

Insurance coverage for infringement claims

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When a party receives a notice letter from a trade mark owner making an allegation of trade mark infringement, one of the first steps that the party should take following receipt of the notice letter (after conferring with counsel) is to review any insurance policy which it may have to ascertain whether insurance coverage is available. Too often, parties simply assume that their insurance policy does not provide protection for claims of trade mark infringement and miss out on the benefits that they are paying their insurance companies to provide.

The potential benefits of having insurance coverage against claims of trade mark infringement are numerous. Depending on the insurance policy, these benefits can include payment of attorney fees and the ability to recoup from the insurance company payments of judgment or settlements made in connection with defending the claim.

Insurance coverage for trade mark infringement claims can sometimes be available to insured parties as part of the advertising injury provisions of their commercial general liability (CGL) insurance policy. Although trade mark infringement is not typically included among the various types of advertising injury offences specifically listed in the policy, it is often considered to fall under the broader scope of misappropriation of advertising ideas or style of business. In particular, courts have often held that the general intention when using a trade mark is to advertise products or services and therefore, in certain circumstances, trade mark infringement is considered advertising injury for purposes of invoking the protections provided by a company's insurance policy.

It is important that an insured party notify their insurance company of the claims of infringement as promptly as possible. Timing is particularly crucial because certain insurance policies often contain an exclusion for insurance coverage in situations where the insured does not provide timely notice. Similarly, insurance policies often preclude recovery by the insured of expenses incurred prior to notification to the insurer. Moreover, under the laws of various states, untimely notice of a claim can constitute a basis for the insurance company to deny coverage.

Accordingly, parties should carefully review their insurance policy to understand what claims it covers and confer both with their trade mark counsel and insurance representative.

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