



CONVERGING RISKS IN A DIGITAL ECONOMY: JEWELRY DESIGNERS, MANUFACTURERS AND RETAILERS

This is one installment in a series of “White Papers” prepared by ThinkRisk Underwriting Agency discussing the converging media and technology risks facing various industry segments. The white papers provide real-world claims examples, and explore the insurance ramifications of these emerging exposures. This installment of the series discusses risks faced by companies in the jewelry industry, including fashion jewelry designers, manufactures and retailers.

Introduction to the convergence phenomenon: Digital technology is a powerful tool that has changed the way businesses and other organizations operate. It has unleashed corporate creativity, leading to new products, new ways to manage and store data, and new ways to interact and communicate with constituencies. At the same time, digitization and the way it permits companies to gather, create, distribute and store information and media content has altered the risks of doing business in a fundamental way and exposes inadequacies in the current insurance response to these new risks. Here’s how this phenomenon affects the jewelry industry.

Content: It has become a cliché that in today’s information-based environment, “everyone’s a publisher.” This seems particularly true with respect to the jewelry industry, where designers, manufacturers and retailers look to reach their desired audiences by “telling a story” through their branding and advertising. Indeed, many fashion jewelry businesses more closely resemble entertainment companies than standard commercial enterprises, with frequent use of celebrity endorsers, creative Internet and social media strategies, and other “new media” practices. As a result, jewelry companies can face content-related claims from a wide variety of sources, ranging from traditional media and advertising activities such as billboards and print and broadcast ads to branding, publishing, product placement, entertainment programming and other media activities. For example:

- A model who says she has worked hard to maintain a wholesome image has filed a \$5 million lawsuit complaining that a jewelry company's video advertisement in which she writhes and moans looks pornographic. The commercial, seen on the Internet in a clip titled "Rock Her World," shows a woman wearing blue lacy lingerie and a diamond necklace while moaning and stroking her face and neck. It ends with the Web address for the jewelry company, Szul.com. The woman is asking for \$2.5 million in compensatory damages and \$2.5 million in punitive damages.
- Jessica Simpson sued U.S. retailer Inspired Silver in 2005 for allegedly using her image to sell products without permission.

Design. In addition to media content, businesses in the jewelry industry face a myriad of intellectual property exposures arising out of the very design of their products – creative elements such as shapes of gemstones, ornamental designs, and other elements incorporated into the design of the product. Although the jewelry industry has faced intellectual property challenges probably since the design of the first wedding band, digital technology has aggravated the problem. Advances in technology have dramatically shortened the product development lifecycle. New designs can be developed digitally and placed into production so quickly that often there is no opportunity for legal review or other sober reflection on the risks. Images, patterns and other protected intellectual property can easily be copied electronically and incorporated into new designs. And the ease of online sales platforms means that new designs can be brought to market, globally, in days as opposed to months or years.

As a result, it is not surprising that there are a great many recent examples of design-related claims against the jewelry industry, including:

- Jewelry designer Sonya Frisina does business as Sonya Ooten and has a retail store in Los Angeles. Ooten owns [U.S. Design Patent No. D544,389](#), titled “Metal Crochet Earring,” covering the ornamental jewelry design. Because different forms of intellectual property often overlap, Ooten, to maximize protection, also registered the “Cosmos” earring design with the [U.S. Copyright Office](#). Ooten has alleged that Soixante Neuf’s “Oval Woven Beaded Earrings” infringe both its design patent and copyright.
- Jewelry designer David Rasnick sued Jewelry and Minerals of Las Vegas for copyright infringement. Rasnick has been designing jewelry for over 20 years and designed a teardrop-shaped humpback whale loop earring. Rasnick registered the work with the Copyright Office on May 22, 1989. Rasnick alleged that “Defendant has sold unauthorized and infringing copies of the humpback whale earring, which bear a design that is substantially similar to the humpback whale earring at retail, at wholesale and through retailers.” Rasnick further alleged that his damages cannot yet be determined and he may elect between the profits generated by the defendant or statutory damages.
- In February of 2010, U.S. jewelry manufacturer Orogem Corp. filed a copyright infringement lawsuit against De Beers, Zale Corp., Helzberg’s Diamonds and others, claiming that the Everlon Diamond Knot Collection too closely mirrors one of its own designs. Orogem is seeking at least \$100,000 in damages and over \$5 million in gains, profits or advantages made by the sale of Everlon jewelry.

