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## Insurance Coverage For Lanham Act Claims Under Section B Of Standard CGL Policies

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# Commentary

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*[Editor's Note: James M. Westerlind and Krista M. Ellis are senior associates in the New York office of Arent Fox LLP who focus on resolving insurance and reinsurance disputes. Any commentary or opinions do not reflect the opinions of Arent Fox LLP. Copyright © 2011 by James M. Westerlind and Krista M. Ellis. Responses are welcome.]*

### Introduction

They say that good fences make good neighbors. Clearly marked boundaries tell property owners exactly where their properties begin and end, leaving little to argue over in disputes. In the same way, good definitions and exclusions, with clear language setting forth what is and is not covered, make good insurance policies, leaving little to litigate over in court. Clearly worded liability policies enable an insured served with a lawsuit to determine whether the claims are covered under its policy.

Over the past thirty years, Insurance Services Office, Inc. ("ISO")<sup>2</sup> has issued and re-issued various commercial general liability ("CGL") policy forms which provide limited coverage under Section B for claims alleging trademark and trade dress infringement under the Lanham Act, Title 15 of the U.S. Code. While many companies assume that their CGL policy will provide defense and indemnity coverage for trademark and trade dress infringement claims made against them, they are often surprised to learn (often too late) that CGL policies were designed to provide limited coverage for such claims. To add to the confusion, different courts have interpreted the relevant policy language in these CGL forms in different ways.

The plight of a fence manufacturer in Illinois is an example. In a 2003 Northern District of Illinois case, fence manufacturer StunFence, Inc. was accused of infringing upon another company's intellectual property.<sup>3</sup> Another fence manufacturer, Gallagher Security USA, alleged that StunFence misappropriated its advertising and promotion claims when it: (1) installed fence systems made with non-Gallagher materials and sold them under Gallagher's registered trademark "Power Fence;" (2) put its own StunFence signs on Gallagher's products; (3) represented in industry periodicals that it developed, introduced and owned the Power Fence and its related technology; and (4) asserted on its website that its product was "the world's only virtually false alarm free outdoor security product"—the same marketing claims that Gallagher made with reference to its own product. StunFence tendered the lawsuit to its CGL carrier with a request that the insurer provide it with a defense and indemnify it if the plaintiff prevailed. The insurance company, however, contended that the policy did not cover trademark infringements. StunFence disagreed and coverage litigation ensued. The federal court ultimately ruled in favor of StunFence, finding that the insurer had a duty to defend because some of the allegations were within the potential of the policy's coverage for injuries arising from the "use of another's advertising idea in your 'advertising.'"<sup>4</sup> However, the outcome of this case could have been different depending on which version of the ISO form policy was used, which state law governed the dispute, and which state the court sat in.

Why the potential for different results? Today, with every business advertising its products on the Internet, and every competitor ready to sue in a heartbeat, wouldn't every business expect such claims to be covered under its CGL policy?

This paper will explore the evolution of the CGL policy forms and the varying ways that they have been interpreted by different jurisdictions. Section I reviews the history of the ISO CGL forms. Section II analyzes ISO's 1986 CGL policy form and the commonly litigated issue of whether damages arising from Lanham Act claims are covered under Section B of that form. Section III discusses the changes made in ISO's 1998 CGL form and how courts have interpreted those changes when determining whether there is coverage under Section B for trademark and trade dress infringement claims. Section IV finds a commonality between ISO's 1986 and 1998 CGL policy forms.

**I. History Of ISO CGL Forms**

The evolution of ISO's CGL policy forms sheds some light on why the courts have not uniformly interpreted the policy language with respect to coverage for Lanham Act claims. In the 1970s, damages arising from advertising activities were not covered under the standard CGL policy. In 1981, "Advertising Injury" coverage was first offered in a Broad Form Endorsement to the CGL form, which contained the following definition:

Advertising Injury means injury arising out of an offense committed during the policy period occurring in the course of the named insured's advertising activities if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

The Endorsement also included the following relevant exclusions:

(B) This insurance does not apply:

\* \* \*

- (6) to *advertising injury* arising out of:
  - (a) failure of performance of contract, but this exclusion does

not apply to the unauthorized appropriation of ideas based upon alleged breach of implied contract, or

- (b) infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods, products, or services sold, offered for sale or advertised, or
  - (c) incorrect description or mistake in advertised price of goods, products or services sold, offered for sale or advertised;
- (7) with respect to *advertising injury*:
- (a) to any *insured* in the business of advertising, broadcasting, publishing or telecasting, or
  - (b) to any injury arising out of any act committed by the insured with actual malice.

In 1986, "advertising injury" liability coverage was moved into Section B of the standard CGL policy along with "personal injury." "Advertising injury" was defined as follows:

Advertising Injury means injury arising out of one or more of the following offenses:

- a. 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;
- b. Oral or written publication of material that violates a person's right of privacy;
- c. **Misappropriation of advertising ideas or style of doing business; or**
- d. **Infringement of copyright, title or slogan.**

(Emphasis added). The following exclusions also applied:

This insurance does not apply to:

\* \* \*

- (b) "Advertising injury" arising out of:
  - (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract;
  - (2) The failure of goods, products or services to conform with advertised quality or performance;
  - (3) The wrong description of the price of goods, products or services; or
  - (4) An offense committed by an insured whose business is advertising, broadcasting, publication or telecasting.

The mid-80s revision made a number of changes, some remarkable and some not. While the word "defamation" was deleted, coverage for defamation was certainly included within subdivision a. of the definition of "advertising injury." Likewise, "piracy," defined in *Merriam-Webster's Collegiate Dictionary* (10<sup>th</sup> ed. 1997) in relevant part as "the unauthorized use of another's production, invention, or conception esp. in infringement of a copyright," and *Black's Law Dictionary* (8<sup>th</sup> ed. 1999) as "[t]he unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law," appears to have been covered, at least to a limited degree, by subdivision d. of the definition.

