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Cybercoverage for Cyber-Risks: An Overview of Insurers' Responses to the Perils of E-Commerce

Robert H. Jerry II

Michele L. Mekel

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CYBERCOVERAGE FOR CYBER-RISKS: AN OVERVIEW OF INSURERS' RESPONSES TO THE PERILS OF E-COMMERCE

Robert H. Jerry, II and Michele L. Mekel***

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INTRODUCTION

With nearly seven percent of the world's population currently online¹ and e-commerce² forecast to hit \$6.8 trillion by 2004,³ one need not be

* Floyd R. Gibson Missouri Endowed Professor of Law, University of Missouri-Columbia School of Law. This article is based on a presentation given by Professor Jerry at the Annual Meeting of the Insurance Law Section of the Association of American Law Schools in San Francisco, California, on January 5, 2001.

** B.J., University of Missouri-Columbia, 1992; J.D., University of Missouri-Columbia, expected 2002; MBA, University of Missouri-Columbia, expected 2003; MHA, University of Missouri-Columbia, expected 2003.

1. At the close of 2000, more than 104 million American adults had Internet access and fifty-six percent used the Internet daily. *How Many Online Worldwide Survey*, available at http://www.nua.ie/surveys/how_many_online/world.html (last visited Nov. 12, 2001); see also Lee Rainie & Dan Packel, *More Online, Doing More: 16 million newcomers*

Nostradamus to predict that the Internet means great change for all industries—including the insurance industry. Presently, however, the proverbial cart is leading the horse as the insurance industry struggles to develop strategies to quantify, cover, and contain “cyber-risks.” Policyholders also face new challenges as they confront the possibility that their traditional insurance coverages are woefully inadequate either to secure their electronic and intellectual property assets or to guard against their potential e-commerce liabilities to third parties.

Ironically, the risks posed by e-commerce are not nearly as novel as the medium that makes such transactions possible. In fact, traditional causes of action abound, including the full range of intellectual property infringements (copyright, patent, and trademark), defamation, and invasion of privacy.⁴ Rather than presenting new theories of liability, the Internet’s inherent accessibility has increased the rapidity and scale of these torts and infringements, should they occur.⁵ Indeed, some underwriters at Lloyd’s of

gain Internet access in the last half of 2000 as women, minorities, and families with modest incomes continue to surge online, Pew Internet & American Life Project, at http://www.pewinternet.org/reports/pdfs/pip_changing_population.pdf (Feb. 18, 2001).

2. E-commerce, short for electronic commerce, “is the integration of technology and business processes to facilitate both inter- and intra-company workflows, as well as communication with individual consumers. Electronic commerce uses technology to transfer information and conduct business.” *Electronic Commerce in Property/Casualty Insurance: Strategic Advantage or Economic Imperative?*, at <http://www.iso.com/docs/stud010.htm> (Dec. 1997).

3. Forrester Research, Inc., *Forrester Findings: Worldwide eCommerce Growth*, at <http://www.forrester.com/ER/Press/ForrFind/0,1768,0,00.html> (last visited Nov. 10, 2001). This forecast constitutes 8.6% of total estimated sales for 2004. *Id.* For the United States, total e-commerce sales are slated for nearly \$3.2 trillion, or 13.3% of total estimated sales for 2004. *Id.* This total, if it is realized, will be an extraordinarily rapid increase from sales totals for 1998 and 1999, which were \$39 billion and \$155 billion respectively. In 1999, e-advertising revenue exceeded \$4 billion, an approximately five hundred percent annual increase for each of the three prior years. The figure is forecast to reach \$11 billion by 2003, which exceeds projected revenues from cable television advertising. See James A. Riddle & Hilary N. Rowen, *Avoiding Bad Days for Risk Managers: Insurance for Internet Related Risks*, TORT & INS. PRAC. COMMITTEE NEWS (Insurance Coverage Litigation Committee), Summer 2001, at 3.

4. See Truda Borthwick-Stevens, *E-insurance: Are You Covered?*, 8 CORP. COUNS., Jan. 2001, at A20; Dawn Dinkins, *Internet Liabilities: A Look at Coverage Under the Traditional Commercial General Liability Policy*, 16 No. 6 ANDREWS CORP. OFFICERS & DIRECTORS LIABILITY LITIG. REP. 15, Jan. 2, 2001; Adam H. Fleischer, *Internet Torts and Cyberspace Insurance: New Issues for the E-economy*, 88 ILL. B.J. 268, 268-72 (2000); Richard Kurnit, *Liability Online*, J. INTERNET L. (June 1998), at http://www.gwcf.com/articles/journal/jil_june98_3.html.

5. Dinkins, *supra* note 4, at 15.

London believe that “e-commerce will emerge as the single biggest insurance risk of the 21st century.”⁶ One commentator explains that “cybertorts” diverge from their traditional counterparts in three primary ways: “(1) [t]he number of suits involving these . . . claims can be expected to be exponentially greater than in pre-Internet days[;] (2) [c]omplex issues of international law, multi-jurisdictional disputes, and technical computer expertise will drive up the costs of defending and indemnifying these [claims; and] (3) [t]he . . . activities giving rise to these ‘cybertorts’ will present valid arguments for both insureds and insurers about whether they [fall within coverage].”⁷ In addition to the third-party liability presented by cybertorts, the Internet also impacts first-party coverage by highlighting the present-day dependence on intangible assets, such as data and intellectual property.⁸

Insurers’ responses to the risks inherent in e-commerce and the demand for coverage have been anything but uniform. Instead, the solutions are a patchwork of stop-gap measures and niche offerings, including: (1) exclusions to coverage;⁹ (2) modifications to existing policies in order to extend or to limit coverage;¹⁰ and (3) the creation of new policies that

6. David R. Cohen & Roberta D. Anderson, *Insurance Coverage for “Cyber-Losses,”* 35 TORTS & INS. L.J. 891, 892 (2000) (quoting Reuters Eng. News Serv., May 9, 2000).

7. Fleischer, *supra* note 4, at 269. One insurance executive put it this way: “[t]he explosive growth of the Internet and the rapid deployment of new technology worldwide have expanded potential liabilities related to intellectual property.” Mark E. Ruquet, *Intellectual Property Cat Coverage Offered*, NAT’L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT. EDITION, Aug. 21, 2000, at 13 (quoting Dominic Davison-Jenkins, senior vice-president and intellectual property practice leader at Marsh & McLennan, upon announcement of a new Marsh product called “IP-CAT,” offered in response to “growing litigation over the infringement of intellectual property”).

8. See Michael F. Clayton & Howard T. Weir, *Insurance for Intellectual Property Claims*, 624 PLI/PAT 129, 131 (2000); Joby A. Hughes & Kate L. Birenbaum, *Insuring Intellectual Property Risks: Creative Solutions on the Cutting Edge*, 568 PLI/Pat 203, 205 (1999) (noting that fixed assets are being “replaced in strategic importance by intellectual property assets”) [hereinafter Hughes & Birenbaum, *Insuring*]; John F. Cahill & Timothy Fitzgibbon, *Intellectual Property Assets Raise Insurance Issues: many companies seek coverage specifically designed for IP- and Internet-related risks*, NAT’L L.J., Oct. 25, 1999, at C17, available at http://www.clm.com/pubs/pub-925382_1.html; *Infringement of Intellectual Property Rights: Do We Need Coverage for This?*, ABA BUS. LAW SEC.: ANN. MEETING (Aug. 4, 1998).

9. See Dinkins, *supra* note 4, at 15; Joanne Wojcik, *Insurers Cut E-risks From Policies*, BUS. INS., Sept. 10, 2001, at 1.

10. *Id.*

specifically target Internet-related liabilities and losses.¹¹ These various measures have been applied in both the first- and third-party settings. This article presents an overview of some of the risks involved in the new “e-economy” and surveys how insurers are responding to these new risks.¹²

I. FIRST-PARTY INSURANCE

Although the exact terminology varies from policy to policy, first-party coverage¹³ provided by most commercial property policies generally requires “‘physical loss or damage to covered property’ [that] results from a ‘covered cause of loss.’”¹⁴ Because e-commerce risks often involve “non-physical” events, coverage under the standard language in the first-party forms is problematic. Such risks include denial of service attacks,¹⁵ computer viruses,¹⁶ and hackers, as well as power, phone, and Internet service provider outages.¹⁷ For example, in a denial of service attack, a

11. See, e.g., Dinkins, *supra* note 4, at 15; Randy K. Paar, *Coverage for Losses Arising Out of Use of the Internet*, ALI-ABA Course of Study, MATERIALS INS. COVERAGE IN THE NEW MILLENNIUM, VOL. II 1095, 1104 (2000); Joshua Gold, *Property and Liability Insurance for Internet and E-commerce Risks*, CORP. COUNS., Nov. 2000, at A12; Wojcik, *supra* note 9, at 1; Michael A. Rossi, *Stand Alone E-Commerce Market Survey*, available at <http://www.irmi.com/expert/articles/rossi004Chart.asp> (Dec. 2000); INS. INFO. INST., *Insurance Coverage Available for Web Sites Attacked by Computer Hackers*, available at http://www.iii.org/media/issues/internet_insurance.html (last visited Nov. 12, 2001).

