The Coverage Inkwell

Emerging Coverage Issues in Intellectual Property, Privacy, and Cyber Liability

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THREE ADDITIONAL AND IMPORTANT TAKEAWAYS FROM SONY

In *Zurich Amer. Ins. Co. v. Sony Corp.*, Index No. 651982/2011 (N.Y. Supr. Ct. Feb. 21, 2014), the New York trial court held that Sony Corporation was not entitled to insurance coverage under general liability policies for the multitude of data breach lawsuits filed against it in connection with the Sony's PlayStation data breach. The Court reasoned that because none of the lawsuits alleged that Sony had been the entity publishing material, the lawsuits did not allege "oral or written publication, in any manner, of material that violates a person's right of privacy" to satisfy the definition for "personal and advertising injury" under Coverage B of the policies.

Plenty has been written about this holding. However, comparably little attention has been given to other conclusions rendered by the Court in its decision. Arguably, given *Sony's* notoriety, and the forthcoming ISO data breach exclusions for general liability policies, these other holdings could have a broader and more long-lasting impact in privacy litigation than the main holding that has caused such an uproar.

The 82-page transcript for the *Sony* hearing provides critical detail and insight into the Court's decision. (The Court did not issue a written opinion.) Given that the trial court's decision has been appealed, and *amicus* briefs are likely, these other holdings should not be overlooked. They are: (1) the phrase "in any manner" does not alter the meaning of the term "publication"; (2) analogizing the issue to Greek mythology, the Court held that the underlying data breach lawsuits alleged a "publication"; and (3) for the Insureds in Media and Internet Type of Business exclusion to apply, the excluded business must be the insured's sole business. The first decision is similar to that rendered by the Eleventh Circuit in *Creative Hospitality Ventures, Inc. v. U.S. Liab. Ins. Co.*, 444 Fed. App'x 370 (11th Cir. 2011). The two other decisions are extraordinary.

The Meaning of "In Any Manner". Policyholders frequently argue that the phrase "publication, *in any manner*, of material" means any type of dissemination of material, whatsoever; whether the dissemination be a distribution to the public at large, a discrete disclosure to a third party, or even the mere recording or collecting of material.

Sony advanced the same argument, but with a twist. Sony asserted that the phrase "in any manner" meant any type of dissemination *by anyone* – i.e., that the insured itself need not be the one publishing the material at issue in order to implicate "personal and advertising injury" coverage under the defined offense "oral or written publication, in any manner, of material that violates a person's right of privacy."

Sony contended that the phrase "in any manner" changed the meaning of the word publication: "They [the insurers] could have said oral or written publication in any media. It says, in any manner." (Tr., p. 63.)

The Court disagreed, concluding that the phrase does not modify the meaning of the term "publication." Instead, it merely expands upon the methods of publication to include electronic means:

> In any manner, as Zurich's counsel pointed out, means oral or written publication in any manner. It is the medium. It is the kind of way it is being publicized. It's either by fax, it is either by e-mail, either by so forth. But, it doesn't define who actually sends that kind of publication.

(Tr., p. 78.)

This decision is the same rendered by the Eleventh Circuit in *Creative Hospitality Ventures, supra*, where the court held that the phrase "in any manner" did not render the term "publication" ambiguous. According to the court, the phrase "merely expands the categories of publication (such as e-mail, handwritten letters, and, perhaps 'blast-faxes') covered by the Policy. But the phrase *cannot change* the plain meaning of the underlying term 'publication.'" *Id.* at 376 (emphasis added). Notably, this understanding is also consistent with ISO filings that explained the phrase was intended to have the term publication also mean electronic publications. *See* Commercial General Liability, Forms Filing GL-2000-OMF00. Thus, the New York court's decision in *Sony* is consistent with other authority.

What is a "Publication"? The meaning of the phrase "publication," and whether an underlying action alleges one, is a commonly litigated issue. Part of the problem is that the criteria for defining "publication" are different for different causes of action. For instance, a "publication" for an invasion of privacy claim requires dissemination of information either to the public at large or to so many persons that it is substantially certain that the information will become public knowledge." *E.g., Restatement (Second) of Torts*, § 652D, comment a. A "publication" for a defamation claim, on the other hand, requires only disclosure to a single third party. *Id*. at §577.

Some courts stick to the meaning of "publication" in an invasion of privacy claim. *Whole Enchilada Inc. v. Travelers Prop. Cas. Co. of Am.*, 581 F. Supp. 2d 677, 697 (W.D. Pa. 2008). Although the offense "oral or written publication, in any manner, of material that violates a person's right of privacy," on its face, addresses an invasion of privacy claim, other courts interpret "publication" under a defamation standard. *Park Univ. Enters., Inc. v. Am Cas. Co. of Reading*, 442 F.3d 1239 (10th Cir. 2006). Some courts go so far as to eschew a disclosure requirement altogether. *Encore Receivable Mgmt., Inc. v. ACE Prop. & Cas. Ins. Co.*, 2013 WL 3354571 (S.D. Ohio July 3, 2013) (mere recording constituted publication).