The absence of the word "unfair competition," however, appears to have been significant. The federal unfair competition statute is 15 U.S.C. § 1125(a) (section 43(a) of the Lanham Act). The term "unfair competition" has notably been difficult to define<sup>5</sup> and under

the Lanham Act refers to a broad range of individual intellectual property tort theories. Its deletion in the mid-80s revision substantially limited the scope of coverage available under the resulting definition of "advertising injury."

The 1986 form also deleted the exclusion for "infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods, products, or services sold, offered for sale or advertised." While at first glance this may indicate an intention to broaden coverage to include trademark, service mark and trade name claims, this does not appear to be the case in light of the simultaneous deletion of the words "unfair competition" from the definition of "advertising injury." Once "unfair competition" was eliminated from coverage, the exclusion for trademark, service mark and trade names became superfluous.<sup>6</sup>

The vagueness of subdivisions c. (misappropriation of advertising ideas or style of doing business) and d. (infringement of copyright, title or slogan) has resulted in considerable litigation and competing notions by the courts as to which Lanham Act claims, if any, are included within the coverage provided by this definition of "advertising injury."<sup>7</sup>

In 1998, ISO again revised the CGL policy. Section B now covered "personal and advertising injury," which was defined, in pertinent part, as:

- (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;
- (e) Oral or written publication of material that violates a person's right of privacy;
- (f) **The use of another's advertising idea in your "advertisement"; or**
- (g) **Infringing upon another's copyright, trade dress or slogan in your "advertisement."**

(Emphasis added). The following relevant exclusions also were added:

This insurance does not apply to:

- (a) "Personal or advertising injury":
- (1) Caused by or at the direction of the insured with knowledge that the act would violate the rights of another and would inflict "personal and advertising injury";
  - (2) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
  - (3) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
- \* \* \*
- (6) Arising out of breach of contract, except an implied contract to use another's advertising idea in your "advertisement";
  - (7) Arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement";
  - (8) Arising out of the wrong description of the price of goods, products or services stated in your "advertisement";
  - (9) Committed by an insured whose business is advertising, broadcasting, publishing or telecasting.

In addition, "advertisement" was separately defined in ISO's 1998 CGL policy form as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." This definition, while broad, requires a "notice . . . for the purpose of attracting customers or supporters," which may limit coverage under certain circumstances.<sup>8</sup>

One important change made in 1998 was the substitution of the word "trade dress" for "title" in the definition of "advertising injury." This may indicate an intent to limit the scope of coverage available, as many courts have recognized the term "title" to include trademark infringement claims. While the term "trademark" has been "employed 'in a broad and generic sense to denote the entire field of trademarks, service marks, trade names, and trade dress,' the term 'trade dress' alone denotes only a subset of trademark law."<sup>9</sup>

Another notable difference is the word "use" in the phrase "[t]he use of another's advertising idea" in subdivision (f) of the 1998 CGL policy form, as opposed to the word "misappropriation" in the phrase "misappropriation of advertising ideas" in subdivision (c) of the earlier CGL policy form. As discussed in greater detail below, some courts interpreting the pre-1998 CGL policy form have limited coverage based on a narrow reading of the word "misappropriation."<sup>10</sup> The word "use," however, appears to broaden the scope of coverage, or, at the very least, render the disagreement among the courts as to the meaning of the word "misappropriation" moot.<sup>11</sup>

ISO made further revisions with the release of its 2001 CGL policy form. It added certain Internet activity to the definition of "advertisement," including "[m]aterial placed on the Internet or on similar electronic means of communication" and "[r]egarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters."

The 2001 revisions mainly consisted of new and broad exclusions. First, advertising injuries "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights" were excluded. However, the exclusion does not apply to "infringement, in your 'advertisement,' of copyright, trade dress or slogan." Second, advertising injury

coverage for website designers and Internet search, access, content, or service providers was excluded. Third, advertising injuries “arising out of the unauthorized use of another’s name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another’s potential customers” were excluded. Finally, advertising injury arising out of an electronic bulletin board or chat room that the policyholder hosts, owns, or over which he exercises control was excluded.<sup>12</sup>

## II. Do Lanham Act Violations Constitute Advertising Injuries Under The Pre-1998 CGL Policy Form?

In order to find coverage under the “advertising injury” section of a CGL policy, the following must be satisfied: (1) the underlying complaint alleges facts constituting one of the enumerated “advertising injury” offenses; (2) there is a causal connection between the alleged advertising activities and the damages alleged; and (3) no exclusions apply to bar coverage. This article will focus on how courts have interpreted item (1),<sup>13</sup> whether trademark or trade dress claims fall within the ambit of “misappropriation of advertising ideas or style of doing business” or “infringement of copyright, title or slogan.”

### A. Does Trademark or Trade Dress Infringement Constitute Misappropriation of Advertising Ideas or Style of Doing Business?

One of the most commonly litigated issues involves a single phrase in the 1986 CGL policy: “misappropriation of advertising ideas or style of doing business.” There is presently a split among the federal courts as to whether federal trademark or trade dress claims fall within this clause. The majority of federal courts have held that trademark and trade dress infringement inherently involve misappropriating an advertising injury.<sup>14</sup> A minority of courts, notably the Fifth, Sixth, and Eighth Circuits, have held that trademark and trade dress infringement do not fall under this umbrella.<sup>15</sup> Other courts have taken a middle-of-the-road approach, finding that trademark/trade dress infringement claims can involve advertising injury depending on the circumstances of the case.<sup>16</sup>

The courts have generally taken one of two different paths in concluding that trademark and trade dress infringement do not fall within the phrase

“misappropriation of advertising ideas or style of doing business.” One method focuses on interpreting the word “misappropriate.” The Sixth Circuit, in *Advance Watch*, held that “misappropriation of advertising ideas or style of doing business” does not include trademark or trade dress infringement.<sup>17</sup> The court utilized the common law definition of the term “misappropriation,” which does not include the unauthorized taking or use of interests eligible for protection under statutory or common law trademark.<sup>18</sup> In addition, the court noted that trademark or trade dress were not included among the offenses contained in the definition of “advertising injury” in the policy.<sup>19</sup>

