

# Marketing, Advertising and Communications Liability Insurance


Advertising agencies have to create, plan and handle innovative and dynamic global campaigns for their clients to allow them to compete in an increasingly fluid market place. Regardless of the technology or medium used, from skywriting to pop-ups, our policy will respond.



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# Marketing, Advertising and Communications Liability Insurance

## Policy overview



US advertising expenditures in 2013 finished the year at

**\$140.2B<sup>2</sup>**

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### Advantages

- Occurrence form
- Open perils form
- Worldwide coverage
- Coverage for content in any form including but not limited to, pop-ups, banner ads, Facebook ads
- Acquisitions can be automatically covered
- Final adjudication fraud or dishonesty coverage
- Rectification costs agreed by us to mitigate potential claims with no coinsurance or sub-limit as standard.

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### Benefits

- One comprehensive policy with optional coverages:
  - privacy and network security liability
  - technology activities
  - miscellaneous professional services
  - hacker damage (first-party loss).
- 25 years experience underwriting Media Liability worldwide
- Underwriting bench strength – lead underwriters with 20+ years
- Bold and creative underwriting solutions to meet even the most complex needs
- Admitted policy form; Hiscox Insurance Company Inc. is rated A (Excellent) by A.M. Best.<sup>1</sup>

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### Who we cover

- Advertising agencies
- Sales promotion companies
- New media agencies
- Media buyers/media independents
- Public relations companies
- Direct marketing companies.

# Marketing, Advertising and Communications Liability Insurance

## Comparative checklist

Use the checklist below to spot any gaps in your clients' coverage.

Coverage	Current?	Hiscox
Open perils' protection (not just specific named torts) including, but not limited to traditional libel, slander, invasion of privacy, breach of confidentiality, copyright, trademark perils and also defamation, injurious falsehood, trespass and publicity rights violations.		✓
Occurrence form coverage all media activities which occur during the policy periods, regardless of when the claim is made.		✓
Claims brought anywhere in the world.		✓
Plagiarism, piracy of breach or an implied contract to use a third-party's creative idea.		✓
Breaches of the scope of a license your insured has acquired to use a third-party's material.		✓
Misappropriation of content, formats, characters, trade names, character names, titles, plots, musical compositions, voices, slogans, graphic material or artwork.		✓
Negligence arising out of content.		✓
Breach of comparative advertising statutes.		✓
Costs of prosecuting your insured's own declaratory relief actions in the face of an infringement claim.		✓
Advertising in any form, whether it is on the internet, a podcast or mobile phone message.		✓
Broad definition of advertising incorporating marketing, publicity and promotion of goods and services.		✓
Broad definition of advertising services, including website design and development.		✓
Coverage for our insured's website content, including blogs and also unauthorized access to this content resulting in claim for defamation, IP infringement, breach of privacy, outrage, infliction of emotional distress or negligent publication.		✓

