought insurance coverage for the claim. The insurance company denied coverage on two grounds: (a) the policy only applied to common-law "misappropriation" claims, and not to traditional trademark claims; and (b) the offenses in question did not occur during the course of "advertising activities." Both arguments were rejected.

The decision in *Ben Berger & Son v. American Motorist Inc. Co*. (S.D.N.Y. 1995) is also instructive. The policyholder was sued by a children's clothing designer, Cynthia McKinney, who alleged that, subsequent to her termination of a licensing relationship with the policyholder, the policyholder continued to manufacture and market similar products.

In rejecting the insurance company's argument that such misappropriation of trade dress did *not* constitute advertising injury, the court noted that, because the terms of the advertising injury definition were not defined, they must be given their ordinary meaning. In light of the common, everyday meaning of the terms, the court readily concluded that the alleged misconduct constituted "advertising injury" for purposes of insurance coverage.

Cyberspace Claims and "Advertising Injury"

In the context of Cyberspace related claims, policyholders may be protected by advertising injury insurance for liabilities stemming from disputes over Internet domain names. Domain names are the electronic online addresses for Internet users and advertisers. Understandably, companies are eager to stake out domain names that will be easily recognizable to consumers. Indeed, the disputes surrounding domain names serve to underscore the dangers present for even the Internet's peripheral players.

Domain name disputes frequently involve claims of trademark infringement. For example, in *MTV Networks v. Curry* (S.D.N.Y. 1994), the video music channel, MTV, sued a former video host for trademark infringement for the host's use of the domain name "mtv.com." Insurance coverage under a CGL insurance policy should be available for such a lawsuit because numerous courts have held that trademark infringement falls within the CGL policy's definition of "advertising injury."

Also important in connection with activities in Cyberspace, is the fact that CGL policies often provide insurance coverage for "[o]ral or written publication of material that violates a person's privacy." As more and more information is transferred over the Internet, and as more technology enables businesses to track an Internet user's every move over the Internet, lawsuits may begin to proliferate. Enabling technology, for example, sometimes referred to as "little brothers," permits the tracking of Internet users. The tracking information is then sold to direct marketers, collection agencies, private investigators, web-site designers and many others. Policyholders who are alleged to have violated a person's right of privacy should look to their insurance policies for insurance coverage. Not only do CGL policies provide potential insurance coverage for such claims, but umbrella insurance policies and media E&O insurance policies may as well.

Global Nature of Cyberspace

The global nature of the Internet has implications for insurance coverage for claims stemming from Internet activities. Jurisdictional questions may have a bearing on any insurance coverage that a policyholder might have available for potential liabilities or losses. In addition, many insurance policies have geographic limitations to insurance coverage. As such, insurance companies may assert that the availability of insurance coverage may be contingent upon where the claim is first made against the policyholder. In order to be protected, policyholders who are active over the Internet may wish to buy insurance that will protect them worldwide.

Insurance companies may also argue that provisions in the CGL policy that exclude coverage for policyholders in the business of "advertising, broadcasting, publishing or telecasting," apply. These exclusions, however, should be inapplicable to most CGL policyholders. Doing business over the Internet regularly should not transform a policyholder into an advertiser, broadcaster, publisher or telecaster for purposes of the CGL policy.

Conclusion

Advertising injury insurance coverage is routinely purchased by numerous policyholders but often overlooked when advertising injuries surface. Case law demonstrates that there should be

insurance coverage *whatever* the medium by which a policyholder allegedly has caused confusion or sought to trade off of the name or reputation of a competitor. As such, policyholders engaging in commerce and communication over the Internet should be aware of the significant advertising injury insurance coverage they may have available under their insurance policies. ■

JOHN B. BERRINGER AND JOSHUA GOLD ARE PARTNERS IN AKO'S NEW YORK OFFICE. MR. BERRINGER CAN BE REACHED AT (212)278-1500 OR **jberringer@andersonkill.com** MR. GOLD CAN BE REACHED AT (212)278-1886 OR **jgold@andersonkill.com**