The Duty to Defend Intellectual Property Claims Under Traditional CGL Policies in Texas, Emerging IP Liability Products, Coverage for First-Party Losses Under Traditional Property and Casualty Policies, Coverage for Y2K Costs and Expenses, and Other Complex Issues Facing Courts, Policyholders, and Insurers in the New Millenium

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THE DUTY TO DEFEND INTELLECTUAL PROPERTY CLAIMS UNDER TRADITIONAL CGL POLICIES IN TEXAS, EMERGING IP LIABILITY PRODUCTS, COVERAGE FOR FIRST-PARTY LOSSES UNDER TRADITIONAL PROPERTY AND CASUALTY POLICIES, COVERAGE FOR Y2K COSTS AND EXPENSES, AND OTHER COMPLEX ISSUES FACING COURTS, POLICYHOLDERS, AND INSURERS IN THE NEW MILLENIUM

INTRODUCTION

Given transformations in the American and global economy and the continuing shift to a service and information-based economy dependent on technology, future insurance coverage cases are likely to focus increasingly on intellectual property (IP) liability issues.[1] Policyholders conducting business operations in cyberspace or involved in high technology enterprises face significant potential first-party losses and third-party liability claims. For example, policyholders engaged in e-commerce activities may suffer significant first-party losses due to network downtime, loss or corruption of computer data, damaged or defaced web-sites, and similar claims.[2] Policyholders operating in a wide range of fields, including the textile, technology, semi-conductor, biotechnology, medical research, and pharmaceutical industries may be faced with patent, trademark, copyright, and service mark litigation. Such issues include potential liability for third

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[1] Robert Paul Norman recently warned that , "E-commerce is growing at a simply phenomenal pace. Previously, it was estimated that e-commerce would total $1.4 trillion by the year 2003. It is now virtually certain that e-commerce will far surpass that estimate. Data 'traffic' on the 'Net alone is growing exponentially, somewhere between 200-600% per year. Tens of millions of people log on to the Internet every day. Net traffic doubles every 100 days. Amazingly, PC's are becoming a thing of the past in this new economy. In their place, hundreds of millions of hand held Internet 'appliances' (such as cell phones and Palm Pilots) will be used to access the Internet. This exponential growth of the Internet is resulting in exponential growth in exposure for users of the 'Net.' Insurance carriers believe that e-commerce will be the 'single biggest insurance risk of the 21St century.' Reuters Eng. News Serv. (May 9, 2000); J. Com. Abstracts 12, May 18, 2000. For instance, the so-called Love Bug email virus caused an estimated $15 billion in damages. Many insurance carriers have already gone on record as saying that Love Bug losses are not covered under traditional insurance products. As a result, many carriers have begun to produce new insurance policies which are directed specifically at the types of risks that exist in cyber space. "Virtual Insurance: Is Your old Policy From InvisibleINC.COM? If so, What Cyber Policy Adequately Covers Your Risks?," ABA's Tort and Insurance Law Practice Group Seminar Presentation, March 20-24, 2001.

[2] *See also* Robert Paul Norman, "Virtual Insurance: Is Your Old Policy From InvisibleINC.COM? If so, What Cyber Policy Adequately Covers Your Risks?," A.B.A. Insurance Coverage Litigation Committee Annual Midyear Program, February 22-24, 2001 (".

party claims of patent infringement, copyright and trademark infringement, and similar liability claims, as well as first party claims for loss or corruption of computer data, network downtime, damages caused by hackers, and other similar first party losses. The magnitude of risk facing a policyholder conductingThis article focuses primarily on the duty to defend in third party cases, and policyholder strategies for recovering losses in first-party cases.

Section I analyzes the duty to defend IP liability claims and defamation, libel, slander and related claims in Texas and also analyzes key decisions from other states on issues that have yet to be addressed in Texas. Section II describes new insurance products being offered to fill perceived gaps in the traditional CGL policy, including offensive and defensive patent infringement policies. Section III analyzes key first party issues facing policyholders who are attempting or may attempt to recover economic losses caused by loss of or corruption of computer data, network downtime, and other risks. This section also analyzes current coverage issues in the litigation brought by policyholders to obtain reimbursement for their y2k costs and expenses.

I. THE DUTY TO DEFEND IN INTELLECTUAL PROPERTY CASES

Given the tremendous legal costs and uncertainties involved in defending and prosecuting intellectual property claims, policyholders and insurers need to very carefully assess their respective positions on the duty to defend.[3] Following the service of suit on a policyholder, the following critical questions must generally be addressed as soon as possible: (1) should the suit be tendered to the insurance carrier; (2) should the carrier accept coverage and agree to defend the policyholder,

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[3] Given the expected growth of e-commerce and the continued increasing reliance on technology, there is likely to be a substantial increase in the number of intellectual property disputes in the near future. According to commentator Robert Paul Norman, "E-commerce is growing at a simply phenomenal pace. Previously, it was estimated that e-commerce would total $1.4 trillion by the year 2003. It is now virtually certain that e-commerce will far surpass that estimate. Data 'traffic' on the 'Net alone is growing exponentially, somewhere between 200-600% per year. Tens of millions of people log on to the Internet every day. Net traffic <u>doubles</u> every 100 days. Amazingly, PC's are becoming a thing of the past in this new economy. In their place, hundreds of millions of hand held Internet 'appliances' (such as cell phones and Palm Pilots) will be used to access the Internet. This exponential growth of the Internet is resulting in exponential growth in exposure for users of the 'Net.' Insurance carriers believe that e-commerce will be the 'single biggest insurance risk of the 21St century.' Reuters Eng. News Serv. (May 9, 2000); J. Com. Abstracts 12, May 18, 2000. For instance, the so-called Love Bug email virus caused an estimated $15 billion in damages. Many insurance carriers have already gone on record as saying that Love Bug losses are not covered under traditional insurance products. As a result, many carriers have begun to produce new insurance policies which are directed specifically at the types of risks that exist in cyber space. "Virtual Insurance: Is Your old Policy From InvisibleINC.COM? If so, What Cyber Policy Adequately Covers Your Risks?," ABA's Tort and Insurance Law Practice Group Seminar Presentation, March 20-24, 2001.

deny coverage and refuse to defend, or defend under a "reservation of rights"; (3) should the policyholder accept a limited form of defense offered by the carrier in a reservation of rights letter or expend its own funds defending the suit and seek reimbursement later; (4) should the carrier file a declaratory judgment action to determine its defense and indemnity obligations; and (5) is the policyholder entitled to require the carrier to prosecute a counterclaim. These are complex, significant issues for both policyholders and carriers. It is also unclear whether or not policyholders are entitled to recover “pre-tender” defense costs, although case law outside of Texas generally supports policyholders. In order to understand the strategies that are open to policyholders facing a lawsuit alleging intellectual property liabilities and the strategies that are available to the insurer in response, it is first necessary to understand when the duty to defend is triggered under the “eight corners” rule and the relatively few exceptions to that rule.[4]

A. When is the duty to defend "triggered" under Texas’s “eight corners” or “complaint allegation” rule?

The classic formulation of Texas's "eight corners rule" or "complaint allegation rule" was provided by the Texas Supreme Court in *Heyden Newport Chemical Corp. v. Southern General Insurance Company*:

> We think that in determining the duty of a liability insurance company to defend a lawsuit the allegations of the complainant should be considered in the light of the policy provisions without reference to the truth or falsity of such allegations and without reference to what the parties know or believe the true facts to be, or without reference to a legal determination thereof.[5]

Courts will not look beyond the “eight corners” of the petition and the insurance policy in determining whether or not the insurer owes a duty to defend.[6]

In reviewing the petition, Texas courts initially focused on whether or not the allegations made in the petition "were sufficient to state a cause of action against [the policyholder] coming

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[4] *See generally* Lee H. Shidlofsky, Duty to Defend: An Analysis of the Eight Corners Rule, 9th Annual Ultimate Insurance Law Seminar, State Bar of Texas (March 30-31, 2000).

[5] 387 S.W.2d 22, 24 (Tex. 1965).

[6] As explained by commentators Michael Sean Quinn and Pamela D. Nielson, "The rule is quite simple. If a petition alleges facts which would, if proved, require the insurer to make payments on behalf of the insured, then the insurer has a duty to defend. The truth of the allegations does not matter in the slightest. Under the Eight Corners Rule, courts are not to 'read facts into the pleadings.' Furthermore, courts should not look 'outside the pleadings, or imagine factual scenarios which might trigger coverage.'" *Annual Survey of Texas Law, Insurance Law*, 51 S.M.U. L. Rev. 1131, 1167 (1998).

within the terms of the policy."[7] The duty to defend was triggered if the factual allegations stated a "cause of action" that could potentially result in a judgment of liability that would be covered by the insurance policy. Texas courts now focus on the factual allegations made in the petition, rather than focusing on a cause of action test. If the factual allegations state a claim that may be covered by the insurance policy, then the court will find a duty to defend.[8] Moving away from a cause of action test shifts the focus away from the legal allegations made in the petition to the facts that caused the alleged injuries and makes it much less likely that an allegation of "negligence," for example, would trigger the duty to defend.

