

## #insuringsocialmedia: Commercial Liability Policies

*Part II in a series regarding insurance for social media litigation.*

*Part I focused on coverage for media companies, and Part III will look at coverage for individuals.*

The majority of companies and small businesses embrace social media to build brand identity, interact with customers, enhance public relations and increase sales. Unfortunately, employees and the general public sometimes use these same sites to bash competitors, colleagues - and the company itself - giving rise to defamation, invasion of privacy, advertising law violations and a litany of other corporate headaches. The content of such sites can also give rise to copyright and trademark infringement litigation.

While there have not been as many suits against businesses as there have been against individuals for posting offensive content – maybe because alcohol is less likely to have played a part - there has been litigated activity giving rise to six and seven figure damage awards, not including defense costs, which would be significant. Many larger companies have adopted comprehensive social media policies that reduce exposure by providing guidance to employees as to what online conduct is permissible on the employers' social media sites and the types of information that can be disseminated. Unfortunately, social media policies are parchment barriers, and the elimination of all claims is impossible. As a result, insurance is an important consideration.

The Commercial General Liability (“CGL”) policy is the “go to” policy for most third party liability lawsuits. As a general rule, CGL policies provide coverage for “personal and advertising injury” under “Coverage B.” This article examines the most recent 2013 form drafted by the Insurance Services Office (“ISO”) and its coverage for claims arising from business use of social media, such as Twitter, Facebook, LinkedIn and YouTube. It’s important to note that insurers do not always adopt the most recent ISO form so the insured’s specific CGL form must be closely reviewed, as well as any coverage narrowing or broadening endorsements to determine if coverage is available.

Coverage A under the CGL probably isn’t relevant. That coverage part, which extends to the classic “slip and fall” exposures, requires an “occurrence” (typically defined as an accident or repeated exposure to a harmful condition) committed by the insured causing “bodily injury” or “property damage.” While jurisdictions may differ, “bodily injury” does not generally include the type of hurt feelings, reputational damages or economic loss typically associated with the posting of offending or infringing content. While a claimant suing for copyright infringement arising from the use of his or her artwork on a company’s fan page may be shaking with anger and seeing red, it’s very unlikely that a bodily injury claim has taken place. Additionally, the insured’s posting on a social media site or the uploading of a corporate moment on YouTube is generally perceived as an intentional act and difficult to cast as an accident or “occurrence” under the policy.

The types of offenses associated with social media litigation are typically found within Coverage B, such as defamation and invasion of privacy. (Oops! Invasion of privacy has been deleted by a new endorsement to this form. Better check your policy and read our article “ISO Broadens Personal and Advertising Injury Coverage Gaps” on our website). Specifically, the insuring agreement of Coverage B provides coverage for “sums that the insured becomes legally obligated to pay as damages because of ‘personal and advertising injury’ arising out of the insured’s business.” A “suit” must have been filed against the insured seeking damages, and the offense must have been committed in the “coverage territory” during the policy period. Last, but certainly not least, the claim must not fall within one or more of the 16 (sixteen) exclusions.

“Personal and advertising injury” is defined as,

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*[I]njury, including consequential “bodily injury,” arising out of one or more of the following offenses:*

\* \* \*

- 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.’”*

\* \* \*

As is true with most insurance policies, there are terms embedded within terms, which generally narrow coverage for the insured. For Instance, for coverage to be available for the intellectual property-related perils, the offense must arise from the insured’s “advertisement,” which is defined as follows:

\* \* \*

*[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 communications; and*
- b. Regarding webs 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.*

\* \* \*

The first consideration in evaluating coverage for a social media claim is whether the offense arose out of the insured's business or within the scope of an employee's job. With some companies, mostly larger ones, employees may be authorized or even assigned to post, tweet and otherwise participate in social media on the company's behalf. In such cases, it is clear that the social media content is connected to the insured's business. It becomes less clear, however, when the offending employee isn't expressly instructed to post material, posts after hours or where the small business owner blends his or her business and personal life in online posts. When the social media content seems to be more personal than business, a coverage issue will likely result.

The next consideration is whether the offense giving rise to the suit is a named peril. Libel is specifically covered in the CGL wording, and a social media posting should be considered a "publication." Accordingly, a defamation suit should be subject to coverage. The same is true for invasion of privacy in a "publication," unless the policy has the ISO endorsement (discussed above) that excludes this cause of action.

Copyright infringement is an important peril that arises if, for instance, a business uses a third party's artwork or photograph on social media or plays unlicensed music in a YouTube infomercial. It is key to note that copyright infringement is only covered if it arises directly out of the insured's "advertisement." That, of course, raises the question of whether all of a company's social media posts, which presumably support the business in some way, are "advertisements" within the policy's definition.

