THE EVOLUTION OF THE ADVERTISING INJURY EXCLUSION IN THE INSURANCE SERVICE OFFICE, INC.'S COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY FORMS

KYLE LAMBRECHT

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This article examines the issue of whether Comprehensive General Liability (CGL) insurance policy forms provide coverage for third party patent infringement claims under the forms' "advertising injury" provision. The paper traces the evolution of these Comprehensive General Liability forms, from the 1973 CGL standard forms through the 1986 forms and even up to the most recent set of revisions as reflected in the 1998 and 2001 CGL broad form versions. The article then discusses three leading cases on the issue, all of which stand for the proposition that insurers have a duty to defend policyholders against third party patent infringement claims when the insured was alleged to have infringed an advertising technique that was itself patented. In the aftermath of these decisions, however, changes were made to the CGL policy forms which are likely to benefit the insurer seeking to avoid coverage and further the trend towards increasingly limited policyholder coverage for third party patent infringement.

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I. INTRODUCTION

Internet commerce is growing at an exponential rate. It is estimated that global usage doubles every one hundred days and increases between 200-600% annually.[1] The drastic increase in internet commerce is directly attributable to the availability and affordability of personal computers and handheld devices equipped with internet connectivity.[2] As a result of this increase in global usage, some insurance carriers have

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[1] *See* Robert P. Norman, *Virtual Insurance: Is Your Old Policy from InvisibleINC.com? If so, what Cyber Policy Adequately Covers Your Risks?*, 673 PLI/LIT 557, 565 (2002).

[2] *See, e.g., id.*

suggested that internet commerce will be the "single biggest insurance risk of the twenty-first century."[3]

Internet advertising is a relatively inexpensive and efficient means of marketing to a broad audience situated throughout the world. Insurance policyholders engaged in internet business and advertising have seen an increase in intellectual property liability claims, including but not limited to, third party patent infringement claims based on the content and design of company websites. This paper first discusses the evolution of the Insurance Service Office, Inc.'s ("ISO") standard Comprehensive General Liability ("CGL") insurance policy forms and then focuses on an insurer's duty to defend against third party patent infringement claims under the "advertising injury" provision in these forms. Subsequently, this paper will analyze the reasoning espoused by three separate courts holding that the advertising injury provision of a standard CGL insurance policy creates a duty for insurers to defend against third party patent infringement claims, in situations where the advertising technique itself was patented by the third party claimant.

II. ADVERTISING INJURY COVERAGE IN ISO COMMERCIAL OR COMPREHENSIVE GENERAL LIABILITY POLICY FORMS

The ISO is a subsidiary of Verisk Analytics Incorporated and it drafts standardized insurance policy forms that are utilized by over 1,400 member companies operating in every state.[4] Most of the member insurance companies "adopt ISO forms verbatim while … other[s] use [general] ISO forms as a starting point for their own modified forms."[5] Although the forms used by member companies to service policyholders are substantially similar, standard ISO CGL insurance forms have historically provided varying degrees of coverage for policyholders within the purview of the advertising injury provision.

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[3] *See id.* at 565 (quoting UDAY KHANDEPARKAR, *Indian Security Firm Expects "Love Bug" Boost*, REUTERS ENG. NEWS SERV. (May 9, 2000); J. OF COM., VIRUS UNDERSCORES RISKS IN E-COMMERCE (May 18, 2000), *available at* WestLaw 2000 WLNR989539.

[4] INSURANCE SERVICE OFFICE, INC., http://www.iso.com (last visited Oct. 2, 2012).

[5] Jerold Oshinsky & Damon A. Thayer, *A Primer on Coverage for Infringement Suits*, LAW360.COM, (Feb. 22, 2011, 1:56 PM) http://www.law360.com/articles/225699/a-primer-on-coverage-for-infringement-suits.

Generally, an advertising injury is understood to be any injury to a third party brought about through the advertisement of a business' goods and services. Presently, ISO CGL insurance forms indemnify the policyholder from liability to third parties for bodily injury, personal injury, *advertising injury* and property damage under two primary policy provisions: (i) "Coverage A Bodily Injury and Property Damage Liability, and (ii) Coverage B Personal and Advertising Liability."[6] The ISO CGL insurance forms have been modified extensively since 1973, and the current advertising injury provisions differ greatly from those forty years ago. However, despite these extensive changes, many CGL insurance policies used today still contain the language of older ISO CGL endorsements.

A. THE 1973 ISO BROAD FORM CGL ENDORSEMENT REVISIONS

Prior to 1973, ISO CGL insurance forms did not include coverage for advertising injury and only a few insurers offered advertising coverage as an additional endorsement to their standard CGL policies.[7] In 1973, the ISO radically altered its standard forms by making "advertising injury" and "personal injury" coverage available through the purchase of a Broad Form CGL endorsement or a Personal Injury Liability endorsement ("PIL").[8] This was the first time the ISO specifically adopted an advertising injury coverage provision into its Broad Form CGL endorsement.[9]

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[6] *See* Dawn Dinkins, *Internet Liabilities: A Look at Coverage Under the Traditional Commercial General Liability Policy*, 16 NO. 6 ANDREWS CORP. OFFICERS & DIRECTORS LIABILITY LITIG. REP., Jan. 2, 2001, at 2-; INS. SERVS. OFF., INC., COM. GENERAL LIABILITY COVERAGE FORM CG 00 01 10 01 (2000).

[7] *See* Lawrence O. Monin, *ISO Advertising and Personal Injury Revisions: Major Surgery of Just a Band-Aid Fix?*, 4-16 MEALEY'S EMERGING INS. DISPS. 6 (1999).

[8] The PIL endorsement covered only personal injury, while the 1973 CGL Broad Form combined coverage for personal injury and liability arising out of advertising. *See* JAMES L. HAIGH & SARAH L. SHOWALTER, HISTORICAL ANALYSIS OF THE CHANGES TO COVERAGE B, *reprinted in* COUSINEAU LAW FORUM SERIES, http://cousineaulaw.com/forum/historical_analysis_of_the_changes_to_coverage_b (last accessed Oct. 2, 2012). As such, this article will not explore the revisions of the PIL endorsement.

[9] *See* Bruce Telles, *Insurance Coverage for Intellectual Property Torts*, 602 PLI/LIT 629, 645 (1999); Robert H Jerry, II & Michele L, Mekel, *Cybercoverage for Cyber-Risks: An Overview of Insurers' Responses to the Perils of E-Commerce*, 8 CONN. INS. L.J. 7, 17 (2001).

