SCOPE OF ADVERTISING INJURY UNDER IOWA LAW IN COMMERCIAL GENERAL LIABILITY POLICIES

*William P. Kelly**

TABLE OF CONTENTS

I. Introduction 625
  A. Overview of Advertising Injury Insurance 625
  B. Types of Advertising Injury Insurance 630
  C. Entitlements and Elements Under Advertising Injury Insurance 633
II. Recent Case Development in Advertising Injury 634
III. Definitions of Advertising Activities 635
  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 637
  B. Oral or Written Publication of Material That Violates a Person's Right of Privacy 639
  C. Misappropriation of Advertising Ideas or Style of Doing Business 640
  D. Infringement of Copyright, Title, or Slogan 643
IV. Advertising Injury Analysis Under Iowa Law 647
  A. Duty to Defend 648
  B. Iowa Influence 651
V. Conclusion 652

I. INTRODUCTION

A. *Overview of Advertising Injury Insurance*

Advertising injury in the scope of this Article is not the harm experienced by turning on your television and hearing a banjo in the background seeing Ray Szmanda, the Menards guy pushing bathroom fixtures, light bulb specials, and treated lumber; or even the possibility of being subjected to Budweiser's "Whassup" over and over. In its simplest terms, advertising injury in this context is a type of liability insurance. Lawsuits asserting violations of

intellectual property rights are being tendered to insurance companies for defense and indemnification under the advertising injury provision of commercial general liability policies.[1] In some policies the determination of what is exactly covered by advertising injury insurance is not clear, but for risk managers and attorneys it is imperative to be aware of what this type of insurance provides. "Infringement of patent, copyright, trademark, trade name, trade dress, or other intellectual property rights is often alleged to be accompanied by marketing or advertising that either violates these rights directly or is part of a scheme to make the violation widespread and effective."[2]

This Article covers the advertising injury insurance clauses that are integral in commercial, or comprehensive, general liability (CGL) policies to insure companies against certain claims by third parties. In many policies, the policyholder may be entitled to coverage for attorney's fees, which can mount quickly and become colossal in defending the lawsuit. Reflecting on current trends in court decisions, the issue surfaces as to whether alleged conduct falls within the definitions in the policies. Consequently, due to recent rulings, courts looking at these type of policies are no longer requiring the insurer to defend causes of action unless the action is specifically included within the definition of advertising injury and spelled out clearly in the policy.[3]

This Article explores the issues relating to the scope of advertising injury insurance coverage under Iowa law. As pointed out in *Couch on Insurance*, "[a]n insurer's duty to defend a lawsuit against its insured is separate and distinct

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* B.A., Brown University, 1990; J.D., Drake University Law School, 1999. Associate Davis, Brown, Koehn, Shors & Roberts, P.C, Des Moines, Iowa. The author would like to thank attorney Deborah M. Tharnish of the Davis, Brown, Koehn, Shors & Roberts, P.C. Law Firm who generously reviewed and critiqued this Article. Any errors of judgment or substance that remain are the authors.

1. *See infra* Part II.

2. Malcolm A. Misuraca, *Insurance Defense in Intellectual Property Cases*, CA26 A.L.I.-A.B.A. 137, 139 (1996).

3. *See* Buss v. Superior Court, 939 P.2d 766, 783 (Cal. 1997). The California Supreme Court found, if the words the parties use in an insurance policy unambiguously express the nature and kind of risk that the policy covers, courts will not extend coverage to risks that the carrier did not agree to accept and for which the policyholder paid no premium. *Id.* Of course many commercial general liability policies have exclusions for liability assumed in contract and liability for damages caused by one's own product or work. Thus, depending on the facts of the claim such exclusions could also be bases for denying coverage. *See, e.g.*, Callas Enters. v. Travelers Indem. Co. of Am., 193 F.3d 952, 955 (8th Cir. 1999) (analyzing a policy which "excludes coverage for advertising injuries 'arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity' and for injuries 'arising out of [b]reach of contract, other than misappropriation of advertising ideas under an implied contract'" (quoting plaintiff's commercial general liability insurance policy)).

from the duty to indemnify the insured for liability imposed after trial."[4] Costs such as attorney fees are at stake, and accordingly an important distinction is drawn based on the temporal difference between the "duty to defend, which arises before litigation is completed, and the duty to indemnify, which arises only after finding of liability."[5] Advertising injury protection provides one of the most valuable components in a liability insurance policy because the insurance company defends or pays the policyholder's defense costs if there is merely the potential for coverage.[6] "This part of liability insurance has been called 'litigation insurance.'"[7]

Litigation insurance provisions are in effect if there is not a modified endorsement or definitional change contained within the policy clearly excluding coverage.[8] The exclusions to the 1986 form policy which are still in use today provide:

> This insurance does not apply to: . . . (a) advertising injury: (1) arising out of oral or written publication of material if done by or at the direction of the policyholder with knowledge of its falsity; (2) arising out of oral or written publication of material if the first publication took place before the beginning of the policy.[9]

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4. 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 200:3, at 200-11 to -12 (3d ed. 1997).