In *Sony*, the Court went *One Step Beyond*. Analogizing the issue to Pandora's Box, the Court held that once the hackers broke into Sony's network, there was a publication. It mattered not that none of the lawsuits alleged the hackers actually had "published" the information that was stolen:

> [MR. COUGHLIN] But, there is no allegation that the hackers themselves published anything.
>
> THE COURT: That is getting into real subtleties. Because, I look at this as a Pandora's box. Once it is opened, it doesn't matter who does what with it. It is out there. It is out there in the world, that information.

> And whether or not it's actually used later on to get any benefit by the hackers, that in my mind is not the issue. The issue is that it was in their vault.

(Tr., p. 42.)

According to the New York Court, "[w]hen you open up the box, it's the Pandora's box. Everything comes out." (*Id.*) The Court later reiterated its reasoning in its conclusions:

> So that in the box, [the information] is safe and it is secured. Once it is opened, it comes out. And this is where I believe that's where the publication comes in. It's been opened. It comes out. It doesn't matter if it has to be oral or written.

(Tr., pp. 76-77.)

Notably, another recent data breach insurance decision held differently. In *Recall Total Info. Management, Inc. v. Federal Ins. Co.*, 83 A.2d 664, 666-67 (Conn. App. Ct. 2014), the Appellate Court of Connecticut held that without proof of access, stolen data could not be considered published no matter the meaning of the term.

Insureds in Media and Internet Type of Business Exclusion. The exclusion, which may be found in Coverage B of general liability policy forms, prohibits coverage for "personal and advertising injury" committed by an insured whose business is "an internet search, access, content or service provider." Generally, the exclusion applies when the insured's principal business fall within one of the exclusion's enumerated industries. *State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249, 261 (4th Cir. 2003); *Penn Nat'l Ins. Co. v. Group C Communications, Inc.*, 2011 WL 3241491, at *6-7 (N.J. Super. Ct. A.D., Aug. 1, 2011).

The insurers in *Sony* argued that because Sony provided content through its PlayStation Network, such as gaming content and access to Hulu and Netflix, Sony is a content and/or service provider and, therefore, the exclusion applied. (Tr., pp. 14, 17.) Noting that Sony engages in additional activities and services, the Court concluded that Sony is a "hybrid," something that Zurich conceded:

> It sounds like they [Sony defendants] do more than being an internet search, or access, or content or service provider. They are sort of a hybrid. They do a lot of things.
>
> MR. COUGHLIN: They certainly do, your Honor.

(Tr., p. 16.)

This concession may have been fatal to Zurich's argument. The Court ultimately reached the conclusion that Sony's additional business activities, which made it a "hybrid," precluded application of the exclusion. When Zurich argued that Sony's additional activities did not preclude the exclusion, because Sony *principally* was a content or service provider, the Court rejected the notion:

> MR. COUGHLIN: And the case law says it doesn't have to be the only business. It has to be a principal business.

> THE COURT: That's not what this says. That is not what your policy said.
>
> * * *
>
> So that when you talk about that I would like you to point out in paragraph 3 [of the exclusion addressing content and service providers] where you get that principal language. I looked at that policy. I didn't see it.

(Tr., p. 17.)

According to the Court, an insured must solely be a content or service provider in order for the exclusion to apply:

> MR. COUGHLIN: That's correct. This on-line platform, Judge. So, that on-line platform, which is without doubt from their own witness a significant part of their business. Not the exclusive. We have never said that. But, to say that unless it is the only part of their business the exclusion should not apply, I think, misreads the intent of the words.
>
> THE COURT: No. That's not misreading the intent of the words. That is just reading it on face value what the words say. Because, there are issues in terms of these policies here. And what you're asking me to do is you're asking me to read this, these straight forward words, unambiguous words. You're asking me to read this you way of saying that, well, it doesn't mean that's exclusively what they have to do, but principally what they have to do. There is no such wording in here that says, either principally or exclusively. But you're asking me to read this that way.

(Tr., pp. 19-20.) But, by deciding not "to read it this way," the *Sony* court read the exclusion in an entirely different way.

What does this case mean? *Sony* is significant because of its notoriety and because it is among the first data breach insurance coverage decisions. Because of this, the Court's holdings on "in any manner" and "publication" could have extraordinary effect on privacy-rights coverage if an intermediate appellate court or, ultimately, the New York Court of Appeals affirms them. The Court's interpretation of "in any manner" can be another nail in the coffin for the argument that the phrase alters the meaning of "publication." The Court's broad interpretation of "publication," meanwhile, can have a broad and unintended effect in the context of other invasion of privacy claims. The Court's interpretation of the Insureds in Media and Internet Type of Business exclusion may limit the provision in other contexts.

In other cases, these decisions would have garnered considerable attention; yet, very little attention has been given to them here. To be fair, that largely may be the result of the fact that there is no written opinion. However, the uproar over *Sony's* decision of no coverage undoubtedly helped overshadow them. The New York trial court announced that it was issuing a ruling from the bench in lieu of a written opinion because the case was "important enough that it needs to seek Appellate review as quickly as

possible." There will be another day to argue. Hopefully, these additional decisions will not be lost in the mix.

Questions and comments are welcome.

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