Under the eight corners rule, Texas courts also generally construe complaint allegations liberally in favor of coverage. As stated in the *Heyden Newport* case, "While we have said above that the court is limited to consideration of the allegations and the insurance policy in determining an insurer's duty to defend, we wish to point out that in considering such allegations a liberal interpretation of their meaning should be indulged."[9] There are few legal precedents on how broadly allegations should be read in favor of coverage. However, in the *Farmers Texas County Mutual Insurance Company v. Griffin* case that while factual allegations will be construed liberally in favor of coverage, the construction of the allegations must be reasonable. As stated in Griffin, "Farmers is not required to defend Royal for another reason: Griffin's petition does not allege that his injuries resulted from an auto accident. . . . To read Griffin's petition as alleging an 'auto accident' would strain that term beyond any reasonable meaning."[10] *Id.* at 82.

If, after applying a liberal pro-coverage interpretation to the allegations, there is no real doubt that the policy would not cover the factual allegations pled, the court will not find a duty to defend. Courts have disagreed on whether there is enough doubt to warrant finding a duty to defend. For example, in *Merchants*, after liberally interpreting the allegations in the plaintiff's petition, the Texas Supreme Court overruled the Beaumont Court of Appeals' opinion that the allegations made by the plaintiff triggered the duty to defend. The court held that "[b]ecause the facts alleged in the pleadings do not suggest even a remote causal relationship between the truck's operation and Gonzalez's injury, they do not create that degree of doubt which compels resolution of the issue for

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[7] *Maryland Casualty Co. v. Moritz*, 138 S.W.2d 1095, 1098 (Tex. Civ. App.--Austin 1940, writ ref'd); *see also Heyden Newport*, 387 S.W.2d at 26.

[8] *See National Union Fire Ins. Co. of Pittsburgh v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997) ("It is not the cause of action alleged that determines coverage but the *facts* giving rise to the alleged actionable conduct.") (citing *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673, 676 (Tex. App.--Houston [14th Dist.] 1993, writ denied).

[9] *See also Merchants*, 939 S.W.2d at 140 (Tex. 1997) ("When applying the eight corners rule, we give the allegations in the petition a liberal interpretation").

[10] 955 S.W.2d 81, 82 (Tex. 1997)

the insured."[11] Future decisions will likely to focus on whether the facts alleged by the plaintiff create a "degree of doubt" that is sufficient to trigger the duty to defend.

Finally, the Texas Supreme Court has also recently clarified that because of the eight corners rule an insurer has no duty to conduct an investigation into the merits of the underlying claims in evaluating whether or not a defense is owed.[12] There are obvious advantages and disadvantages of the eight corners rule. The primary advantage is that it is simple to apply. Disadvantages include creating an incentive to file groundless pleadings that trigger coverage in order to force a settlement, and while the basic parameters of the rule are well known, there will always be some uncertainty as to whether the factual allegations create a sufficient degree of doubt to trigger the duty to defend. The existence of liability insurance may provide an incentive to target companies that otherwise would not be sued. Requiring insurers to defend cases merely to force them to settle claims for the estimated amount of defense costs expected to be incurred provides an incentive to abuse the judicial process.[13]

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[11] *Id.* Under the court's analysis, the policyholder would be required to show that the injuries sustained by the plaintiff resulted from the use of the policyholder's truck. While the policyholder was using the truck at the time of the incident, the injuries were caused by the policyholder's allegedly negligent discharge of a firearm. There was no link between the use of the truck and the discharge of the firearm.

[12] *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 829 (Tex. 1997) ("[U]nder the 'complaint allegation rule' an insurer is entitled to rely solely on the factual allegations contained in the petition in conjunction with the terms of the policy to determine whether it has a duty to defend. The duty to defend is not affected by facts ascertained before suit, developed in the process of litigation, or by the ultimate outcome of the suit.").

[13] Susan Randall asserts that "the rules increase the likelihood that an insured will be sued. Because the complaint measures an insurer's duty, plaintiff's counsel can manipulate the pleadings to trigger the defense obligation, even in cases which are clearly not covered under the policy. The existence of liability insurance drives tort litigation; a defendant whose insurer can be involved in a litigation is a more attractive target and more likely to be sued than a defendant whose insurer cannot be involved. Second, although individual insureds may benefit economically be receiving an insurer-provided defense, the complaint rule works to the economic detriment of insureds as a class by raising insurance costs. The complaint rule raises costs in at least two ways, by increasing the incidence of lawsuits, and by requiring a defense in cases not covered by the applicable policies. Defense costs represent a significant expense for insurers, and these costs are passed onto insurance consumers. Finally, the complaint rule increases the possibility of conflicts of interest in insurance defense. An insurer must defend even where it believes there is no coverage under the policy. As many courts have articulated the rule, an insurer has a duty to defend until it can confine the case to noncovered claims. This formulation is a recipe for conflicts of interest. The insurer's primary concern is demonstrating noncoverage; the insured's interest lies in avoiding liability, or at least limiting it to a covered claim." *Redefining the Insurer's Duty to Defend*, 2 Conn. Ins. L.J. 221, 222-23 (1997).

B. Analyzing the Duty to Defend in Intellectual Property Cases in Texas

There are few legal precedents to guide courts, policyholders, and insurers on the question of whether or not factual allegations made by the plaintiff in underlying intellectual property litigation trigger a duty to defend under the eight corners rule in Texas. Each of the Texas cases involves an "advertising injury"-type claim under Coverage "B" of the standard CGL policy. Based on these cases, it is critical that a policyholder show that: (1) the “advertising injury” arose out of and was “causally related” to the policyholder’s “advertising activities”; and (2) that the advertising offense first occurred during the time the policy was in effect.

Each case has been decided on one of the following five grounds: (a) the underlying petition did not contain a factual allegation connecting the plaintiff's alleged damages to the policyholder's "advertising activities"; (b) the conduct resulting in the alleged damages occurred prior to the inception of the policy; (c) coverage was precluded for public policy reasons under the loss in progress or known loss doctrine; (d) coverage was precluded because the plaintiff sought equitable relief rather than damages; and (e) the activity alleged to have caused the plaintiff's damages was not "advertising" within the meaning of the CGL policy.

The courts' narrow approach to resolving each case, while understandable and expedient, leaves many critical questions facing policyholders and insurers unanswered, including the following: (1) when may an insurer recoup defense costs; (2) when may a court properly consider extrinsic evidence in determining whether the insurer owes a duty to defend; (3) when are the facts of the underlying case sufficiently developed to permit the insurer to file a declaratory judgment action; (4) when, if ever, is the duty to defend triggered by facts alleged in a suit that are not contained in the plaintiff's petition; (5) what res judicata or collateral estoppel effect, if any, does a declaratory judgment in a subsequent coverage action have when the plaintiff amends its pleadings to allege a claim that would trigger the duty to defend; (6) should an insurer be required to defend when the insurer knows or is aware of facts related to the underlying litigation that would require the insurer to defend the action; and (7) when may a policyholder recover the costs incurred in defending itself against a declaratory judgment action brought by its insurer.

Because of the narrow focus in resolving these coverage cases, courts likewise understandably have not addressed broader cost and efficiency issues, such as: (1) is there a feasible, better, less costly alternative to litigation to resolve duty to defend issues, such as arbitration or non-binding mediation; (2) is there an alternative to the eight corners rule that would allow insurers and policyholders to better evaluate their respective positions resulting in less cost and uncertainty. Section "D" below proposes answers to the foregoing questions and proposes feasible alternatives to litigation as the exclusive means of resolving disputes between policyholders and their insurers.

1. Cases Finding No Duty to Defend Because of the Lack of a Causal

Connection Between the Alleged Damages and the Policyholder's Advertising Activities

a. ***Cigna Lloyds Ins. Co. v. Bradleys' Electric, Inc.*****, 33 S.W.3d 102 (Tex.App.--Corpus Christi 2000, pet. denied)**

The court in *Bradleys' Electric* held that there was no duty to defend the policyholder against a counterclaim alleging patent infringement and contributory patent infringement. The court applied the eight corners rule and found no duty to defend because the plaintiff's petition did not contain any factual allegations that the policyholder's advertising activities caused the patent infringement to occur. 33 S.W.3d at 105.

In addition to the court's holding, several other aspects of the case are significant. First, despite the absence of any factual allegations linking the plaintiff's damages to the policyholder's advertising activities, the policyholder's primary insurance carrier initially agreed to provide a defense, subject to a reservation of rights. The carrier's decision reflects the uncertainty that exists in Texas regarding the application of the eight corners rule and the penalties that follow from mistakenly denying the policyholder a defense. [insert footnote re consequences of mistake].

Second, the primary insurer subsequently withdrew its defense and demanded to be reimbursed for the costs incurred in providing the defense. The court was not required to address the issue of whether or not the insurer was entitled to be reimbursed for the defense costs incurred. [insert footnote re when it is appropriate to withdraw, how to withdraw, and whether carrier can recoup defense costs].

Third, the court was not required to address issues regarding the res judicata or collateral estoppel effect of the declaratory judgment. For example, if the plaintiff in the underlying suit amended its petition, following the entry of the declaratory judgment, to allege that the policyholder's advertising activities caused the plaintiff's damages, presumably under the eight corners rule the insurer would be obligated to assume the policyholder's defense notwithstanding the earlier entry of the declaratory judgment. [insert footnote re cases].

Fourth, while the court leaves open the possibility that patent infringement actions may trigger a duty to defend in Texas, it does not provide an example of such a case. The court cites a slip opinion from California holding that the duty to defend is triggered by allegations that the insured's advertising "actively induces another to infringe." However, the court also noted that the opinion was subsequently reversed. It is unclear what type of factual allegations would trigger an insurer's duty to defend a patent infringement suit in Texas.