12. Any effort to survey these issues must be accompanied by a significant caveat: rapid changes in technology, business practices, and insurance coverage create rapidly moving targets for any effort to describe the landscape; thus, any “current” description necessarily has a short life span and quickly becomes inaccurate if not updated.

13. “In first-party insurance, the contract between the insurer and the insured indemnifies the insured for a loss suffered directly by the insured.” Eric England, *Insurance Coverage Available for Web Sites Attacked by Computer Hackers*, *Wisconsin Insurance Alliance Advises*, WISC. INS. ALLIANCE, at http://www.wisinsal.org/WIA_PR17_Webcoverage.htm (last visited Oct. 26, 2001).

14. Jones Day, *Internet Insurance: Old Problems in the New Economy*, 5:11 CYBERSPACE LAW 4, 4 (Feb. 2001).

15. A denial of service attack occurs when a “[w]eb site is bombarded with millions of e-mails from a bogus source, thereby blocking access to the site by legitimate users.” Michael A. Rossi, *First-Party E-Commerce Risks*, available at <http://www.irmi.com/expert/articles/rossi002.asp> (June 2000) [hereinafter Rossi, *Risks*].

16. See David Hughes, *The Property Industry Eyes the Horizon for a “Cyber-Storm,”* LIABILITY BULL., Jan. 2001 (No. 1) (NAC REINSURANCE CORP.) (describing the rapid increase in business exposure to computer viruses and the potential consequences).

17. See Bernard P. Bell, *Do You Need E-Business Insurance?*, E-BUS. ADVISOR, Sept. 2000, at 28; Cohen & Anderson, *supra* note 6, at 893-97; Jones Day, *supra* note 14, at 4; Spencer M. Taylor & Sean W. Shirley, *Insurance and Cyber-Losses: Coverage for Downloading Disaster*, 62 ALA. LAW. 193, 193 (2001); Paar, *supra* note 11, at 1104.

website is temporarily forced out of service, but the site is neither destroyed nor permanently damaged—hence, no physical loss or damage occurs. On the other hand, infection with a computer virus might result in permanent damage or loss as viruses corrupt files and storage media. Alternatively, a virus might embed itself into software and storage media, thereby necessitating an expensive clean-up, but it may not involve actual destruction or alteration of computer data or software, and thus, arguably, no physical loss or damage.¹⁸

Whatever might be said about current commercial property policies, however, there is reason to think that changes in the commonly used standardized forms are imminent. For example, the Insurance Services Office (“ISO”) has prepared, and is in the process of circulating for state approval, changes in its commercial property forms that address cyber-risk issues.¹⁹ These forms narrow coverage for e-commerce-related losses.²⁰ It seems inevitable that policy text drafted for an era without substantial e-commerce activity will be changed and modified in an attempt to clarify the extent of insurers’ obligations for the new kinds of risks.

Beyond the standard commercial property forms, a policyholder occasionally might be able to fit an e-commerce loss under the coverage of an employee dishonesty, commercial crime, or kidnap and ransom policy. In the usual e-commerce situation, however, these policies will have gaps rendering them inapplicable.²¹ For example, a computer hacker who seeks to extort a ransom under threat of destruction of the insured’s computer files or servers might trigger the coverage of a kidnap and ransom policy, unless the policy’s coverage is limited to bodily injury or to ransoms paid under threat of physical destruction of property in circumstances where the

18. Cohen & Anderson, *supra* note 6, at 902.

19. See David Hughes, *The CGL and Cyber-Risk: ISO & the Internet*, 11 *ANDREWS INS. COVERAGE LITIG. REP.* 594 (2001) [hereinafter Hughes, *Cyber-Risk*], available at [http://www.nacre.com/nacre/nrcpubs.nsf/c449e30ac24e38468525669100386f69/2f4a2190fd7c06f485256ad80052429f/\\$FILE/April+2001.pdf](http://www.nacre.com/nacre/nrcpubs.nsf/c449e30ac24e38468525669100386f69/2f4a2190fd7c06f485256ad80052429f/$FILE/April+2001.pdf) (last visited Sept. 3, 2001). Hughes indicated that the ISO Circular making such changes already has been distributed to the states and is now in the process of state review. Telephone Interview with David Hughes, Vice President and Claims Manager, Claims Management Division, NAC Reins. Corp. (Sept. 4, 2001) [hereinafter Hughes, Interview].

20. Hughes, Interview, *supra* note 19. This is entirely consistent with the narrowing of coverage the ISO contemplates for the CGL form. For example, supplementary text for the definition of “property damage” in the CGL places damage to computerized or electronically stored data, programs, or software outside the scope of the definition. One might predict that a similar restriction on the definition would be included in the general commercial property form.

21. Rossi, *Risks*, *supra* note 15.

threat does not involve actual physical damage.²² If the e-commerce loss is attributable to employee theft, a firm may be able to turn to a commercial crime policy or fidelity bond for compensation (although most commercial property policies exclude coverage for loss caused by employee theft), but such policies typically have an exclusion for income lost as a result of employee theft, which often will be the greater concern.²³

Coverage for e-commerce risks is less debatable under commercial property coverage if the policy in question contains a "corruption of data clause" that defines the traditional "physical loss or damage" requirement as including events such as "the accidental, intentional or malicious distortion, corruption, manipulation, erasure or loss of data, or software of any kind."²⁴ In addition, a number of insurers offer "electronic data processing endorsements that explicitly relate to computer systems."²⁵ There is, however, no standard language for such riders, so generalizations about what they cover are impossible.²⁶

Another kind of first-party policy that may provide coverage for e-commerce risks is business interruption insurance. Such policies cover lost income and expenses incurred due to an interruption in business operations.²⁷ These policies, however, usually have indemnity period limitations that restrict coverage for e-commerce losses.²⁸ Also, coverage

22. *Id.* See also Barbara A. Morris, *E-Commerce Exposures*, ROUGH NOTES, June 1, 2001, at 108 (reporting on a presentation by Bryan Tilden, who described the "not uncommon scenario in which the cyberterrorist sends a 'Trojan Horse' disguised in an e-mail and time-activated to destroy the company's critical electronic data unless a ransom is paid"); Robert W. Hammesfahr & Zac Chacon, *Insurers Develop New Products to Cover Web Perils*, NAT'L. L.J., Aug. 20, 2001, at C8 (describing a hacker's failed attempt to extort money from credit card online business, and the hacker's subsequent exposure of fifty-five thousand credit card numbers of customers the business-to-business site had collected).

23. *Id.*

24. Cohen & Anderson, *supra* note 6, at 902.

25. Bell, *supra* note 17, at 28.

26. *Id.*

27. Stephen C. Healey, *Insurance and Alternative Funding Strategies for E-Commerce Liability Exposure*, TORTSOURCE, Winter 2001, at 1, 6.