Whereas the Sixth Circuit focused on the meaning of “misappropriate,” the Fifth Circuit, in *Sports Supply*, focused on the meaning of “advertising idea.”<sup>20</sup> Interpreting Texas law, the Fifth Circuit said that advertising refers to “a device for the solicitation of business.” Thus, the Fifth Circuit concluded that trademark infringement by itself, even under the “broadest reading” of the phrase “misappropriation of advertising ideas,” does not fall within the meaning of this phrase.<sup>21</sup>

Most courts find, however, that trademark and trade dress infringement fall within the phrase “misappropriation of advertising ideas or style of doing business.” Instead of interpreting the term “misappropriate” to coincide with the common law definition, the majority of courts use the dictionary definition, finding that the word is broad enough to include trademark and trade dress infringement, as well as misappropriation of trade secrets.<sup>22</sup> According to these courts, this is the plain meaning that the insured would use.<sup>23</sup> Some courts have also given the phrase “advertising idea” a looser application, holding that trademark infringement may implicate the use of advertising ideas.<sup>24</sup>

A number of courts have also determined that trademark, service mark, and trade dress claims fall within the concept of “style of doing business.”<sup>25</sup> A trademark is defined as “any word, name, symbol, or device, or any combination thereof” used by a person “to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”<sup>26</sup> A service mark is “any word, name, symbol, or device, or any combination thereof” used by a person “to identify and distinguish the services of one person, including a unique service, from the services of

others and to indicate the source of the services, even if that source is unknown.”<sup>27</sup> Trade dress involves the total image of a product and may include features such as shape, color or color combinations, texture, graphics, or even particular sales techniques, and is most frequently used to indicate the packaging or labeling of goods, but may also include the design of a product itself.<sup>28</sup> All of these concepts relate to efforts made by a manufacturer or service provider to protect its product or service. Since the phrase “style of doing business,” as used in the CGL policy, refers to a company’s “comprehensive manner of operating its business,”<sup>29</sup> it is certainly arguable that such claims would fall within this definition of “advertising injury.”<sup>30</sup>

### **B. Does Trademark or Trade Dress Infringement Constitute Infringement of Copyright, Title, or Slogan?**

If the insured fails to obtain coverage by arguing that his trademark infringement constitutes a “misappropriation of advertising ideas or style of doing business,” there is another way for it to win. The 1986 CGL policy form defines advertising injury either as the “misappropriation of advertising ideas or style of doing business” or as an “infringement of copyright, title or slogan.” Since infringement of copyright is a common cause of action that expressly falls within the definition of “advertising injury,” there is no doubt that this claim would be covered under a standard CGL policy if the causation requirement has been satisfied. Whether a trademark claim falls within the meaning of “title” or “slogan,” however, requires a bit more analysis. “Title” and “slogan” are not defined in the 1986 CGL policy form. Thus, the courts have been forced to interpret the meaning of these terms.

In *J.A. Brundage Plumbing*, the court relied upon *Black’s Law Dictionary* and a prominent intellectual property treatise to conclude that trademark or trade name infringement falls within the definition of “title” or “slogan.”<sup>31</sup> The Sixth Circuit, however, in *Sholodge, Inc. v. Travelers Indemnity Co. of Illinois*, concluded that the word “title” in the phrase “infringement of copyright, title or slogan” unambiguously referred only “to the non-copyrightable title of a book, film, or other literary or artistic work.”<sup>32</sup> The Seventh Circuit, in *Charter Oak Fire Ins. Co. v. Hedeem & Cos.*, has rejected *Sholodge*, finding that the “infringement of . . . title”

language in a CGL policy may be broad enough to include an infringement of trademark claim.<sup>33</sup>

In any event, if the underlying plaintiff does not have an ownership interest in, or exclusive right to use, the copyright, title or slogan, there may be no coverage because there is no alleged “infringement.”<sup>34</sup> Moreover, other courts have found that claims of misappropriation of trade secrets, including customer lists, fall within the meaning of the phrase “infringement of title,” relying on the reasonable expectations of the insured.<sup>35</sup>

Thus, while the focus appears to be more definitional rather than conceptual when courts analyze coverage under “infringement of copyright, title or slogan” as opposed to “misappropriation of advertising ideas or style of doing business,” the answer will depend largely upon the specific allegations of the complaint and the jurisdiction deciding the issue. The uncertainty of policy interpretation in this regard makes it much more difficult for insurers to estimate exposure, proper reserves, and calculate appropriate premium commensurate with the risk.

### **III. Do Lanham Act Violations Constitute Advertising Injuries Under The 1998 CGL Policy Form?**

In 1998, again ISO revised its CGL policy form. There are at least three important changes. First, ISO erased the problematic “misappropriation” language, and replaced it with the term “use,” so that advertising injury now included the “use of another’s advertising idea.” As mentioned in Section I, this appears to have broadened the scope of coverage, or, at the very least, rendered the disagreement among the courts as to the meaning of the word “misappropriation” moot.<sup>36</sup>

Second, the 1998 CGL policy form defined what constituted an advertisement. An advertisement was now 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.” As discussed below, this definition narrowed the scope of coverage for trademark infringements.

Third, the 1998 CGL policy form replaced the word “title” with “trade dress” so that advertising injury now included the “infringement upon another’s copyright, trade dress or slogan in your advertisement.” Different

courts have interpreted the term “trade dress” differently. Some courts found that trade dress and trademark are near synonymous while others have drawn a distinction between the concepts. This Section III will focus on the latter two changes.

