

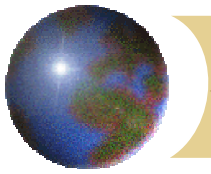
# *Insuring Risk Allocation Provisions*

William R. Denny

Potter Anderson & Corroon LLP

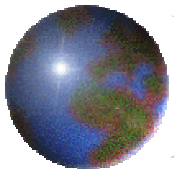
June 14, 2004





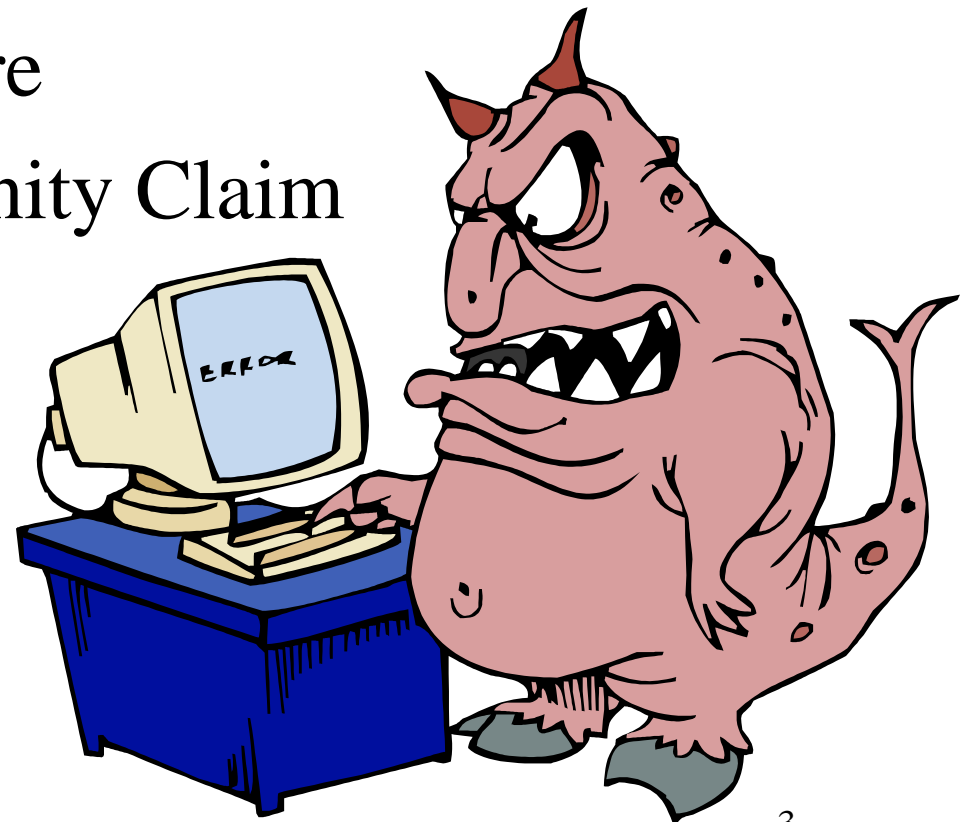
# *Agenda*

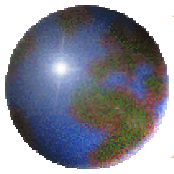
- ⊕ Risk Factors in Valuing Indemnity Clauses
- ⊕ Types of Claims Subject to Indemnification
- ⊕ Lawyers' Duty to Advise Clients
- ⊕ Types of Insurance Available
- ⊕ Checklist for Insurance Clauses



# *Risk Factors*

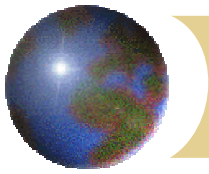
- ⊕ Financial Resources of Vendor
- ⊕ Criticality of Software
- ⊕ Likelihood of Indemnity Claim
- ⊕ Jurisdiction





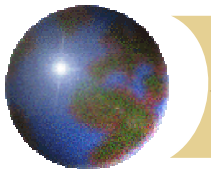
# *Types of Claims Subject to Indemnity*

- ⊕ Bodily Injury or Property Damage
- ⊕ Copyright Infringement
- ⊕ Patent or Trademark Infringement
- ⊕ Trade Secret Violation
- ⊕ Defamation
- ⊕ Invasion of Privacy



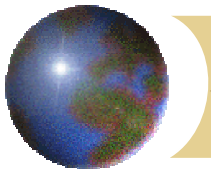
# *Lawyers' Duty to Advise Clients*

- ⊕ Possibility of Insurance Coverage
- ⊕ Place Insurers on Notice of Claims
  - ⊞ *Darby & Darby v. VSI International* (N.Y. Ct. App. 2000)
  - ⊞ *Jordache Enterprises v. Brobeck Phleger & Harrison* (Cal. Supr. 1998)



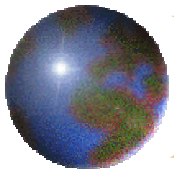
# *Types of Insurance Available*

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



# *Insurance Principles*

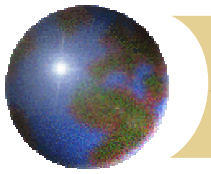
- ⊕ First Party or Third Party
- ⊕ Occurrence v. Claims Made Trigger
- ⊕ Coverage for Indemnity and Defense
  - ⊞ Defense applies at outset
  - ⊞ Defense broader than indemnity
  - ⊞ Defense may be on top of policy limits