28. For example, if a direct physical loss of electronic media and records has occurred, the 1994 ISO Business Income and Extra Expense Coverage Form (CP-00-30-06-95) limits the period for recovery of lost business income caused by direct physical loss or damage to electronic media and records to the longer of: (a) sixty days from the date of the loss or damage or the period; or (b) the period necessary for repair, rebuilding, or replacement of other property at the premises due to loss or damage caused by the occurrence. Thus, if the insured can copy lost or destroyed data from back-up files, that capability would limit the recovery of lost income, even if the actual lost income went well beyond the short time required to restore the information. Rossi, *Risks*, *supra* note 15.

under these policies is typically triggered by damage to “tangible property.” If computer data is not considered to be tangible property or if, as discussed above, the data is not deemed to be “damaged,” a business interruption resulting from a problem with computer data or a computer failure may be outside the coverage.²⁹ Moreover, the extent of interruption needed to trigger coverage varies across policies. If a policy requires, for example, a “substantial” suspension of business before losses are covered, a website crash, even one of long duration, may not be enough to trigger coverage if the insured has multiple methods of product distribution (e.g., retail outlets, toll-free telephone ordering, mail order, etc.).³⁰ One type of business interruption risk associated with e-commerce is a denial of service attack.³¹ Such attacks typically are not covered by standard business interruption policies. Instead, insureds must look to e-commerce policies—stand-alone policies specifically designed to cover cyber-risks not addressed by traditional commercial coverages. For protection,

[t]he business interruption portion of an e-commerce policy usually will cover the cost of sending computer consultants to the company to help stop the attack and to determine how to prevent future attacks. It also covers loss of income for the time that an e-commerce site was down and unable to accept business.³²

The new e-commerce policies, which often provide a combination of first- and third-party coverage, are navigating through uncharted waters. As a result, “[t]here is little loss experience or construction of the new policy wording, and therefore, there is less certainty regarding the scope of coverage afforded by the policies.”³³ Some of the insurers that have

29. See Wojcik, *supra* note 9, at 1 (quoting Michael Rossi, president of Insurance Law Group, Inc.).

30. Riddle & Rowen, *supra* note 3, at 6.

31. See *supra* note 17 and accompanying text.

32. Insurance Information Institute, *Insurance Coverage Available for Web Sites Attacked by Computer Hackers*, available at http://www.iii.org/media/issues/internet_insurance.html (last visited Dec. 22, 2000). “E-commerce sites . . . that market products to consumers online usually are able to recover lost income because they were unable to complete any sales while the [w]eb site was down. Content provider sites . . . usually are reimbursed for lost ‘click-throughs,’ which are used to determine ad revenue.” *Id.*

33. Paar, *supra* note 11, at 1112.

entered this arena include: CIGNA, AIG, INSUREtrust, Net Secure, Chubb, St. Paul Companies, Zurich U.S., and selected Lloyd's syndicates.³⁴

II. THIRD-PARTY INSURANCE

Although e-commerce policies may have third-party coverage components,³⁵ insureds facing such claims often look to other more common forms of coverage, such as their commercial general liability ("CGL"), errors and omissions ("E&O"), and directors' and officers' ("D&O") policies. Among the typical allegations prompting insureds to seek coverage under these traditional policies are claims of intellectual property right infringement,³⁶ defamation,³⁷ invasion of privacy,³⁸ and

34. See Hammesfahr & Chacon, *supra* note 22, at C8 (describing gaps in traditional coverages and the emergence of e-commerce coverages); Paar, *supra* note 11, at 1113; James R. Warnot, Jr. & Daniel C. Glazer, *Insurance Coverage for Intellectual Property and Cyberspace Liability*, 629 PLI/LIT 547, 564 (2000); Healey, *supra* note 27, at 7; Riddle & Rowen, *supra* note 3, at 9; Rossi, *Risks*, *supra* note 15; Michael A. Rossi, *New Stand-Alone E-Commerce Liability Insurance Policies (Part I)*, available at <http://www.irmi.com/expert/articles/rossi004.asp> (Dec. 2000) [hereinafter Rossi, *Policies*]; Robert A. Chesler & Robyn Ann Valle, *Old and New Policies Protect E-Commerce*, CORP. COUNS., Nov. 1999; see also Richard S. Betterley, *Intellectual Property Insurance Market Survey 2000: New Players Challenge Market Leaders*, available at <http://www.betterley.com/prod02.html> (last modified Jan. 16, 2001); Michael A. Rossi, *Stand-Alone E-Commerce Market Survey*, available at <http://www.irmi.com/expert/articles/rossi004Chart.asp> (Dec. 2000) [hereinafter Rossi, *Survey*]. "In general, companies with revenues of \$1 billion or less can expect to pay premiums of about \$25,000 to \$125,000 for at least \$25 million in coverage." Insurance Information Institute, *Insurance Coverage Available for Web Sites Attacked by Computer Hackers*, available at http://www.iii.org/media/issues/internet_insurance.html (last visited Dec. 22, 2000). Variations in policy wording make it difficult for firms with large exposures to cover their risk by combining the policies of several carriers. See Wojcik, *supra* note 9, at 53.

35. Under third-party insurance, "the interests protected by the [insurance] contract are ultimately those of third parties injured by the insured's conduct." England, *supra* note 13.

36. Intellectual property is "[a] form of intangible property consisting of documented, written or recorded knowledge, ideas, discoveries, product names, and problem-solving techniques[, where o]wnership is usually established by a copyright, patent, or trademark." RUPP'S INSURANCE & RISK MANAGEMENT GLOSSARY, *Intellectual Property*, available at <http://www.nils.com/rupps/intellectual-property.htm> (last visited June 4, 2001). Copyright infringement constitutes a violation of the United States Copyright Act, which was designed to protect "original works of authorship fixed in any tangible medium of expression." Warnot & Glazer, *supra* note 34, at 551. Copyrights, which come into existence upon execution of the copyrighted work, protect the expression of the idea, rather than the idea itself, and give the work's author the exclusive authority to reproduce, exhibit, and authorize others to reproduce or exhibit the work in question. *Id.* Categories of work that may be protected under a copyright include: literary (including computer programs); musical;

electronic damages inflicted on third parties. Different types of policies handle such claims in different ways; therefore, these policy types will be addressed individually.

A. Commercial General Liability Coverage

One of the most pervasive types of insurance purchased by businesses is CGL coverage, which indemnifies the insured for liability to third parties for bodily injury, property damage, personal injury, and advertising injury that is unintended and unexpected from the insured's perspective.³⁹ The CGL provides this coverage under two primary policy provisions: (1) "Coverage A Bodily Injury and Property Damage Liability" ("Coverage

dramatic; choreographic and pantomime; pictorial, graphic, and sculptural; audiovisual; sound recording; and architectural. Fleischer, *supra* note 4, at 269. Patents, on the other hand, protect an idea by providing the creator with "a legal right, for a limited term, to exclude others from using, selling or making an invention or discovery." Kay Millonzi & William G. Passannante, *Intellectual Property and Insurance: A Valuable Asset and a Lurking Liability*, GP SOLO & SMALL FIRM L., Mar. 1999, at 54. Trademarks, the third and final form of intellectual property, consist of "words, symbols, logos, designs or slogans that identify products or services as coming from a common source" and are protected under the Lanham Trademark Act. *Id.* Cyberclaims that give rise to trademark infringement actions include disputes over domain names, meta tags, and linking or framing. Fleischer, *supra* note 4, at 270. Domain name infringement, also known as "cybersquatting" or "cyberpiracy," is defined as "registering, trafficking in, or using domain names . . . that are identical or confusingly similar to trademarks with the bad-faith intent to profit from the goodwill of trademarks." Peter J. Veiguera, *Cybersquatting: Highway Robbery in the Digital Age*, CM REP., Fall 2000, at 4. The Anticyber-Squatting Consumer Protection Act, codified as part of the Lanham Trademark Act, "prevent[s] the registration of domain names for bad-faith purposes, such as registering a domain name of a known trademark, company, or person, with the sole purpose of making money by selling the mark to the company or prohibiting it from using its mark as a domain name." Fleischer, *supra* note 4, at 270. Meta tags are "[k]ey words embedded in . . . [w]eb page [encoding for the purpose of] bringing traffic to [the] site." *Id.* Finally, "[l]inking allows a [w]eb surfer to click on an icon and jump instantly to another [w]eb site," and "[f]raming occurs when one site is linked to another site, but then the content on the second site is "framed" so that it appears that the second site is part of the first." *Id.*

37. Defamation is "a false statement about a living entity that damages its reputation," which if spoken constitutes slander and if written constitutes libel. Fleischer, *supra* note 4; see also DAN B. DOBBS, *THE LAW OF TORTS* §§ 400-01 (2000).

38. Invasion of privacy is comprised of a group of four common law torts: (1) intrusion on the plaintiff's solitude or personal affairs; (2) public disclosure of embarrassing facts about the plaintiff; (3) publication of information casting the plaintiff in a false light; and, (4) appropriation of the plaintiff's name or likeness for the defendant's advantage. Bruce Telles, *Insurance Coverage for Intellectual Property Torts*, 602 P.L.I./LIT 629, 641-42 (1999); see also DOBBS, *supra* note 37, at §§ 424-28 (2000).