Finally, the court was not required to analyze whether a petition containing the allegation that the policyholder's "advertising activities" are "responsible, directly or indirectly, for the patent infringement alleged [by the plaintiff]" would be sufficient to trigger the carrier's obligation to defend. It is uncertain whether a conclusory "factual" allegation of this nature would trigger the duty to defend. Including such an allegation is similar to including an allegation that the policyholder's negligent acts caused the plaintiff's damages. While courts have determined that this type of allegation is not sufficient to trigger the duty to defend because it is a "legal" allegation, it is unclear how a Texas court would evaluate an allegation that the policyholder's advertising activities caused the damages sought. Applying the eight corners rule, it seems clear that such an allegation should trigger the insurer's obligation to defend. [insert footnote].

b. *Franklin v. Fugro-McClelland (Southwest), Inc.*, 16 F. Supp.2d 732 (S.D. Tex. 1997).

In *Franklin* six insurers brought suit against two policyholders seeking a declaratory judgment that the insurers had no duty to defend or indemnify in connection with a lawsuit pending against the policyholders. The decision was ultimately based on the court's application of the "known loss" and "loss in progress" doctrines.

In the underlying litigation, the plaintiffs alleged that the defendants infringed the plaintiffs' patents, misappropriated trade secrets, committed fraud, breached fiduciary duties, tortiously interfered with existing and prospective contractual relationships, and committed other similar wrongful actions. Plaintiffs contended that an employee of Fugro's viewed the operations and equipment of the plaintiffs under an obligation of confidence. Thereafter, Fugro allegedly solicited one of the plaintiffs to perform soil sampling work for Fugro using a machine patented to one of the plaintiffs and licensed to the other plaintiff. During the performance of the work, two Fugro employees were allowed to observe the work but were advised that the equipment was patented and that the work methods were confidential and not to be used or disclosed to others. Thereafter, one of the defendants allegedly solicited technical information from the defendants regarding marketing, scheduling, and billing. The information solicited was provided based on the belief that Fugro intended to hire the plaintiffs to complete additional work. Plaintiffs later allegedly learned that Fugro had constructed a soil sampling machine that would allow Fugro to perform the work itself. Fugro was informed that the construction and use of the machine violated an existing patent and plaintiffs demanded that Fugro cease the infringing activities and cease misappropriating plaintiffs' trade secret information. Fugro thereafter allegedly informed the plaintiffs that it would no longer use the machine. However, plaintiffs alleged that Fugro continued to use the machine and constructed additional infringing machines.

The insurers advanced several arguments against coverage. However, because the court accepted the insurers' contention that the loss in progress or continuing loss doctrine applied, the court did not address the other non-coverage theories advanced. Prior to taking up the continuing loss doctrine, the court first addressed defendants' claim that the declaratory judgment action was not ripe for adjudication because liability had not been determined in the underlying litigation. The court rejected the defendants' argument in a footnote, finding that the case "can be decided as a matter of law, without further factual development in the underlying litigation . . . ." While the court found that the ripeness standard had been met in this case, the question of whether or not a declaratory judgment is ripe for adjudication will vary with each technology case depending on the facts and circumstances of the claims made in the underlying litigation.

Several potential issues may arise in future cases in which the policyholder asserts that the insurer's declaratory judgment action is premature. *See generally Ellen S. Pryor*, <u>Mapping the Changing Boundaries of the Duty to Defend in Texas</u>, 31 Texas Tech L. Rev. 869, 889-890 (2000). For example, what if the policyholders in *Franklin* contested the plaintiffs' claims in the underlying litigation and specifically asserted that they did not infringe any of the intellectual property rights of the plaintiffs at any time? Is the duty to defend defeated merely based on the plaintiffs' allegation of facts that the insureds claim are untrue? Isn't a declaratory judgment action inappropriate until the contested facts are judicially resolved? What if the facts in dispute do not relate to the judgment being sought in the underlying action? Is it appropriate for the insurance company to essentially intervene in the resolution of the underlying case by filing a declaratory judgment action to resolve facts that are not essential to the judgment in the underlying litigation? How is a court supposed to resolve such issues given the likely probability that the insurance policy is silent on the question of whether or not either party may file a declaratory judgment to resolve defense issues in the underlying litigation? No Texas courts have addressed these issues with respect to a technology claim but such issues could produce a mass of future litigation given the *Two Pesos* and *Franklin* decisions, which potentially present insurers with an incentive to file a declaratory judgment action to resolve the duty to defend and duty to indemnify by claiming that the policyholder knew that a loss would occur prior to purchasing the insurance policy.

Broader questions of risk assessment and risk allocation also may arise. Did the policyholder bargain for a defense that would not be provided until the insurer resolved factual questions that were not relevant to the adjudication of underlying litigation? Who should pay for the costs of adjudicating the declaratory judgment brought by the insurer on the duty to defend? Is the insurer entitled to reimbursement for defense costs, if any, incurred in investigating and defending the claims made against the insured in the event the insurer prevails in its declaratory judgment action? What if the plaintiffs in the underlying action amend their complaint to remove factual allegations implicating the known loss doctrine? Are factual allegations in a superceded complaint ever admissible in a declaratory judgment action brought by the insurer to escape the duty to defend?

The court found that the claims were not covered by the advertising injury section of the policyholder’s CGL policy because “the alleged injury began before the effective date of the insurance policy.” The court relied heavily on *Two Pesos, Inc. v. Gulf Ins. Co.,* 901 S.W.2d 495, 502 (Tex. App.--Houston [14th Dist.] 1995, no writ.), which determined that trade dress infringement claims were not covered because the wrongful activities began before the purchase of the insurance coverage.[14] Again, as in the *Bradleys' Electric* case, because the court found that the patent infringement occurred prior to the inception of the policy, the court was not required to tackle the issue of whether or not patent infringement claims would be covered by the insured's CGL policy.

c. *Gemmy Industries Corporation v. Allianz General Insurance Company*, No. 3-98-CV-0014-BD, 1998 WL 804698 (N.D. Tex. Nov. 17, 1998).

The *Gemmy* case does not involve a patent infringement claim. However, the court cites several out-of-state cases for the proposition that such claims are not covered by the advertising injury section of the CGL policy: *Simply Fresh Fruit, Inc. v. Continental Ins. Co.*, 94 F.3d 1219, 1222 (9th Cir.); *cert. denied*, ___ U.S. ___, 1175 Ct. 388 (1996) ("[M]ere advertising, without more, cannot constitute actionable patent infringement"); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Silconix, Inc.*, 729 F. Supp. 77, 79 (N.D. Cal. 1989); *A Meyers & Sons Corp. v. Zurich Am. Ins. Group*, 545 N.E. 2d 1206, 1208-1209 (N.Y. 1989).

2. Copyright, Trademark, and Service Mark Infringement Coverage Cases in Texas

There are very few Texas cases analyzing the issue of whether or not insurance coverage may be available to provide a defense or indemnity of claims arising out of allegations of copyright, trademark, and service mark infringement.

a. *The Feed Store, Inc. v. Reliance Ins. Co.*, 774 S.W.2d 73 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (service mark decision)

The Feed Store, Inc. v. Reliance Ins. Co., 774 S.W.2d 73 (Tex. App.—Houston [14th Dist.] 1989, writ denied), primarily involved the issue of whether or not the advertising injury section of CGL policy required Reliance to reimburse the policyholder for its defense costs. The Feed Store was sued by Dairy Queen, which claimed that The Feed Store infringed upon Dairy Queen's registered service mark "Texas Country" by using the phrase "Texas Country Cookin" in its business. Judge Mahon granted summary judgment in favor of The Feed Store that Dairy Queen take nothing on its claims. The Feed Store then filed suit to recover its defense costs incurred in obtaining the take nothing judgment.

Reliance sought summary judgment on two grounds: (1) that Dairy Queen's suit sought injunctive relief only, rather than damages, and therefore the allegations in the complaint did not

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[14] It should be noted that ISO's 1998 revisions include a new exclusion of coverage for advertising injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another or would inflict 'personal or advertising injury.'" This new exclusion appears intended to reinforce the doctrines of fortuity, known loss, and loss in progress.

trigger a duty to defend; and (2) that the phrase "Texas Country" is not a slogan and therefore an exclusion in the advertising injury section of the policy barred coverage. The court affirmed summary judgment after reviewing Dairy Queen's complaint and determining that there was no allegation that Dairy Queen was seeking to recover damages. The court expressly declined to rule on the issue of whether or not "Texas Country" constitutes a slogan because of the "complexities of trademark law."

b. *ABC Distributing, Inc. v. Lumbermens Mut. Ins. Co.*, 646 F.2d 207 (5th Cir. 1981) (trademark infringement decision)

In *ABC Distributing, Inc. v. Lumbermens Mut. Ins. Co.*, 646 F.2d 207 (5th Cir. 1981), the court affirmed the district court's decision to grant the insurers' motion for summary judgment. In the underlying action, ABC was sued by Lighting Systems, Inc. in a seven-count complaint alleging trademark infringement and other related cause of action. Because the "overall scheme" alleged by Lighting Systems was "clearly intentional," the court determined that the complaint fell within the intentional act exception to the policy and that there was no duty to defend.

c. *Essex Ins. Co. v. Redtail Products, Inc.*, 1998 WL 812394 (N.D. Tex. 1998) (trademark infringement decision)

Essex Ins. Co. v. Redtail Products, Inc., 1998 WL 812394 (N.D. Tex. 1998), involved the question of whether or not an insurer should be required to defend or indemnify the policyholder against federal trademark claims. The court granted the insurer's motion for summary judgment on two grounds: (1) the policy did not apply to offenses committed before the beginning of the policy period; and (2) the fortuity doctrine precluded coverage because of the facts and circumstances of the case. In reaching its decision, the court focused primarily on a letter from the plaintiff in the underlying action dated September 27, 1996 which "complained about Redtail's marketing practices and alleged that Redtail's use of OMC's marks violated its trademark rights." As this letter was dated prior to the inception of the policy, the court ruled there was no coverage.

d. *Two Pesos, Inc. v. Gulf Ins. Co.*, 901 S.W.2d 495 (Tex. App.—Houston [14th Dist.] 1995, no writ) (trademark and trade dress infringement decision)

In *Two Pesos*, the court of appeals found that there was no coverage because the alleged offence occurred prior to the policy's inception date. The court recognized that trademark infringement is a "continuous wrong, and as such gives rise to a claim for relief as long as the infringement persists." However, the court appeared to deny coverage for two reasons: (1) because the claim "constitute[d] a known loss or loss in progress" that would be barred under the fortuity doctrine; and (2) because "affording coverage to Two Pesos would violate public policy by allowing protection for a known loss and permitting an insured to benefit from its wrongdoing."