# Marketing, Advertising and Communications Liability Insurance

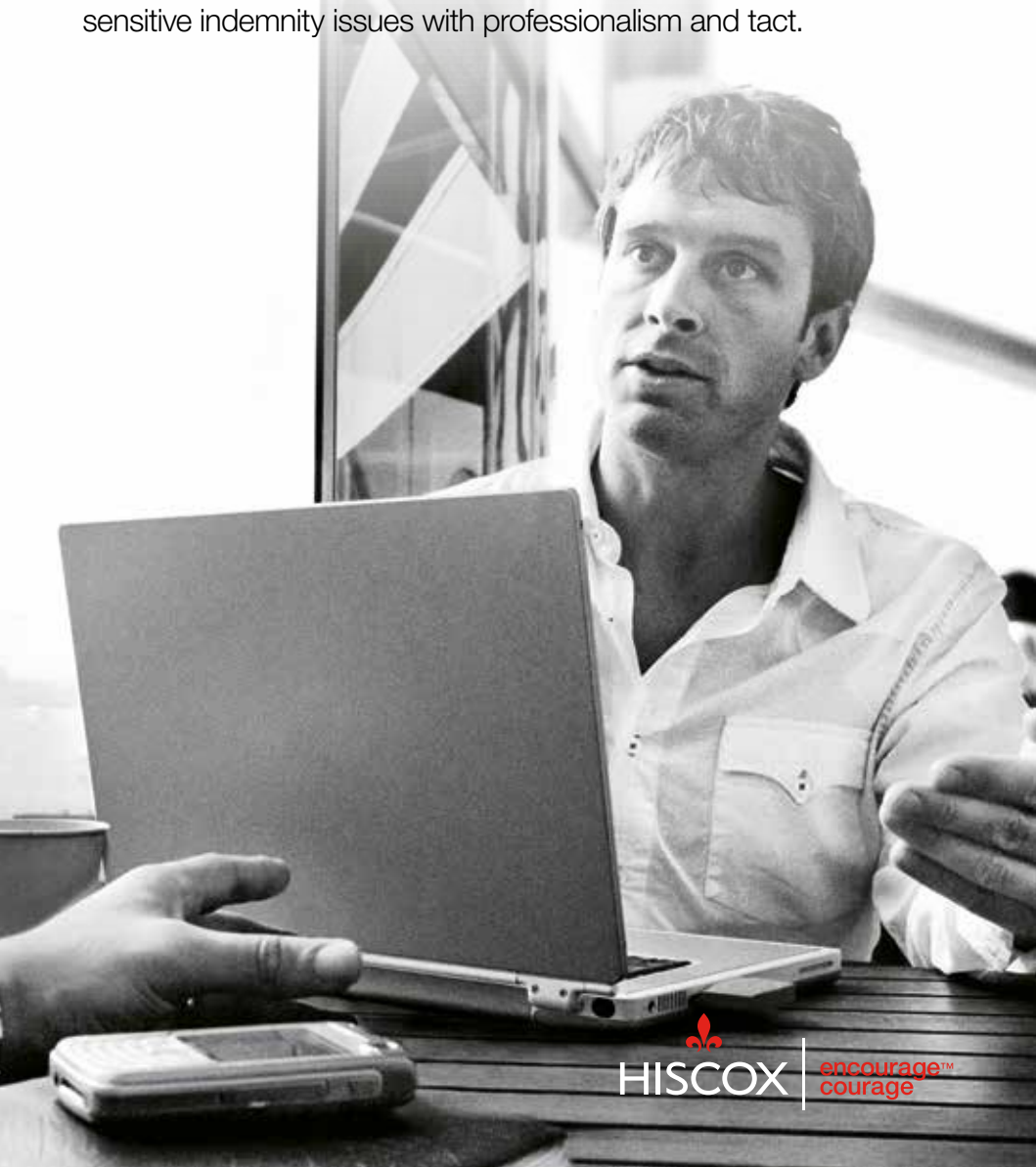
## Comparative checklist

Coverage	Current?	Hiscox
Pay, in excess of the retention, rectification costs agreed by us to mitigate a potential claim.		✓
Insured's negligent transmission of a computer virus or malicious code.		✓
Coverage for your insured's own advertising.		✓
Carve back for fraudulent or dishonest conduct where it has not yet been established by a final adjudication.		✓
Affirmative coverage for punitive and exemplary damages (where insurable by law).		✓
Duty to pay coverage with choice of defense counsel (with approval, not to be reasonably withheld).		✓
Prevent the insurer from forcing your insured to accept a settlement.		✓
Enable your insured to: <ul style="list-style-type: none"> <li>— settle within the retention</li> <li>— control decision to correct or retract content</li> <li>— protect anonymity of a news-gathering source</li> <li>— extend coverage to third parties including but not limited to freelancers, correspondents, stringers, photographers, volunteers and 'leased employees', commissioned or engaged to provide media content</li> <li>— extend coverage for liability assumed under agreement where claims arise out of your insured's content</li> <li>— extend coverage to past, present or future directors, officers, trustees, partners in, or employees</li> <li>— automatically cover new acquisitions with you to 10% of insured's revenues.</li> </ul>		✓
Provide severability as to the wilful acts of your insured's employees who are not board members, executive offices, in-house counsel, or risk managers of your insured.		✓

# Marketing, Advertising and Communications Liability Insurance

## Claims scenarios

Complex claims requires a clear strategy and an insurer on your side. Hiscox specializes in Insurance for the media industry and our dedicated claims team specializes in the exposures that are unique to the media industry. We pride ourselves on handling sensitive indemnity issues with professionalism and tact.