39. Cohen & Anderson, *supra* note 6, at 923.

A”) and (2) “Coverage B Personal and Advertising Injury Liability.” (“Coverage B”).⁴⁰ The CGL underwent significant revisions relevant to both coverages in 1973, 1986, and 1998. Moreover, it has been reported that additional revisions will be submitted to the states in 2001 and that a number of these revisions will pertain to so-called “Internet liability.”⁴¹

Under Coverage A, the 1998 iteration of the CGL provides coverage for “property damage liability,” defined as “[p]hysical injury to tangible property, including all resulting loss of the use of that property,” as well as “[l]oss of the use of tangible property that is not physically injured.”⁴² As a result, questions, such as “whether electronically stored data constitute ‘tangible’ property,” arise.⁴³ To date, a number of courts have answered this particular question in the affirmative, holding that electronic data and software are tangible property.⁴⁴ Thus, the CGL’s Coverage A may provide liability protection in connection with damage to or corruption of data or software belonging to a third party.

Changes in the CGL reportedly coming in 2001, however, will affect the foregoing analysis. The definition of “property damage” will not be changed, but limiting language will be added to the definition:

For the purpose of this insurance, electronic data is not tangible property. As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy discs, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.⁴⁵

This language takes direct aim at those judicial decisions that have found damage to electronic data to be damage to “tangible property,”⁴⁶ and

40. INS. SERVS. OFFICE, INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 07 98 (1997) [hereinafter ISO, CGL FORM; see also Dinkins, *supra* note 4, at 15.

41. See Hughes, *Cyber-Risk*, *supra* note 19. These changes are summarized in INS. SERVS. OFFICE, INC., 2001 GENERAL LIABILITY MULTI STATE FORMS REVISIONS TO BE SUBMITTED LI-GL-2001-001, Jan. 4, 2001 [hereinafter ISO, REVISIONS].

42. ISO, CGL FORM, *supra* note 40, at 13.

43. Cohen & Anderson, *supra* note 6, at 924.

44. *Id.*; see also Taylor & Shirley, *supra* note 17, at 195.

45. Hughes, *Cyber-Risk*, *supra* note 19; ISO REVISIONS, *supra* note 41, at 11; see Wojcik, *supra* note 9, at 1.

46. The most prominent of the few decisions to address the issue is *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.*, No. 99-185-TUC-ACM, 2000 WL 726789 (D. Ariz. Apr. 18, 2000), where the court ruled that “physical damage” in a business interruption policy “is not

seeks to put these kinds of losses outside the scope of the CGL. One can anticipate quarrels over the meaning of this definition in future cases as it applies to particular loss situations,⁴⁷ but it is clear that the drafters intended to limit coverage and that the language will succeed in doing so in many situations.

Whatever the scope of coverage for electronic data under the 1998 iteration of the CGL, other types of “cyberdamage” inflicted on third parties may not enjoy such protection. For example, if the insured’s activities cause a suspension of the third party’s business by temporarily crashing the third party’s website, it appears that the CGL provides no coverage under Coverage A because no damage to tangible property results. This result will not change under the proposed 2001 revisions. Furthermore, damage to intangible property, which includes all forms of intellectual property, has almost uniformly been held to not constitute property damage within the CGL’s Coverage A.⁴⁸

The CGL’s Coverage B, the so-called “advertising injury” coverage, is the portion of the CGL that is most relevant to the intellectual property-based claims arising out of e-commerce activities. Prior to 1973, some insurers offered advertising coverage as an endorsement to their standard commercial liability policies,⁴⁹ but it was not until 1973 that the ISO adopted advertising injury coverage as part of its broad form endorsement to the CGL.⁵⁰ In 1986, this coverage (with revisions) was incorporated into

restricted to the physical destruction or harm of computer circuitry but includes loss of access, loss of use, and loss of functionality.” *Id.* at *2. This aspect of the case was cited with approval by the court in *Am. Online, Inc. v. Nat’l Health Care Disc., Inc.*, 121 F. Supp. 1255, 1274 n.18 (N.D. Iowa 2000).

47. For example, as a matter of syntax, it might be argued that the phrase beginning with the word “including” modifies “software,” instead of “information, facts or programs.” Thus, one might try to argue that damage to software is not excluded from the definition, under the logic that information, facts, or programs stored as or on software are not covered, but the software is. This assumes that software has an identity distinct from information or programs, which seems debatable. Insurers, no doubt, will argue that everything in the “including” phrase is an example of “information, facts or programs,” which are outside the definition of “tangible property.” Insureds will argue that the definition is not clear, and whatever it is intended to say, ambiguities must go against the drafter.

48. BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* §7.03[b][2][B], at 346-47 (10th ed. 2000). There is case authority supporting the proposition that copyrights do not constitute tangible property, and it seems fair to assume that the same logic extends to other forms of intellectual property.

49. Lawrence O. Monin, *ISO Advertising and Personal Injury 1998 Revisions: Major Surgery or Just a Band-Aid Fix?*, 4 MEALEY’S EMERGING INS. DISP. 24 (Aug. 19, 1999).

50. Telles, *supra* note 38, at 645.

the standard CGL as “Coverage B.”⁵¹ The 1973, 1986, and 1998 iterations of the ISO CGL policy have significantly different provisions in the advertising injury coverage,⁵² even though the ISO, in announcing both the 1986 and 1998 revisions, described the changes as non-substantive clarifications of prior coverage.⁵³ In addition, further changes are planned for late 2001 (and early 2002 in some states) in Coverage B.⁵⁴

The offenses covered under the CGLs have shifted under the two revisions. The 1986 revision eliminated two offenses from the 1973 definition of advertising injury—piracy and unfair competition—and hence from the coverage.⁵⁵ Until 1998, the CGL distinguished between “personal injury” and “advertising injury.” The 1998 form conflated these two concepts,⁵⁶ but it deleted “infringement of title,” “misappropriation of the style of doing business,” and “misappropriation of advertising ideas” from the definition, and hence the coverage. In the place of these deletions, the 1998 form added two offenses to the coverage: “[t]he use of another’s advertising idea in your ‘advertisement,’” and “[i]nfringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’”⁵⁷ In both new

51. *Id.*

52. The full text of the relevant language of the policies is reproduced in the Appendix. *See infra* app.

53. A 1985 ISO publication stated: “language changes between the previous policy and the current policy represent a simplification, but do not change the scope of coverage offered.” A “Notice to Policyholders” for the 1998 revisions stated:

[T]he changes in the Personal and Advertising injury in these coverage forms result in broadening the coverage in certain respects and may, in certain states, result in a decrease in other respects. The impact of the changes in the revision are very difficult to quantify and may differ in different states. Taken as a whole, the revised Personal and Advertising Injury Coverage is at least equal to, if not broader than, that which the current coverage provides.

Monin, *supra* note 49.

54. These changes, now in circulation, are expected to take effect for policies issued after December 1, 2001, or sometime in early 2002. The effective dates vary in the different states and are contingent, of course, on approval of the state insurance department. ISO REVISIONS, *supra* note 41, at 2.

55. *See* Telles, *supra* note 38, at 645.

56. *Id.* at 646. In addition, the 1998 form changes the “causation” language of the 1986 form, which required the advertising injury to be “caused by an offense committed *in the course of* advertising your goods, products or services.” *Id.* at 645 (emphasis added). The 1998 form, in conflating the concepts of “personal injury” and “advertising injury,” adopted the causation language used in the 1986 form for personal injury—the offense must be one “arising out of your business.” *See* Monin, *supra* note 49.

57. Telles, *supra* note 38, at 646. These changes can be tracked by examining the policy excerpts provided in the Appendix. *See infra* app.

offenses, the policy required the advertising injury-causing offense to be committed in the “advertisement” itself, a significant change from prior language.⁵⁸

Exactly what constituted “advertising” was not defined in the 1973 and 1986 CGLs, which led to frequent coverage disputes. While the 1998 form’s definition of advertising is designed to eliminate some of these disputes⁵⁹ and “some of the more extreme judicial interpretations,”⁶⁰ the new definition does not distinguish between traditional means of advertising (e.g., television, radio, billboards, etc.) and newer forms, such as the Internet (as well as milk cartons, T-shirts, and motor vehicles). It may be that any kind of promotional activity on the Internet triggers the new definition, but it is fair to question whether web advertisements are “broadcast” or “published,” which is the operative language of the 1998 CGL.⁶¹

These ambiguities have been recognized, apparently, by the ISO, and the proposed 2001 revisions will seek to eliminate them. The definition of “advertisement” in the 1998 iteration of the CGL will not be changed, but clarifying text will be added to the definition:

