Insuring Risk
Allocation Provisions

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Agenda

- Risk Factors in Valuing Indemnity Clauses
- Types of Claims Subject to Indemnification
- Lawyers’ Duty to Advise Clients
- Types of Insurance Available
- Checklist for Insurance Clauses
Risk Factors

- Financial Resources of Vendor
- Criticality of Software
- Likelihood of Indemnity Claim
- Jurisdiction
Types of Claims Subject to Indemnity

- Bodily Injury or Property Damage
- Copyright Infringement
- Patent or Trademark Infringement
- Trade Secret Violation
- Defamation
- Invasion of Privacy
Lawyers’ Duty to Advise Clients

- Possibility of Insurance Coverage
- Place Insurers on Notice of Claims


Types of Insurance Available

- Commercial General Liability (CGL)
- Errors & Omissions (E&O)
- Specialty Insurance
  - Multimedia Liability
  - Intellectual Property Infringement
  - Reputation and Communications Liability
  - Breach of Security
Insurance Principles

- First Party or Third Party
- Occurrence v. Claims Made Trigger
- Coverage for Indemnity and Defense
  - Defense applies at outset
  - Defense broader than indemnity
  - Defense may be on top of policy limits
Coverage Provided: CGL

- Third Party Liability Arising Out Of:
  - Bodily Injury
  - Property Damage
  - Personal and Advertising Injury
Property Damage

- Property damage includes:
  - Physical injury to tangible property, and
  - Loss of use of tangible property that is not physically injured
- Software or data generally deemed to be intangible property
Personal and Advertising Injury

CGL Policy (ISO 2001 Form) Covers:

- Injury
- Caused by an “Offence”, Including
  - Slander or Libel
  - Violation of a Person’s Right of Privacy
  - Infringement of Copyright, Trade Dress or Slogan in your Advertisement
- Committed in the Course of Advertising your Goods, Products or Services.
Three Steps to Coverage

- Is there advertising activity?
- Is there an advertising injury offense?
- Is there a causal nexus between the advertising activity and the offense?
Exclusions: Advertising Injury

- Knowing Violation of Rights of Another
- Knowledge of Falsity of Material
- Material Published Prior to Policy Period
- Contractual Liability
- Breach of Contract
- Infringement of Copyright, Patent, Trademark
- Insureds in Media and Internet Type Business
- Unauthorized Use of Another’s Name or Product
Other Problems of Coverage

- Must be the insured’s advertising activity
- Trademark infringement not specifically listed, but may fall within:
  - Misappropriation of style of doing business
  - Infringement of title or slogan
- Coverage trigger for “Invasion of Privacy” typically dissemination, not gathering
- Patent infringement typically not covered
CGL Exclusions By Endorsement

- Programming errors
- Contract performance disputes
- Professional services liability
  - Computer Software
  - Electronic Data Processing
Coverage Provided: E&O

- Third party liability arising out of
  - a negligent act, error or omission
  - in the performance of the insured’s professional services

- Examples:
  - Failure of product to perform its function
  - Failure to perform services per contract
Defenses to E&O Coverage

- Non-negligent error
- Meaning of “professional services”
  - Liability must arise out of special risks inherent in the practice of the profession
  - Interpreting relationship as “sale of goods” would bar coverage (dominant purpose test)
- Often applies only to consequential damages (i.e., loss of income due to failure)
Defenses to E&O Coverage

- Economic loss doctrine
  - Applies to “tort” malpractice claims
  - Requires third party damage to person or property
- Exclusion for damage to tangible property
- Express warranty exclusion
Common Endorsements to E&O

- Intellectual property infringement
  - Infringement of patent, copyright, trademark, trade name, trade dress, trade secret, and any other intellectual property

- Computer virus
  - Unauthorized access to electronic systems
  - Damage caused by computer viruses and worms
Specialty Insurance Products
Multimedia Liability Insurance

- Occurrence-based, third party insurance
- Liability arising out of “media activities”
- “Media activities” defined as:
  - Act, error or omission arising out of the gathering, recording, collection, publication, dissemination or release of “Matter” in “Covered Media”
  - Includes acts by a party whom the insured has agreed to indemnify
**Multimedia Liability Insurance**

- “Media Activities” includes:
  - Invasion of privacy
  - Copyright infringement
  - Libel and slander
  - Product disparagement, trade libel, dilution, or infringement of title, slogan, trademark, trade name, service mark or service name
  - Negligence regarding content of “Matter”
Multimedia Liability Insurance

“Covered Media” includes “publications, programs, broadcast or cable stations, or other communications”

“Matter” is defined as “the content of any communication . . . including . . . computer coding”
Additional Features

- No exclusion for “internal” copyright disputes brought by employees or contractors
- Punitive damages covered
- Choice between indemnity and duty to defend
Infringement Defense Cost Insurance

- Covers copyright, trademark or patent infringement claims arising out of insured’s operations
- Pays for defense of infringement suits
- Riders available for
  - Loss of business income, royalties, license fees
  - Loss of trade secret advantage
  - Cost of redesign
Limitations

- Applies only to claims asserted at least 90 days after policy inception date
- Applies only when insured asserts invalidity as defense to infringement claim
- Requires “favorable infringement opinion” as part of underwriting
- Licensees must be added as Additional Insureds
Reputational Injury and Communications Liability Insurance

- Covers claims of copyright and trademark infringement, libel, slander, product disparagement and violation of rights of privacy and publicity
- Defends against claims seeking damages as well as injunctive relief
- Excludes coverage for copyright infringement relating to computer code
Breach of Security Insurance

- First or Third Party Coverage
- Covers for claims arising out of defined perils (such as hacking, theft of data) arising out of the failure of insured’s security measures or procedures
Checklist for Insurance Clauses

Vendor Maintains Insurance for:
- General Liability
- Professional Errors and Omissions
- Intellectual Property Infringement
- Defamation and Privacy

Licensee Maintains Insurance for:
- General Liability, Property
- Business Interruption
Checklist for Insurance Clauses

- Contractual Indemnification
- Name Licensee as Additional Insured
  - Licensee to Approve Amount and Companies
  - 30-Day Notice of Cancellation or Change
- Provide Evidence of Insurance
  - Right to Obtain Insurance, Charge Vendor
  - Provide Replacement or Renewal Coverage
Questions?

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