Practical Considerations for Media Liability Insurance

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Overview

Every day, creators of media content produce and market countless works of art and entertainment—including scripted and reality television programs, motion pictures, books, newspaper and Internet articles, blogs, and musical works. But every time content "goes live," media and entertainment entities and other content creators face the risk of liability for claims alleging infringement of intellectual property rights, or violation of certain private and reputational interests. To protect themselves against such liability, members of the media and entertainment industries commonly purchase entertainment errors and omissions insurance, also known as "media liability" coverage. In this QuickCounsel, we address the types of claims that may be covered under media liability insurance policies and provide tips and precautions to help insureds maximize the value of their coverage.

What Insureds Need to Know About Their Media Liability Coverage

What Types of Claims Are Covered?

Media liability insurance is a specialized form of errors and omissions insurance that provides coverage for claims brought by third parties. These policies are designed to protect media and entertainment insureds from liability resulting from a wide range of claims—including, depending on the insured's precise policy terms, claims alleging invasion of privacy; defamation; libel; slander; disparagement (including product disparagement); breach of implied contract arising out of the submission of ideas; copyright infringement; plagiarism and other unauthorized use of material, names, or trademarks; breach of license agreement; and breach of agreement relating to product placement. Notably, the broad coverage provided under many media liability policies may extend to claims excluded under other liability policies, including standard form commercial general liability insurance.

Media liability coverage generally extends only to claims arising out of the insured's "business"—a defined term in the policy that needs to be evaluated carefully prior to purchasing coverage. Indeed, the breadth of this definition can have a significant impact on the scope of coverage provided under a media liability policy. Because an insured's business pursuits can vary widely, it is important for insureds to purchase coverage that is sufficiently broad in scope to cover all of their entertainment and media activities.

The precise needs of media and entertainment entities vary widely, so media liability coverage is generally not written on standard form policies. Instead, most media liability insurers manuscript policy forms tailored to meet their insured's specific needs. Although the specialized nature of this type of policy can be a bonus for insureds facing unique risks, because the terms of media liability policies vary greatly, insureds must carefully review the terms and conditions of their policies—both when purchasing a policy and when making a claim for coverage. Indeed, because there is such variety in policy terms for this line of coverage, insureds should not make any assumptions about what is covered—or, for that matter, what is *not* covered—under their media liability policies.

Who Is Covered?

Media liability policies often define the term "insured" quite broadly, providing coverage not only for the named insured but also related companies and individuals. For example, it would not be uncommon for a media liability policy to cover a company as well as its subsidiaries, employees, directors, and officers. Coverage also may extend to independent contractors performing services on behalf of the insured. However, given the wide variation of the terms in media liability policies, insureds should make sure that their policies are broad enough to cover all of the entities, people, and activities at risk.

What Is the Difference Between Occurrence and Claims-Made Policies?

Media liability policies can be either "occurrence" or "claims-made" policies. Aptly named, occurrence policies cover losses that occur during the policy period. For example, if a lawsuit filed in August 2013 alleges that the insured infringed the plaintiff's copyright in June 2011, the insured would look to its 2011 occurrence policy for coverage. Claims-made policies, on the other hand, cover claims that are filed or otherwise asserted during the policy period. Using the previous example, under a claims-made policy, the insured would look to its 2013 claims-made policy for coverage.

Because media liability coverage is increasingly provided on a claims-made basis, it is important for insureds to understand the reporting requirements of their claims-made policies. Many claims-made policies require notice to be provided within a specified timeframe—sometimes as little as 30 days or less—after the insured learns of a claim. The term "claim" is typically defined broadly to include lawsuits, arbitrations, civil and administrative proceedings, and demand letters. Furthermore, many claims-made media liability policies require the insured to provide notice of "potential claims," which may be referred to as a "notice of circumstances." Such provisions may require the insured to notify its insurer of acts, errors, or omissions that it has reason to believe may lead to a future claim.

What Forms of Relief Are Covered?

In addition to the costs of settlements and adverse judgments, media liability policies typically cover defense costs, which can include the fees charged by counsel and all other expenses incurred to defend the insured against a potentially covered lawsuit. Depending on the terms of coverage, defense expenses can be either "within limits" (meaning that they will reduce available policy limits) or "outside of limits" (meaning that they will not erode available policy limits). It is important for an insured to understand the distinction between these two forms of coverage so that it can ensure that it purchases a policy that meets its coverage needs and expectations.

Some media liability policies cover other forms of relief as well. For instance, a number of media liability insurers expressly provide coverage for the costs of complying with an injunction—a feature of coverage that can be particularly valuable for entertainment and media entities.