For the purpose of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for

58. The 1998 language contrasts with both the 1973 broad form (which required that the offense be “committed . . . in the course of the named insured’s advertising activities”) and the 1986 CGL (which required that the offense be “committed in the course of advertising the named insured’s goods, products or services.”) See Telles, *supra* note 38, at 649; Monin, *supra* note 49. The 1998 form also incorporates “consequential bodily injury” into the definition of “personal and advertising injury.” See Telles, *supra* note 38, at 649. Telles contends that the bodily injury must flow from the personal and advertising injury offense, as would be the situation if the insured’s defamatory statement caused the claimant to suffer emotional distress that, in turn, produced physical symptoms. *Id.* This is not so much an expansion of coverage as it is a clarifying shift in coverage: Coverage A in the 1998 CGL was modified to exclude bodily injury caused by personal and advertising injury from that coverage’s scope, thereby making clear that all claims arising out of advertising offenses are meant to be run through Coverage B, not Coverage A. See *id.*

59. See Telles, *supra* note 38, at 649.

60. Monin, *supra* note 49.

61. *Id.*

the purpose of attracting coverage or supporters is considered an advertisement.⁶²

This language addresses some of the deficiencies in the wording of the 1998 CGL. Obviously, the drafters recognize that Internet advertising is an important way that merchants now disseminate information about their goods and services, but the language in (b) narrows the coverage merchants receive with respect to information on their website. Information about a competitor's products or other unrelated products produced by other manufacturers, links to other websites and banner advertising by other firms that appear on the insured's web pages all seem to be outside the definition of "advertisement" in the 2001 CGL revisions. This may be what the drafters of the 1998 CGL intended but did not clarify. Significantly, the 1998 CGL limited the advertising liability coverage to offenses contained in "your advertisement." Thus, if a third party's advertisement (i.e., in a banner) on the insured's website contained the infringing material, it was not obvious that the CGL provided coverage for the insured, but the point was at least arguable.⁶³ The 2001 revisions will seek to place this kind of liability outside the CGL's coverage, which significantly limits the scope of the CGL's protection.

The 1998 CGL also reorganized the exclusions from coverage into two categories, making some significant changes along the way. A new exclusion, (a)(1), eliminated coverage for intentionally caused injury; intentional acts are not automatically excluded from coverage, but if an injurious result is also intentional, the policy does not provide coverage.⁶⁴ Exclusion (a)(10) sought to take pollution damage out of the scope of the personal injury coverage.⁶⁵ Exclusion (a)(4) put outside the coverage, an injury "[a]rising out of a criminal act committed by or at the direction of any insured," which is broader than the prior exclusion (3), which contained a "willfulness" requirement.⁶⁶

The proposed 2001 revisions also contain some new exclusions that narrow the CGL's coverage for e-commerce-related liabilities. An exclusion will be added for liabilities arising out of the insured's hosting, owning, or controlling a chat room or bulletin board.⁶⁷ In addition, another

62. Hughes, *Cyber-Risk*, *supra* note 19; ISO REVISIONS, *supra* note 41, at 10.

63. See Hughes, *Cyber-Risk*, *supra* note 19.

64. See the 1998 CGL excerpts *infra* app. at 35.

65. See Telles, *supra* note 38, at 648.

66. See Monin, *supra* note 49.

67. See Hughes, *Cyber-Risk*, *supra* note 19. The new language reads: "Electronic Chatrooms or Bulletin Boards. 'Personal or advertising injury' arising out of an electronic

exclusion will be added for liabilities associated with the insured's efforts to mislead web users so as to divert them from competitors' websites to their own.⁶⁸ Other changes will clarify some potential ambiguities created by Internet advertising. The CGL has long excluded coverage for insureds in the business of advertising, broadcasting, publishing, or telecasting, but the 2001 revisions will specify that those who design or determine content for the websites of others or serve as Internet search, access, content, or service providers are within the scope of this exclusion and, therefore, outside the scope of Coverage B.⁶⁹ The drafters apparently also desire to clarify that an insured's own advertising on the Web does not, by itself, put an insured within the scope of the exclusion for those in the business of advertising,⁷⁰ but the language selected for this exclusion is not entirely clear and is arguably inconsistent with the language seeking to put those in the business of advertising outside the scope of Coverage B.⁷¹

As for the traditional intellectual property claims, copyright infringement is specifically covered in the CGL, and it is the one type of claim most clearly covered under all three iterations of the CGL.⁷² The 1998 iteration of the CGL made clear that the copyright infringement is one that must occur in the advertisement itself, which modified (or as the drafters would say, "clarified") the prior coverage for copyright infringement "committed in the course of advertising your goods, products or services," a potentially broader set of claims.⁷³ Patent infringement is

bulletin board the insured hosts, owns, or over which the insured exercises control." ISO REVISIONS, *supra* note 41, at 9.

68. See Hughes, *Cyber-Risk*, *supra* note 19. The new language reads: "Unauthorized Use of Another's Name or Product Arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any similar tactic to mislead another's potential customers." ISO REVISIONS, *supra* note 41, at 9.

69. See Hughes, *Cyber-Risk*, *supra* note 19. The language seeks to exclude from coverage anyone engaged in the business of "[d]esigning or determining content of websites for others; or . . . [a]n Internet search, access, content or service provider." *Id.*

70. *Id.*

71. The language is as follows: "For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet is not, by itself, considered the business of advertising, broadcasting, publishing or telecasting." *Id.* ISO REVISIONS, *supra* note 41, at 9. Read literally, "the placing of . . . advertising, for . . . others anywhere on the Internet is not, by itself, considered the business of advertising." Hughes, *Cyber-Risk*, *supra* note 19; ISO REVISIONS, *supra* note 41, at 9.

72. See Warnot & Glazer, *supra* note 34, at 557; Susan R. Schick, *Need to Defend Against an Intellectual Property Claim? Try Your Commercial General Liability Insurance Policy*, GP SOLO, April/May 2000, at 34, 35.

73. See Telles, *supra* note 38, at 652; Schick, *supra* note 72, at 35-36; Warnot & Glazer, *supra* note 34, at 412-14.

not specifically enumerated as a covered offense in the 1998 CGL, and most (though not all) courts have held that the CGL does not provide coverage for patent infringement.⁷⁴ The CGL's coverage of trademark infringement is murkier still. Trademark infringement was specifically excluded under the 1973 broad form endorsement, but this exclusion was deleted from the 1986 form. One commentator has contended that the 1986 deletion of the offense of "piracy"⁷⁵ eliminated the need for an exclusion for trademark infringement; not all courts, however, have agreed with this assessment.⁷⁶ The 1998 CGL provided coverage for "trade dress" infringement in an advertisement, but "trademark" or "service mark" infringement was not listed as an enumerated offense.⁷⁷ Moreover, the ISO specifically disavowed any intent to cover trademark infringement under the 1998 revisions.⁷⁸ Exactly how this issue will evolve in the courts is, at present, unclear.

The 2001 revisions to the CGL seek to bring clarity to this area through the appearance of a new, broadly-phrased intellectual property exclusion that "effectively excludes coverage for the infringement of all intellectual

74. See Warnot & Glazer, *supra* note 34, at 557.

75. See Monin, *supra* note 49, at 7-9.

76. See Telles, *supra* note 38, at 652.

77. See Monin, *supra* note 49, at 7-9.

78. See *id.* at 7.

[C]overage is explicitly extended in the 1998 ISO revision to include "trade dress" infringement. "Trade dress," which ISO describes as the "totality of elements in which a product or service is packaged or presented," seemed designed to substitute for the deleted "style of doing business" coverage. With the presence of coverage for infringement of "trade dress" along with "slogan" (another potentially "elastic" term), one wonders how significant this 1998 revision will actually be. Although coverage for "trademark infringement" may now be more clearly not covered, undoubtedly insureds in many future cases will seek to find a "copyright, trade dress or slogan" hook.

Id.

According to another commentator:

[y]our client's defense against trademark infringement has a better chance of being covered if its CGL policy is based on the 1986 form . . . [w]hether the 1998 CGL form policy includes trademark infringement within its enumerated offenses is unclear . . . since the 1998 language expressly includes infringement of a "trade dress or slogan. . . but not a trademark, it could be interpreted as not covering trademark infringement.

Schick, *supra* note 72; at 35; see generally Warnot & Glazer, *supra* note 34. Courts will no doubt be reluctant to construe "personal and advertising injury" to include trademark infringement under the 1998 form. *Id.* at 557.

property rights and excludes infringements of patent, trademark and trade secret by name. The exclusion is so broad that it requires an exception to grant back the limited intellectual property coverage afforded [in the prior version of the CGL].”⁷⁹ The new exclusion will exclude from the scope of Coverage B “‘Personal and Advertising Injury’ arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. However, this exclusion does not apply to infringement in your ‘advertisement’ of copyright, trade dress, or slogan.”⁸⁰ This text addresses the murkiness remaining after the 1986 and 1998 CGL revisions, and underscores that the only copyright protection afforded by the CGL is that which involves infringements in the insured’s own advertisements.