The 1973 Broad Form CGL endorsement provided policyholders with coverage for "all sums which the insured [became] legally obligated to pay as damages because of . . . advertising injury to which the insurance applie[d] . . . arising out of the conduct of the named insured's business . . . and the [insurance] company shall have the right and duty to defend. . . "[10] Advertising injury was defined as any "[i]njury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities, if such injury ar[ose] out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan."[11]

Claims for "advertising injury arising out of … infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods, products, or services sold, offered for sale, or advertised" were typically excluded from coverage for policyholders in the 1973 Broad Form CGL endorsement.[12] In addition to these exclusions, coverage was not provided for any claims: (i) "[a]rising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity," (ii) "[a]rising out of oral or written publication of material whose first publication took place before the beginning of the policy," and (iii) "[a]rising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured," or (iv) "[f]or which the insured ha[d] assumed liability in a contract or agreement."[13] The advertising injury provision also did not apply to liabilities arising from damages that the policyholder incurred in the absence of the contract or agreement.

Similar to most other occasions when the ISO implemented detailed changes to an endorsement, certain coverage issues surrounding the 1973 Broad Form CGL endorsement were highly litigated. Most of the litigation relating to third party patent infringement claims focused on the ISO's failure to define the term "advertising," in the relevant policy language. When faced with multiple propositions for the appropriate definition of the term "advertising," courts repeatedly construed the term in favor of the carrier, and in most cases, the policyholder failed to persuade

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[10] Richard Bale & Patrick J. Boley, *Advertising Injury Coverage* 1-2 (2007), *available at* http://www.larsonking.com/ArticleUploads/Advertising%20Injury%20Coverage.pdf.

[11] *Id.* (quoting Lebas Fashion Imps. of USA, Inc. v. ITT Hartford Ins. Grp., 59 Cal. Rptr. 2d 36, 41 (Cal. Ct. App. 1996)).

[12] HAIGH & SHOWALTER, *supra* note 8.

[13] *Id.*

the court that the insurer had a duty to defend against third party patent infringement and other intellectual property claims under the advertising injury provision in their CGL policy.[14]

B. THE 1986 ISO BROAD FORM CGL ENDORSEMENT REVISIONS

In 1986, the ISO made several major revisions to the 1973 Broad Form CGL endorsement which subsequently enabled courts to find that an insurer had a duty to defend against third party patent infringement claims under the "advertising injury" provision.[15] In an attempt to clarify and expand the coverage provided in the 1973 Broad Form CGL endorsement, the ISO introduced "Coverage B."[16] "Coverage B" combined the "advertising injury" and "personal injury" provisions of the 1973 Broad Form CGL endorsement into one section and made changes to several of the enumerated offenses covered under the endorsement.[17] Following these revisions to the 1986 Broad Form CGL endorsement, policyholders automatically received coverage for both types of injuries and no longer needed to purchase separate ISO CGL endorsements for "advertising injury" and "personal injury" coverage.[18]

Similar to the 1973 Broad Form CGL endorsement, the ISO again failed to define the term "advertising." However, the ISO attempted to eliminate some of the previous uncertainty by enumerating several offenses to which advertising injury would apply. The ISO 1986 Broad Form CGL endorsement stated that the "advertising injury" provision would provide coverage for any injury, committed during the coverage period, arising out of one of more of the following offenses: (i) "[o]ral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services," (ii) "[o]ral or written publication of material that violates a person's right of privacy," (iii) "[m]isappropriation of advertising ideas or style of doing business," or (iv) "[i]nfringement of copyright, title or slogan."[19] In an attempt to further

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[14] *But see, e.g.*, Playboy Enters., Inc. v. St. Paul Fire & Marine Ins. Co., 769 F.2d 425 (7th Cir. 1985); CNA Cas. of Cal. v. Seaboard Surety Co., 222 Cal. Rptr. 276 (Cal. Ct. App. 1986).

[15] *See* discussion *infra* Part III.

[16] *See* Telles, *supra* note 9, at 646; Monin, *supra* note 7, at 2-6.

[17] *See* Telles, *supra* note 9, at 646; Monin, *supra* note 7, at 2-6.

[18] *See* Telles, *supra* note 9, at 646; Monin, *supra* note 7, at 2-6.

[19] Policy form CG 00 01 11 85 (copyrighted in 1982 and 1984 by the ISO) (public promulgation and adoption of the states did not occur until the mid-1980s); *see* HAIGH & SHOWALTER, *supra* note 8, at n.5.

clarify issues that had plagued 1973 Broad Form CGL endorsement, the ISO inserted the same set of advertising injury exclusions, as well as defined a new set of exclusions.[20] The new exclusions applied to any of the following claims: (i) a "[b]reach of contract, other than misappropriation of advertising ideas under an implied contract, (ii) "[t]he failure of goods, products, or services to conform with advertised quality or performance," (iii) "[t]he wrong description of the price of the goods, products or services," and (iv) any "[o]ffense committed by an insured whose business is advertising, broadcasting, publishing or telecasting."[21]

The 1986 Broad Form CGL endorsement differed from its 1973 predecessor in that it no longer provided coverage for "piracy" nor the specific exclusion for "infringement of trademark, service mark or trade name other than titles or slogans."[22] Additionally, the ISO provided coverage for "misappropriation of advertising ideas and style of doing business" which replaces the 1973 endorsement's "unfair competition" coverage. Despite these changes to the 1986 Broad Form CGL endorsement, the ISO described the revisions as "non-substantive clarifications of prior coverage."[23] However, policyholders had greater success in obtaining coverage under the new revisions, despite the ISO's characterization of the changes.[24] This paper focuses on the 1986 Broad Form CGL endorsement language, "misappropriation of advertising ideas and style of doing business," specifically, when the provision creates a duty for insurers to defend against third party patent infringement claims.

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[20] Policy form CG 00 01 11 85 (copyrighted in 1982 and 1984 by the ISO) (public promulgation and adoption of the states did not occur until the mid-1980s); *see* HAIGH & SHOWALTER, *supra* note 8, at n.5.

[21] Policy form CG 00 01 11 85 (copyrighted in 1982 and 1984 by the ISO) (public promulgation and adoption of the states did not occur until the mid-1980s); *see* HAIGH & SHOWALTER, *supra* note 8, at n.5.

[22] Telles, *supra* note 9, at 652.

[23] Jerry, II & Mekel, *supra* note 9, at 18 (discussing the success of policyholders in obtaining coverage for trademark infringement under the "misappropriation of advertising ideas or style of doing business" provision, despite the deletion of the term "trademark").