What Might Be Excluded?

Like any insurance policy, media liability policies contain a number of exclusions. For instance, media liability policies will often exclude coverage for breach of contract, breach of fiduciary duty, and patent infringement claims. It is also common for media liability insurers to exclude coverage for knowing or intentional violations of the rights of another, although such exclusions may not apply to defense costs.

In addition, media liability policies may contain a "first publication" exclusion that purports to limit coverage for claims arising out of material that was first published prior to the policy period. Typically, this provision is included because insurers do not want to insure risks that already have materialized. However, under most versions of this exclusion, coverage is only barred if the material published during the policy period is identical to the material published before the policy's inception. Many courts have held that exclusions of this sort do not apply to claims arising out of material that is merely "similar" to material published prior to the policy period. Sample cases here and here. As a practical matter, even if a particular claim arises out of material that is identical to material published prior to the policy period, it is possible that the insured will have coverage under a prior policy.

Media liability policies issued to film or television producers may contain a "green light" exclusion limiting coverage to liabilities incurred prior to the start of principal photography. These exclusions, which are designed to apply to claims arising out of errors and omissions occurring during the production or in post-production, can be neutralized through the purchase of "post green light"

endorsements—which generally have the effect of extending coverage through post-production.

Of course, media liability policies may contain additional exclusions and limitations not discussed here. As a result, insureds should familiarize themselves with the precise terms of their policies. It is worth noting, however, that if there is any potential for coverage, the insurer cannot rely on its exclusion to deny its insured a defense. Moreover, policy exclusions are construed narrowly, and the insurer bears the burden of proving the applicability of an exclusion. Therefore, if an insurer relies on an exclusion to disclaim coverage for a claim, the insured should closely scrutinize the denial and evaluate whether the insurer's reliance on the exclusion is justified.

Other Considerations for Media Liability Policies

In addition to some of the more standard insurance policy conditions (such as those governing notice of claims and cooperation with the insurer), media liability policies also may include media-specific conditions. If, for example, the insured is involved in distribution, its insurer may require that it adhere to pre-approved clearance procedures— including, for instance, checking and securing all of the rights (both personal and property) needed to produce, distribute, and/or broadcast a film, book, blog, magazine, movie, or television program prior to distribution in order to minimize future legal risks. Indeed, many media liability policy applications will ask whether the insured has established clearance procedures and/or whether the applicant has retained legal counsel with expertise in media law and/or intellectual property to assist with clearance, content review, and other issues. Similarly, if the applicant is a television or film producer, the insurer may ask for assurances that appropriate steps have been taken to obtain all necessary rights to use music and other visual content (e.g., photographs, film clips, stock footage, graphics, animation, etc.) in the applicant's television program or film.

Even if an insured fails to adhere to its own clearance procedures in a particular instance, coverage may still be available for a subsequent claim. Indeed, some media liability policies expressly provide that an insured's inadvertent failure to adhere to its clearance procedures will not operate as a bar to coverage.

Making a Claim for Coverage

Ideally, before a claim arises, the insured should familiarize itself with the terms and conditions of its particular policy. Part of this review should include careful attention to any timing-related requirements regarding notice and reporting requirements. In the event a claim does arise (or the potential for a claim is determined depending on the policy's requirements), the insured should strive to comply with the policy's requirements.

Likewise, insureds should be mindful of timing-related limitations governing their right to initiate litigation against their insurers, should such action be necessary. Such limitations may be found in the policy itself, or they may derive from statutes or regulations setting the timeframe to initiate litigation. Either way, insureds should be mindful of the relevant limitations period so that they can obtain the full benefits of coverage. An additional resource relating to notice can be found here.

Conclusion

Media liability insurance can provide much-needed coverage for members of the media and entertainment industries, especially today when more media content is being generated than ever. However, because the needs of insureds and the terms of this form of coverage vary so widely, an insured should carefully assess its own needs when purchasing coverage. Then, in the event of a claim, the insured must once again carefully review all applicable policy terms and conditions so that it can maximize the benefits of its media liability coverage.

Additional Resources

ACC Resources

- ACC Webcast: Insurance Coverage for Marketing and Advertising Risks (2013)

- ACC InfoPAK: A Policyholder's Primer on Insurance (2010)

Web Resources

- Chapter 8: Entertainment Errors and Omissions/Media Liability Insurance (*New Appleman Sports and Entertainment Insurance Law & Practice Guide* 2012)
- "The Breadth of an Insurer's Duty to Defend," The Advocate (Kirk Pasich June 2012)
- Dickstein Shapiros Policyholder Informer Blog