The 1998 CGL covers publications that invade privacy through an utterance or dissemination of information. A significant current privacy concern is the *gathering* of information about persons who visit websites without knowing that information is being gathered about them. Under the 1998 CGL, an insurer should be expected to argue that a claim based on privacy invasion arising out of information gathering, as opposed to information dissemination, is outside the scope of the CGL.⁸¹ This issue is not addressed in the proposed 2001 revision.

B. Directors’ and Officers’ Coverage

Another traditional type of coverage that may come into play with a third-party cyberloss claim is D&O insurance, which indemnifies individual directors and officers “sued in connection with [the] discharge of their corporate duties.”⁸² Typically, D&O policies are comprised of two types of coverage: (1) coverage for defense costs and other related expenses; and (2) indemnification of covered individuals for third-party liabilities.⁸³ Designed to cover acts such as negligence and errors in judgment, D&O policies may provide protection against shareholder derivative actions “predicated . . . on allegations of ‘breach of fiduciary

79. Hughes, *Cyber-Risk*, *supra* note 19, at 4.

80. *Id.*; ISO REVISIONS, *supra* note 39, at 9.

81. See Michael A. Rossi, *Third-party Liability E-Commerce Risks and Traditional Insurance Programs* (Aug. 2000), at <http://www.irmi.com/expert/articles/rossi003.asp> [hereinafter Rossi, *Programs*]; see also Riddle & Rowan, *supra* note 3, at 8.

82. Cohen & Anderson, *supra* note 6, at 926; see also Healey, *supra* note 27, at 6; Jerold Oshinsky & Judith Hall Howard, *Insurance Coverage for Intellectual Property, Employment, and Computer Technology-Related Claims*, 5-6 (2000).

83. See Oshinsky & Howard, *supra* note 82, at 6. Traditionally, these policies “are written on a claims-made basis.” *Id.*

duty' for failure to implement measures to prevent [such things as hacker] attacks'" in the e-commerce arena.⁸⁴

C. Errors and Omissions Coverage

E&O policies offer defense against and indemnification for claims arising from "negligence, omissions, mistakes, and errors made by the insured in the course of providing professional services."⁸⁵ Historically purchased by professionals such as lawyers and physicians, these policies recently have been specifically tailored and marketed to computer consultants, software and hardware providers, and e-commerce and technology experts.⁸⁶ Today's "techno-oriented" E&O policies, unlike their traditional counterparts, often cover losses stemming from the insured's products, as well as the insured's services, so long as the cause of the losses is covered.⁸⁷ The policies tend to focus on four main areas: (1) security; (2) advertising and personal injury; (3) electronic activity liability; and (4) sometimes, infringements on intellectual property.⁸⁸

84. Cohen & Anderson, *supra* note 6, at 926. Unlike the issues surrounding CGL coverage as related to cyberclaims, "D&O coverage usually will apply so long as the alleged failures were not intentionally fraudulent or criminal." *Id.*

85. *Id.* at 925; *see also* Healey, *supra* note 27, at 6; Jonathan B. Sokol, *Insurance Coverage for Intellectual Property and Technology Claims*, at <http://library.lp.findlaw.com/scripts/getfile.pl?FILE=firms/graycary/gcwf000081> (Fall 1998). E&O policies are generally claims-made and are drafted to apply to specific activities of the insured in a given industry. *See* Telles, *supra* note 38, at 657-58; John F. Cahill & Timothy Fitzgibbon, *Intellectual Property Assets Raise Insurance Issues*, NAT'L L.J., (Oct. 25, 1999), available at http://www.clm.com/pubs/pub-925382_1.html. Furthermore, the content of these policies is unique to the issuing carrier and excludes the liabilities covered by the CGL. *Id.* Finally, traditional E&O policies "excluded coverage for any claims arising out of goods or products manufactured, distributed, or repaired by the insured or for any claim due to property damage to goods or products manufactured, sold, or distributed by the insured or due to property damage to work performed by or on behalf of the insured." Sokol, *supra*.

86. *See* Telles, *supra* note 38, at 657-58; Cahill & Fitzgibbon, *supra* note 85. According to one account, the oldest E&O technology policy, the so-called "Electronic Errors or Omissions Policy," was originally designed for hardware manufacturers. Sokol, *supra* note 85. Typical coverage was for "damages the insured [became] legally obligated to pay for any claim arising out of a negligent act, error or omission, by or on behalf of the insured resulting in the failure of . . . electronic products to perform the function or serve the purpose intended after installation and testing." *Id.* Unlike the CGL, this policy would cover "certain economic damages and intangible losses other than property damage arising out of computer software or hardware products, including loss of data, business interruption, and loss of revenue claims asserted by customers." *Id.*

87. *See* Telles, *supra* note 38, at 658; Sokol, *supra* note 85.

88. *See* Hammesfahr & Chacon, *supra* note 22, at C8 (describing errors and omissions policies tailored toward e-commerce).

D. Media Coverage

Usually carried by entities in the publishing and entertainment industries, media liability policies, which vary in coverage and exclusions from carrier to carrier, generally protect against claims involving copyright and trademark infringement, defamation, plagiarism, and invasion of privacy⁸⁹ that arise during the course of specified activities, such as the insured's publication of "materials" or use of the Internet as defined in the policy.⁹⁰ These policies are needed by the above-noted enterprises due to the exclusion pertinent to such businesses in the CGL.⁹¹

E. Intellectual Property Infringement, Prosecution, and Defense Coverage

Because of the exorbitant expense associated with defending and indemnifying intellectual property infringement claims, and because such coverage is scarce under CGL policies, a number of insurers have created specialized policies for "defense, indemnity, and even prosecution of [such] . . . infringement claims."⁹² Some of these policies, known as

89. See Healey, *supra* note 27, at 6; Melvin Simensky & Eric C. Osterberg, *The Insurance and Management of Intellectual Property Risks*, 17 CARDOZO ARTS & ENT. L.J. 321, 326 (1999); Telles, *supra* note 38, at 657; Michelle Worrall Tilton & Chad E. Milton, *Insuring Intellectual Property Claims* 563 PLI/LIT 379, 386 (1997).

90. Telles, *supra* note 38, at 657. See also Tilton & Milton, *supra* note 89, at 389. Typically, media policies are issued on a "claims-made" basis." Telles, *supra* note 38, at 656.

91. Tilton & Milton, *supra* note 89, at 386. See also *supra* notes 47-79 and accompanying text.

92. Telles, *supra* note 38, at 658. "[O]n average, it costs more than . . . \$500,000 to prosecute a patent infringement case in the US courts." *Intellectual Property Infringement Insurance*, available at http://thinkusa.com/Think_Licensing/What_is_ThinkLicensing/Intellectual_Property_Manageme/intellectual_property_manageme.html (last visited June 4, 2001). "The minimum cost to take a patent infringement action to trial . . . ranges from \$150,000 to \$300,000. Fees often exceed \$1 [m]illion and have reached as much as \$25 [m]illion." Oshinsky & Howard, *supra* note 82, at 2. For more detail on such policies, see *IPRM's Patent Infringement Liability Insurance Policy*, available at <http://www.iprm.com/highlights.html> (last visited Sept. 28, 2001); *IPRM Frequently Asked Questions*, available at <http://www.iprm.com/faq.html> (last visited Sept. 29, 2001); *ECC Insurance Casualty Products Intellectual Property Coverage*, available at http://www.eccins.com/html/casualty_ip.html (last visited Nov. 12, 2001); *Lighthouse Underwriters Intellectual Property Liability Insurance*, available at <http://www.aplegal.com/ipli.html> (last visited Sept. 30, 2001); *Features of Infringement Abatement Insurance*, available at <http://www.infringeins.com/app/features.asp> (last visited Sept. 30, 2001). In the case of patent defense policies, the forms contain very specific definitions of what types of claims

“infringement abatement” policies, involve an agreement between the insurer and the insured under which the insurer agrees to share the expense of prosecuting specified patent, trademark, or copyright claims (and, sometimes, to share the benefits of such actions if successful).⁹³ Under such policies, the insurer must first authorize the litigation for there to be coverage.⁹⁴ The “prosecution” portion of the infringement abatement insurance can be characterized as a kind of first-party intellectual property insurance; under the policy, to the extent a third party infringes a protected intellectual property interest of the insured, the insured and insurer might prosecute the third party to protect the insured’s interests.