[24] *See* ROBERT D. CHESLER & CINDY TZVI SONENBLICK, INSURANCE COVERAGE FOR INTELLECTUAL PROPERTY INFRINGEMENT (Bloomberg Finance L.P. Law Reports, 2008).

III. DUTY TO DEFEND AGAINST THIRD PARTY PATENT INFRINGEMENT CLAIMS UNDER THE "MISAPPROPRIATION OF ADVERTISING IDEAS AND STYLE OF DOING BUSINESS" PROVISION IN COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICIES

In the United States, a patent is a property right which grants the owner the power to exclude others from making, using, selling and offering to sell a new, non-obvious, useful invention in the United States for up to twenty years.[25] Prior to 1994, it was well settled that patent infringement was not covered under the advertising injury provisions.[26] In reaching this conclusion, courts looked to the language of the patent statute which prohibited "making, using or selling" a product which infringed on a patent.[27] Based on this language, a majority of courts unequivocally rejected coverage for claims involving patent infringement under the advertising injury provisions of CGL policies.[28]

In order to comply with the requirements of the General Agreement on Tariffs and Trade Treaty, Congress amended the Patent Act

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[25] *See* James R. Warnot, Jr. & Daniel C. Glazer, *Insurance Coverage for Intellectual Property and Cyberspace Liability*, 652 PLI/LIT 407, 409 (2001).

[26] *See, e.g.*, U.S. Fid. & Guar. Co. v. Frosty Bites, Inc., 232 F. Supp. 2d 101, 103 (S.D.N.Y. 2002); BATES, CAREY & NICOLAIDES, LLP., PATENT CLAIMS NOT COVERED AS ADVERTISING INJURY (2004), *available at* http://www.bcnlaw.com/newsandarticles/newsletter1_patentclaims.asp (noting that "[t]he Mississippi Supreme Court recently joined the majority of courts in ruling that claims involving patent infringement are not covered under the advertising injury section of a commercial general liability policy."); Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc., 97 F. Supp. 2d 913, 930 n.10 (S.D. Ind. 2000) (stating that patent infringement cannot be misappropriation of style of doing business); Auto Sox USA Inc. v. Zurich N. Am., 88 P.3d 1008, 1011 n.1 (2004) (noting that "the majority of cases hold that patent infringement is not covered by the misappropriation of an advertising idea in an insurance policy"); LINDA A. GALELLA, LIMITATIONS ON ADVERTISING INJURY COVERAGE CLAIMS (2000), *available at* http://www.capehart.com/Legal-Alerts-Table-of-Contents/Limitations-on-Advertising-Injury-Coverage-Claims.shtml (concluding that "New Jersey courts do not find coverage for patent infringement under the advertising injury provisions of CGL policies").

[27] *See Auto Sox*, 88 P.3d at 1011; GALELLA, *supra* note 26.

[28] *See Auto Sox*, 88 P.3d at 1012; *Frosty Bites*, 232 F. Supp. 2d at 106; *Heritage*, 97 F. Supp. 2d at 930 n.10.

in 1994.[29] One of the amendments to the Patent Act was the inclusion of "offers to sell," as a type of conduct that constituted a direct patent infringement.[30] With the changes to the definitions in the patent statute, particularly, the inclusion of "offers to sell," most courts have since concluded that advertising *can* give rise to a direct patent infringement.[31] Despite the generally accepted view that advertising can give rise to a direct patent infringement, some courts unequivocally reject insurance coverage for third party patent infringement claims under the advertising injury provisions of a CGL policy.[32] However, a few courts have been willing to extend coverage against third party patent infringement claims when a policy contains language similar to that of the ISO 1986 Broad Form CGL endorsement.[33]

Generally, misappropriation of a patented advertising idea must occur in the "elements *of the advertising itself* – in its text[,] form, logo, or pictures – rather than in the product being advertised."[34] In determining whether a third party patent infringement claim is covered under the advertising injury provisions of a CGL policy, courts examine several different factors. To establish coverage, a policyholder must generally prove three elements; (i) that the alleged conduct potentially falls within the scope of the policy's enumerated advertising injury provisions, (ii) that there is a causal nexus between the policyholder's advertising activities and the alleged offense, in order to satisfy a typical policy's requirement that the infringement "occur in the course of the insured's advertising activities," and (iii) that the conduct constitutes "advertising activity"

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[29] *See, e.g.*, 35 U.S.C. § 271(a) (and accompanying Historical and Statutory Notes re 1994 Amendments and Effective Date of 1994 Amendments).

[30] *See id.*

[31] *See, e.g.*, *HollyAnne Corp. v. TFT, Inc.*, 199 F.3d 1304, 1309 n.6 (Fed. Cir. 1999) (advertisements may be "offers to sell" and, thus, give rise to direct patent infringement claim); Homedics Inc. v. Valley Forge Ins. Co., 315 F.3d 1135, 1138 (9th Cir. 2003); *Maxconn Inc. v. Truck Ins. Exch.*, 88 Cal. Rptr. 2d 750 (Cal. Ct. App. 1999) ("[T]he amendment of the [patent] statute has nullified the argument that patent infringement could not arise out of the insured's advertising activities as a matter of law.").

[32] *See Homedics*, 315 F.3d at 1137.

[33] *See e.g.*, Amazon.com Int'l, Inc. v. Am. Dynasty Surplus Lines Ins. Co., 85 P.3d 974 (Wash. App. Div. 1 2004); DISH Network Corp. v. Arch Specialty Ins. Co., 659 F.3d 1010, 1028 (10th Cir. 2011); Hyundai Motor Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 600 F.3d 1092 (9th Cir. 2010).

[34] *See* Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1506 (9th Cir. 1994).

within the meaning of the policy. Decisions finding no duty to defend typically involve either:

> (i) direct infringement from the manufacture of sale of a patented subject matter that lacks the necessary causal relationship between an insured's advertising activities and the infringement;[35] (ii) induced infringement that lacks the necessary causal relationship between the insured's advertising activities and the infringement;[36] (iii) overly technical readings of the scope of a policy's advertising injury coverage for undefined offenses;[37] or (iv) spurious statements of public policy that reflect a courts misunderstanding of the scienter requirement for induced patent infringement.[38]

The majority of courts which unequivocally reject coverage under the advertising injury provisions of a CGL policy typically find that an insurer does not have duty to defend against a third party patent infringement claim because there is no causal connection between the policyholder's advertising and the alleged offense.[39] Specifically, the courts find that the alleged patent infringement did not occur in the course of advertising.[40]

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[35] *See* David A. Gauntlett, *Patents and Insurance: Who Will Pay for Reimbursement*, 4 B.U. J. SCI. & TECH. L. 200, 203 (1998); *Iolab Corp.*, 15 F.3d at 1506-07; Davila v. Arlasky, 857 F. Supp. 1258, 1262-63 (N.D. Ill. 1994); Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F. Supp. 423, 429-30 (E.D. Pa. 1994); Polaris Indus., L.P. v. Continental Ins. Co., 539 N.W.2d 619, 622 (Minn. Ct. App. 1995).