3. Unfair Competition, Business Disparagement, and Trade Dress Coverage Cases in Texas

There also are very few Texas cases providing guidance on the existence and scope of unfair competition, business disparagement, and trade dress coverage provided under the advertising injury section of the CGL policy.

a. *Industrial Molding Corp. v. American Mfrs. Mut. Ins. Co.*, 17 F. Supp.2d. 633 (N.D. Tex. 1998), *vacated*, *Industrial Molding Corp. v. American Mfrs. Mut. Ins. Co.*, 22 F. Supp.2d. 569 (N.D. Tex. 1998)[15]

Industrial Molding provides the most comprehensive discussion to date of the coverage provided by the "advertising injury" section of the CGL policy. The case involved a claim brought against a policyholder for trade dress infringement under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1996). The plaintiff claimed that the policyholder introduced a "prototype Christmas tree stand product for vertical positioning of a tree during February 1996, at the American Christmas Show in New Orleans." The plaintiff also claimed that the policyholder sold and marketed Christmas tree stands that infringed on the plaintiff's trade dress in a Swivel Straight stand and that the policyholder was attempting to avoid design, development, marketing, and advertising costs by copying the plaintiff's stand and had misappropriated the plaintiff's trade dress in its product. The policyholder brought suit against its insurer and sought a declaratory judgment that the insurer had a duty to defend, as well as damages for breach of contract, DTPA violations, unfair insurance practices, and bad faith. In ruling on cross motions for summary judgment, the court held in favor of the policyholder that coverage existed under the advertising injury section of the CGL policy for the plaintiff's claims because there was "no doubt that the complaint accused IMC of engaging in unlawful advertising activity [and therefore] IMC has successfully shown that the allegations in the underlying complaint aver an 'advertising injury.'"

In reaching its holding, the court applied the three-part test applied in *Sentex Sys., Inc. v. Hartford Accident & Indem. Co.*, 882 F. Supp. 930, 936 (C.D. Cal. 1995): (1) whether or not the allegations in the underlying complaint raised a "potential" for liability under one of the covered offenses stated in the policy; (2) whether or not the insured engaged in "advertising activity" during the policy period when the alleged "advertising injury" occurred; and (3) whether or not the insured's advertising activities were causally related to the underlying

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[15] The parties settled their claims after the district court entered its Order granting Plaintiff's Motion for Summary Judgment and denying Defendant's Motion for Summary Judgment. The Order vacating the Court's September 16, 1998 Order was made "pursuant to this settlement." Plaintiff "neither oppose[d] nor agree[d] with" Defendant's Motion to Vacate Order.

lawsuit's trade dress infringement claims.

In addressing whether or not the first prong of the *Sentex* test had been met, the court concluded that trade dress infringement is a covered offense under the policy. The court cited a "clear majority" line of cases holding that the phrase "style of doing business," taken in its "ordinary and popular sense," embraced "trade dress."[16]

The court found that the second prong of *Sentex* was also met because the insured's marketing activities constituted advertising under the policy. Noting that the policy did not define "advertising," the court applied the following broad Black's Law Dictionary definition of "advertisement," based on a Texas case: "Notice given in a manner designed to attract public attention." BLACK'S LAW DICTIONARY 54 (6th ed. 1990) (citing *Edwards v. Lubbock Co.,* 33 S.W.2d 482, 484 (Tex. Civ. App.--Amarillo 1930, no writ)).

The court held that the third prong of the test was met because the insured's advertising activities were "causally related" to the trade dress infringement allegations made in the underlying action. "Not only was misappropriation of trade dress alleged in the underlying complaint, the required nexus between the advertising activities and damages alleged by County Line also proved the necessary causal nexus." *Industrial Molding,* 17 F. Supp.2d. at 639.

Would the case have turned out differently under the ISO's revisions? Probably not, especially given that the 1998 revisions specifically cover the infringement of another's "trade dress."[17]

. **b.** ***Bay Electric Supply, Inc., et al. v. The Travelers Lloyds Insurance Company,* No. CIV. A. G-98-134, 1999 WL 688748 (S.D. Tex. Aug. 31, 1999) (trade dress and trademark infringement case)**

In *Bay Electric*, Bay Electric and FAE, Inc. filed a declaratory judgment and breach of contract lawsuit against Travelers. The underlying action arose out of claims made against Bay

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[16] The court rejected *Advance Watch Co. v. Kemper Nat'l Ins. Co.*, 99 F. 3d 795 (6th Cir. 1996), which refused to find that "misappropriation of advertising ideas or style of doing business" included trademark or trade dress infringement, under Michigan law.

[17] However, the new definition of "advertisement" contained in the policy differs from the Black's Law definition. The new definition refers to "<u>a notice</u>" that is "<u>broadcast</u> or <u>published</u> in the general or specific market segments <u>about</u> <u>your</u> <u>goods</u>, <u>products</u>, or <u>services</u> . . . ." whereas the Black's Law definition refers to "notice given" to the public. Under the District Court's view, the product itself arguably constitutes "notice given" to the public whereas under the new definition it is possible that "a notice" separate and apart from the product must be given and that the product itself may not constitute an "advertisement."

and FAE by a competitor, American Circuit Breaker Corporation ("ACB"). ACB alleged that Bay and FAE violated federal and state law prohibiting trademark and trade dress infringement, trademark dilution, and unfair competition. The allegations in the underlying action were based upon the sale by Bay and FAE of circuit breakers "bearing trademarks and configurations allegedly identified with and owned by ACB." Travelers denied coverage on January 16, 1998. Thereafter, counsel for Bay and FAE requested reconsideration of that decision on March 25, 1998, but Travelers again denied coverage. Subsequently, FAE and Bay settled the underlying lawsuit.

In the coverage action, the court found that the *Industrial Molding* case was the only Texas case "squarely addressing" the issue of whether or not claims of trademark and trade dress infringement constitute an "advertising injury" under Texas law. The district court agreed with *Industrial Molding* that trademark and trade dress infringement are covered "advertising injury" claims. In reaching its holding, the court also relied on the three-part *Sentex* test discussed in section (a) above.

With respect to the first prong of *Sentex*, the court agreed with Bay and FAE's contention that the "<u>physical</u> <u>appearance</u>--<u>the ornamental features which serve to identify its source and distinguish it from similar products</u>--can reasonably be construed as either an 'advertising idea' or 'style of doing business.'" It may be significant in future cases that a definition of "advertisement" has been added to the policy. The court's emphasis in future cases may be placed more on the contents of the advertisement than the "physical appearance" of the product. Furthermore, the ISO revisions delete coverage for misappropriation of the "style of doing business." In addition, coverage for "misappropriation of advertising ideas" has been transformed into "the use of another's advertising ideas in your 'advertisement'." If the product itself is not an "advertisement," cases such as *Bay Electric* may be resolved in a different manner.

The district court also relied on the following history of the "advertising injury" coverage to reach its holding:

> Until 1986, the standard ISO CGL form included "unfair competition" as a covered class of advertising injuries, and explicitly excluded injuries resulting from trademark, service mark, and trade name infringement. In 1986, ISO revised the standard form: unfair competition was eliminated in favor of misappropriation of advertising ideas and style of doing business, and the trademark, service mark, and trade name exclusions was eliminated. <u>Thus, a policyholder over time could reasonably infer that claims related to trade dress would not be excluded from a CGL policy, based upon 1986 revision of the</u>

standard form.[18]

The court also squarely rejected Travelers's contention that "only a wholesale copying of all of the company's products falls within the scope of this term." According to the court, "such categories would be wholly artificial and impossible to apply in any consistent fashion from case to case, and the court declines Travelers' invitation to do so. An examination of the underlying Complaint in the instant action, in which it is unclear what portion of ACB's products and ideas Bay and FAE copied demonstrates the difficulty that a court would constantly encounter in trying to ascertain from a complaint the precise extent of the alleged infringement."

c. *Gemmy Industries Corp. v. Allianz General Ins. Co.*, No. 3-98-CV-0014-BD, 1998 WL 804698 (N.D. Tex. Nov. 17, 1998) (trade dress, unfair competition, and false designation of origin case)

Gemmy Industries, which is also briefly discussed under Section II, B (1) (c) above, involved a case brought by a policyholder against its insurance companies arising out of an underlying action brought by Fun-Damental Too, Ltd. ("Fundamental") for: (1) unfair competition; (2) injury to business reputation; (3) tortious interference with contract; (4) trade dress infringement; and (5) false designation of origin under section 43(a) of the Lamham Act.