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# Marketing, Advertising and Communications Liability Insurance

## Copyright Infringement



**Loss  
scenario**

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### What went wrong?

An advertising agency is retained by a baked-goods company to develop a campaign that emphasizes the company's "old fashioned" image. While researching folk art for the campaign, an agency executive comes across a cookbook that is handwritten and distinctively illustrated. The executive contacts the author and invites her to submit illustrations and handwriting samples for the campaign, which she does. The agency then hires another artist to execute the final ads, with instructions to base drawings in the advertisements on the handwriting in the cookbook.

The cookbook author sues the ad agency for, among other things, copyright infringement. After a year of discovery, the trial court grants summary judgment for the agency on all claims except the infringement count. That claim proceeds to trial, which lasts six days.

### The outcome

The jury finds that the agency had infringed the plaintiff's copyright, but awards only nominal actual damages of \$1. The court denies plaintiff's motion for a judgment notwithstanding the verdict. The plaintiff then elects an award of statutory damages, which the court determines to be \$10,000. The court further awards the plaintiff, as the prevailing party, \$117,000 in attorney's fees. No appeal is taken. The total cost of litigating this case for the agency would be expected to be approximately \$815,000.

<b>Defense cost payment</b>	\$815,000
<b>Indemnity payment</b>	\$127,000
<b>Total loss</b>	<b>\$942,000</b>

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# Marketing, Advertising and Communications Liability Insurance

## Breach of Scope of License



**Loss  
scenario**

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### What went wrong?

Representatives of an advertising agency, working on behalf of a fast-food restaurant, approach the creators of a canine cartoon character with an idea for making use of the character in an upcoming campaign. The cartoonists agree to create art boards that incorporate their dog character and the restaurant brand. They submit the boards to the agency in the belief that, if the agency uses the idea in the campaign, they will be paid. The agency proceeds to develop a campaign based on a real dog of the same breed that has many of the same characteristics and “personality” traits as the cartoon dog reflected in the art boards.

The cartoonists, who receive no compensation, sue the agency. They contend that the submission of the art boards included an implicit limitation on the scope of their use and that any other use of the ideas without compensation exceeds the implicit license. The trial court grants in part the ad agency’s motion to dismiss, but permits some claims to proceed. At the close of fifteen months of discovery, which involves substantial motions practice, the court grants summary judgment for the agency. The court of appeals reverses and remands for further proceedings. On remand, the parties engage in several months of new discovery and additional pretrial motions practice. The court grants summary judgment for the agency on all but one count, which proceeds to trial. After a fourteen-day trial, the jury returns a verdict for the cartoonists and an award of \$30 million. The court awards an additional \$11.8 million in prejudgment interest.

### The outcome

The ad agency appeals, but the parties settle for \$28 million before the appeal is resolved. The total cost of litigating this case for the agency would be expected to exceed \$2.5 million.

<b>Defense cost payment</b>	\$2,500,000
<b>Indemnity payment</b>	\$28,000,000
<b>Total loss</b>	<b>\$30,500,000</b>

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# Marketing, Advertising and Communications Liability Insurance

## Errors and Omissions



Loss  
scenario

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### What went wrong?

A chain of Italian-themed restaurants engages an advertising firm to create and produce a series of television commercials, the underlying theme of which was an emphasis on family. One of the commercials depicts a family enjoying a festive meal at the restaurant. The music playing in the background is a distinctive song associated with a famous deceased recording artist, and the singing voice bears a striking resemblance to that artist in tone and style.