[36] *See* Gauntlett, *supra* note 35, at 203; Gencor Indus., Inc. v. Wausau Underwriters Ins. Co., 857 F. Supp. 1560, 1565 (M.D. Fla. 1994); N.H. Ins. Co. v. R.L. Chaides Constr. Co., 847 F. Supp. 1452, 1458-59 (N.D. Cal. 1994); Gitano Group, Inc. v. Kemper Group, 31 Cal. Rptr. 2d 271, 274 (Cal. Ct. App. 1994).

[37] *See* Gauntlett, *supra* note 35, at 203; *Iolab Corp*., 15 F.3d at 1506; I.C.D. Indus., Inc. v. Federal Ins. Co., 879 F. Supp. 480, 485-86 (E.D. Pa. 1995); *Gencor Indus., Inc*., 857 F. Supp. at 1565-66; Classic Corp. v. Charter Oak Fire Ins. Co., 35 U.S.P.Q.2d 1726, 1728 (C.D. Cal. 1995).

[38] *See* Gauntlett, *supra* note 35, at 203; Intex Plastics Sales Co. v. United Nat'l Ins. Co., 23 F.3d 254, 257 (9th Cir. 1994); Aetna Cas. & Sur. Co. v. Superior Court, 23 Cal. Rptr. 2d 442, 447-48 (Cal. Ct. App. 1994); *see also* David A. Gauntlett, *Changing Winds: Recent Decisions Favor Policyholders in Intellectual Property Coverage Claims*, 1, 20 COVERAGE, (May-June 1995).

[39] Brian W. Klemm, *Insurance Coverage for Intellectual Property Claims: A Changing Landscape*, 563 PLI/LIT 421, 424 (1997) ("When considering whether a claimed injury is a covered offense, courts have been asked to interpret the

Three situations currently support an insurer's duty to defend and indemnify a policyholder against third party claims of patent infringement under the advertising injury provisions of a CGL policy; (i) when "a manufacturer advertises [a] component, which is used in a product patented by another party [and] the advertising induces a third party to combine the component with other element, the combination of which produces the product covered by the patent and infringes the patent claims";[41] (ii) when "a product manufactured using a protected process is advertised in such a way that, although the advertisement itself does not constitute infringement, the advertisement induces others to use the process to create the product";[42] and (iii) when "a manufacturer demonstrates the viability of its non-infringing process by using advertising that infringes another process."[43] In each of the cases discussed subsequently, the courts addressed a different situation and found that an insurer had a duty to defend a policyholder against third party patent infringement claims under the advertising injury provision of their CGL policy.[44] The courts analyzed the "misappropriation of advertising or style of doing business" language in three different CGL policies, each of which contained language mirroring the "advertising injury" provisions of the ISO's 1986 Broad Form CGL endorsement.[45] Reaching the same conclusion, the courts found that a duty

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meanings of the terms piracy, unfair competition, and infringement of copyright, title, or slogan under the 1976 [ISO] form policy and policy, because typical CGL policies provide no definition of these terms.")

[40] Brian W. Klemm, *Insurance Coverage for Intellectual Property Claims: A Changing Landscape*, 563 PLI/LIT 421, 424 (1997) ("When considering whether a claimed injury is a covered offense, courts have been asked to interpret the meanings of the terms piracy, unfair competition, and infringement of copyright, title, or slogan under the 1976 [ISO] form policy and policy, because typical CGL policies provide no definition of these terms.")

[41] *See* Gauntlett, *supra* note 35, at 204; Union Ins. Co. v. Land & Sky, Inc., 529 N.W.2d 773, 774-75 (Neb. 1995)

[42] *See* Gauntlett, *supra* note 35, at 204; Norton Alcoa Proppants v. American Motorists Ins. Co., No. C-4012-91-A (N.D. Tex. Jan. 5, 1993); *Hyundai*, 600 F.3d at 1103 n.4 ("There may be situations in which an advertisement induces another to infringe a patent.").

[43] *See* Gauntlett, *supra* note 35, at 204; Omnitel v. Chubb Group of Ins. Cos., 26 U.S.P.Q.2d 1933, 1937-38 (Cal. Super. Ct. 1993).

[44] *See, e.g.*, *Amazon.com*, 85 P.3d 974; *DISH Network*, 659 F.3d 1010; *Hyundai*, 600 F.3d 1092.

[45] *See id.*

to defend existed when the insured was alleged to have infringed an advertising technique that itself was patented.[46]

A. AMAZON.COM INTERNATIONAL, INC. V. AMERICAN DYNASTY SURPLUS LINES INSURANCE COMPANY

The first case to find that an insurer had a duty to defend a policyholder against a third party patent infringement claim was *Amazon.com International, Inc. v. American Dynasty Surplus Lines Insurance Company*. Applying Washington state law, the Court of Appeals of Washington reversed a decision by the Superior Court of King County granting summary judgment in favor of the insurers.[47] In the underlying action, Intouch, a software manufacturer alleged that Amazon had infringed upon its patents for "interactive music preview technology, which enabled customers to listen to samples of music products at kiosks and over the internet."[48] Specifically, Amazon used Intouch technology to permit its customers to preview music products available for sale on Amazon's corporate website.[49]

Amazon tendered a defense to its insurers under both its primary insurance and excess carrier policies.[50] Each policy promised to defend and indemnify Amazon against third party claims alleging "advertising injury," among other things.[51] One of the enumerated offenses under the "advertising injury" provision mirrored that of the ISO's 1986 Broad Form CGL endorsement and provided coverage for the "misappropriation of advertising ideas or style of doing business."[52] The court stated that "misappropriation of advertising ideas or style of doing business" could be satisfied by: (i) the "wrongful taking of another's manner of advertising,"[53] (ii) the "wrongful taking of an idea concerning the solicitation of business

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[46] *See id.*

[47] *See Amazon.com*, 85 P.3d at 978.

[48] *See id*. at 975.

