



## Exclusions In Your Insurance Policy May Leave Your Business Exposed

### Insurance Companies are Increasingly Excluding Coverage for Copyright and Trademark Infringement Actions

Most companies obtain one or more insurance policies to help limit the company's risk. A commercial general liability policy (or "CGL policy") is arguably the most common insurance policy that companies obtain. CGL policies are often thought to provide broad protection to a company for various risk factors. This coverage includes things often outside the company's control (e.g., things that happen just because the company is "in business"). Many companies rely on these insurance policies to provide coverage to defend against frivolous lawsuits, including those brought by trademark and copyright "trolls" whose primary purpose is to make money through litigation. Without insurance coverage, a company that is met with a (threatened) lawsuit is left to pay extensive attorneys' fees for a legal defense, and/or must concede to the extortion of the plaintiff (which usually entails paying for a settlement, plus relinquishing other rights that negatively impact the company).

Historically, CGL policies provided coverage for "advertising injuries." While there are various definitions of an "advertising injury," the concept relates to liability stemming from a publication a company makes while marketing its products and services. Common examples include uploading a blog article that contains pictures taken from elsewhere on the internet, publication of a website using design elements created by a third-party, selling a product or service via an online marketplace that uses a brand name that is similar to another registered trademark, and posting social media updates with pictures or references to another brand name.

Trademark and copyright infringement lawsuits have become a lucrative business. Certain intellectual property rights holders (think artists, photographers, and brand companies that solely purchase intellectual property rights from others with the idea of commencing lawsuits) obtain a significant amount of their revenue from suing out such claims. While some infringement claims are justified, there are also a significant number of frivolous cases being filed against unsuspecting companies. Due to the American justice system, where parties generally bear their own attorneys' fees, and the way intellectual property laws are written, a company can act completely in good faith, have no knowledge of any violation, do nothing wrong and still get slapped with an expensive, unmeritorious infringement lawsuit. It is increasingly common for advertising injury plaintiffs to sue out their claim in court before even communicating their proposed "settlement demand" (aka extortion) to a company.

The large number and expensive nature of these advertising injury cases has caught the eye of watchful insurers. While nearly all insurers historically provided coverage for such claims under their standard CGL policies, over the past two decades, insurers have been increasingly excluding coverage. Why? The purpose from the insurer's point of view is two-fold: (1) removal of this coverage helps keep premiums lower for customers, and (2) it decreases the insurer's liability for these increasingly popular claims. Regardless of the insurer's reasoning for the exclusion, the effect on companies purchasing CGL policies is significant. Companies who purchase CGL policies often expect to be protected against such lawsuits, but later are shocked to find out that no coverage exists.

So what should executives and business owners do in light of the current trend of insurance companies excluding coverage for advertising injuries, including intellectual property infringement claims? Three things:

- Confirm with your insurance agent/broker that your CGL policy: (i) has coverage for advertising injuries, and (ii) does not have any exclusions for intellectual property infringement allegations.
- If your GCL policy does not afford coverage for intellectual property infringement, ask your insurance agent/broker for a quote on what such coverage would cost.
- Assuming you have a trusted lawyer who is experienced in the legal defense of such claims, ask your insurer to approve your lawyer's law firm as approved

counsel in the event you have to file a claim and seek legal defense under your insurance policy. If you do not do so, you are at the mercy of the insurer to assign you legal counsel (who may not serve your interests as well as your trusted legal counsel).

This blog was drafted by [Jon L. Farnsworth](#) and [Barry Pickens](#). Jon is a partner at Spencer Fane LLP's Minneapolis office. His legal practice includes representing business clients on corporate, technology, and intellectual property matters, including trademarks and copyright. Barry is a partner at Spence Fane LLP's Overland Park, Kansas office. His legal practice includes advising clients on complex insurance matters and litigating insurance coverage disputes. For more information, visit [www.spencerfane.com](http://www.spencerfane.com).