At issue in the underlying action was a novelty item manufactured by Gemmy known as the "Currency Can." Fundamental alleged that this item was identical or confusingly similar to its own product called the "Toilet Bank." "Fun-Damental specifically alleged numerous ways in which the design and the appearance of plaintiff's product mimicked its own and caused consumer confusion. It is clear that plaintiff was sued for using this trade dress to 'call public attention' to its product. Such a use constitutes 'advertising injury.'" The court also stated that "both insurance policies cover 'advertising injury' arising from: (1) personal or business defamation; (2) publication of material that violates the right of privacy; (3) misappropriation of advertising ideas or style of doing business; and (4) infringement of copyright, title, or slogan. Most courts have held that trademark and trade dress infringement constitute misappropriation of advertising ideas or style of doing business." The court specifically rejected the Sixth Circuit's *Advance Watch* analysis, which distinguished between the common law tort of misappropriation and misappropriation of trademarks and trade dress and found that advertising injury coverage did not extend to any statute-based or non-common-law theory of misappropriation. However, *Gemmy Industries* declined to adopt the foregoing reasoning because "to do so would circumvent well established principles of contract construction. The terms of an insurance contract must be given their plain, ordinary, and generally accepted meanings unless the policy clearly indicates that the contractual terms are used in a different or

[18] A policyholder should continue to have a reasonable expectation that claims related to trade dress will not be excluded under ISO's revisions because the revisions include, coverage for infringement of another's "trade dress" in the policyholder's "advertisement."

technical sense. The court concluded that "dress infringement constitutes a 'misappropriation of advertising ideas or style of doing business' under both the Alianz and American Equity policies. The claim was clearly alleged in the amended complaint filed by Fun-Damental."

There is no question that trade dress infringement is covered by the 1998 advertising injury coverage part. ISO specifically revised the definition of "advertising injury" to include injury arising out of the infringement of another's "trade dress" in your advertisement. However, given the new definition of "advertisement," insurers may argue that the injury sustained by the third party arose out of other factors, such as, the appearance of the product. Such a position would appear to contradict the purpose of coverage for trade dress infringement.

4. Other Texas Coverage Cases Raising "Advertising Injury Issues."

a. *ANR Production Co. v. American Guarantee & Liability Ins. Co.,* 981 S.W.2d 889 (Tex. App.—Houston [1st Dist.] 1998, no writ) (policyholder's statements to prospective customer did not constitute advertising).

The *ANR* case involved the issue of whether or not a policyholder's statement regarding the ownership of a "debottlenecking" process installed in ANR's natural gas plant constituted "advertising." The trial court granted summary judgment in favor of the insurance company and the court of appeals affirmed, holding that the policyholder's statements were not advertising. "To accept ANR's definition of advertising would mean that any time parties negotiated any kind of contract, there would be a potential for coverage under advertising injury for representations or omissions made during the negotiations."

It will be interesting to see if coverage issues arise concerning whether or not different types of oral representations regarding a policyholder's goods, products or services made for the purpose of attracting customers or supporters count as "advertisements" under the new definition. Would a statement by a policyholder to a prospective client that the policyholder owned a "debottlenecking" process made for the purpose of obtaining work count as an "advertisement?" Would a similar statement made in a trade publication constitute an "advertisement?"

b. *Atlantic Lloyd's Ins. Co. of Texas v. Susman Godfrey, L.L.P.* 982 S.W.2d 472 (Tex. App.—Dallas 1998, no writ).

The *Atlantic* case involved the issue of whether a law firm's solicitation letter containing statements about a doctor's "sloppy, callous, unacceptable, impersonal, and indifferent" work and "outrageous" conduct fell within the definition of "advertising injury." The case does not involve a cyberspace claim. However, the case again highlights the importance of the new "advertisement" definition. Would a solicitation letter sent to one prospective client constitute "a notice that is broadcast or published in the general public or specific market segments about your goods, product or services for the purpose of attracting customers or supporters?" Does one person constitute a specific market segment?

C. Intellectual property cases outside of Texas

1. Patent infringement cases

a. Cases Finding No Coverage for Patent Infringement

According to commentators, the majority of courts have ruled that patent infringement claims are not covered under the advertising injury section of the policy. Bruce Telles, "Insurance Coverage for Intellectual Property Torts in Cyberspace," Mealey's Emerging Insurance Disputes (July 3, 1997) ("Policyholders have frequently, and almost always unsuccessfully, attempted to obtain coverage for suits alleging that they have infringed a third party's patents. Courts have for the most part rejected these efforts, with a majority holding that patent infringement is not an enumerated offense."). For example, in an unpublished opinion a Delaware Superior Court recently ruled that advertising injury coverage does not extend to coverage for patent infringement actions. *ABB Flakt, Inc., et al. v. National Fire Insurance Company of Pittsburgh*, 1998 WL 437137 (Del. Super. June 10, 1998). The court determined that the policyholder's actions neither "arose out of" nor "occurred in the course of" its advertising activities as required by the policies.

In the underlying case, Joy Technologies, Inc., one of Flakt's competitors developed a flue gas desulferization (FGD) system covered by a patent. Joy sued Flakt in 1989 for direct, inducing, and contributory patent infringement. A jury found in Joy's favor on all three counts, finding that Flakt directly infringed, contributed to the infringement, and induced infringement of the patent. Joy subsequently filed a second suit alleging Flakt adopted certain contracts from Combustion Engineering, Inc. and committed acts identical for which Flakt was found liable in the first suit. Flakt sought a defense and indemnity from its carriers, which denied coverage, and subsequently Flakt filed a declaratory judgment action.

The court entered summary judgment for the insurance carriers, finding that patent infringement did not fall within the enumerated offenses in the policies and that there was no causal connection between the patent infringement and the policyholder's advertising activities. The court also determined that "misappropriation" refers to the common law tort and not to conduct prohibited by statute and thus did not encompass patent infringement. This case was later affirmed by the Delaware Supreme Court , which agreed that the infringement for which the insured sought coverage did not arise out of or occur in the course of the insured's advertising activities. 731 A.2d 811 (Del. Sup. June 28, 1999).

District Judge Thelton Henderson of the Northern District of California likewise ruled in an unpublished opinion in *Doskocil, Inc. et al. v. Fireman's Fund Insurance Co., et al.,* 1999 WL 430755 (N.D. Cal. June 17, 1999), that the advertising injury provision of a Travelers' policy was not triggered because the patent infringement action made "no mention whatsoever of advertising activities" on the part of the policyholder. There was no evidence in the complaint demonstrating a causal connection between advertising activity and plaintiff's claims. It is interesting to note that the court refused to consider the policyholder's "ample extrinsic evidence of advertising activity" because of the eight corners rule.

Applying Texas law, which governed the action, Judge Henderson also determined that the continuing tort of patent infringement is not covered if the tortious activity begins before the inception of the policy. The plaintiff in the underlying action alleged that the policyholder began infringing his patent in the spring of 1997. The Travelers' policy covered the period from June 30, 1997 to June 30,1998. The court, therefore, reasoned that "even assuming that Dogloo became a covered entity under Doskocil's policy with Travelers and that the alleged offense is qualified as advertising injuries, there was no offense during the policy period here since Dogloo began making and selling allegedly infringing products before June 30, 1997."

The court in *Clark Manufacturing d/b/a Sundance Spas, et al. v. North Field Insurance Co.,* No. 97-56582 (9th Cir. 1998) similarly rejected coverage claims for patent infringement and inducement to infringe a patent and ruled that the claims made against the policyholder did not arise out of the insured's advertising activities, but rather out of the insured's alleged misappropriation and use of its trade secrets to manufacture and sell components patented by a competitor. According to the court, the competitor's alleged injury "has no causal connection to any advertising activities [because it occurred] independent and irrespective of any advertising" by the policyholder.

Furthermore, the court rejected "Clark's attempt to squeeze what is essentially a patent infringement case into the 'misappropriation of advertising ideas' offense category. . . . The 'misappropriation of an advertising idea' involves the 'wrongful taking of the manner in which another advertises its goods or services,' . . . [I]n this case, the facts do not indicate that there were 'advertising ideas' at issue." The court specifically rejected the policyholder's claims that the allegations of inducement to infringe a patent potentially fell within advertising injury coverage: "Thus, while Clark correctly notes that inducement itself can occur in the course 'advertising activity' this fact is irrelevant because it is not an 'advertising activity' that gives arise to a numerated offense within the policy."

b. Cases Finding Coverage for Patent Infringement Claims.