#### A. Impact of Defining “Advertisement”

By giving “advertisement” a concrete definition, the post-1986 CGL policy forms have limited its scope. As a result, the field of trademark infringements that may receive coverage under the post-1986 CGL policy forms has been narrowed. For example, in *Citizens Ins. Co. v. Pro-Seal Serv. Group, Inc.*,<sup>37</sup> a Michigan company, Pro-Seal, was accused of shipping mechanical seals in its competitor’s packaging with Pro-Seal’s own label affixed to it. Pro-Seal’s insurance company, Citizens Insurance, claimed that it did not have to defend Pro-Seal in the subsequent litigation because the nature of the allegations were beyond the scope of its CGL policy.<sup>38</sup>

Pro-Seal brought suit against Citizens in Michigan state court, claiming that Pro-Seal’s infringement of its competitor’s trademark was covered under the CGL policy. The trial court agreed with the insurance company and granted its motion for summary disposition. The victory for the insurance company was short-lived, however. The Court of Appeals reversed the trial court’s decision and found that the policy did, in fact, cover trademark infringements. The Court of Appeals relied on a decision issued by a federal trial court in Michigan, *Poof Toy Products, Inc. v. United States Fidelity & Guaranty Co.*<sup>39</sup> The Eastern District of Michigan stated in *Poof Toys* that trademark infringement inherently involves advertising activity; that is, there could be no trademark infringement without advertising.

The Supreme Court of Michigan, however, reversed the appellate court’s decision, pointing out that since the policy now specifically defined “advertisement,” the lower court’s reliance on *Poof Toys*, which was based on a policy that did not define “advertisement,” was improper.<sup>40</sup> The Supreme Court of Michigan emphasized that because the policy now defined “advertisement,” a trademark infringement that may have previously been covered under the old CGL policy form would no longer be covered under the new policy form.<sup>41</sup> *Pro-Seal Serv. Group, Inc.*, demonstrates that by specifically defining the term “advertisement,”

ISO narrowed the possible field of insurable trademark infringements in its post-1986 CGL policy forms.<sup>42</sup>

The narrower definition, however, has not eliminated coverage. According to some courts, “[a] web page is advertising under any definition.”<sup>43</sup> In *Westfield Companies v. O.K.L. Can Line*, the court determined that a complaint against the insured for trade dress and patent infringement stated a claim within the advertising injury provisions of the ISO 1998 CGL policy form before it and alleged that the insured engaged in “advertisement,” as defined by the policy, finding that the claims were potentially covered and the insurer had a duty to defend.<sup>44</sup> The court acknowledged that under the 1998 CGL policy form, “trade dress” is specifically listed as an offense within the “advertising injury” provisions. The court also found that the complaint alleged that the insured engaged in “advertisement,” despite the complaint’s failure to use the words “advertisement” or “advertising.” The complaint, however, did state that the insured “sold and marketed” the product and confused “buyers and potential buyers.” The court found that those allegations met the definition of “advertisement” in the policy for “a notice that is broadcasted or published to the general public or specific market segment about your goods, products or services for the purposes of attracting customers or supporters.” With respect to the definition’s requirement of a “notice” intended to attract customers, the court pointed to “a public ad for the product” on the insured’s website. Since “[a] web page is advertising under any definition,” the court was satisfied that the complaint alleged that the insured had engaged in “advertisement” as defined in the policy.<sup>45</sup> Thus, while the definition of “advertisement” in ISO’s 1998 CGL policy form has added an additional hurdle in the quest for coverage, *i.e.*, “a notice that is broadcasted or published to the general public or specific market segment about your goods, products or services for the purposes of attracting customers or supporters,” *O.K.L. Can Line* found that ads on a website for the allegedly infringing product clear this hurdle.<sup>46</sup>

This additional hurdle was also met in *Central Mut. Ins. Co. v. StunFence, Inc.*<sup>47</sup> In *StunFence, Inc.*, the insured contended that the claim fell within the following coverage provision of the CGL policy: “[t]he use of another’s advertising idea in your ‘advertisement.’”<sup>48</sup> While the court acknowledged that the policy’s definition of “advertising” limited the scope of coverage to

notices that are broadcast or published for the purpose of attracting customers or supporters,<sup>49</sup> the court nevertheless determined that the insurer had a duty to defend under the “use of another’s advertising idea in your ‘advertisement’” provision because the competitor alleged that the insured used its trademark on the insured’s website, made promotional claims identical to those used by the competitor in marketing its own product, and made statements in trade industry periodicals that the insured owned and developed the competitor’s technology and maintained proprietary rights over that technology.<sup>50</sup> Thus, the court implicitly concluded that the competitor’s trademark was an “advertising idea” and, like *O.K.L. Can Line*, that use of that trademark on the insured’s website was an “advertisement” which caused “advertising injury” within the meaning of the policy.

#### **B. Impact of Adding Trade Dress As A Covered Advertising Injury**

The 1986 CGL policy form covered advertising injuries including infringement upon another’s “copyright, title, or slogan.” In litigation involving the 1986 CGL policy form, plaintiffs argued, to varying degrees of success, that coverage for trademark infringement could be found under the phrase “title.”<sup>51</sup> ISO, perhaps in an attempt to clarify vagueness, replaced “title” with “trade dress” in the 1998 version of its CGL policy form. How have courts interpreted trade dress?

As expected, different courts have given different answers. In South Carolina, the state’s highest court ruled that trade dress infringement often does include trademark infringement.<sup>52</sup> In this 2009 case, Mattel brought suit against Super Duper, an education company that was allegedly posting Mattel’s trademark on its products. Super Duper’s insurance company claimed that trademark infringements were not covered in the policy, pointing out that the policy only covered trade dress infringements. The court noted that “[t]rade dress is a more amorphous concept,” acknowledged that “the history of American law throughout much of the Twentieth Century is the gradual disappearance of distinctions between the law of ‘trade dress’ and that of ‘trademarks,’” and concluded that a trademark infringement may occur when a party infringes upon another’s trade dress, and here, the trademark serves “as an element to the overall trade dress of a product.”<sup>53</sup> Other courts, including a New York trial court, have

found trademark infringements to be covered under ISO’s 1998 CGL policy form as well.<sup>54</sup>

A Fifth Circuit court came to a different conclusion in a 2009 case involving the AARP.<sup>55</sup> The AARP alleged that a company, Mailers, inappropriately used its trademark in a “deceptive manner.”<sup>56</sup> Mailer’s insurer argued that the language of ISO’s 1998 CGL policy form covered trade dress infringements, but that the case at hand involved only a trademark infringement. The Fifth Circuit agreed with the insurer:

