

National Underwriter

THE LEADER IN PROPERTY & CASUALTY NEWS

■ MEDIA LIABILITY

Occurrence Form Gives Eternity Of Coverage

BY LEIB DODELL

UNLIKE MOST OTHER FORMS OF PROFESSIONAL liability insurance, media liability insurance is typically written on an occurrence rather than a claims-made basis.

In other words, the policies cover claims arising out of "occurrences" during the policy period, regardless of when the claim is made or suit is brought.

An "occurrence" is typically defined as the first publication of a particular piece of content, such as a book, film or magazine—sometimes referred to as "matter." Thus, as long as the matter covered by the policy is first published during the policy period, the insured will have an eternity of coverage for claims arising out of that matter.

The reason underwriters have been comfortable writing media liability coverage on an occurrence basis is important to understand.

Historically, the principal cause of action covered by a media insurance policy was defamation, also known as libel and slander. Indeed, originally media liability insurance was also called "libel insurance."

Defamation claims are governed by notoriously short statutes of limitations, usually one-to-three years from the date of first publication, regardless of when the plaintiff first learned of the publication. Moreover, under the "single publication rule," subsequent publications of the same content "relate back" to the original publication and the statute of limitations begins to run at that time.

Thus, insurers know that they can write media coverage on an occurrence basis without fear of a "long tail." Despite the fact that media liability policies have expanded over the years to

cover a wide range of claims in addition to libel and slander—some of which may have longer statutes of limitation—most media liability underwriters continue to offer the coverage on an occurrence basis for most classes of business.



► **UNDER A CLAIMS-MADE FORM**, coverage for a copyright dispute over Margaret Mitchell's classic 1936 Civil War novel would be gone with the wind if it were brought today, while even a claim brought 70 years after publication remains covered under an occurrence form.

The tremendous value of the occurrence policy should not be overlooked. Consider a media liability policy written for a specific book or film—what is typically referred to as "project-specific E&O." As long as the book or film is first disseminated during the policy period, coverage will "attach" at that time. In most cases, of course, the book or film will remain in circulation long after the policy period expires.

With an occurrence form, there is no need to renew the policy to maintain coverage. Coverage has attached, and will follow that book or film like a bad penny throughout its circulation lifespan.

Of course, if the content changes—such as outtakes or interviews added to a DVD, or a new edition of a book with added content—the underwriter will need to review the new material, charge whatever additional premium may be appropriate, and either endorse coverage onto the original policy or issue a new one. But as long as the content is unchanged, the original policy will respond.

If the policy had been written on a claims-made basis, on the other hand, the insured

would have to continually renew the policy in order to maintain coverage.

"Gone With The Wind," for example, was first published in 1936 and remains in circulation today. Imagine the burden on the original publisher and author and their successors and estates—not to mention their insurance agents—if they had to renew the original publisher's liability policy for the next 70 years to maintain in-force coverage.

To be sure, it is unlikely that a claim would be brought 70 years after original publication. But media law can be tricky. It is not unheard of for claims to be asserted long after the first publication of the original work, particularly with respect to copyright and other intellectual property disputes.

A great example is the case of *MGM vs. McClory*. MGM is the producer and distributor of James Bond films, having acquired the rights from Ian Fleming, who created the Bond character in his spy novels. The first Bond film, "Dr. No," was released in 1962. More than 35 years later, Kevin McClory alleged that he owned rights to the Bond character based on his alleged collaboration on the original "Thunderball" screenplay in the late 1950s.

MGM ultimately prevailed in the lawsuit, but only after years of litigation and legal expenses that literally ran in the multiple millions of dollars.

Despite the advantages, the value of the occurrence policy seems occasionally to be overlooked in the marketplace. Some customers and agents continue to purchase claims-made offerings despite the availability of comparably priced occurrence coverage.

Occasionally, they will request a three-year claims-made policy, apparently on the theory that the three-year term will compensate for the difference in triggers.

Of course, the difference between a three-year claims-made form and an occurrence policy is the difference between three years and infinity. ■



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