III. THE EROSION OF COMPREHENSIVE BUSINESS COVERAGE AND THE EMERGENCE OF E-COMMERCE COVERAGE

Those who have watched the evolution of the CGL through the decades have witnessed the form’s evolution from a “comprehensive” business policy with only a few exclusions to a much narrower coverage replete with a large number of exclusions.⁹⁵ As recent evidence of this trend, the CGL’s treatment of risks related to e-commerce is archetypical. Electronic data is a significant business asset for many enterprises, but the evolution of Coverage A of the CGL has moved toward reducing coverage for liability for damage to this kind of property. Indeed, it is increasingly difficult to imagine a business enterprise that does not have a computer connected to the Internet. As recent events demonstrate,⁹⁶ it is entirely

are covered, and they require the insured to have taken significant due diligence measures against infringement. Telles, *supra* note 38, at 658.

93. Telles, *supra* note 38, at 658; see also Fleischer, *supra* note 4, at 274 (noting “the emerging need for ‘offensive’ products”).

94. Telles, *supra* note 38, at 658.

95. For an excellent summary of the history of the CGL and the trend toward “ever more narrow CGL coverage,” see Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 86-101, 104-05 (2001).

96. In 2000, the global cost of computer viruses exceeded \$17 billion. Reuters, *Viruses costing organizations billions*, available at http://www.nua.com/surveys/index.cgi?f=VS&art_id=905357152&rel=true (Sept. 3, 2001). Recent examples of viruses running rampant over the Internet and leaving a trail of destruction and grief in their path include Code Red, Love Bug, and Melissa. See, e.g., Robert Lemos, *Microsoft Security Flaw Threatens Web*, available at <http://news.cnet.com/news/0-1003-200-6312094.html> (June 18, 2001) [hereinafter Lemos, *Microsoft*]; Robert Lemos, *Microsoft Reveals Web Server Hole*, available at <http://news.cnet.com/news/0-1003-200-6312870.html> (June 18, 2001) [hereinafter Lemos, *Web Server*]; Robert Lemos, “Code Red” Worm Claims 12,000 Servers, available at <http://news.cnet.com/news/0-1003-200-6604515.html> (July 18, 2001) [hereinafter Lemos, *Worm*]; Robert Lemos, *Code Red Stopped—For Now*, available at

foreseeable that an insured's computers could be seized by a hacker who co-opts the insured's computer network to launch a virus that destroys third parties' data. However, the intent of the drafters of the CGL is to deny coverage for this kind of liability, even though it is a risk to which virtually every business with an Internet-connected computer is exposed.

Similarly, the number of businesses that incorporate the Internet into their marketing and sales practices is growing rapidly, but the trend in Coverage B is toward narrowing the coverage for liabilities associated with this advertising and business medium. In its early decades, the CGL emerged as the "one-stop" answer to a typical business's need to purchase several different coverages in order to have "full" protection for expected business risks. The multi-policy, multi-endorsement approach also carried the attendant risk that significant gaps would continue to exist if the policies were not neatly coordinated, even as the multiple coverages overlapped in some respects. Yet in recent decades, the CGL has been moving in the other direction, creating the need for businesses, once again, to purchase a variety of discrete coverages to meet the full range of their possible exposures.⁹⁷

Evidencing this trend is the report that the ISO is developing a new policy titled "Electronic Data Liability Coverage Form," which, according to the ISO, "will provide coverage for loss or corruption of computerized or electronically stored data or software which results from an occurrence that

<http://news.cnet.com/news/0-1003-200-6625470.html> (July 20, 2001) [hereinafter Lemos, *Code Red*]; Doug Muth, *Love Bug*, available at <http://www.claws-and-paws.com/virus/articles/lovebug.shtml> (last visited Sept. 30, 2001) [hereinafter Muth, *Love*]; Doug Muth, *The Melissa Virus*, available at <http://www.claws-and-paws.com/virus/articles/melissa.shtml> (updated Sept. 2, 2001) [hereinafter Muth, *Melissa*].

The most recent of these viruses, Code Red and its mutations, hit in the summer of 2001, infected an estimated 300,000 internet-connected computers by exploiting a "hole" in Microsoft Internet Information Service software, and attempted a denial of service attack on the White House website. See Lemos, *Microsoft*, *supra*; Lemos, *Web Server*, *supra*; Lemos, *Worm*, *supra*; Lemos *Code Red*, *supra*. To date, Code Red "has been the costliest [virus] so far this year at . . . [\$]2.6 billion. About . . . [\$]1.5 billion of this came from lost productivity, while . . . [\$]1.1 billion was spent on cleaning computer systems infected by the bug." Reuters, *supra*. Nevertheless, "[t]he costliest virus ever was last year's Love Bug[,] which cost . . . [\$]8.7 billion in lost productivity and clean-up costs." *Id.* The Love Bug, which replicated via e-mail, deleted files from infected computers' hard drives and "sen[t] out copies of itself." Muth, *Love*, *supra*; Muth, *Melissa*, *supra*.

97. See Diana Reitz, *Smaller Firms Face Exposures on Web*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT. EDITION, Mar. 12, 2001, at 23 (noting that small companies have not conducted e-risk audits, have not modified coverages, and are depending on traditional policies for coverage, when these policies have significant gaps in coverage).

causes physical injury to tangible property.”⁹⁸ This will be a coverage distinct from the CGL. Yet, in the assessment of one commentator, even this form will “not provide coverage for direct damage to data, but [will] only [cover] consequential damage to data arising from an occurrence that causes physical injury to tangible property,” thus providing no solution for at least one entirely foreseeable risk—the insured’s inadequate security permitting a third party using the insured’s computers to launch a data-destroying virus around the globe.⁹⁹

Thus, insureds who seek security from these kinds of potential liabilities now, and perhaps for the foreseeable future, must turn to insurers in specialty markets who offer “e-commerce” policies. As discussed in connection with first-party insurance,¹⁰⁰ a number of insurers are developing stand-alone specialty policies to address cyber-risks.¹⁰¹ Nevertheless, additional policies are not attractive to all clients. For example, “Fortune 1000 companies are taking the position that they do not want more stand-alone policies which they have to negotiate, buy and administer. . . .”¹⁰² As a result, endorsements to existing CGL, E&O, and D&O coverages, or the negotiation of the individualization of such policies, may be the appropriate approach for large entities. On the other hand, small companies, which “lack the risk manage[ment] experience, premium size, and other clout that a Fortune 1000 company can bring to bear,” may find that buying stand-alone e-commerce policies is the best—

98. Hughes, *Cyber-Risk*, *supra* note 19; ISO REVISIONS, *supra* note 41, at 8. *See also*, Wojcik, *supra* note 9, at 1.

99. Hughes, *Cyber-Risk*, *supra* note 19.

100. *See supra* notes 13-32 and accompanying text.

101. *See* Healey, *supra* note 27, at 7. Nevertheless,

[t]he names of these policies are quite fanciful, even if . . . the liability insurance coverages provided by them are not really all that novel. For example; AIG is selling the “netAdvantage Internet Professional Liability Policy[.]” Chubb is selling the “SafetyNet Internet Liability Policy Zurich is selling the “E-Risk Protection Policy[.]” Royal is selling the “Computer, Telecommunications and Internet Services Liability Coverage Policy[.]” Gulf . . . is selling the “CyberLiability Plus Insurance Policy[.] and Great American (through Tamarack) is selling the “Dot.Com Errors and Omissions Liability Insurance Policy.”

Rossi, *Programs*, *supra* note 81. *See also* Jones Day, *supra* note 14, at 4; Rossi, *Policies*, *supra* note 34.

102. Michael A. Rossi, *Bringing Order to Chaos: Insurance Issues for E-Commerce Activities*, available at <http://www.irmi.com/expert/articles/rossi001.asp> (May 2000) [hereinafter Rossi, *Activities*].

or the only—approach at their disposal.¹⁰³ However one proceeds, the language of these policies and endorsements is not uniform, and the policyholder must take extraordinary care to ensure that the foreseeable risks faced by the business are covered by the policies it purchases.

