

BLOGS

Policyholder

How Commercial General Liability Policies' 'Coverage B' Can Help Mitigate IP Losses

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In recent years, intellectual property (IP) claims have been on the rise—patent disputes, infringement claims, unlicensed use of social media content—all often lead to expensive IP litigation. While most businesses are familiar with and purchase Commercial General Liability (CGL) policies, there is an often-overlooked section that can be a powerful tool for protection in IP-related claims called “Coverage B.”

Coverage B, or “Personal and Advertising Injury Coverage,” offers critical coverage that may provide defense (and indemnity) against lawsuits alleging disparagement, defamation, and similar claims that often accompany intellectual property disputes.

Understanding Your CGL Coverage

There are two main coverage sections to typical CGL coverage: Coverage A, which protects against third-party bodily injury and property damage claims, and Coverage B for “Personal and Advertising Injury.” Coverage B is often overlooked, despite its potential to protect against a broad range of claims. Unlike Coverage A, which requires an “occurrence” or accident to trigger coverage, Coverage B protects against a list of “offenses,” including intentional acts like disparagement, slander, and libel. This is a significant difference that can be key to triggering the insurer’s duty to defend claims that fall outside the realm of bodily injury and property damage but are potentially far more damaging to a business.

Although you should read your policy carefully to determine if there is coverage, Coverage B typically includes protection for claims alleging:

- False arrest or imprisonment
- Malicious prosecution
- Wrongful eviction or invasion of privacy

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- Oral or written publication of material that slanders, libels, or disparages an individual or business
- Infringing upon another's copyright, trade dress, or slogan in your advertisement

In addition to the specific coverage for copyright and trade dress infringement noted above, many insured have received a defense of other types of infringement lawsuits from CGL insurers because of the inclusion of allegations related to defamation and disparagement. Even if not plainly stated as a cause of action for "disparagement" in the complaint, a claimant's allegations, when taken as a whole, may fit such cause of action and trigger the insurer's duty to defend. For example, this may occur when one business allegedly harms another's reputation by casting doubt on the quality or ownership of their products or services.

Key Considerations and Common Misconceptions

There have been several misconceptions among insurers (and insureds) regarding the scope of Coverage B. If insureds do not fully understand the coverage and fail to push back after receiving a denial, they are potentially forfeiting millions of dollars in defense coverage they purchased. When denying coverage for these types of claims, insurers will often assert that Coverage B requires the same accident-based trigger as Coverage A. However, as noted above, Coverage B is typically triggered by intentional actions, such as statements made in an advertisement that disparage another company's products. Examples of where this distinction was emphasized can be found in cases like *Hartford Fire Ins. Co. v. Vita Craft Corp.*, 911 F.Supp.2d 1164 (D. Kan. 2012) and *Foliar Nutrients, Inc., Big Bend Agri-Services, Inc. and Monty Ferrell v. Nationwide Agribusiness Ins. Co.*, 133 F.Supp.3d 1372 (M.D. Ga. 2015). In the *Vita Craft* and *Big Bend* cases, courts found that even sparse allegations related to disparagement or false rumors were enough to trigger the insurer's duty to defend.

Insurers also commonly argue that exclusions related to intellectual property, such as those for patent or trademark infringement, automatically bar all coverage under Coverage B in these types of disputes. While it is true that most policies contain exclusions for certain types of intellectual property infringement, courts have held that disparagement allegations, even if sparsely alleged, may fall within the scope of Coverage B despite the presence of other excluded intellectual property claims. This is critical because in most jurisdictions, typical CGL policy language requires an insurer to defend the *entire lawsuit* even if only one of the asserted claims is *potentially* covered.

Disparagement in the Context of Intellectual Property

Disparagement can take many forms, including statements made by a company that allegedly harm a competitor's product or service. In the *Big Bend* case, for example, the company was accused of contacting its competitor's customers, telling them that the competitor's products were involved in litigation, and discouraging them from purchasing those products. Big Bend's insurance policy provided coverage under Coverage B for "personal and advertising injury," which included "injury arising from the oral or written publication of material that slanders or disparages another's goods, products, or services," and the court found that Big Bend's insurer had to provide defense for the underlying lawsuit as a result.

Similarly, in the *Vita Craft* case, the insured was accused of orchestrating a scheme to damage a competitor by spreading false rumors. The court found that even though the primary lawsuit involved claims of patent infringement and breach of contract, the allegations of disparagement included in an "unfair competition" cause of action was sufficient to trigger the insurer's duty to defend under Coverage B.

Strategies for Securing Coverage

While Coverage B can provide valuable protection, securing that coverage often requires policyholders to be proactive and diligent in managing their claims. Here are a few strategies to maximize the potential for coverage should you find yourself in an intellectual property lawsuit:

1. Review the Entire Complaint:

Look beyond the labels and names of counts. Even if a lawsuit is framed as a breach of contract or patent infringement case, review the complaint closely for any allegations that could be construed as disparagement or defamation. These claims can trigger the duty to defend even if they are only a small part of the overall lawsuit

2. Push Back Against Denials and Exclusions:

Insurers may argue that intellectual property exclusions bar coverage. However, as seen in the *Big Bend* case, exclusions for patent or trademark infringement do not necessarily apply to claims of disparagement. Additionally, it is the insurer's burden to prove that an exclusion applies to bar coverage. This often makes it difficult for an insurer to escape the duty to defend based on an exclusion, particularly when the insured denies any wrongdoing.

3. Provide Additional Information:

If the allegations in the complaint are unclear, provide additional facts that might help establish a duty to defend as the lawsuit progresses. In the *Vita Craft* case, additional information obtained during discovery and provided to the insurer helped secure coverage by clarifying the nature of the disparagement claims.

4. Follow Up in Writing:

If your insurer denies coverage, don't hesitate to follow up in writing and point out specific language in the complaint that supports your claim for coverage. Insurers may overlook or misinterpret key details, especially when dealing with less obvious allegations of disparagement.

Risk Management Considerations

While it's important to understand how Coverage B can provide protection, businesses should also take steps to manage the risks associated with intellectual property claims. Here are a few key considerations:

- **Be Mindful of Advertising Claims:** Statements made in advertisements, press releases, or other public communications about competitors or their products can give rise to claims of disparagement or defamation. Businesses should ensure that marketing materials are reviewed carefully to avoid making misleading or damaging statements.
- **Know Your Policies:** It's critical to understand the scope of your coverage, including any exclusions that may apply. This will help you negotiate the best possible terms at the outset (or renewal), as well as anticipate potential coverage issues and manage disputes with insurers more effectively.
- **Engage with Insurers Early:** If faced with an intellectual property lawsuit, engage with your insurer early and provide them with all relevant information, including any details that support a claim for defense under Coverage B. This can help prevent delays and denials of coverage.

Be Proactive, Vigilant and Strategic

Coverage B can provide critical protection against a range of claims, including those involving disparagement and defamation that may not be obviously stated, but are often included in IP litigation. By understanding the scope of Coverage B and being proactive in managing claims, businesses can better protect themselves against the financial and reputational risks associated with intellectual property disputes. For policyholders, the key is to be vigilant, strategic, and assertive in securing the full benefit of the coverage they purchased.



This nuanced understanding of Coverage B can make the difference between having millions of dollars of defense costs covered in a lawsuit or facing substantial financial exposure alone.

If you have any questions regarding Coverage B, please contact the author listed above, or reach out to your regular Lathrop GPM attorney.

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