## *Coverage Provided: CGL*

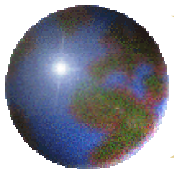
- ⊕ Third Party Liability Arising Out Of:
  - ⊕ Bodily Injury
  - ⊕ Property Damage
  - ⊕ Personal and Advertising Injury





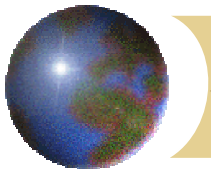
# *Property Damage*

- ❖ 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



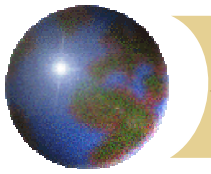
# *Personal and Advertising Injury*

- ❖ 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.



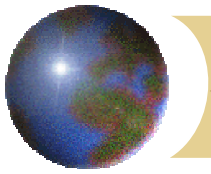
## *Three Steps to Coverage*

- ⊕ Is there advertising activity?
- ⊕ Is there an advertising injury offense?
- ⊕ Is there a causal nexus between the advertising activity and the offense?



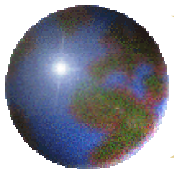
## *Exclusions: Advertising Injury*

- ⊕ 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*

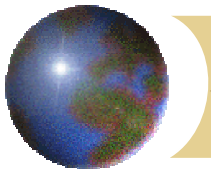
- ❖ Must be the insured's advertising activity
- ❖ Trademark infringement not specifically listed, but may fall within:
  - ❑ Misappropriation of style of doing business
  - ❑ Infringement of title or slogan
- ❖ Coverage trigger for “Invasion of Privacy” typically dissemination, not gathering
- ❖ Patent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



# *CGL Exclusions By Endorsement*

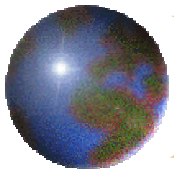
- ❖ Programming errors
- ❖ Contract performance disputes
- ❖ Professional services liability
  - ❑ Computer Software
  - ❑ Electronic Data Processing





## *Coverage Provided: E&O*

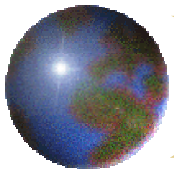
- Third party liability arising out of
  - a negligent act, error or omission
  - in the performance of the insured's professional services
- Examples:
  - Failure of product to perform its function
  - Failure to perform services per contract



# *Defenses to E&O Coverage*

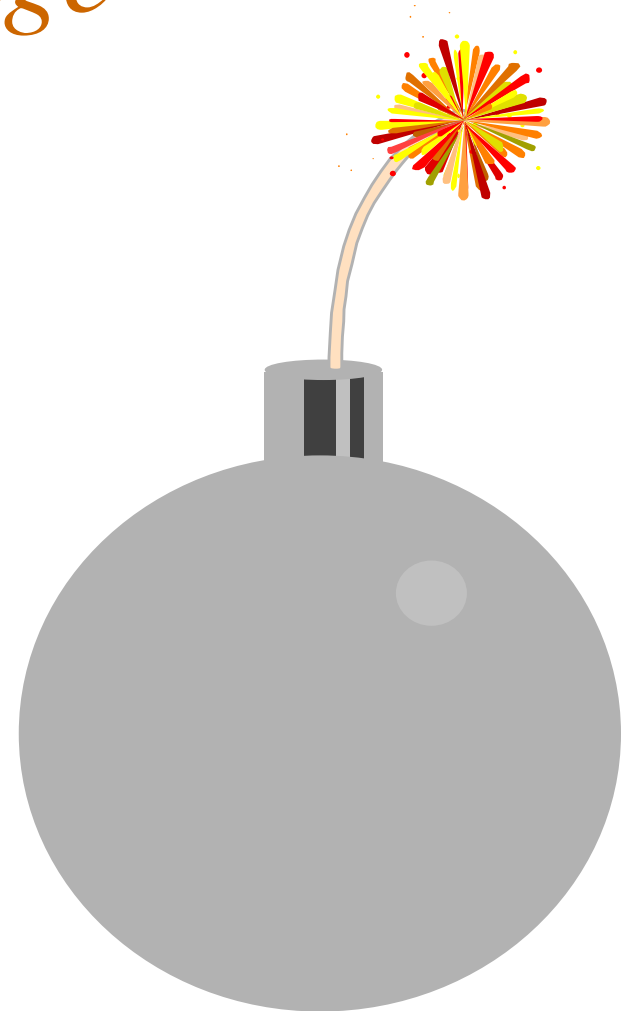
- ❖ Non-negligent error
- ❖ Meaning of “professional services”
  - ❑ Liability must arise out of special risks inherent in the practice of the profession
  - ❑ Interpreting relationship as “sale of goods” would bar coverage (dominant purpose test)
- ❖ Often applies only to consequential damages (i.e.,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