False Advertising

Closely related to the issue of intellectual property in content, jewelry companies face a multitude of exposures relating to false advertising or misrepresentation in advertising. Jewelry advertising often contains representations as to the quality of the product, the product’s value, etc. – all of which may draw consumer or competitor complaints. In an increasingly health-conscious society, consumer groups and government regulators are ever vigilant in identifying representations that they believe to be false or misleading, and bringing claims against the advertisers. Most notable, of course, is California’s “Proposition 65,” which requires businesses to notify consumers when there are significant amount of certain chemicals in their products. Proposition 65 has spawned a significant number of claims against a wide variety of companies, including jewelry companies. These claims can be extraordinarily expensive to defend. Some examples of recent false advertising claims in the jewelry industry include:

- In May of 2008, a California woman filed suit claiming that the Shopping Network knowingly sold treated gemstones as though they were “extremely rare” and “all natural,” when in fact they were not. The suit seeks damages in excess of \$5 million and class-action status.
- Tiffany & Co. sued Diamond Ten and Dearborn, Mich.–based Ace Diamond Jewelry on June 2, 2011 for injunctive relief, alleging false advertising, trademark infringement and unfair or deceptive trade practices. Tiffany’s claims that Diamond Ten and Ace Diamond Jewelry offered rings for sale on eBay and advertised those rings as authentic Tiffany products. The company claims the rings are fake and marked with counterfeit Tiffany trademarks.
- The Center for Environmental Health (CEH) has filed the most recent Proposition 65 claims against jewelry manufacturers and distributors Two’s Company, Inc., Cara’s Accessories, Ltd., High Accessories, Inc., Toscana Accessories, Inc., and New Ashley Stewart, Inc., claiming those companies failed to warn consumers about dangerous levels of lead contained in their jewelry. As with all such claims, the plaintiff is seeking civil penalties, injunctive relief, attorney’s fees and costs.

Network security and data privacy

Digital technology makes gathering and storing data easier, creating opportunities for companies to collect and store vast amounts of data, including not just employee information but also data concerning customers, vendors, website visitors and many others. In addition, many jewelry companies have online stores and therefore may collect credit card or other personal financial information from customers. In the event of a breach of security, state laws in most jurisdictions require the data holder to notify all potentially impacted persons, the cost of which can be astronomical. If the information is used in a way that is damaging, companies could face liability claims as well. In addition, companies are likely to have digital versions of many designs, patterns and other creative works belonging to vendors, independent contractors and other third parties, the value of which might be compromised if the digital copies were accidentally released.

There have been many instances of data security breaches involving designers and retailers. Probably the single most infamous data security case involved the apparel retailer TJ Maxx:

- TJX Cos., owner of the apparel retailers TJ Maxx and Marshalls, was the subject of one of the largest data breach incidents in corporate history. Unidentified hackers placed software on the company’s network and were able to obtain data on approximately 45 million credit and debit cards. Some of this data was used to make fake credit cards, which were then used to purchase millions of dollars of electronics from Wal-Mart and other stores. TJX has estimated the total costs of the breach at around \$250 million, which includes notifying impacted consumers, investigating the breach, restoring defective computer systems and responding to lawsuits.
- In February 2007, data concerning employees of Rabun Apparel, a former subsidiary of Fruit of the Loom, was available for over a month on the Internet. The data consisted of over 1,000 records and included employees’ names and Social Security numbers.

Coverages in the standard insurance marketplace

Most media and entertainment companies purchase specialized “media liability” policies to protect themselves against intellectual property and related claims. Most apparel and jewelry companies, however, do not. Instead, they have historically relied on the “advertising injury” coverage in the Commercial General Liability (“CGL”) policy.

Typical CGL policies, however, provide very limited coverage for the types of design, media and network

security claims discussed above. Libel and invasion of privacy in publications may be covered, but that leaves much media activity unprotected. For instance, intellectual property is excluded, except for copyright in “advertisements.” This means that the litany of copyright, trademark and related intellectual property claims discussed above arising out of jewelry design would likely not be covered. Similarly, website content is generally not covered, unless the content is considered “advertising,” which is construed narrowly. Chat rooms, bulletin boards and other interactive media are excluded. Data breaches are generally outside the scope of the GCL.

Similarly, although some D&O policies can include personal and advertising injury coverage similar to CGL policies, those coverages may not be offered to jewelry companies. Likewise, many D&O policies have intellectual property and other similar exclusions that would defeat coverage in many of the high-exposure areas discussed in this paper. Even when such coverage is provided, it is generally not robust, and the carrier may not have the necessary legal expertise to deal with highly specialized or technical claims.

ThinkRisk’s Converging Risk Liability Policy:

The Converging Risk Liability Policy from ThinkRisk is tailored to address these unique and emerging exposures, and fill the gaps left by traditional policies. The policy is “modular” and can therefore be customized to meet the needs of the particular institution. Coverage Part A of the Policy provides coverage for claims arising out of the distribution of content, whether by print, electronic or any other means. This coverage can be endorsed to provide Design Coverage for similar types of claims (e.g., copyright, trademark, etc.) arising out of jewelry design and for false advertising coverage. To the extent that a jewelry company provides any type of professional services (such as design services for others or other consulting services), Coverage Part B provides coverage for claims alleging errors and omissions in the course of providing such services. Coverage Parts C and D provide network security coverage, both for liability claims brought against the insured (Part C) and for certain costs incurred by the insured in responding to a breach (Part D), including the cost of notifying affected persons.

To obtain a quote, please contact your insurance agent. To our agents: For more information, contact us at info@thinkriskins.com or (816) 994-6400. Submissions may be sent to submissions@thinkriskins.com.
