



**CONVERGING RISKS IN A DIGITAL ECONOMY:
FOOD AND BEVERAGE COMPANIES**

This is one installment in a series of “White Papers” prepared by ThinkRisk Underwriting Agency discussing the converging media and technology-related risks faced by various industry segments as a result of the digital economy. The white papers provide real-world examples of these emerging exposures, and explore the insurance ramifications of these developments. This installment of the series discusses risks faced by the food and beverage industry.

Introduction to the convergence phenomenon: Digital technology is a powerful tool that has changed the way businesses and other organizations operate. Digital technology 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 food and beverage industry.

Content: The food and beverage industry creates media content in a variety of ways. Like other industries, food and beverage companies increasingly turn to media content to inform consumers and build brand loyalties with them. That content can range from traditional advertising (e.g., print/broadcast ads, product labels, point-of-sale materials, celebrity spokespersons) to more cutting-edge marketing campaigns (including social networking, interactive websites, and viral marketing). All of this marketing activity involves content creation, and carries all the exposures of any media outlet. For instance, as with any media content, copyright and trademark infringement can arise from the unlicensed use of music, artwork, copy, slogans or any other expressive element. Food and celebrities naturally go together, but making that connection without the celebrity’s consent can lead to a misappropriation claim.

In addition, some food and beverage content goes well beyond mere “advertising.” Many businesses in this industry try to connect consumers to particular foods and brands with tools like magazines, cookbooks, cooking shows, product placement in entertainment programming, and other media

activities. For example, a new Seattle-based coffee company organizes and promotes a series of consumer-hosted concerts around the country as a way of promoting its brand. When they act in this way, food and beverage companies more closely resemble media and entertainment businesses in terms of their exposure to intellectual property claims. Moreover, because technology allows companies to create and distribute content easily and inexpensively, more business are engaging in these marketing activities in-house, rather than hiring advertising firms, which further increases their exposure.

As a result, it is not surprising that there are many examples of media and intellectual property claims involving food and beverage companies, including:

- Dominick's, a Chicago-area grocery, bought a congratulatory ad in a publication celebrating Michael Jordan's induction into the NBA Hall of Fame. The ad featured Jordan's name, jersey number "23", and a coupon for use in the grocery. Jordan responded by suing the grocery for commercial misappropriation of his name and identity.
- The Japanese entertainment conglomerate that owns the rights to the famous movie monster "Godzilla" has brought a trademark infringement action against a small company in Maine that operates a barbecue stand under the name Grill Zilla.
- Ocean Spray claims a rival beverage company launched a media smear campaign accusing it of leaving the cranberry out of its sweetened dried cranberries. The industry giant claims Decas Cranberry Products created the website Scamberry.org as part of an "unlawful and malicious campaign" accusing Ocean Spray of "abandoning the cranberry."
- Maker's Mark Distillery brought suit against Jose Cuervo International alleging that the defendant violated federal trademark and common law by producing and distributing a bottle of tequila capped with a red dripping wax seal similar to the seal Maker's Mark had used for over 50 years. Maker's Mark alleged federal trademark infringement, false designation of origin, dilution, common law trademark infringement and unfair competition. After a six-day bench trial, the U.S. district court found that Cuervo's use of a similar red dripping wax infringed Maker's Mark's mark.
- Robert John Burck is the famous "Naked Cowboy" who plays the guitar in Times Square wearing a white cowboy hat, cowboy boots and underpants. As a marketing campaign, the candy company Mars Inc. created a short animation of a Blue M&M character playing a guitar while dressed in a white cowboy hat, cowboy boots and underpants on the electronic display outside the M&M'S store in Times Square. Burck sued Mars for trademark infringement and for misappropriating his persona. After considerable litigation, the case was settled in November 2008 for an undisclosed amount.

False Advertising

Closely related to the issue of intellectual property in content, food and beverage companies face a multitude of exposures relating to false advertising or misrepresentation in advertising. Food and beverage labels and general advertising often contain representations as to the quality of the product,

nutritional value, health benefits, 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.