While the AARP has alleged that Mailers inappropriately used the AARP’s trademark in a deceptive manner, the AARP is not challenging the shape, design, color scheme, or any other aesthetic aspect of the cards or the similarity of Mailers’s cards to any other advertisements for financial products. The AARP is only challenging the fact that Mailers used the AARP name on its cards. This is not a trade dress claim.<sup>57</sup>

The court in *StunFence, Inc.* came to a similar conclusion on this issue. The insured contended that the claim against it was covered under the following provisions of the policy: “[i]nfringing upon another’s copyright, trade dress or slogan in your ‘advertisement.’”<sup>58</sup> The court found that the suit involved trademark infringement, not trade dress infringement, and while trade dress infringement is a subset of trademark infringement, the converse is not true.<sup>59</sup>

#### **IV. 1986 And 1998 CGL Forms: Common Ground**

Some parties make the argument that there may be trademark coverage under the term “slogan.” Litigation involving this phrase is applicable to both the 1986 and post-1986 CGL policy forms because both policy forms include the “infringement of . . . slogan” as a covered injury.

In some instances, courts have been willing to find coverage for trademark infringement under policy language that covers slogans. In the 2009 case involving Mattel and Super Duper, discussed above, the infringing party sought coverage under both trade dress and slogan. The Supreme Court of South Carolina stated that the insurance company had a duty to defend

because the alleged trademark infringement was covered under “trade dress.” The Court then continued to express that it would also be willing to find trademark infringement where there was slogan infringement, stating that “a trademark may be a product’s slogan. Therefore, trademark infringement potentially relates to the improper use of another’s slogan.”<sup>60</sup>

A similar conclusion was reached by the Sixth Circuit in *Cincinnati Ins. Co. v. Zen Design Group, Ltd.*<sup>61</sup> Zen Design Group, a company that manufactures flashlights, was accused of infringing upon a competitor’s trademark by printing “The Wearable Light” on its flashlights. Zen’s insurer argued that it had no duty to defend because its policy did not cover trademark infringements. The Sixth Circuit disagreed, saying that Michigan law requires an insurer to defend when the underlying claim is “arguably” covered by the policy.<sup>62</sup> The court said that it was ambiguous whether “The Wearable Light” printed on the flashlights was a trademark or a slogan. Since Zen’s use of “The Wearable Light” could arguably result in a claim for infringement of slogan, which was explicitly covered by the insurance policy, the insurer had a duty to defend.<sup>63</sup>

### Conclusion

ISO’s 1998 CGL policy form removed the often litigated phrase “misappropriation of advertising,” specifically defined the term “advertisement,” and substituted the term “trade dress” for “title.” These revisions, in theory, should have put an end to the debates over insurance coverage of trademark infringement. Apparently, ISO was trying to build better fences.

In part, ISO has succeeded. Some things are clearer. Most courts agree that the 1998 definition of “advertisement” imposes another step in the coverage analysis, and the 1998 CGL policy form has clarified the scope of coverage provided. These courts also agree that the use of a trademark on a website is an “advertising idea.”

But with new policy language came new litigation strategies: some insured parties have tried to convince courts that coverage for trademark infringement should be found under “trade dress;” other parties have argued that trademarks should be covered because they are arguably “slogan[s].” Given what one judge called “the real contours of intellectual property law, which often proceeds under a bewildering variety of different labels covering the same material facts,”<sup>64</sup> it seems that

the best advice for business clients is to purchase additional insurance specifically targeted to cover certain intellectual property risks.<sup>65</sup>

Despite what the courts eventually decide or what new policy form ISO may issue in the future, one thing can be certain: as long as there are fences, people will try to circumvent them — no matter how clear or well-defined they may be.

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### Endnotes

1. Special acknowledgement and thanks to Roger O. Chao, 2011 Summer Associate at Arent Fox LLP, for his research and assistance with this article.
2. The ISO is a private entity which, among other things, prepares and sells standard policy forms to insurance companies.
3. *Central Mut. Ins. Co. v. StunFence, Inc.*, 292 F. Supp. 2d 1072 (N.D Ill. 2003).
4. *Id.* at 1079-80. StunFence’s policy coverage for damages “arising out of the use of another’s advertising idea in your advertisement” comes from the 1998 CGL policy form, which is discussed in Section III. below.
5. *See Parameter Driven Software, Inc. v. Massachusetts Bay Ins. Co.*, 25 F.3d 332, 336-37 (6th Cir. 1994) (listing the various acts that may be considered “unfair competition,” including infringement of trademarks and service marks, use of confusingly similar corporate, business and professional names, and simulation of a container or product configuration and of trade dress and packaging). The Sixth Circuit also noted that a more narrative description of “unfair competition” has been used. *Id.* at 337 n.4 (finding that unfair competition has been “applied to the practice or endeavoring to substitute one’s own goods or products in the markets for those of another, having an established reputation and extensive sale, by means of imitating or counterfeiting the name, title, size, shape, or distinctive peculiarities of the article, or the shape, color, label, wrapper, or general appearance of the package, or other such simulations, the imitation