5. *Id.*

6. *See* Stonewall Ins. Co. v. City of Palos Verdes Estates, 54 Cal. Rptr. 2d 176, 188 (Ct. App. 1996) (holding "a duty to defend of course can arise where there is merely a potential for coverage"); First Newton Nat'l Bank v. General Cas. Co., 426 N.W.2d 618, 630 (Iowa 1988).

7. Andrew M. Reidy & Robert L. Carter, *Insurance Coverage—A Safe Harbor for Policyholders Caught Up in the New Wave of Tobacco Litigation*, MEALEY'S LITIG. REP.: INS., May 2, 1995, at 16, 18.

8. *See* David A. Gauntlett, *No Advertising Injury Exclusions in Commercial General Liability Policies Bar Coverage for Intellectual Property Lawsuits*, IPL NEWSL., Spring 1996, at 13, 13-14.

9. David A. Gauntlett, *American Bar Association, Section of Intellectual Property Law, Special Committee on Insurance, 654 Committee Report* (visited Apr. 1, 2000) <http://www.gauntlettlaw.com/committee.htm>. It is important to note new exclusions may soon be in effect. The insurance office (ISO)

> released a contemporaneous explanatory memorandum which noted the inclusion of one new exclusion: "A personal injury and advertising injury (1) caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" In addition to eliminating a separate advertising injury definition and incorporating it in the personal injury definition, ISO included the following comments: "An exclusion has been added to Paragraph A to preclude coverage under circumstances in which the 'personal advertising injury' is caused by the insured with the knowledge that the act would violate another's rights and inflict 'personal advertising injury.'

Therefore, if the underlying action involved in an advertising injury is not subject to the exclusionary clause, the insurance company would have both a duty to defend and indemnify.[10]

The history of the advertising injury coverage provision shows the coverage was intended for a wide variety of offenses.[11] If liability provisions are not clear on the type of offenses the insurance company is required to defend, this ambiguity can cause additional litigation. Coverage determination rests on the factual circumstances alleged in the underlying action.[12] Insurers argue that in the absence of an express reference to a certain offense in the advertising

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> Although Coverage B is essentially an 'intentional acts' coverage, this exclusion serves the purposes of excluding the intention to commit an offense under 'personal advertising injury.' This is similar to the current Exclusion pertaining to the commitment of libel or slander against another intentionally with knowledge of its falsity."

David A. Gauntlett, *Insurance Coverage/IP Counselor* (visited Apr. 12, 2000) <http://gauntlettlaw.com/newsWin99.html> (quoting ISO revisions).

10. It is important to remember if the duty to defend issue is decided in the insured's favor, it cannot be said the insurer also has a duty to indemnify the insured for sums paid in settling the underlying action. Warfield-Dorsey Co. v. Travelers Cas. & Sur. Co., 66 F. Supp. 2d 681, 686 (D. Md. 1999). As discussed by the court in *Warfield-Dorsey Co. v. Travelers Casualty & Surety Co.*, "this contention ignores applicable authority and is clearly wrong." *Id.* at 685 n.2. There are many factors involved in settlements that need to be considered before the duty to indemnify is realized. *Id.* at 685-87.

11. *See* Robert M. Horkovich & William G. Passannante, *Insurance Coverage for Intellectual Property Liabilities Under the "Advertising Injury" Coverage Provision in Liability Insurance Policies*, 573, P.L.I./PAT. 83, 91 (1999).

12. *See Insurance Coverage for Intellectual Property Lawsuits*, INTELL. PROP. COUNSELING & LITIG. (MB) § 29.01, at 29-9 (Lester Horwitz & Ethan Horwitz eds., 1998); *see also* Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 641 (Iowa 1996) (holding "the duty to defend rests solely on whether the petition contains any allegations that arguably or potentially bring the action within the policy coverage" (quoting A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607, 627 (Iowa 1991) (en banc))). In addition, the Iowa Supreme Court noted "it is clear under Iowa law that an insurance company is to look at the *allegations of fact* in the . . . plaintiff's petition against the insured and *not* the legal theories on which the . . . party claims insured is liable." *Id.* at 642.