These claims can be extraordinarily expensive to defend. Moreover, as noted below, false advertising claims are generally excluded in most media liability and other E&O insurance policies. Some examples of recent false advertising claims in the food and beverage industry include:

- A large dairy has been sued by groups of consumers who claim its label representation of “organic” is false. There are extensive federal regulations detailing the conditions under which a particular food item can be identified as “organic.” The lawsuit has been going on for years and at the time of this printing is in the federal court of appeals.
- POM Wonderful, a seller of pomegranate juice, has sued several rival juice companies alleging that they make erroneous claims of pomegranate juice content in their products.
- A Vermont water bottling company sued a competitor claiming that the competitor’s label depicting its bottles as containing “spring water” was deceptive because the bottles contained water pumped from the ground.
- Another consumer suit was brought in California against distributors of farm-raised salmon contending that the labels for the packages of fresh salmon should have revealed that the salmon had been injected with artificial coloring.

Network security and data privacy

Like many other businesses, food and beverage companies are taking advantage of digital technology to learn more about their customers and stay connected to them. Often, that means gathering and holding private information about consumers collected through the businesses’ websites and other sources. In other settings, data may be collected in person, such as through point of sale store loyalty cards. Of course, any food and beverage company that has retail operations is likely to have personal credit card information. In addition to consumer information, most food and beverage companies are likely to maintain data concerning employees, vendors, suppliers and other third parties.

This data can be a powerful business tool, but carries the responsibility to avoid a breach of security. In the event of a data breach, state laws in most jurisdictions require the company to notify all potentially impacted persons of the breach, the cost of which can be astronomical. If the information is used in a way that is damaging, the company could face liability claims as well. Despite these risks, a company’s data security practices may not be state-of-the-art, because the company may lack the resources to hire full-time technology officers or to purchase top-of-the-line commercially available security systems.

There are many examples of data breaches involving the food and beverage industry. Many breaches are the result of intrusions from hackers and thieves, but the simple loss of a laptop is a frequent cause of breaches, too. Some breaches in the food and beverage industry include:

- In 2008, a security breach affected about 300 stores of the Hannaford Bros. supermarket chain, based in Portland, Maine, and about 4.2 million consumer records were copied. More than 1800 of the credit card numbers involved in the breach later incurred fraudulent transactions. Several class action lawsuits followed.
- In 2008 hackers intruded into the network of Dave and Busters restaurants and installed “packet sniffer” software that read credit card data as it was being processed. As of early 2009, about \$600,000 in fraudulent transactions were reported on about 700 cards.
- In 2008, Starbuck’s reported the theft of a laptop containing private information of about 97,000 employees.

Coverages in the standard insurance marketplace

Although most businesses purchase Commercial General Liability (“CGL”) coverage, typical CGL policies provide limited coverage for media and network security claims. Libel and invasion of privacy in publications may be covered, but that leaves much media activity unprotected. For instance, intellectual property claims are typically excluded, except for copyright in “advertisements,” which is narrowly defined. The result is that trademark and other intellectual property infringement (and even copyright claims outside of traditional “advertising”) will likely not be covered by the CGL. Similarly, website content is generally not covered, unless the content is considered “advertising.” Chat rooms, bulletin boards and other interactive media are often excluded. Data breaches and the attendant costs are generally outside the scope of the CGL. Even when such coverage can be found, it is generally not robust, and the carrier may not have the necessary legal expertise to deal with highly specialized or technical claims. In addition, as noted above, false advertising claims are typically excluded from the CGL, as well as most standard media and E&O policies.

ThinkRisk’s Converging Risk Liability Policy: The Converging Risk Liability Policy from ThinkRisk addresses these unique and emerging exposures, and fills 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. Of particular importance to the food and beverage industry, Coverage A can be endorsed to cover false advertising claims. To the extent that the company provides any type of professional service (such as labeling or marketing services for others), Coverage Part B provides coverage for claims alleging errors and omissions in the course of such services. Coverage Parts C and D provide network security coverage, both for liability claims brought against the institution (Part C) and for certain costs incurred by the institution in responding to a breach (Part D), such as the cost of notifying impacted persons.

To obtain a quote, please contact your insurance agent. For more information, contact us at info@thinkriskins.com or (816) 994-6400.