[49] *Id*.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 976 (internal quotation marks omitted) (citing Am. States Ins. Co. v. Vortherms, 5 S.W.3d 538, 543 (Mo. Ct. App. 1999); Fluoroware, Inc. v. Chubb Grp. of Ins. Cos., 545 N.W.2d 678, 682 (Minn. Ct. App. 1996)).

and customers,"[54] or (iii) the "wrongful taking of the manner by which another advertises its goods or services."[55] The court determined that "patent infringement may constitute an advertising injury *where an entity uses an advertising technique that is itself patented*."[56] The court's conclusions and rationale set precedent for subsequent courts to find a duty to defend against third party patent infringement claims, when the language of the advertising injury provisions in a CGL policy mirrors that of the ISO 1986 Broad Form endorsement.[57]

After concluding that patent infringement *could* constitute an advertising injury, the court determined that the injury to Intouch occurred in the course of advertising goods for sale.[58] In the absence of a specific definition of the term "advertising," the court noted that advertising typically refers to "any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business, … [or the] widespread distribution of promotional material to the public at large."[59] Finally, the court concluded that a causal connection existed between the advertising injury and the policyholder's advertising activities, stating that "an injury that could have occurred independent and irrespective of any advertising is not an advertising injury."[60] In most cases, the requisite causal relationship does not exist because the claim against the policyholder is based on the sale of an infringing product, not an advertisement.[61] Courts reject these claims because an advertising injury does not occur "where the injury is caused by the subsequent

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[54] *Amazon.com*, 85 P.3d at 976 (internal quotations omitted) (citing Green Mach. Corp v. Zurich-American Ins. Grp., 313 F.3d 837, 839 (3d Cir. 2002)); Frog, Switch & Mfg. Co., v. Travelers Ins. Co., 193 F.3d 742, 748 (3d Cir. 1999).

[55] *Amazon.com*, 85 P.3d at 976-77 (internal quotation marks omitted) (citing Applied Bolting Tech. Prod., Inc. v. United States Fidelity & Guaranty Co., 942 F. Supp. 1029, 1034 (E.D.Pa. 1996)).

[56] *Id.* at 977 (internal quotation marks omitted*)* (citing Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1507 n.5 (9th Cir. 1994) (citing Bank of the West v. Superior Court, 833 P.2d 545, 559 (Cal. 1992)) (emphasis added); State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am., 343 F.3d 249, 258, 258 n.12 (4th Cir. 2003).

[57] *See* DISH Network Corp. v. Arch Specialty Ins. Co., 659 F.3d 1010, 1018 (10th Cir. 2011); Hyundai Motor Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 600 F.3d 1092, 1101-02 (9th Cir. 2010).

[58] *See Amazon.com*, 85 P.3d at 977 (citing *Vortherms*, 5 S.W.3d at 544).

[59] *Id*. (internal quotation marks omitted).

[60] *See id.* (citing Simply Fresh Fruit, Inc. v. Continental Ins. Co., 94 F.3d 1219, 1222-23 (9th Cir. 1996)).

[61] *See also Amazon.*com, 85 P.3d at 977 n.20.

advertising of an already infringing product."[62] As such, the injury derived from the use of the software code as the means to market goods for sale satisfied the causation requirement. In reaching this conclusion, the court noted that it is irrelevant whether the customer or policyholder has actual knowledge of the infringement.[63]

B. HYUNDAI MOTOR AMERICA V. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

The first federal court case finding that an insurer had a duty to defend a policyholder against a third party patent infringement claim was *Hyundai Motor America v. National Union Fire Insurance Co. of Pittsburgh, PA*.[64] Applying California law, the United States Court of Appeals, Ninth Circuit, reversed a decision by the United States District Court for the Central District of California granting summary judgment in favor of the insurers.[65] Similar to Amazon and most other major corporations, Hyundai maintained an interactive website.[66] Hyundai's corporate website allowed users to "build [their] own" vehicle by navigating through a series of questions on different menus pertaining to colors, engine types, transmission types, etc.[67] In response to each user's input, the corporate website "displayed customized vehicle images and pricing information."[68] The website also contained a similar feature that allowed customers to select customized parts for the very same vehicles.[69] In the underlying action pertaining to Hyundai's interactive website, Orion IP, LLC, a patent-holding company alleged that the "build your own vehicle" feature and the parts catalogue feature infringed on Orion's patented computer-based system which created customized product proposals, including pictures and text, to be used in the creation of a proposal.[70] Hyundai tendered a defense under its primary insurance policy, which promised to defend and indemnify Hyundai against claims alleging

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[62] *See Amazon.com*, 85 P.3d at 977-78 & n.21.

[63] *See Amazon.com*, 85 P.3d at 978 n.25 (rejecting the insurer's argument that Intouch's injury could not have been caused by Amazon's advertising because customers would not have been aware that they were using an infringing product).

[64] 600 F.3d 1092 (9th Cir. 2010).

[65] *See Hyundai*, 600 F.3d at 1104.

[66] *See id*. at 1095.

[67] *Id*.

[68] *Id*.

[69] *Id*.

[70] *Id*. at 1095-96.

"advertising injury," among other things.[71] Similar to the provisions of the insurance policy at issue in *Amazon*, one of the enumerated offenses under the "advertising injury" provision mirrored that the of the ISO 1986 Broad Form CGL endorsement, and provided the policyholder with coverage for "misappropriation of advertising ideas or style of doing business."[72]

To determine whether the insurer had a duty to defend Hyundai under the "advertising injury" provision of its insurance policy, the court looked to find the existence of three elements: (i) whether Hyundai engaged in "advertising" during the relevant policy period when the alleged "advertising injury" occurred, (ii) whether Orion's allegations created a potential liability under one of the covered offenses (i.e., misappropriation of advertising ideas), and (iii) whether a causal connection existed between the alleged injury and the "advertising."[73] The court stated that "patent infringement can qualify as an advertising injury if the patent involves any process or invention which could reasonably be considered an advertising idea," i.e., if the third party "allege[d] violation of a method patent involving advertising ideas."[74]

Similar to the ISO 1986 Broad Form endorsement, the CGL policy at issue in this case failed to define "advertising," and the court was forced to determine the appropriate meaning of the undefined term.[75] In the context of the insurance policy provision, the court concluded that the term "advertising" referred to the "widespread promotional activities usually directed to the public at large," but it did "*not* encompass solicitation" under California law.[76] The court determined that the BYO feature *was* "widely distributed to the public at large, to millions of unknown web-browsing potential customers, even if the precise information conveyed to each … varie[d] with user input … [because] the users [we]re using the

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[71] *Hyundai*, 600 F.3d at 1095-96.