- being carried far enough to mislead the general public or deceive an unwary purchaser, and yet not amounting to an absolute counterfeit or to the infringement of a trademark or trade-name”) (internal citations and quotations omitted).
6. See *Advance Watch Co., Ltd. v. Kemper National Ins. Co.*, 99 F.3d 795, 805 (6th Cir. 1996), *rehearing en banc, denied*, Nos. 95-1367/95-1387, 1996 U.S. App. LEXIS 34340 (6th Cir. Dec. 30, 1996) (citation omitted).
  7. These cases are discussed in Section II. herein.
  8. See *Westfield Co. v. O.K.L. Can Line*, 804 N.E.2d 45, 51 (Ohio Ct. App. 2003), *appeal denied*, 809 N.E.2d 33 (Ohio 2004); *StunFence, Inc.*, 292 F. Supp. 2d at 1078.
  9. *StunFence, Inc.*, 292 F. Supp. 2d at 1077-78 (citations omitted).
  10. See, e.g., *Advance Watch*, 99 F.3d at 804; *Callas Enter., Inc. v. Travelers Indem. Co. of Am.*, 193 F.3d 952, 956-57 (8th Cir. 1999).
  11. See *StunFence, Inc.*, 292 F. Supp. 2d at 1079. Cases analyzing coverage for Lanham Act claims under the 1998 CGL policy form are discussed in Section III. below.
  12. There is currently little case law interpreting the language of the 2001 CGL policy form. Indeed, the majority of litigation interpreting CGL insurance policies is based on the 1986 ISO form. Furthermore, the CGL policy form was further revised in 2004 and 2007, but these latest changes are not pertinent to this discussion.
  13. This article will not address the courts' interpretation of the various exclusions that may apply. While the relevant exclusions are included in Section I. above, this is only for purposes of showing the scope of coverage and express limitations provided in a standard CGL policy, and the changes that have transpired over the last few decades.
  14. See *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 600 F.3d 1092, 1101, (9th Cir. 2010); *Capitol Indem. Corp. v. Elston Self Service Wholesale Groceries, Inc.*, 551 F. Supp. 2d 711, 721 (N.D. Ill. 2008); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. The Massachusetts Bay Ins. Co.*, 818 F. Supp. 553 (W.D.N.Y. 1993), *vacated by reason of settlement*, 153 F.R.D. 36 (W.D.N.Y. 1994); *Super Duper Inc. v. Pa. Nat. Mut. Ins. Co.*, 683 S.E.2d 792, 796-98 (S.C. 2009); see also *R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co.*, 287 F.3d 242, 248 (2d Cir. 2002); *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 747 (3d Cir. 1999).
  15. See *Sports Supply Groups, Inc. v. Columbia Cas. Co.* 335 F.3d 453, 463-65 (5th Cir. 2003); *Callas Enterprises, Inc. v. The Travelers Indem. Co. of America*, 193 F.3d 952, 956-57 (8th Cir. 1999); *Sholodge Inc. v. Travelers Indem. Co. of Ill.*, 168 F.3d 256, 259-60 (6th Cir. 1999); *Advance Watch Company, Ltd. V. Kemper National Ins. Co.*, 99 F.3d 795, 802 (6th Cir. 1996), *rehearing en banc denied*, Nos. 95 1367/95 1387, 1996 U.S. App. LEXIS 34340 (6th Cir. Dec. 30, 1996).
  16. See, e.g., *State Auto Prop. and Cas. Ins. Co. v. Travelers Indem. Co. of America*, 343 F.3d 249, 258 (4th Cir. 2003); *Hyman v. Nationwide Mutual Fire Ins. Co.*, 304 F.3d 1179, 1193-94 (11th Cir. 2002).
  17. *Advance Watch*, 99 F.3d at 802.
  18. *Id.*; see also *Sholodge*, 168 F.3d at 259 (following *Advance Watch* and finding coverage for service mark infringement); *Callas Enterprises, Inc.*, 193 F.3d at 957 (“We find the Sixth Circuit’s treatment of this policy language natural, reasonable, and unforced.”).
  19. *Advance Watch*, 99 F.3d at 803.
  20. *Sports Supply Groups, Inc.*, 335 F.3d at 463.
  21. *Id.* at 463-65.
  22. See *Hyman*, 304 F.3d at 1189 (concluding that the term’s ordinary meaning encompasses a wider range of harms and citing *Webster’s Third New International Dictionary* 1442 (1986) (defining misappropriation more broadly to mean “to apply to illegal purposes” or “to appropriate dishonestly”)); *American Employers’ Ins. Co. v. DeLorme Publishing Co., Inc.*, 39 F. Supp. 2d 64, 77 (D. Me. 1999) (utilizing an ordinary

- meaning approach and found the term unambiguous, meaning “to appropriate wrongly; that is to wrongfully take or make use of without authority or right” (quoting *Webster’s New Collegiate Dictionary*, 98, 758 (9th ed. 1987)) (internal quotation marks omitted); *J.A. Brundage Plumbing*, 818 F. Supp. at 557 (finding that misappropriation of an “advertising idea” means the wrongful taking of the manner by which another advertises its goods or services, which would include the misuse of another’s trademark or trade name); see also *Union Ins. Co. v. The Knife Co., Inc.*, 897 F. Supp. 1213, 1215-16 (W.D. Ark. 1995) (concluding that trademark infringement claim is a misappropriation of advertising ideas or style of doing business); *Sentex Systems, Inc. v. Hartford Accident & Indem. Co.*, 882 F. Supp. 930 (C.D. Cal. 1995), *aff’d*, 93 F.3d 578, 943-44 (9th Cir. 1995) (finding claim for misappropriation of trade secrets covered); *Dogloo, Inc. v. Northern Ins. Co.*, 907 F. Supp. 1382, 1390 (C.D. Cal. 1995) (same).
23. See *Aearo Corp. v. Am. Int’l Specialty Lines Ins. Co.*, 676 F. Supp. 2d 738, 746 (S.D. Ind. 2009) (“This court predicts that Indiana would follow the majority view and hold that coverage for ‘misappropriation of advertising ideas or style of doing business’ encompasses coverage for claims of trademark infringement.”); *Super Duper Inc. v. Pa. Nat. Mut. Ins. Co.*, 683 S.E.2d 792, 796 (S.C. 2009) (“We [use] . . . the general term misappropriation, to which we apply its common meaning. Generally, misappropriate is ‘to appropriate dishonestly for one’s own use . . . [or] to appropriate wrongly or misapply in use.’ Webster’s Third New International Dictionary 1442 (2002). Trademark infringement is squarely within this definition.”).
24. See *Capitol Indem. Corp. v. Elston Self Service Wholesale Groceries, Inc.*, 551 F. Supp. 2d 711, 721 (N.D. Ill. 2008) (“Even if trademark infringement did not constitute infringement of title, trademark infringement causes an advertising injury if it constitutes a misappropriation of [another’s] advertising ideas or style of doing business. Thus, [the insurer] must also defend the [insured] in the underlying litigation if trademark infringement is a misappropriation of advertising ideas or style of doing business.”).
25. See, e.g., *J.A. Brundage Plumbing*, 818 F. Supp. at 557 (“misappropriation of ‘style of doing business’ would include trademark, trade name or servicemark infringement.”); see also *DeLorme Publishing Co., Inc.*, 39 F. Supp. 2d at 76.
26. 15 U.S.C. § 1127.
27. *Id.*
28. See *Hyman*, 304 F.3d at 1189.
29. *Id.* (“[S]tyle of doing business’ must include the manner in which a company promotes, presents, and markets its products to the public.”) (citation omitted).
30. But see *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 749 (3d Cir. 1999), stating in dicta that a trademark could be seen as an advertising idea, but ultimately finding that:
- In this case . . . the underlying complaint does not allege that what the insured took was itself an idea about identifying oneself to customers. The complaint did not allege that the misappropriated dipper bucket design served as an indication of origin, or that ESCO/Amsco’s identifying marks were misused. Nor did ESCO allege that Frog took an idea about advertising dipper buckets (the idea of claiming a revolutionary new design as an enticement to customers); it alleged that Frog took the dipper bucket design itself and lied about the design’s origin.
- Similarly, ESCO alleged not that Frog copied a style of doing business—a plan for interacting with consumers and getting their business—but that Frog copied a particular product line that might be attractive to consumers.
- We predict that . . . Pennsylvania courts would not find the allegations in this case fall within a reasonable understanding of the policy terms. Thus, the District Court was correct that the underlying complaint did not allege advertising injury.
- Id.* at 749-50 (citations omitted); *GAF Sales & Service, Inc. v. Hastings Mut. Ins. Co.*, 568 N.W.2d 165, 168 (Mich. Ct. App. 1997), *appeal denied*, 586 N.W.2d 919 (Mich. 1998) (underlying claim of trade secret misappropriation, that insureds improperly retained