In *Everett Associates, Inc. v. Transcontinental Insurance Co., et al.,* ___ F. Supp. ___, 1999 WL 503835 (N.D. Cal. May 26, 1999), the court held that the phrase "misappropriation of advertising ideas or style of doing business" is ambiguous and could reasonably be construed by the policyholder to cover patent infringement claims. In addition, the court found there was a sufficient nexus between the policyholder's advertisement and the patent infringement claims asserted by Clark to establish a causal connection and to require the carrier to defend the action. According to the court,

> Plaintiffs argue that the addition of the 'offers to sell' language in Section 271 [of the Patent Act], along with claims against Everett in the Clark action based upon Everett's advertising of the allegedly infringing products, create a sufficient causal connection between the patent infringement and the advertising injury to invoke defendant Transcontinental's duty to defend. In addition, the 'offers to sell' language creates an objectively reasonably expectation on the part of the insured that the insured could be prosecuted for advertising injury in a claims for patent infringement. Transcontinental hotly disputes these contentions. However, for two reasons, the Court must agree with plaintiffs. First, the cases cited by Transcontinental which determine there is no duty to defend patent infringement claims indicate that the very reason those courts found no duty was because the Patent Act did not, at that time, include the 'offer to sell' provision that it now contains. Second, the court in the underlying Clark action, based upon the new language in the Patent Act, entertained the plaintiff's claims for patent infringement <u>based on Everett's advertising activity</u>. This alone is enough to demonstrate the required causal connection between Everett's advertising activities and the patent infringement claims. In addition, it indicates that the insured could have an objectively reasonably expectation that it could be prosecuted for advertising injury in a claim for patent infringement.

(emphasis in original). The court also rejected Transcontinental's argument that coverage is barred by the policy's "first publication" exclusion, noting that Transcontinental did not conduct an investigation before denying coverage and was not aware of the possible application of the exclusion at the time suit was tendered for defense.

In *Foundation for Blood Research v. St. Paul Marine & Fire Ins. Co.,*730 A. 2d 175, 180 (Me. 1999), the Supreme Judicial Court of Maine held that a commercial general insurer had a duty to defend a policyholder in an action alleging that the policyholder induced patent infringement. The policy provided coverage for advertising injury and personal injury coverage that included coverage for injuries resulting from "belittling the products of others." The court provided an example of an insured belittling the validity of a plaintiff's patent to third parties and the third parties afterwards attempting to infringe the plaintiff's patent as a potentially covered claim. The court refused to limit the meaning of "belittle" to the archaic tort of belittlement.

The court in *Elan Pharmaceutical Research Corp. v. Employers Insurance of Wausau, et al.*, 144 F.3d 1372 (11th Cir. 1998), held that an insurer was obligated to defend its policyholder in a suit alleging that the policyholder infringed a drug patent by selling a competing version of a drug patented by Pfizer. The panel found that the insured's dissemination of the information about its competing drug in trade journals and at presentations brought its conduct within the advertising activity requirement and that a causal connection existed between such advertising activity and the harm allegedly suffered by Pfizer. According to the court,

> In 1992, when Pfizer filed its complaint, it was an open question of federal patent law whether the subsequent dissemination of clinical studies and information developed for the purpose of obtaining FDA approval for a drug or medical device to deprived the defendant of the protections of Section 271 (e) (1) and therefore gave rise to an action of Section 271 (a). Under such a theory of liability, the dissemination of the data in a company's advertising would give rise to an action for patent infringement, because the dissemination would retroactively deprive the protected use of the patented drug to collect the data of its exemption. Construed this way, Pfizer's lawsuit provided the necessary causal connection between the alleged patent infringement and Elan's advertising activities, because without and until that activity took place the chemical studies would have been exempt.

c. Views of Commentators.

Commentators are divided on the issue of whether or not there is advertising injury coverage for patent infringement claims under the 1985 coverage form. David A. Gauntlett, a policyholder advocate, contends that patent infringement may fall within advertising injury coverage. Gauntlett, "The Case for 'Advertising Injury' Coverage of Intellectual Property Litigation," ABA Intellectual Property Law Section (August 2, 1998). Gauntlett's analysis is based on coverage for "privacy" that was eliminated by ISO's 1985 revisions. Gauntlett has since taken the position that the phrase "misappropriation of advertising ideas or style of doing business" contained in the post-1985 policy, but deleted by the 1998 revisions, is subject to a number of reasonable definitions, "some of which encompass patent infringement claims." Gauntlett, "Exposing Duplicity of Insurer Analysis of 'Advertising Injury' Offenses," Mealey's Emerging Insurance Disputes.

George B. Hall, an insurance company advocate, strongly disagrees that patent infringement claims of any nature are covered. Hall, "A Logical Approach to Advertising Injury Coverage," Mealey's Emerging Insurance Disputes (June 3, 1999) (citing *Gencor Industries, Inc. v. Wausau Underwriters Ins. Co.,* 857 F. Supp. 1560, 1564 (M.D. Fla. 1994)("It is nonsense to suppose that if the parties had intended the insurance policy in question to cover patent infringement claims the policy would explicitly cover infringement of 'copyright, title or slogan and then include patent infringement, sub silentio, in a different provision by reference to unauthorized taking of . . . [the] style of doing business.")).

2. Cases Outside of Texas Regarding Copyright, Trademark, And Service Mark Claims.

a. Cases finding coverage.

Courts are divided on the question of whether or not advertising injury coverage extends to cover claims of infringement of copyrights, trademarks, service marks. In *Advance Watch v. Kemper*, 99 F.3d 795 (6th Cir. 1996), the court found that coverage for "misappropriation of advertising ideas or style of doing business" extended only to the common law tort of misappropriation and did not extend to rights subject to "statutory systems of protecting intellectual property: copyright, patent, trademark/deception as to origin." However, *Lebas Fashion Imports of U.S.A. v. ITT Hartford Insurance Group*, 50 Cal. App.4th 548 (1996), reached the opposite conclusion, finding the coverage ambiguous and holding that trade dress and trademark infringement claims were potentially covered. *See also Zurich Ins. Co. v. Keller Music, Inc*., 998 F.2d 674 (9th Cir. 1993). Furthermore, in *Federal Insurance Co. and Great Northern Insurance Co. v. Microsoft Corp.* 1993 WL 371416 (W.D. Wash. April 14, 1993), order vacated by 1994 WL 510102, Microsoft obtained a defense of Apple's suit against it for copyright infringement based on Microsoft's Windows platform on the basis of allegations that Microsoft had infringed Apple's copyright by marketing, distributing, and licensing Windows.

In addition, the Idaho Supreme Court in *Doron Precision Systems, Inc. v. United States Fidelity & Guaranty Company*, 963 P.2d 363 (Idaho June 4, 1998), found a duty to defend on the part of USF&G in a copyright action. The court rejected USF&G's argument that the advertising injury provision did not cover copyright infringement unless the advertising itself constituted copyright infringement. According to the court,

> Doron's complaint alleged that Dinison violated Duron's copyrights regarding certain films and computer programs by copying such material, by placing the material on the market, by selling or giving away such material, and by showing in displaying such material. Although the allegations did not directly state that the copyright infringement occurred in the course of advertising, these allegations in the complaint, when read broadly, reveal a potential for liability under the insurance policy. Specifically, the allegations that Dinison showed and displayed the copyright and materials, and placed the materials 'on the market' gave rise to the potential that Dinison's copyright infringement activities were related to or connected with advertising. Where there is doubt as to whether the complaint sufficiently alleged advertising injury, USF&G must defend regardless of its potential defenses.

b. Viewpoints of Commentators.

Commentators and courts in other jurisdictions are divided on the issue of whether or not advertising injury coverage exists for trademark, copyright, or service mark infringement claims under the 1985 advertising injury coverage. Hall believes such claims are not covered, citing an attachment to a January 6, 1998 ISO circular, which states:

> Infringement of trademark was never intended to be covered under Personal and Advertising Injury Liability Coverage, and deleting the term 'title' [from the infringement of copyright, title, or slogan offense] clarifies that original intent. The phrase 'infringement of copyright' is intended to encompass publication titles such as title of song, title of book, etc.

Monin believes one of ISO's goals in revising the coverage was to "eliminate coverage for trademark infringement." However, he concludes that "Although coverage for 'trademark infringement' may now be more clearly not covered, undoubtedly insureds in many future cases will seek to find a 'copyright, trade dress or slogan' hook."

With regard to copyright infringement, commentators note that while the insured's advertising activities must still proximately cause the injuries sustained by the copyright holder, the courts have accepted a "relatively slim connection" at least for purposes of requiring a defense. Martin C. Loesch and David M. Brenner, "Coverage on the Technology Frontier," presented at the ABA's Committee on Insurance Coverage seminar in Tucson, March 14-15, 1997.

4. Cases Outside of Texas Regarding Unfair Competition Claims.

In *Western States Insurance Co., et al. v. Wisconsin Whole Sale Tire, Inc., et al.*, 184 F.3d 699 (7th Cir. 1998), the court found that a complaint filed against an insured accused of unfair competition through misappropriation of customer lists did not trigger defense or indemnity obligations under the personal injury or advertising injury sections of the policy.

The court concluded there was an insufficient nexus between the allegations of business disparagement and unfair competition and the policyholder's "advertising activities." According to the court,

> Wisconsin Tire [relies] on paragraph c, asserting that mita accused it of "piracy" and "unfair competition." This is a sensible characterization of mita's complaint—but of course the "advertising injury" clause does not cover all piracy and unfair competition. It insures only those incidents of piracy and competition that arise out of Wisconsin Tire's "advertising activities of [its] own goods, products or services."

The court also distinguished between "advertising" and "marketing" and reasoned that if advertising were found to be equivalent to marketing "then the work of a salesman in calling up customers is 'advertising,' an unnatural use of that word, and any effort to sell that involves one of the four listed ‘offenses’ is covered.” The court found that such an interpretation would not be sensible and declined to “torture ordinary words until they confess to ambiguity.”