[72] *Compare Hyundai*, 600 F.3d at 1096, *and Amazon.com* ,

85 P.3d at 976 , *with* INS. SERV. OFFICE, INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 11 85 (1984).

[73] *Hyundai*, 600 F.3d at 1098 (quoting Hameid v. Nat'l Fire Ins. of Hartford, 71 P.3d 761, 764-65 (Cal. 2003)).

[74] *Id.* at 1100 (internal quotation marks omitted) (citing Homedics, Inc. v. Valley Forge Ins. Co., 315 F.3d 1135, 1141 (9th Cir. 2003)).

[75] *See id.* at 1098; INS. SERV. OFFICE, INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 11 85 (1984).

[76] *See Hyundai*, 600 F.3d at 1098 (quoting *Hameid*, 71 P.3d at 764-65) (internal quotation marks omitted).

same BYO feature."[77] Therefore, the BYO feature was not a solicitation insofar as it varied for each different user, but rather, it was a widely distributed, public advertisement. After concluding that the interactive website was not merely a "solicitation," the court determined that Orion's patent infringement claim constituted a "misappropriation of advertising idea," because a lay person would reasonably understand the phrase to include Orion's patent infringement claim.[78] In reaching its conclusion, the court noted *dicta* in *Iolab* stating that "patent infringement may constitute an advertising injury *where an entity uses an advertising technique that is itself patented*."[79] The court also relied on *Amazon*, which it found analogous to the present case, because the BYO feature was the "form of the advertisement itself … and plainly is not the product being advertised."[80]

Agreeing with the Court of Appeals of Washington in *Amazon*, the court stated that a causal relationship does not exist when the alleged infringement concerns patents covering the underlying product for sale.[81] The court summarized the causal connection requirement and concluded that "[w]hen the patent infringement occurs independent of the actual advertisement of the underlying product, because the patent concerns the underlying product … then the causal connection typically is not established, even when the advertising exposes the infringement."[82] Conversely, "[w]hen the patent infringement occurs in the course of the advertising . . . the causal connection is established."[83] In the summary of the causal connection requirement, the court noted that many of the previous Ninth Circuit decisions suggested that a causal connection would *never* exist, even when the patent concerned the method of advertising.[84]

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[77] *Id*. at 1099-1100 (alteration in original) (noting that the "patent's raison d'etre is to create *customized* proposals, *specific to an individual user*.").

[78] *Id*. at 1101.

[79] *Id*. at 1102 (emphasis added) (quoting Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1507 n.5 (9th Cir. 1994)).

[80] *Id*. at 1101-02 (internal quotation marks omitted) (citing Amazon Int'l, Inc. v. Am. Dynasty Surplus Linens Ins. Co., 85 P.3d 974, 977 (Wash. Ct. App. 2004)).

[81] *Id*. at 1102.

[82] *Hyundai*, 600 F.3d at 1103 (alteration in original). *But see Hyundai*, 600 F.3d at 1103 n.4 (suggesting that situations where advertisements induce others to infringe on a patent may produce the requisite causal connection).

[83] *Id*. at 1103 (alteration in original).

[84] *See id.* at 1102-04; *see also* Simply Fresh Fruit v. Cont'l Ins. Co., 94 F.3d 1219, 1223 (9th Cir. 1996) (noting that "the *advertising activities* must *cause* the

However, the court distinguished the case on the basis that the infringement was Hyundai's use of patented techniques as part of its own "marketing method" or "marketing system" and the claim potentially alleged advertising injury within the insurance policy coverage.[85] Based on these differences, the court concluded that a duty to defend against the third party patent infringement existed under the CGL insurance policy "advertising injury" provision.[86]

C. DISH NETWORK CORPORATION V. ARCH SPECIALTY INSURANCE COMPANY

The most recent case finding that an insurer had a duty to defend a policyholder against a third party patent infringement claim was *DISH Network Corporation v. Arch Specialty Insurance Company*. Applying Colorado law, the Tenth Circuit of the United States Court of Appeals reversed a decision by the District of Colorado granting summary judgment in favor of the insurers.[87] In the underlying action, Ronald A. Katz Technology, Licensing, L.P. filed one or more claims on twenty-three different patents, alleging that by DISH Network committed patent infringement by "making, using, offering to sell, and/or selling … automated telephone systems, including … the DISH Network customer service telephone system, [which] allow[ed] [DISH's] customers to perform pay-per-view ordering and customer service functions over the telephone."[88] DISH Network tendered a defense under its primary insurance and excess coverage policies, all of which promised to defend and indemnify DISH against claims alleging "advertising injury," among other items.[89] Four of DISH Network's five insurance policies enumerated four categories of offenses which constituted "advertising injury," in language identical to the advertising injury provisions in the ISO 1986 Broad Form Endorsement.[90] The fifth insurance policy explicitly excluded

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injury," not merely expose it) (emphasis in original); Microtec Research v. Nationwide Mut. Ins. Co., 40 F.3d 968, 971 (9th Cir. 1994).

[85] *See Hyundai*, 600 F.3d 1092.

[86] *Id.*

[87] DISH Network Corp. v. Arch Specialty Ins. Co., 659 F.3d 1010, 1028 (10th Cir. 2011).

[88] *Id*. at 1012-13 (alteration in original) (citation omitted). The language of the underlying action mirrors that of the revision to the Patent Act in 1994.

[89] *Id*. at 1013.

[90] *Id*.; INS. SERVS. OFFICE, INC., COMMERCIAL GENERAL COMMERCE LIABILITY COVERAGE FORM, CG 00 01 11 85 (1984).

from coverage, "any claim … [a]rising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights," however, the exclusion did not apply to "infringement, in [the insured's] 'advertisement,' of copyright, trade dress or slogan."[91]

Reviewing the lower court decision *de novo*, Colorado law required the Tenth Circuit to adhere to a "four corners rule," under which the court was required to "compare the allegations of the underlying complaint with the terms of the applicable insurance policy."[92] In the context of a duty to defend against a third party patent infringement claim, the rule requires an insurer to tender a defense if the underlying action alleges *any* facts or claims that might fall within the insurance policy's provisions.[93] Adhering to the "four corners rule," the court applied a three-part test to determine whether the insurers owed a defense to DISH Network under the advertising injury provisions.[94] Specifically, the court analyzed: (i) whether DISH Network "engaged in 'advertising' during the relevant period, (ii) whether the underlying complaint alleged the predicate "advertising injury" offense under the policy, and (iii) whether a causal connection existed between the advertising activity and the alleged injury suffered by the third party patent holder.[95]

Prior to the analysis of the three-part test, the court first determined whether patent infringement *could ever* fall within the applicable CGL advertising injury provisions.96 Looking to other jurisdictions for guiding precedent, the court noted that a clear majority view had emerged and courts "routinely distinguish between claims based on the manufacture and sale of an infringing product-in which case the claim is not covered even if the product is used in advertising and a claim based on the unauthorized use of a patented advertising idea or method- in which case the claim is covered."97 Despite the substantial number of cases suggesting that infringement of a patented idea will qualify for coverage under the advertising injury provisions of a CGL policy, the court noted that many

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[91] *DISH Network Corp.,* 659 F.3d at 1013-14 (citation omitted); *See id.* at 1028-29 (remanding the case to the district court to determine whether the unique language regarding the intellectual property exclusion in the fifth insurance barred a duty to defend against the underlying third party patent infringement claim.).