CONCLUSION

Today's businesses, especially those utilizing technology, cannot afford to assume they are covered for cyber-risks simply because they have traditional coverages, such as CGL, E&O, and D&O policies, in place. While these standard policies may provide significant coverage for some cyberlosses, businesses must be proactive in assessing the potential risks they face,¹⁰⁴ in valuing their intellectual property assets, and in reviewing their existing coverage to identify any gaps.¹⁰⁵ If such gaps are discovered, the business should look to its selected insurer for solutions ranging from

103. *Id.*

104. Potential risks can be minimized by instituting and strictly enforcing detailed written policies regarding Internet use. Lorelie S. Masters, *When Hackers Attack*, LEGAL TIMES, Mar. 13, 2000, at 28. A recent example of the potentially harsh results of such strict enforcement is the firing of a Northwestern University secretary for allegedly storing two thousand MP3 music files on a university computer because "some of the files may have been pirated." Evan Hansen, *Fired over MP3s*, available at <http://news.cnet.com/news/0-1005-200-6775251.html> (Aug. 3, 2001). This comes at a time when "record labels are cracking down on file-swapping services such as Napster that have allowed . . . copying and trading of . . . MP3s." *Id.* Such swapping services are not the only targets of these enforcement efforts; universities and other entities may be swept up in the piracy dragnet. John Borland, *Napster, Universities Sued by Metallica*, available at <http://news.cnet.com/news/0-1005-200-1694163.html> (Apr. 13, 2000) (showing that Metallica, a heavy metal band at the forefront of the MP3 swapping controversy, filed suit against Indiana University, University of Southern California, and Yale University alleging complicity in piracy because they chose not to block access to Napster, which, in turn, led to "the massive . . . thefts of musicians' intellectual property").

When attempting to assess its level of exposure, a company should consider the following three factors:

First is the type of Internet activities it conducts. . . . Second is the extent to which the company is aware of its potential exposure to losses and claims arising from its Internet activities. Third is the extent to which the company has developed prevention programs and contingency plans to deal with Internet risks.

Riddle & Rowan, *supra* note 3, at 4.

105. See Warnot & Glazer, *supra* note 34, at 559-60; Hughes & Birenbaum, *Insuring*, *supra* note 8, at 232-34, 236-39; Tilton & Milton, *supra* note 89, at 416; Bell, *supra* note 19 at 28. "Already, risk managers at Fortune 1000 companies who thought they had coverage under their commercial property policies are finding gaps, especially if they bought coverage from foreign insurers." Wojcik, *supra* note 9, at 1.

the negotiation of an individualized policy to the addition of an endorsement or a stand-alone, e-commerce, intellectual property infringement, or media policy that meets the company's specific needs and level of risk aversion.¹⁰⁶ When new or different coverages are obtained, careful review of policy language is mandatory, and this review should be conducted in light of recent court interpretations of the given or similar language in order to assess whether coverage gaps will be adequately filled. Special attention must be given to policy exclusions, limitations, and geographic scope provisions for the same reason.¹⁰⁷ Furthermore, risk assessment, intellectual property valuation, and coverage review should be conducted frequently. The adoption of new technologies and the continued evolution of e-commerce will produce perpetual change in the cyber-risks that businesses face.

106. See Warnot & Glazer, *supra* note 34, at 559-60; Hughes & Birenbaum, *Insuring*, *supra* note 8, at 234; Rossi, *Programs*, *supra* note 81.

107. See Erik W. Kahn, *Tips on IP Coverage in CGL Insurance Policies*, INTELL. PROP. STRATEGIST, Jan. 2000, at 1. See Rossi, *Policies*, *supra* note 34.

APPENDIX: EVOLUTION OF ADVERTISING INJURY COVERAGE IN THE CGL, 1973-98

- I. The 1973 Policy (INS. SERVS. OFFICE, INC., BROAD FORM CGL ENDORSEMENT, GL 04 04 05 81).
 - A. The coverage grant: “The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of Personal Injury or Advertising Injury to which this insurance applies, sustained by any person or organization arising out of the conduct of the named insured’s business, within the policy territory. . . .” *Id.* at 2.
 - B. Definition of “Advertising Injury”: “injury arising out of an offense committed during the policy period occurring in the course of the named insured’s advertising activities, if the injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition or infringement of copyright, title or slogan.” *Id.* at 2.
 - C. Definition of “Personal Injury”: “injury arising out of one or more of the following offenses committed during the policy period:
 - (1) false arrest, detention, imprisonment, or malicious prosecution;
 - (2) wrongful entry or eviction or other invasion of the right of private occupancy;
 - (3) a publication or utterance
 - (a) of a libel or slander or other defamatory or disparaging material, or
 - (b) in violation of an individual’s right of privacy;
 - (c) except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the named insured shall not be deemed personal injury.” *Id.* at 2.
 - D. Exclusions: “This insurance does not apply:
 - (1) to liability assumed by the insured under any contract or agreement;
 - (2) to personal injury or advertising injury arising out of the wilful violation of a penal statute or ordinance committed by or with the knowledge or consent of the insured;

- (3) to personal injury or advertising injury arising out of a publication or utterance of a libel or slander, or a publication or utterance in violation of an individual's right of privacy, if the first injurious publication or utterance of the same or similar material by or on behalf of the named insured was made prior to the effective date of this insurance;
- (4) to personal injury or advertising injury arising out of libel or slander or the publication or utterance of defamatory or disparaging material concerning any person or organization or goods, products, or services, or in violation of an individual's right of privacy, made by or at the direction of the insured with knowledge of the falsity thereof;
- (5) to personal injury or advertising injury arising out of the conduct of any partnership or joint venture or which the insured is a partner or member and which is not designated in the declarations of the policy as a named insured;
- (6) to advertising injury arising out of
 - (a) failure of performance of contract, but this exclusion does not apply to the unauthorized appropriation of ideas based upon alleged breach of implied contract, or
 - (b) infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods, products or services sold, offered for sale, or advertised, or
 - (c) incorrect description or mistake in advertised price of goods, products or services sold, offered for sale or advertised;
- (7) with respect to advertising injury
 - (a) to any insured in the business of advertising, broadcasting, publishing or telecasting, or
 - (b) to any injury arising out of any act committed by the insured with actual malice." *Id.* at 2.

II. The 1986 Policy (INS. SERVS. OFFICE, INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 10 93).

- A. The coverage grant: "a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this insurance applies. . . .

This insurance applies to:

- (1) 'Personal injury' caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;
 - (2) 'Advertising injury' caused by an offense committed in the course of advertising your goods, products or services; but only if the offense was committed in the 'coverage territory' during the policy period." *Id.* at 4.
- B. Definition of "Advertising Injury": "injury arising out of one or more of the following offenses:
- a. 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;
 - b. Oral or written publication of material that violates a person's right of privacy;
 - c. Misappropriation of advertising ideas or style of doing business; or
 - d. Infringement of copyright, title or slogan." *Id.* at 9.
- C. Definition of "Personal Injury": "injury, other than 'bodily injury,' arising out of one or more of the following offenses:
- a. False arrest, detention or imprisonment;
 - b. Malicious prosecution;
 - c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
 - d. 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
 - e. Oral or written publication of material that violates a person's right of privacy." *Id.* at 11.
- D. Exclusions: "This insurance does not apply to:
- a. 'Personal injury' or 'advertising injury:'
 - (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
 - (2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;

- (3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured; or
 - (4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;
- b. 'Advertising injury' arising out of:
- (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract;
 - (2) The failure of goods, products or services to conform with advertised quality or performance;
 - (3) The wrong description of the price of goods, products or services; or
 - (4) An offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting." *Id.* at 4.

III. The 1998 Policy (INS. SERVS. OFFICE, INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 07 98).

A. The coverage grant:

- a. "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies. . . .
- b. This insurance applies to 'personal and advertising injury' caused by an offense arising out of your business but only if the offense was committed in the 'coverage territory' during the policy period." *Id.* at 5.

B. Definition of "Personal and advertising injury" "injury, including consequential 'bodily injury', arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. 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;
- e. Oral or written publication of material that violates a person's right of privacy;

- f. The use of another's advertising idea in your 'advertisement'; or
 - g. Infringing upon another's copyright, trade dress or slogan in your 'advertisement.'" *Id.* at 12.
 - h. 'Advertisement' means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." *Id.* at 10.
- C. Exclusions: "This insurance does not apply to:
- a. 'Personal and advertising injury:'
 - (1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury;'
 - (2) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge or its falsity;
 - (3) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
 - (4) Arising out of a criminal act committed by or at the direction of any insured;
 - (5) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;
 - (6) Arising out of a breach of contract, except an implied contract to use another's advertising idea in your 'advertisement;'
 - (7) Arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your 'advertisement;'
 - (8) Arising out of the wrong description of the price of goods, products or services stated in your 'advertisement;'
 - (9) Committed by an insured whose business is advertising, broadcasting, publishing or telecasting. However, this exclusion does not apply to Paragraphs 14.a., b., and c. of 'personal and advertising injury' under the Definitions Section; or

- (10) Arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' at any time. [Two other exclusions—b(1) and b(2)—reinforce the pollution exclusion in a(10).]" *Id.* at 5.