The artist's widow sues the restaurant and the agency for unfair competition, unjust enrichment, misappropriation of the right of publicity, false advertising, and interference with prospective economic advantage. The defendants file a motion for judgment on the pleadings, which requires extensive briefing on choice-of-law issues. The court takes the motion under advisement while discovery proceeds. Four months later, the court rules on the motion, denying it except as to the claim for unjust enrichment, which is dismissed. The court finds that the allegations of plaintiff's complaint were sufficient to allow the remaining claims to proceed.

### The outcome

Defendants file a motion for reconsideration, but while that motion is pending the parties reach a settlement of \$500,000. The total cost of litigating this case for the advertising agency would be expected to be in the range of \$225,000.


<b>Defense cost payment</b>	\$225,000
<b>Indemnity payment</b>	\$500,000
<b>Total loss</b>	<b>\$725,000</b>



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# Marketing, Advertising and Communications Liability Insurance

## Misappropriation of name/likeness



**Loss  
scenario**

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### What went wrong?

A department store chain hires an advertising firm to produce a series of newspaper ads featuring clothing from the store's private label. One of the ads is for a line of athletic shirts and features a man wearing a jersey. The words "This is Ron" appear beside the photograph, with an arrow pointing to the man. Below that appear the words "This is Ron's jersey," with a second arrow pointing to the shirt.

Ron Jersey, a famous rock musician, sues the agency and the department store for, among other things, misappropriation of his name. The agency and department store file an early motion for summary judgment, which is denied. The parties then pursue discovery over a period of nine months, at which point the plaintiff files a motion for partial summary judgment.

### The outcome

The court finds that the evidence would support only one conclusion: that the phrase "Ron's jersey" clearly identifies the plaintiff and that the defendants, through their intentional "play on words," had used the plaintiff's name to obtain a commercial benefit. Accordingly, the court grants summary judgment to the plaintiff on the misappropriation claim. The parties then proceed to prepare for a trial on the remaining claims and on damages, but reach a settlement through mediation on the eve of trial. The defendants agree to pay \$750,000, with an unspecified portion going to a charity of the plaintiff's choosing and the remainder going toward the plaintiff's attorneys' fees. The total cost of litigating this case for the agency would be expected to be approximately \$740,000.

<b>Defense cost payment</b>	\$740,000
<b>Indemnity payment</b>	\$750,000
<b>Total loss</b>	<b>\$1,490,000</b>

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**Hiscox is a leading specialist insurer with roots dating back to 1901. For more than 40 years, Hiscox has provided insurance to US businesses through Lloyd's of London, and since 2006, we have expanded our local presence in the US.**

Our diverse portfolio includes media and entertainment, executive risks, financial services, professional liability, and property and specialty products like Terrorism and Kidnap and Ransom. Our underwriting and claims teams provide flexible solutions designed to meet your clients' evolving needs.

**Contact Information**

Insurance brokers are welcome to contact us. Two ways to find your regional contact:

[hiscoxbroker.com/contact-us](http://hiscoxbroker.com/contact-us)

<b>Northeast</b>	<b>Northwest</b>	<b>Southeast</b>	<b>Southwest</b>	<b>Midwest</b>
646 452 2353	415 814 1455	404 410 2800	213 412 1210	312 380 5555

**About Hiscox in the US**

Underwritten by Hiscox Insurance Company Inc., a Chicago-based insurer, which is admitted or licensed to do business in all 50 states and the District of Columbia. Coverages are subject to underwriting and the terms, limits, and conditions of an issued policy, and may not be available in all states. In the event the actual policy forms are inconsistent with any information provided herein, the language of the policy forms shall govern.

Inquiries as to insurance or other products or services should be directed to an insurance agent or broker licensed to conduct business in the relevant US state. Insurance agents or brokers should contact a Hiscox underwriter.

<sup>1</sup> A.M. Best rating date as of October 23, 2014.

<sup>2</sup> As reported by Kantar Media Reports 2014.