[92] *Id*. at 1015.

[93] *Id.* (citing Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 301 (Colo. 2003)).

[94] *Id*. at n.4.

[95] *Id*.

[96] *Id*. at 1017 (citation omitted).

[97] *Id*. (citation omitted).

cases "unequivocally reject patent coverage," where it is not expressly included in the policy.98 Distinguishing the existing case law from the present facts, the Tenth Circuit explained that "[t]he bulk of the published case law addressing patent infringement as advertising injury deals with products the insured happened to advertise, rather than a means of advertising that the insured used to market its own [non-infringing] products."[99] The court concluded that "[d]epending on the context of the facts and circumstances of th[e] case, patent infringement *can* qualify as an advertising injury if the patent involve[s] any process or invention which could reasonably be considered an advertising idea," noting that such cases are rare, in which an "allegedly infringed patent is itself and advertising idea rather than merely an advertised product."[100] In the underlying action, the court explained that DISH Network "allegedly committed patent infringement by using [patented] technology to sell Dish's own non-infringing … products and services."[101] The holding seems to suggest that coverage is only appropriate when both the accused activity and the patent's claims are within the scope of advertising. However, the logic espoused by the court clearly demonstrates a willingness to provide reasonable protection to policyholders in light of the broadly encompassing language in a CGL policy similar to the ISO 1986 Broad Form endorsement.

After determining that patent infringement *could* fall within the applicable CGL advertising injury provisions, the Tenth Circuit applied the *Novell* analysis, and analyzed "whether the complaint potentially alleged a predicate offense, *viz*., 'misappropriation of advertising ideas or style of doing business."[102] As was previously noted, the ISO 1986 Broad Form endorsement failed to define the meaning of the term "advertising," and the definition varies between jurisdictions. The court noted that some jurisdictions apply broadly encompassing definitions for "advertising," such as; (i) the "action of calling something to the attention of the public,"[103] or (ii) any oral, written or graphic statement made by the seller

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[98] *Id*. at 1019 (citing U.S. Fid. & Guar. Co. v. Frosty Bites, Inc., 232 F.Supp.2d 101, 103 (S.D.N.Y. 2002)).

[99] *DISH Network*, 659 F.3d at 1017-18 (alteration in original).

[100] *Id*. at 1020 (alteration in original) (emphasis added) (internal quotations marks omitted) (quoting Hyundai Motor Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 600 F.3d 1092, 1100 (9th Cir. 2010)).

[101] *Id*. at 1018 (alteration in original).

[102] *Id*. at 1020.

[103] Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1188 (11th Cir. 2002) (quoting Adolfo House Distrib. Corp. v. Travelers Prop. & Cas. Ins. Co.,

in any manner in connection with the solicitation of business."[104] Conversely, other jurisdictions provide a strict definition: "widespread distribution of promotional materials to the public at large," in contrast with a one-on-one promotional activity known as a "solicitation."[105] The court failed to reach a conclusion as to which definition should apply to third party patent infringement claims, however, it concluded that the underlying complaint could be read to potentially allege the misappropriation of advertising ideas.[106] Reasoning that the patented functions conceivably allowed DISH Network to sell their product, *and* conceivably make selling offers to the specific caller, the court stated that "the complaint … allege[d] misappropriation of a product specifically designed … for advertising purposes."[107]

After concluding that the complaint potentially alleged misappropriation of advertising ideas or style of doing business under the advertising injury provisions of the insurance policies, the court then analyzed whether the requisite causal connection existed.[108] Specifically, the court examined whether the alleged injury arose in the course of advertising as the policy language mandated.[109] The causal requirement is important for public policy reasons because:

> "[v]irtually every business that sells a product or service advertises, if only in the sense of making representations to potential customers. If no causal relationship were required between "advertising activities and 'advertising injuries, the advertising injury

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165 F.Supp.2d 1332, 1339 (S.D.Fla. 2001)); *see also* discussion *infra* Part IV.A. (noting this definition of "advertising" is similar to that of the 1998 ISO Broad Form Endorsement).

[104] *See* Amazon.com Int'l, Inc. v. Am. Dynasty Surplus Lines Ins. Co., 85 P.3d 974, 977 (Wash. Ct. App. Div. 1 2004) (quoting State Auto Prop. and Cas. Ins. Co. v. Travelers Indem. Co. of Am., 343 F.3d 249, 259 (4th Cir. 2003)).

[105] *See* Hayward v. Centennial Ins. Co., 430 F.3d 989, 991 (9th Cir. 2005) (quoting Hameid v. Nat'l Fire Ins. of Hartford, 71 P.3d 761, 763 (Cal. 2003)).

[106] *See DISH Network*, 659 F.3d at 1022 (alteration in original). It is important to note that under Colorado law the issue is not whether the complaint definitively delineates the specific advertising activities Dish engaged in, but rather whether the alleged facts even potentially fall within the scope of coverage.

[107] *Id.*

[108] *Id.*

[109] *Id.*

> coverage, alone, would encompass most claims related to the insured's business."[110]

In *DISH*, the court delineated several different approached, applied by various courts, to determining whether the requisite causal connection was satisfied. In the first approach, causation was satisfied if the "alleged advertising activities alone would be actionable."[111] Another approach required that "the *advertising activities* must *cause* the injury-not merely expose it."[112] The final approach taken by courts fails to find the requisite causal connection "if the injury could have arisen in the absence of advertising," specifically, if "any advertising done through the use of the software [wa]s incidental to [the underlying plaintiff's] core complaint."[113] The court declined to follow the final approach, which was utilized by the United States Court of Appeals, Fifth Circuit in *Delta Computer Corp. v. Frank*, 196 F.3d 589, 591 (5th Cir. 1999), because the approach was inconsistent "with Colorado's rule that a duty to defend arises wherever the complaint even potentially alleges conduct within the policy language."[114]

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[110] Novell, Inc. v. Fed. Ins. Co., 141 F.3d 983, 989 (10th Cir. 1998) (alteration in original) (quoting Bank of the W. v. Super. Ct., 833 P.2d 525, 560 (Cal. 1992)).

