



[Coverage of Intellectual Property \(IP\) Claims - Episode #127](#)

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John Czuba: Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Recommended Insurance Attorneys*.

We're pleased to have with us today attorney Martha Weis from the [Goodman Allen Donnelly PLLC](#) law firm in Glen Allen, Virginia. Martha is an associate in the intellectual property practice group of the firm. She specializes in all aspects of trademark law, providing counsel on trademark clearance, prosecution, and enforcement litigation matters.

Martha, we're very pleased to have you with us today.

Martha Weis: Good to be here, thank you.

John: Today's discussion pertains to intellectual property, or IP claims. Martha, for our first question today, does the typical general liability insurance policy cover IP claims?

Martha: There is not a hard and fast rule as to whether a typical general liability insurance policy covers intellectual property claims. Under typical policies, there's often coverage for what's known as advertising injury, or business advertising causes.

Depending on the wording of the particular policy, advertising injury coverage often extends to claims made against the insured for trade secret misappropriation and trademark, copyright, trade dress infringement, and sometimes patent infringement as well.

There are two basic forms of advertising and injury coverage. One form defines advertising injury as any injury arising out of an offense committed during the policy period, occurring in the course of the named insured's advertising activities.

If such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition or infringement of copyright, title, or slogan. A possible concern with this definition is that it requires that the offense occurred in the course of the named insured's advertising activities.

Insurance companies could potentially avoid coverage if they could show somehow that there was no causal link or causal connection that exists between the infringement on one hand, and the insured's advertising activities on the other.

The benefit of this form is that it covers unfair competition, which courts could view as broader protection than that afforded to traditional copyright, trademark, or patent infringement claims.

The other form of advertising injury coverage states that a claim is covered if it arises from:

1. 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
2. Oral or written publication of material that violates a person's right of privacy; or
3. Misappropriation of advertising ideas or style of doing business; or
4. Infringement of copyright, title or slogan.

The upside of this definition is that it eliminates the arising in the course of advertising language. We no longer need that causal link. The downside is that it also eliminates the unfair competition language, so we're not afforded that broader protection in that definition.

John: Martha, what are some important policy exclusions?

Martha: I would say that most important policy exclusion is that of intentional torts or intentional acts of the insured. Most courts have held that intentional torts are not covered, and there's no duty on the part of the insurance company to defend in these particular cases.

Nearly every plaintiff filing a lawsuit against a defendant for infringement will claim that the infringement was willful and intentional. It is completely common practice.

John: Now are insurance companies off the hook from the onset?

Martha: It all depends on the jurisdiction, as always. Some courts have held that the mere allegation of knowing wrongdoing is not enough to exonerate an insurance company's obligation to defend, because intent is not a required element of infringement.

There can be a finding of liability against the defendant even if the infringement was innocent and therefore the insurance company would still be on the hook to defend. Other courts have held that the insurance company may rely on the allegations of the complaint to govern their duty to defend, so really depends on the jurisdiction.

John: So then what would your advice be to businesses shopping for a general liability insurance policy?

Martha: The best way to address the uncertainty in the marketplace with respect to whether a general liability insurance policy's advertising injury may be used to cover patent, trademark, trade dress or copyright infringement or trade secret misappropriation is to modify standard policies to be less ambiguous.

Work with the insurance company to tailor a policy that really works for your business and your IP portfolio.



John: Thanks, Martha. Do you have any final thoughts for us today?

Martha: I would say as a general practice point, the definitions for advertising injury that I discussed earlier encompass infringement of copyright, title, or slogan. I found that very often individuals will think that title or slogan refers to a trademark.

And therefore they afforded trademark infringement protection by virtue of the title and slogan language. This is not the case. It can be a point of discussion that some courts have ruled that it might cover.

But to be absolutely sure, a trademark is a source indicator, and is something distinct from a slogan and/or a title. If you want trademark protections specifically, you need to go ahead and work that into your policy.

John: Martha, thank you so much for joining us today.

Martha: Yes, thank you.

John: That was Martha Weis from the law firm of [Goodman Allen Donnelly](#) in Glen Allen, Virginia. Special thanks to today's producer, John Weber. Thank you all for joining us for the insurance law podcast.

To subscribe to this audio program, go to iTunes, or our Web page, www.ambest.com/claimsresource. If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now this message.

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