The court also relied on the *Diversified Investments Corp. v. Regent Ins. Co.,* 226 Wis. 2d 563, 596 N.W.2d 502, 1999 Wis. App. Lexis 399 (April 8, 1999) opinion, in which the court held that even though the plaintiff’s damages in the underlying action arose out of the insured’s advertisement of bicycles that copied its rivals protected design, there was no “advertising injury” coverage because “there must be something wrongful about the advertising.” To hold otherwise, according to the Seventh Circuit, “a fairly narrow clause [would] cover almost every injury connected with a business operation.” Justice Rovner strongly disagreed in her dissent. She concluded that the “advertising injury” provision applied, reasoning that the complaint explicitly alleged that Wisconsin Tire damaged Mita’s reputation through, among other methods, “print advertising.”

In *Comsat Corp. v. St. Paul Mercury Ins. Co.,* D. Minn. Civil Action No. 97-2236, Senior Judge Alsop ruled on March 6, 1998 that “St. Paul owed Comsat a duty to defend for claims of commercial disparagement under its express personal injury coverage for making known . . . material that belittles products.” The court found that factual claims within the pleadings required the carrier to defend, even though no express cause of actions were plead for commercial disparagement or trade libel.

In *A-Mark Financial Corp. v. CIGNA Property & Casualty Co.--Ins. Co. of North America*, 40 Cal. Rptr.2d 808 (Cal. Ct. App. 1995), the court found there was not a duty to defend an insured against claims of unfair competition made under the Idaho Consumer Protection Act. The cases cited above arose under the 1985 coverage that provided coverage for “misappropriation of advertising ideas or style of doing business.” This coverage was eliminated by ISO’s 1998 revisions and replaced with two types coverage, providing coverage for: misappropriation of advertising ideas and coverage for trade dress infringement occurring in the insured’s advertisement.

D. The Impact of ISO's 1998 Revisions to "Advertising Injury" Coverage

Under the most recent CGL policy approved in Texas, “advertising injury” is generally defined as an injury “caused by an offense committed in the course of advertising your goods, products or services; but only if the offense was committed in the ‘coverage territory’ during the policy period.” “Advertising injury” is generally defined under Section V of the typical CGL policy as

> Injury arising out of one or more of the following offenses:
>
> (1) Oral 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;

(2) Oral or written publication of material that violates a person's right of privacy;

(3) Misappropriation of advertising ideas or style of doing business; or

(4) Infringement of copyright, title or slogan.

Section 2 of Coverage "B" generally provides that the insurance does not apply to "advertising injury"

(1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;

(2) Arising out of an oral or written publication of material whose first publication took place before the beginning of the policy period;

(3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured;

(4) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;

(5) Arising out of breach of contract, other than misappropriation of advertising ideas under an implied contract;

(6) Arising out of the failure of goods, products or services to conform with advertised quality or performance;

(7) Arising out of the wrong description of the price of goods, products or services; and

(8) Arising out of an offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

ISO proposed revisions to the advertising injury coverage in 1998, and those revisions have been adopted by every state except Texas and Louisiana.[19] ISO's "Notice to Policyholders"

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[19] Lawrence O. Monin provides an excellent discussion of ISO's revisions in his article entitled "ISO Advertising and Personal Injury 1998 Revisions: Major Surgery or Just a Band-Aid

clarifies that the revisions are not intended to narrow the scope of coverage:

> [T]he changes in the Personal and Advertising injury in these coverage forms result in broadening the coverage in certain respects and may, in certain states, result in a decrease in other respects. The impact of the changes in the revision are very difficult to quantify and may differ in different states. Taken as a whole, the revised Personal Injury and Advertising Injury Coverage is at least equal to, if not broader than, that which the current coverage provides.

A comprehensive discussion of all of ISO's revisions is beyond the scope of this Article and the reader is referred to Laurence Monin's article on this subject for further information. However, two significant changes to the form should be noted.

First, ISO has included, for the first time, a definition of "advertisement," which is defined as "a notice that is broadcast or published in the general public or specific market segments about your goods, products, or services for the purpose of attracting customers or supporters." This definition may eliminate confusion in the courts regarding whether or not advertising is equivalent to marketing and whether or not statements by sales persons constitute advertising. In other words, the intent of defining the term "advertisement" appears to be to restrict coverage.

Second, coverage for "misappropriation of advertising ideas or style of doing business" has been eliminated and replaced with two coverages for "use of another's advertising ideas in your 'advertisement'" and for infringing upon another's "trade dress" in "your 'advertisement.'" "Trade dress" is not defined and may be construed broadly. For example, in the *Two Pesos* litigation, the jury was instructed that "[T]rade dress is the total image of the business. Taco Cabana's trade dress may include the shape and general appearance of the exterior of the restaurant, the identifying sign, the interior kitchen floor plan, the decor, the menu, the equipment used to serve food, the servers' uniforms and other features reflecting on the total image of the restaurant." *Two Pesos, Inc. v. Taco Cabana, Inc.,* 505 U.S. 763, 764 n.l (1992). Monin notes that ISO has described trade dress as the "totality of elements in which a product or service is packaged or presented."

III. NEW IP LIABILITY COVERAGES

Specialized intellectual property policies are being offered that may provide insurance coverage to defend or indemnify against techno tort claims. For example, patent infringement

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Fix?," published in Mealey's Emerging Insurance Disputes (August 19, 1999). Monin concludes that while the revisions are "positive ones, and, in particular, help restore the prior 'advertising injury' coverage part to its apparent original intent," "time will likely demonstrate that the 1998 revisions are just one more band-aid attempt to fix a fundamentally flawed coverage."

liability policies are being sold that provide a defense to both damages and injunctive actions for covered patent infringement and may insure the cost of asserting counterclaims. To be covered, the policyholder may be required to conduct an infringement search and obtain an opinion of non-infringement from a patent attorney before the inception of the policy or the first use/manufacture/distribution of the infringing product. Intellectual property infringement abatement policies are also now being offered that indemnify policyholders for their legal fees and costs in suing to stop alleged infringement of covered property. Coverage also may be available for intellectual property liabilities outside of the advertising injury context.

A. Potential E&O Coverage.

Unlike CGL policies, E&O policies are not based on standardized ISO forms, so there is very little standardization of forms. Assuming that the insured's activities qualify as "insured services," the policy may respond to claims that the insured committed an error or omission in the course of its activities. Some E&O carriers also include coverage for errors or omissions that result in intellectual property litigation, including copyright litigation. There are very few reported cases in this area involving E&O coverage claims.

Technology Errors and Omissions coverage, according to Loesch and Brenner, also may be available to respond to claims for consequential damages that result from error, omission, negligent act or breach of warranty where there is no bodily injury or property damage. Under such coverage, losses must be caused by a “manufacturing or performance error.” Such errors are defined as errors or omissions in the “design, manufacturing, labeling, packaging, distribution or instructions for use of” the policyholder’s work or manufactured product. As Loesch and Brenner note, “most technology errors and omissions policy exclude personal injury and bodily injury claims. Losses based on physical injury to tangible property will not be covered; they fall under the CGL rubric . . . [I]ntellectual property violations are also not covered.” Furthermore, “the world of electronic coding of information on disk drives, floppies, and computer tape poses a substantial challenge to old concepts of ‘tangible’ and ‘intangible’ property. As matters stand, courts have been hostile to coverage for pure data loss, but receptive to any situation which ties the data to damage to hardware in some way.”

B. Media Liability Policies.

These policies are generally designed to protect publishers, broadcasters, advertisers, and advertising agencies. Generally, these policies do not provide coverage errors or omissions in the course of the insured's business. However, endorsements may be added that would provide coverage for errors or omissions contained in the insured's published content. Coverage may also be provided for covered perils that occur in the process of disseminating information via a company's website, home page, or through the publication of online information.

C. D&O Policies.

Coverage may exist for directors and officers if the company is sued for allegedly violating a copyright or trade secret by posting materials on the internet. *Fight Against Coercive Tactics Network, Inc. v. Coregis Ins. Co.,* No. 96-K-166 (D. Colo. 1996).

D. Intellectual Property Policies.

"Offensive" and "defensive" intellectual property policies have been developed to protect the intellectual property rights of the insured. It should be noted that "offensive" or "infringement abatement" policies have not been approved and may not be sold in New York. Typically, infringement abatement policies cover 75-80% of the costs of prosecuting an action to abate the infringement of the insured's intellectual property and is designed to protect insureds who otherwise would not have the financial capacity to bring such a suit to a conclusion. These policies may also provide coverage in the event a counterclaim is asserted against the insured.

E. Excess and Umbrella Policies.

A company with substantial liability exposure through its online activities should consider purchasing an excess or umbrella policy that may provide significant additional insurance protection. Such coverage would provide insurance above the policyholder's primary limits and oftentimes is a relatively inexpensive means of increasing the limits of insurance significantly.

F. First-Party Coverages.

Insurance coverage is now being offered to cover lost data and network downtime. For example, INSUREtrust.com provides “Internet/Network Computer Liability Coverage” for coverage of claims arising out of a “Network Computer Act,” such as intrusion into a network or a “Multimedia Act,” such as copyright and trademark infringement occurring in the course of “Network Computer Activity.” “Digital Asset Protection” provides first-party coverage applicable to (1) “Networked Computer Theft,” such as loss of “money” or “securities”; (2) damage to networked assets (such as “corruption” of proprietary data due to “unauthorized access” or “computer virus”); or (3) loss of “business income” and “additional expense” from business disruption due to a “denial of service attack,” “unauthorized access” or “computer virus.” “Network Extortion and Ransom” provides first-party coverage applicable to (1) the wrongful takeover of a system, (2) the alteration of passwords, or the alteration of security schemes causing loss of control of computer system, (3) expenses resulting from extortion threats, including negotiators, public relations consultants, loan interest, fees to decrypt or replace electronic data, and rewards. “Public Key Infrastructure (PKI) Policies” include “Network Computer Liability Policies,” “Digital Certificate Warranty Liability Policies,” and “Digital Certificate Management Liability Policies.”