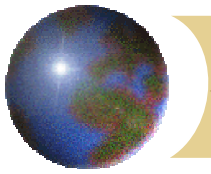




# *Defenses to E&O Coverage*

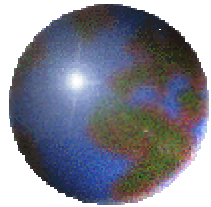
- ⊕ Economic loss doctrine
  - ⊞ Applies to “tort” malpractice claims
  - ⊞ Requires third party damage to person or property
- ⊕ Exclusion for damage to tangible property
- ⊕ Express warranty exclusion



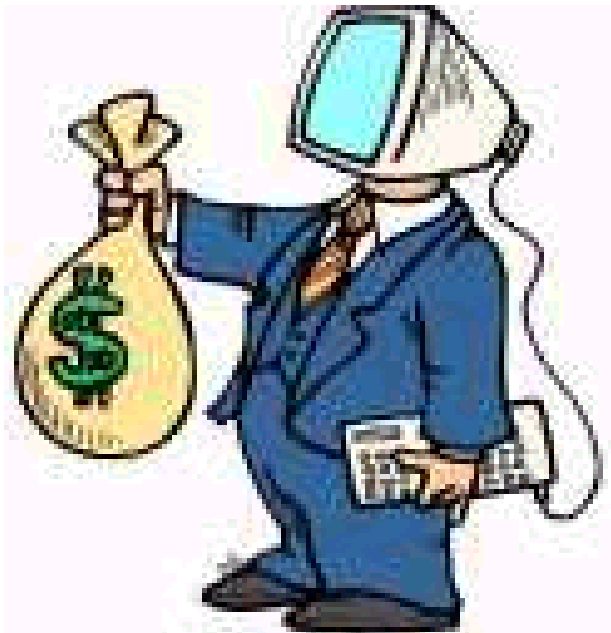


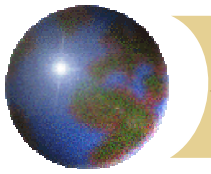
## *Common Endorsements to E&O*

- ❖ 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



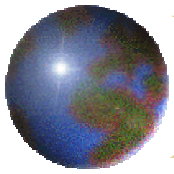
# *Specialty Insurance Products*





# *Multimedia Liability Insurance*

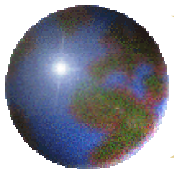
- ⊗ Occurrence-based, third party insurance
- ⊗ Liability arising out of “media activities”
- ⊗ “Media activities” defined as:
  - ⊠ Act, error or omission arising out of the gathering, recording, collection, publication, dissemination or release of “Matter” in “Covered Media”
  - ⊠ Includes acts by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



# *Multimedia Liability Insurance*

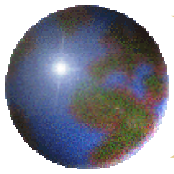
## ☉ “Media Activities” includes:

- ☒ 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”



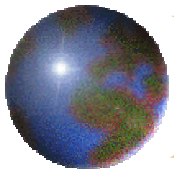
# *Multimedia Liability Insurance*

- ⊕ “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*

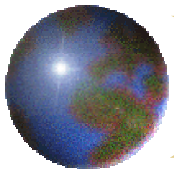
- ❖ No exclusion for “internal” copyright disputes brought by employees or contractors
- ❖ Punitive damages covered
- ❖ Choice between indemnity and duty to defend



## *Infringement Defense Cost Insurance*

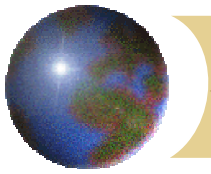
- ❖ Covers copyright, trademark or patent infringement claims arising out of insured's operations
- ❖ Pays for defense of infringement suits
- ❖ Riders available for
  - ❑ Loss of business income, royalties, license fees
  - ❑ Loss of trade secret advantage
  - ❑ Cost of redesign





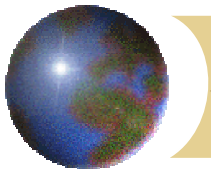
## *Limitations*

- ❖ 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



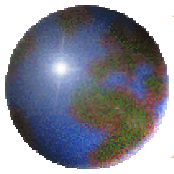
## *Reputational Injury and Communications Liability Insurance*

- ❖ 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



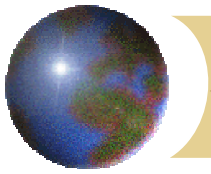
# *Checklist for Insurance Clauses*

## ☉ Vendor Maintains Insurance for:

- ☒ General Liability
- ☒ Professional Errors and Omissions
- ☒ Intellectual Property Infringement
- ☒ Defamation and Privacy

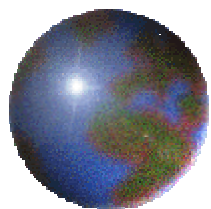
## ☉ Licensee Maintains Insurance for:

- ☒ 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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