drawings and software and utilized customer lists, did not constitute “advertising ideas or style of doing business”).

31. The court stated in relevant part as follows:

“Title” is defined as: “A mark, style or designation; a distinctive appellation; the name by which anything is known.” *Black’s Law Dictionary* 1485 (6th ed. 1990). As to trademarks,

A title may become a subject of property; as one who has adopted a particular title for a newspaper, or other business enterprise, may, by long and prior usage, or by compliance with statutory provisions as to registration and notice, acquire a right to be protected in the exclusive use of it.

*Id.* Clearly, then, infringement of “title” can include trademark or tradename infringement.

Similarly, infringement of slogan can also include trademark or tradename infringement. “Slogan” is defined as follows:

Section 7.5 Slogans as Marks.

Neither in the common law nor the Lanham Act is there any reason why a plurality of words cannot function as a mark to identify and distinguish goods or services. A slogan or any other combination of words is capable of trademark significance, if used in such a way as to identify and distinguish the seller’s goods or services from those of others.

Under common law unfair competition principles, slogans have long been protected against use by others so as to be likely to confuse purchasers . . . a slogan might also incorporate a separate trademark, such that both the slogan and the mark will be protectable; for example, “You are in good hands with ALLSTATE.”

*McCarthy, Trademarks and Unfair Competition* (2d Ed. 1984).

Accordingly, trademark or tradename infringement falls within the definition of “advertising injury” under both subsections (c) and (d).

*J.A. Brundage Plumbing*, 818 F. Supp. at 559; *see Delorme Publishing Co., Inc.*, 39 F. Supp. 2d at 78 (“*Black’s Law Dictionary* defines the term ‘title’ as, ‘a mark, style, designation, a distinctive appellation; the name by which anything is known. *Black’s Law Dictionary* 1485 (6th ed. 1990). According to this definition, a ‘title’ may be a mark and, thus, be protected as a trademark.”); *see also The Knife Co.*, 897 F. Supp. at 1217 (noting that both titles and slogans can be protected as trademarks). For a more detailed discussion of “slogan,” *see* Section IV.

32. 168 F.3d 256, 259-60 (6th Cir. 1999).

33. 280 F.3d 730, 736 (7th Cir. 2002). In *Hedeen*, the underlying complaint alleged that the insured had sent business letters on its letterhead, which included the underlying plaintiff’s trademark, causing confusion among the commercial public. In addition to rejecting *Sholodge*, the Seventh Circuit distinguished its recent decision in *Zurich Ins. Co. v. Amcor Sunclipse N. Am.*, 241 F.3d 605 (7th Cir. 2001), in which it considered a series of one-on-one customer solicitations were “marketing” rather than “advertising,” and therefore not covered under the “advertising injury” provision of the policy. In *Hedeen*, the underlying complaint did not identify the recipients of the business letters, but rather alleged the letters impacted the “commercial public.” These allegations, liberally construed, arguably contended that the plaintiff’s trademark was used in the course of the insured’s advertising. *Hedeen*, 280 F.3d at 736; *see also CGS Indus., Inc. v. Charter Oak Fire Ins. Co.*, 751 F. Supp. 2d 444, 450 (E.D.N.Y. 2010) (“CGSI’s alleged misuse of these marks reasonably constitutes ‘infringement of . . . title’ since it sought to exploit Five Four’s ‘distinctive appellation.’”); *Auto Owners Ins. Co. v. La Oasis, Inc.*, No. 2:04 cv 174, slip op. at 14-15 (N.D. Ind. May 26, 2005) (finding that trademark infringement may fall under the “infringement of title” category of “advertising injury”); *Gen. Cas. Co. of Wisconsin v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 578 (Minn. 2009) (“We are persuaded by the reasoning of the Wisconsin Supreme Court and the trend of other courts in concluding that trademark infringement falls within the plain and ordinary meaning of ‘infringement of

title.’”); *Acuity v. Bagadia*, 734 N.W.2d 464, 470 (Wis. App. 2007), *aff'd*, 750 N.W.2d 817 (Wis. 2008) (“We . . . hold that NORTON SYSTEMWORKS, NORTON ANTIVIRUS, etc., are reasonably described as the ‘titles’ of the programs they describe, and that trademark infringement is therefore an enumerated offense under the policy.”).