IV. COVERAGE FOR LOSSES DUE TO NETWORK DOWNTIME, CORRUPTION OR LOSS OF DATA, HACKERS, AND OTHER TYPES OF LOSSES

Under Coverage "A" of the standard CGL policy, coverage is available for "property damage," generally defined as "Physical injury to tangible property, including all resulting loss of use of that property" as well as "loss of use of tangible property that is not physically injured." It is an open question in Texas whether or not loss of computer data would constitute "property damage" under a CGL policy. A second unresolved issue is whether or not the temporary inability to use computer data would qualify as "loss of use." The Minnesota State Court of Appeals has held that a computer tape, togther with the information contained on the tape, constitutes tangible property for insurance coverage purposes under a CGL policy. *Retail Systems, Inc. v. CNA Ins. Co.*, 469 N.W.2d 735, 738 (Minn. Ct. App. 1991). The same court, however, later held that the data contained or stored on a computer tape is not tangible property. *St. Paul Fire & Marine Ins. Co. v. National Computer Systems, Inc*., 490 N.W.2d 626 (Minn. Ct. App. 1992).

Another important unresolved issue is whether or not software constitutes a "product" for purposes of CGL policies that exclude liabilities resulting from "your work" or "your product". For purposes of the UCC, software has been found to be both a service and a good. Software is a service when it is custom designed and installed for a unique use. Software is a product if it has been mass produced and distributed widely. *RRX Industries, Inc. v. Lab Con, Inc*., 772 F.2d 543 (9th Cir. 1985) and *Advent Systems Ltd. v. Unisys Corporation*, 925 F.2d 670 (3rd Cir. 1991).

In *Seagate Technologies, Inc. v. St. Paul Fire & Marine Insurance Company, et al.*, 11 F. Supp. 1150 (N.D. Cal. May 15, 1998), the court ruled that an umbrella liability insurer need not defend the maker of allegedly defective computer parts because there was no covered "physical injury." The plaintiff in the underlying action sought damages for the failure of the insured's disk drive to perform as promised, but there was no suggestion in the plaintiff's complaint that any damage resulted to any other component from the alleged defects in the disk drives. According to the court, "as a general matter, the risk of replacing or repairing a defective product is considered a commercial risk which is not passed on to a liability insurer. . . . This rule is designed to prevent liability insurance from serving as a warrantor or a guarantor of an insured's product." The court concluded that it "must follow the rule [that] 'physical incorporation of a defective product into another does not constitute property damage unless there is physical harm to the whole.'"

V. INSURANCE COVERAGE CASES RELATING TO THE RECOVERY OF Y2K COMPLIANCE COSTS

Xerox, GTE, and Unisys recently filed lawsuits against their respective insurance carriers seeking to recover their past and future Y2K compliance costs. *See* Mealey's Emerging Insurance Disputes (August 5, 1999) regarding the Xerox and GTE suits, and Mealey's Emerging Insurance Disputes (August 19, 1999) regarding the Unisys suit.

The policyholders contend their Y2K compliance costs are covered under the "sue and labor" clauses of their respective property policies. These clauses generally provide as follows:

> [I]n case of actual or imminent loss or damage by a peril insured against, it shall without prejudice to this insurance, be lawful and necessary for the insured to . . . sue, labor, and travel, in and about the defense, the safeguard, and the recovery of the property or any part of the property insured.

The policies generally require the carriers to "contribute to the expenses so incurred according to the rate and quantity of the sum herein insured."

GTE expects to spend $400 million in year 2000 compliance costs, according to documents filed with the S.E.C. Xerox expects to spend $183 million in 1999 on Y2K costs. On July 15, a consortium of thirty three property/casualty insurers and reinsurers held a round table conference in Washington D.C. in reaction to the actions brought by GTE, Xerox, and Unisys. The insurers raised three arguments against such claims: (1) "remediation expenses are different kind from the types of expenses that sue and labor clauses are intended to cover"; (2) the expenses were not incurred for the primary purpose of benefitting the insurer but rather to meet industry standards, protect their company's reputation, and maintain market share; and (3) allowing such claims would allegedly "transfer the ordinary business costs of remediating non-compliant software to insurers and ultimately to the reserves that insurers maintain to protect all policyholders." *See* "Insurers' Y2K Roundtable Sees No Coverage Under 'Sue and Labor' Clauses," Mealey's Emerging Insurance Disputes (August 5, 1999). The complaints filed in the Unisys, GTE, and Xerox actions are available at www.2000law.com.

VI. POTENTIAL COVERAGE FOR DEFAMATORY/LIBELOUS STATEMENTS IN CYBER-SPACE

Coverage "B" provides coverage for damages the policyholder becomes legally obligated to pay because of "personal injury" to which the insurance applies. "Personal injury" is defined to mean "injury, other than 'bodily injury,'" arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;
b. Malicious prosecution;
c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies by or on behalf of its owner, landlord, or lessor;
d. Oral 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; or
e. Oral or written publication

An untested question in Texas is whether or not online service providers should be classified as publishers, distributors, or common carriers for purposes of assigning liability for defamatory statements transmitted by users of their services. In *Cubby, Inc. v. CompuServe, Inc*., 776 F. Supp. 135 (S.D.N.Y. 1991), the court held CompuServe to the standard of a distributor. The plaintiff sought to hold CompuServe, a comprehensive service provider, liable for defamatory statements contained in a newsletter that CompuServe made available on its electronic journalism forum. An outside publisher was responsible for supplying the newsletter to an independent company, Cameron Communications, Inc., which decided to upload the newsletter and include it in the forum. CompuServe did not review the contents of the newsletter before it was made available to the subscribers.

The court found that CompuServe exercised virtually no editorial control of the content of statements transmitted by its system and therefore classified it as a distributor. The court noted that "while CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents." The court held, accordingly, that CompuServe could not be held liable for the defamatory statements contained in the newsletter unless the plaintiff could show that it knew or should have known of the statement's defamatory nature.

In *Stratton Oakmont., Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), by contrast, the court classified Prodigy, a comprehensive service provider similar to CompuServe, as a publisher for purposes of liability for defamatory statements posted by users on Prodigy's Money Talk" bulletin board. The court found that Prodigy held itself out as exercising editorial control over its network and did in fact exert editorial control akin to a newspaper publisher or television network. The court focused on the following indicia of Prodigy's editorial control: (1) it issued content guidelines that directed users to refrain from posting "insulting" messages or messages that "harass other members or are deemed to be in bad taste or grossly repugnant to community standards"; (2) it used software designed automatically to screen all posting for offensive language; (3) it instituted "board leaders" to monitor its bulletin boards; and (4) it enabled board leaders to delete undesirable messages by using "an emergency delete function." Thus, because Prodigy had in fact taken steps to sensor the material it transmitted, the court treated it as a publisher.

In response to the online service providers' concerns raised by the *Stratton Oakmont* case, Congress included in the Telecommunications Act of 1996 a provision protecting "Good Samaritan" blocking and screening of offensive material. According to the Act, "no provider or publisher of an interactive computer service shall be treated a the publisher or speaker of any information provided by another information content provider." Furthermore, "no provider or user of an interactive computer service shall be held liable on account of--a. any action voluntarily taken in good faith to restrict access to or availability of material that the provider or users considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected. . . ."

As pointed out by Martin C. Loesch and David M. Brenner, authors of "Coverage on the Technology Frontier," presented at the ABA's Committee on Insurance Coverage in Tucson on

March 14-15, 1997, the exception of liability created by the Telecommunications Act is a narrow one and leaves open the question or whether or not OSPs who exercise control over the content of messages posted to a bulletin board may still be held to the standard of publishers where the editorial control is not undertaken for the purpose of restricting online access to obscenity and other "objectionable material," but for other purposes, such as insuring topicality. According to Loesch and Brenner, commentators have for the most part argued against treating online service providers or bulletin board operators as publishers. Rather, they have suggested that a plaintiff should be required to demonstrate that the provider or operator knew of the material's defamatory character before imposing liability. *See also* Loftis E. Becker, Jr., "The Liability of Computer Bulletin Board Operators for Defamation Posted by Others," 22 Connecticut Law Review 203, 220-230 (1989).

CONCLUSION

This article discusses only a few of the many untested coverage questions in a complex and evolving area of the law. The internet, e-commerce, and technology are developing and changing at an incredibly rapid pace. New insurance policies are being offered and being developed to enable participants in the information economy to manage the inherent risks that are present in a world of conflicting intellectual property rights and changing economic systems. While traditional policies are being revised in significant ways, unfortunately in many cases the standard insurance policies do not provide clear answers to critical questions, such as: (1) whether or not a competitor's claims for trade mark or trade dress infringement are covered; (2) whether or not a policyholder is entitled to be reimbursed for its reasonable costs of preparing for Y2K events; (3) whether or not marketing statements by an insured that cause a competitor to infringe the patent of a third party are covered by the CGL policy; (4) whether or not loss of computer data constitutes as tangible injury to property; and (5) whether or not network downtime or computer crashes and damages following from such events are covered by liability or first-party insurance policies. Given the complexities of the coverage issues in this developing area of insurance law, policyholders and insurance carriers will need to proceed with an abundance of caution and foresight.