It may be helpful to understand how the initial tender of a claim to an insurer for coverage is generally made. In *Intellectual Property Counseling and Litigation* the authors state that a claim is made by giving the insurer:

> (1) [A] copy of the complaint filed in the action; (2) a description of the claims asserted against the policyholder; and (3) identification of the policy under which coverage is sought. The policyholder must next request that the insurer advise as to how it intends to handle the claim. It is unwise for the policyholder to offer an exhaustive explanation of the grounds for coverage in this initial tender of claim letter since it may alert the insurer to potential grounds for avoiding coverage that it might not otherwise have recognized.

Insurance Coverage for Intellectual Property Lawsuits, *supra*, § 29.02, at 29-13.

injury definition, the parties' intended that the omitted offense is not covered. It may sound like an odd inquiry, but it comes down to how much ambiguity is needed in the claim before an insurance company is not required to defend an action.

The question arises as to whether the duty to defend is broader than the duty to indemnify. "Liability insurers owe their insureds contractual duties of defense and indemnity. While insurers' defense and indemnity obligations are sometimes described as 'twin' duties, the duties are separate and distinct. An insurer's duty to defend is much broader than its duty to indemnify."[13] Therefore, a liability insurer must defend its insured if the plaintiff's allegations are even arguably or potentially within the scope of coverage.[14]

Accordingly, an insurer may have the duty to defend based on the potential of liability under its policy but eventually have no duty to indemnify.[15] In Iowa, according to the precedent set in *A.Y. McDonald Industries, Inc. v. Insurance Co. of North America*,[16] if any claim alleged against the insured can be rationally said to fall within such coverage, the insurer must defend the entire action.[17] In case of doubt as to whether the suit alleges a claim that is covered by the policy, the doubt is resolved in favor of the insured.[18] Controversies over advertising injury insurance coverage generally arise because this type of policy is marketed as the "broadest package of coverage available to the average insured," but then the offense does not fit into the broad package.[19] Advertising injury coverage is

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13. Douglas R. Richmond & Darren S. Black, *Expanding Liability Coverage: Insured Contracts and Additional Insureds*, 44 DRAKE L. REV. 781, 792 (1996). The duty to defend is treated differently because "[a]n insurer's duty to defend is separate from its duty to indemnify; the duty to defend is broader than the duty to indemnify." Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d at 641 (citing A.Y. McDonald Indus., Inc. v. Insurance Co. of Am., 475 N.W.2d at 627); *see also Insurance Coverage for Intellectual Property Lawsuits*, *supra* note 12, § 29.06[2], at 29-81 (stating the duty to defend "subsumes many of the issues involved in the duty to indemnify").

14. 14 RUSS & SEGALLA, *supra* note 4, § 200:3, at 200-14; *see also* Sheets v. Brethren Mut. Ins., 679 A.2d 540, 544 (Md. 1996) (stating the underlying suit need only allege action that is potentially covered by the policy, "no matter how attenuated, frivolous, or illogical" such allegations may be); Tradesoft Techs., Inc. v. Franklin Mut. Ins. Co., 746 A.2d 1078, 1081 (N.J. Super. Ct. App. Div. 2000) (stating "if there is an ambiguity in the policy language, principles of insurance contract construction require the ambiguity to be resolved in the insured's favor").

15. Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d at 642.

16. A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607 (Iowa 1991).

17. *Id.* at 627.

18. *Id.*

19. Kay Millonzi & William G. Passannante, *Intellectual Property and Insurance: A Valuable Asset and a Lurking Liability*, 27 SPG BRIEF 40, 42 (1998). *But see* M. Epstein, *Insuring Against Infringement 1, In Insurance Claims and Litigation for Intellectual Property Disputes*,

crucial for intellectual property claims, because plaintiffs typically seek economic damages for infringement, which are not covered as bodily injury or property damage losses.[20] In addition, controversies to determine the potential of liability under policies arise because "intellectual property litigation . . . often proceeds under a bewildering variety of different labels covering the same material facts."[21]