34. See *Applied Bolting Technology Products, Inc. v. United States Fidelity & Guaranty Co.*, 942 F. Supp. 1029 (E.D. Pa. 1996), *aff'd*, 118 F.3d 1574 (3d Cir. 1997):

Here, Turner alleges in the underlying suit that Applied falsely advertises that its DTIs conform to ASTM F959-94a. It is undisputed that Turner does not allege that it has an ownership interest in or an exclusive right to use “all DTIs made to ASTM F959-94a.” Thus, assuming ASTM F959-94a is a “slogan” within the meaning of the policy, I am satisfied that the language “infringement of . . . slogan” does not arguably require USF&G to defend or indemnify Applied.

*Applied Bolting Technology*, 942 F. Supp. at 1034-35.

35. See, e.g., *Sentex Systems, Inc.*, 882 F. Supp. at 944 (“[I]t is reasonable for an insured to expect coverage for the alleged infringement of either a business name or property so long as the advertising injury occurs in the course of advertising.”).
36. See *StunFence, Inc.*, 292 F. Supp. 2d at 1079.
37. 730 NW 2d. 682 (Mich. 2007).
38. *Pro-Seal*, 730 N.W.2d at 684.
39. 891 F. Supp. 1228, 1235-1236 (E.D. Mich. 1995).
40. *Pro-Seal*, 730 N.W.2d 682, 686 (2007) (“[T]he insurance contract at issue in [*Poof Toys*] did not define the term “advertisement.” Because the term was left undefined, the United States District Court consulted a dictionary to define the term and concluded on the basis of that definition that there was coverage under that policy. Because the term “advertisement” is defined in the instant CGL policy, and that definition is incorporated into the umbrella policy as well, the Court of Appeals’ reliance on *Poof Toys* was

inappropriate inasmuch as it potentially subjects plaintiff to a risk that it did not assume.”).

41. *Id.* at 684.
42. See also *Premier Pet Products, LLC v. Travelers Prop. Cas. Co. of Am.*, 678 F. Supp. 2d 409, 413 (E.D. Va. 2010) (holding that there was no advertising in the course of the trademark infringement).
43. *Westfield Co. v. O.K.L. Can Line*, 804 N.E.2d 45, 50-51 (Ohio Ct. App. 2003), *appeal denied*, 809 N.E.2d 33 (Ohio 2004).
44. *Id.*
45. *Id.*
46. See also *Transcontinental Ins. Co. v. Jim Black & Associates, Inc.*, 888 So.2d 671, 678 (Fla. Ct. App. 2004) (“Although the complaint alleged demonstration of the port and sought to prohibit promotion of the port, it did not allege a claim for injury as a result of any notice that was broadcast or published.”).
47. 292 F. Supp. 2d 1072 (N.D. Ill. 2003).
48. *Id.* at 1080.
49. *Id.* at 1078 (finding no duty to defend arising from the allegations that the insured misused of another’s signs on its own products because it was not apparent from the allegations that the purported misuse was intended to attract customers or supporters).
50. *Id.* at 1079-80.
51. See Section II above.
52. *Super Duper Inc. v. Pa. Nat. Mut. Cas. Ins. Co.*, 683 S.E.2d 792, 798 (S.C. 2009). The policy at issue in *Super Duper* incorporated clauses from both the 1986 and 1998 policy forms. See notes 14 and 23, above, for a discussion of the 1986 provisions in the *Super Duper* policy.
53. *Id.*
54. See *Sarin v. CNA Fin. Corp.*, 21 Misc. 3d 1101(A), 873 N.Y.S.2d 237 (N.Y. Sup. Ct. 2008) (finding that

- insurance company's policy covered alleged trademark infringement of Colgate toothpaste).
55. *Am. 's Recommended Mailers Inc. v. Maryland Cas. Co.*, 339 F. App'x. 467 (5th Cir. 2009).
  56. *Id* at 469.
  57. *Id.*
  58. *StunFence, Inc.*, 292 F. Supp. 2d at 1077-78.
  59. *Id.* The court eventually ruled in favor of StunFence on a separate issue, as discussed above.
  60. *Super Duper*, 683 S.E.2d at 798.
  61. 329 F.3d 546 (6th Cir. 2003).
  62. *Id.* at 552.
  63. *Id.*
  64. *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 747 (3d Cir. 1999).
  65. See Hilary Ditch, *Intellectual Property Infringement: The Question of Advertising Injury*, 31 HASTINGS

COMM. & ENT. L.J. 479, 499 (2008) (noting that it is beneficial to have a "set of highly specialized policies for those entities that have a firm grasp on their intellectual property coverage"); Sidney J. Hardy & Eugene T. Rhee, *Coverage for Intellectual Property Claims under GCL Insurance Policies*, 58.3 FED'N OF DEF. & CORP. COUNS. Q. 337, 346 (2008) (advising clients to purchase IP-specific insurance coverage in addition to the general policy) *available at* <http://www.thefederation.org/documents/V58N3-Hardy.pdf> (last visited Aug. 9, 2011); Kenneth W. Brothers, *Coverage for IP-Related Risks*, DICKSTEIN SHAPIRO LLP, <http://www.dicksteinshapiro.com/ipnewsfall2008/coverage/> (last visited Aug. 9, 2011). Even specialized coverage, however, may not provide the full range of coverage that the insured needs. For instance, some insurance companies offer so-called cyber insurance policies, which are intended to provide coverage for the cost of re-creating lost data resulting from events such as data breaches of an insured's servers. Cyber policies, however, do not typically provide coverage for costs incurred by an insured in providing notification to its customers of a data breach, and certain legal costs incurred by an insured in defending lawsuits of customers for damages allegedly arising from a breach of the insured's data system — legal fees and costs that appear to be inherent when a data breach occurs to a large insured. ■

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