Now You See It, Now You Don’t...

April 24, 2014—27th Annual Media and the Law Seminar
Sponsored by the Media, Privacy and Defamation Law and Insurance Coverage Litigation Committees of the ABA’s Tort, Trial and Insurance Practice Section
Introduction of panelists

• Moderator Jim Holmes, Partner, Sedgwick, LLP
• Adam Cottini, Area Vice President, Arthur J. Gallagher & Co.
• Cassandra S. Franklin, Managing Attorney - Coverage Counsel, Fireman's Fund Insurance Company
• Seth D. Lamden, Partner, Neal, Gerber & Eisenberg LLP
• Larry Warshaw, Coverage Specialist and Client Relationship Manager, Carl Warren & Company
Evolution of the CGL policy form

- Broad Form Endorsement
- History of ISO Revisions
- Current Policy Form
Segue
An Insurance Insider's Insight

May 30, 2014
Overland Park Doubletree Hotel

MagiCLE.us/events
Discount Code: media
Hypo 1: Trademark

- **IDENTITY CRISIS: TRADEMARK or SLOGAN or BOTH**
  - CGL policies *do not* cover claims for infringement of a trademark in an advertisement.
  - CGL policies *do* cover claims for infringement of a slogan in an advertisement.
  - *Slogans can be trademarked, and trademarks can be found in slogans.*
Hypo 1 (cont.)

- **EASY EXAMPLE:**
  - “Nike” is a trademark. “Just Do It” is a slogan. Both are trademarked.
Hypo 1 (cont.)

**TOUGHER EXAMPLE:**

- Authentic Jerseys is in the business of selling replica NFL jerseys. One of the jerseys sold by Authentic Jerseys is a “Steel Curtain Custom Limited Edition Steelers Jersey.” This jersey reads “Steel Curtain” across the back, and features the black and gold coloring and same style of lettering and numbers that appears on authentic Steelers’ NFL jerseys.

- Authentic Jerseys sold the “Steel Curtain” jersey on its website, which included pictures of the jersey and the text “Steel Curtain.”

- The NFL sued Authentic Jerseys, claiming that the jerseys sold by Authentic Jerseys are counterfeit and that Authentic Jerseys was not authorized to use the “Steel Curtain” mark. The NFL’s lawsuit included claims for trademark infringement, trademark counterfeiting, trademark dilution, unfair competition, and deceptive practices. Specifically, the NFL’s complaint alleges that “[t]he Steelers have strong common law rights in the mark ‘Steel Curtain’ and own a state registration for the mark ‘Steel Curtain . . . Pittsburgh Steelers.’”
Hypo 2: Copyright/Social Media

- A media company owns a popular music website. The company webpage allows users to connect to Facebook through their website and conversely their Facebook page will direct users to the company website. User Generated Content (UGC) in the form of comments can be uploaded to both sites (including hyperlinks). Privacy policies are explicit and state that UGC can only be uploaded if the user has appropriate permissions.

- When the media company began a campaign to encourage its users to vote for their favorite musicians of 2013 there was a tremendous amount of buzz generated and a great deal of enthusiastic fans voted for their favorite bands. Hyperlinks were allowed on both Facebook and the media Company’s own website.
Hypo 2 (cont.)

- Unfortunately, many of the hyperlinks were directed to photographs that violated photographer’s copyrights. As such, a lawsuit was brought against the media company for “Contributory Copyright Infringement”.
- Contributory infringement occurs when an individual or organization had actual and/or constructive knowledge of another’s infringing conduct and induced, caused, and/or materially contributed to the infringing conduct. In this situation, the photographers believe and allege that the music website did not prevent or take down the hyperlinks and effectively enabled, facilitated and materially contributed to the and further provided the avenue by which the infringing activity resulted.
Hypo 3: Independent Contractor

The Mayberry Gazette, a local paper, commissions Floyd & Otis Polling Co. to conduct a poll of the county’s citizens regarding a local tax issue. The paper publishes the study. Barney Polling had already conducted a poll commissioned by the Orange Party to use in its campaign literature. Barney sues both Mayberry Gazette and Floyd & Otis for plagiarizing the poll it had already conducted, which was allegedly hacked/stolen from Barney’s computer by a former Barney employee now working for Floyd & Otis. Floyd & Otis has only a CGL policy. Mayberry Gazette has a media liability policy.
Hypo 4: Invasion of Privacy

- Gwen Stefani has sued Van Halen Guitars in connection with a Van Halen-sponsored blog entitled “In Pursuit of the Ultimate Tone.”

- The blog features a photograph of a woman with white-blond hair and bright red lipstick, with a guitar slung across her shoulder.

- The woman looks a lot like Gwen Stefani.
Hypo 4 (cont.)

“In Pursuit of the Ultimate Tone”

Most guitarists would agree that perfect guitar tone is elusive and highly subjective. Nonetheless, we have found that the highest grossing female vocalists prefer the harmonics of the Van Halen “Hendrix” model.

In the words of one lead singer, with the “Hendrix,” “You just revel in the sheer depth of the bass and the impressive punch with which notes and chords throw forwards. It’s such a sonorous instrument, one of those guitars that even gets those of us with a punky-throatier edge excited by the noise it’s making: very close to genuine magic.”

Stefani’s lawsuit features the quote and the photograph and alleges that the blog misappropriates her identity and infringes on her right of publicity as well as portraying her in a false light.
Options on claims

- Assessment of prospects of “fitting” claim under current language
- Other available coverages/policies
  - Media policies
  - Tech policies
  - Others?
- Prior coverage options
  - “Occurrence” policies – date of occurrence, review prior policy forms
  - “Claim Made” policies – long tail extensions