[111] *See DISH Network*, 659 F.3d at 1026 (citing Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742, 750 n.8 (3d Cir. 1999)).

[112] *See id.* (citing Novell, Inc. v. Fed. Ins. Co., 141 F.3d at 989); *see also* Microtec Research v. Nationwide Mut. Ins. Co., 40 F.3d 968, 971 (9th Cir. 1994) (alteration in original) ("If the [insured] does some wrongful act and then advertises it, harm caused by the wrongful act alone is not within the scope of the term advertising injury.").

[113] *See DISH Network*, 659 F.3d at 1026, 1028 (quoting Delta Computer Corp. v. Frank, 196 F.3d 589, 591 (5th Cir. 1999)); *see also* Delta Computer Corp. v. Frank, 196 F.3d 589, 591 (5th Cir. 1999) (alteration in original) (concluding that the underlying claim was "essentially for infringement of [a] copyrighted software program," not for any advertising the plaintiff may have done with it, and noting that the "underlying pleading state[d] nothing about advertising.").

[114] *See DISH Network*, 659 F.3d at 1028 (citing Compass Ins. Co. v. City of Littleton, 984 F.3d 606, 614 (Colo. 1999)) (The court citing Cyprus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 301 (Colo. 2003), that Colorado requires a duty to defend the entire suit when any claim "might fall within the ambit of the policy")).

IV. RECENT CHANGES LIMITING ADVERTISING INJURY COVERAGE IN INSURANCE SERVICE OFFICE, INC. COMMERCIAL OR COMPREHENSIVE GENERAL LIABILITY POLICY FORMS

A. THE 1998 ISO BROAD FORM CGL ENDORSEMENT REVISIONS

In 1998, the ISO made several major revisions in an attempt to resolve some of the issues surrounding the 1986 Broad Form endorsement. The first substantial change was the combination of the definitions of "personal injury" and "advertising injury" into Part B coverage, "Personal and Advertising Injury."[115] In this section, the ISO defined the term "advertisement" for the first time in the advertising injury provisions, as "notice that is broadcast to or published to the general public or specific market segments … for the purpose of attaining customers or supporters."[116] The second substantial change from the ISO 1986 Broad Form endorsement was the replacement of the provision providing coverage for "infringement of copyright, title or slogan," with a new provision providing coverage for "infring[ement] upon another's copyright, trade dress or slogan in your advertisement."[117] Additionally, the ISO 1998 Broad Form endorsement removed the provision providing coverage for "misappropriation of advertising ideas or style of doing business," and replaced the provision with coverage for "the use of another's advertising idea in your advertisement."[118] Although the effects of these changes are unclear, these revisions may force courts to reach different conclusions under circumstances similar to those of the previously discussed decisions by the Court of Appeals of Washington and subsequently by the United States Court of Appeals, Ninth and Tenth Circuits.

B. THE 2001 ISO BROAD FORM CGL ENDORSEMENT REVISIONS

The ISO 1998 Broad Form endorsement revisions were released in 2001 following major increases in the global use of electronic

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[115] *See* INS. SERVS. OFFICE INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 07 98 (1997); *See also* INS. SERVS. OFFICE INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 11 85 (1986).

[116] INS. SERVS. OFFICE, INC. *supra* note 115.

[117] *Id.* (alteration in original).

[118] *Id.*

communications which raised concerns among ISO member companies.[119] In the ISO 2001 Broad Form endorsement, advertising injury coverage is described under six enumerated offenses: (i) false arrest, detention or imprisonment, (ii) malicious prosecution, (iii) libel, slander, or disparagement, (iv) violation of the right of privacy, (v) use of another's advertising idea in your advertisement, and (vi) infringement of copyright, trade dress, or slogan in your advertising.[120] The ISO 2001 Broad Form endorsement explicitly excludes coverage, any injury "arising out of the *infringement of* copyright, *patent*, trademark, trade secret or other intellectual property rights" from the "Personal and Advertising Injury" provisions.[121] However, this exclusion "does not apply to infringement, in your 'advertisement,' of copyright, trade dress of slogan."[122] These changes appear to be in response to attempts by policyholder to secure coverage for third party patent infringement claim, as described in the previous sections. Insurance policies that utilize language mirroring the newer editions of the Broad Form endorsements are likely to prevent policyholders from obtaining coverage.

V. CONCLUSION

Courts have not yet addressed the issue of whether the new exclusions in the "Personal and Advertising Injury" provision of the ISO 2001 Broad Form endorsement bar coverage when the policyholder infringes on a patented advertising idea, but it is only a matter of time before the question is presented to a court. Generally, courts faced with issues surrounding CGL policies are increasingly limiting policyholder coverage for infringement of intellectual property rights and third party patent infringement. Although the previously discussed cases are a significant victory for policyholders, the ISO CGL endorsements now contain exclusions which are likely to prohibit courts from following the logic espoused by the Ninth and Tenth Circuits and the Washington Court of Appeals. The revisions in the ISO 1998 and 2001 Broad Form

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[119] *See* INS. SERVS. OFFICE INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM CG 00 01 10 01 (2000). (alteration in original) ("Notices that are published include material placed on the Internet, or on similar electronic means of communication; and [r]egarding web-sites, only the part of a web-site that is about your goods, products or services for the purpose of attracting customers or supporters is considered an advertisement.").

[120] *See id*.

[121] *See id.* (emphasis added).

[122] *See id*.

endorsements create more impediments for policyholders and limit the ability to obtain coverage for third party patent infringement claims.[123] "The combination of the sharply curtailed advertising injury coverage with the new IP exclusions mean[s] that, except for a tiny number of cases, the commercial general liability [insurance policies] no longer provides coverage for IP infringement generally, including for patent infringement."[124]

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[123] *See* Robert D. Chesler & Cindy Tzvi Sonenblick, *Insurance Coverage for Intellectual Property Infringement* (pt. 3), BLOOMBERG LAW REPORTS (2008), http://www.lowenstein.com/files/Publication/33ad0bf9-ca30-4c15-a20e-05d8048333be/Presentation/PublicationAttachment/05af2561-74b2-4f37-951e-0b181131c92b/Privacy%20Liability%20Part%203%20Bloomberg%20RC%20and%20CS.%2006.08.pdf, ("[M]any companies now have essentially no coverage for intellectual property infringement.").

[124] *See id*. (alteration in original).