In addition, the CGL form covers the perils of "the use of another's advertising idea" (a very vague concept), as well as infringement of trade dress and slogan; but these causes of action, like copyright infringement, must appear in an "advertisement."

Claims often arise from the use in social media (or company websites, for that matter) of celebrity images and names. However, the tort that gives the celebrity a remedy, infringement of the right of publicity, is not mentioned in the CGL wording. The right of publicity is often thought of as a form of invasion of privacy, thus a policy's coverage for privacy (remember the ISO endorsement) would apply. On the other hand, the right of publicity is sometimes thought of as an intellectual property tort, and potentially subject to the exclusion discussed below. Either way, coverage is problematic.

Even if the requirements of the insuring agreement have been met, what the insurer giveth in one place, may be taketh away in another. With respect to social media claims, the following exclusions must be closely examined:

1. "Material Published With Knowledge Of Falsity" - In defamation suits, the plaintiff will often allege that the offending comment was made with knowing falsity. Although this is often a pleading requirement under applicable state law or an effort to trigger a punitive damages award based upon actual malice, such an allegation will likely trigger a reservation of rights

- from the insurer. However, there must be an admission from the insured or a court determination before an insurer can deny coverage based upon this exclusion alone.
2. “Contractual Liability” - This exclusion can cause trouble if a copyright infringement claim arises from the breach of an existing license and breach of contract is alleged.
  3. “Quality Or Performance of Goods – Failure To Conform to Statements” - In the event the claim alleges that the insured falsely represented its product(s) or services through social media, the insurer may very well deny coverage or reserve rights based upon this exclusion.
  4. “Wrong Description Of Prices” - As above, claims arising from the inaccurate pricing of goods or services will be specifically excluded.
  5. “Infringement of Copyright, Patent, Trademark or Trade Secret” is specifically excluded, although coverage for copyright is extended for claims arising from the insured’s “advertisement.” This is a significant shortcoming for companies that post white papers and other informational materials that are unrelated to advertising. In the advertising context, the exclusion for trademark infringement is notable. Since social media is an inexpensive way for companies to roll out new brands and test customer response, trademark infringement poses a significant threat. Even many specialty media policies written for advertisers do not provide coverage for trademark infringement because it is generally perceived to be a moral hazard for an insurer to provide trademark coverage when an insured can profit from creating confusion in the marketplace with its marks.
  6. “Insureds in Media and Internet Types of Business” – This exclusion prohibits coverage under Coverage B for media companies, thus requiring them to procure media liability coverage through specialty insurance markets. (See Part I of this series, “Insuring Social Media under Media Policies,” on our website).
  7. “Electronic Chatrooms or Bulletin Boards” – This exclusion, which is a BIGGIE, creates coverage problems for claims arising from online postings that “the insured hosts, owns or over which the insured exercises control.” This exclusion first appeared in 2001 when internet users were cutting their interactive teeth in America Online chatrooms, and social media developers were still in diapers. It’s surprising that ISO – twelve years later - would perpetuate the use of such clunky and outdated nomenclature. While it does not appear that courts have interpreted this language in a coverage matter, it is likely that a social media account, whose content or fan page is controlled by the insured, would fall within this exclusion. The language would not appear to exclude, however, coverage for offensive posts made by the insured on a third party’s site.
  8. “Unauthorized Use Of Another’s Name Or Product” – This exclusion prohibits coverage for 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.” This claim is

nothing more than a kissing cousin to trademark infringement, and ISO is making it very clear that they don't want anything to do with it.

9. "Recording And Distribution of Material Or Information In Violation Of Law" – This exclusion bars coverage for claims arising out of spamming, unsolicited faxing and other related conduct prohibited by a myriad of state and federal laws that use acronyms, such as TCPA, CAN-SPAM, FCRA, FACTA, etc. (No, LMAO is not a statute). This exclusion would also eliminate coverage for claims arising from the collection or transmittal of information, such as Personally Identifiable Information.

Because of these exclusions, coverage under the CGL policy for social media content is neither clear nor all-encompassing. Much will depend on the circumstances of individual cases, the creativity of the plaintiff's lawyer or the interpretation by the insurer's claim person – or coverage counsel. For policyholders wanting more clarity, broader coverage and better predictability, procuring coverage through a specialty market for media liability<sup>1</sup> is a smart way to ensure that social media activities – and other business communications – are fully insured.

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<sup>1</sup> Media liability policies generally include coverage for trademark infringement. Advertiser liability policies generally exclude trademark. For full coverage under the latter policy, it will be necessary to add trademark by endorsement.