B. *Types of Advertising Injury Insurance*

ISO is a non-profit organization which creates and periodically updates standard insurance policy forms.[22] Of these policies, some are widely—but not universally—adopted by insurance carriers. Two widely used versions are from the 1973 or 1986 form provisions.[23] Both forms provide corresponding, but not identical, coverage.[24] The relevant section of the 1973 Broad Form Liability dealing with advertising injury states coverage would apply to: "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."[25] This type of insurance was originally sold to "many thousands of policyholders with the promise of providing even 'broader' coverage than already provided by 'comprehensive' general liability insurance policies."[26] Robert M. Horkovich and William G. Passannante point out nearly all of the enumerated torts are intentional, and there is no indication the words used in the definition of advertising injury are words of limitation.[27] In addition, the explanation that injury must merely "arise out of" the advertising activities "suggests a minimal, tangential connection between

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(Business Development Assocs., Inc. & A.B.A., Tort & Ins. L. Prac. Sec. Committee on Intell. Prop.) June 1994 (arguing no general liability insurance company intended to cover patent, copyright, or trademark infringement).

20. Richard L. Antognini, *What You Need to Know About Intellectual Property Coverage*, 31 TORT & INS. L.J. 895, 896 (1996).

21. *See* Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 747 (3d Cir. 1999).

22. Horkovich & Passannante, *supra* note 11, at 91.

23. *See generally* Terri D. Keville, Note, *Advertising Injury Coverage: An Overview*, 65 S. CAL. L. REV. 919, 919 (1992) (providing "descriptions and comparisons of the different versions of advertising injury coverage," and analyzing relevant caselaw).

24. *See* Commercial General Liability Coverage Form CG 00 01 (1991) (on file with author).

25. Keville, *supra* note 23, at 926.

26. Horkovich & Passannante, *supra* note 11, at 93.

27. *Id.*

the injury and the advertising."[28] Courts gave "advertising," "arise out of," and "offense" a fairly broad construction allowing many claims to be defended under the language from the 1973 form.[29]

A supplement came out in 1981 for the basic comprehensive liability policy.[30] An advertising injury section was among the twelve additional coverage provisions comprising part of the Broad Form Comprehensive General Liability Endorsement.[31] This was intended to supplement the basic liability policy.[32]

Five years after the 1981 supplement came out, the ISO revised the form and the definition of advertising injury.[33] The ISO stated "the policy was intended to provide the broadest coverage sold to the average policyholder."[34] In the new forms, advertising injury was modified.[35] The 1986 definition states:

"Advertising injury" means injury arising out of one of the following or more 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.[36]

These four clauses are standard language for defining advertising injury in commercial general liability policies.[37] It is important to understand whether the

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28. *Insurance Coverage for Intellectual Property Lawsuits*, *supra* note 12, § 29.06[2][b], at 29-87.

29. *Id.* § 29.06[2][a]–[d], at 29-84 to -88 (discussing cases having their basis in the 1973 form dealing with the duty to defend under categories such as covered offense, advertising qualification, causation qualification, and the time of offense qualification).

30. Keville, *supra* note 23, at 926.

31. *Id.*

32. *Id.* (defining advertising injury as "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.").

33. *Insurance Coverage for Intellectual Property Lawsuits*, *supra* note 12, § 29.08[1], at 29-177; *see* Keville, *supra* note 23, at 927.

34. *Insurance Coverage for Intellectual Property Lawsuits*, *supra* note 12, § 29.08[2], at 29-178.

35. *See* Keville, *supra* note 23, at 927.

36. *Id.* (quoting *Personal and Advertising Injury Liability*, FIRE, CASUALTY & SURETY BULL., Mar. 1990, at Ab-1, Ab-2).

1986 form language expanded or restricted liability coverage, and how courts have interpreted it.[38] As the Third Circuit explained in *Frog, Switch & Manufacturing Co. v. Travelers Insurance Co.*,[39] "[w]ith varying degrees of success, insured parties have sought coverage for the underlying actions of patent infringement,[40] trademark or trade dress infringement,[41] misappropriation of trade secrets or other confidential information,[42] and actions alleging harm to consumers rather than competitors."[43] Under Iowa law, if any claim alleged

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37. *See* 9 RUSS & SEGALLA, *supra* note 4, § 129:25, at 129-44; *see also* Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 747 (3d Cir. 1999) (construing "misappropriation of advertising ideas or style of doing business"). Changes are in effect to these policies as well. "Most Department of Insurances throughout the United States have approved ISO's new advertising injury coverage policy form." David Gauntlett, *supra* note 9. Form CG00010798 made the following pertinent changes to advertising injury coverage:

> First, it deletes the following offenses: (1) infringement of title; and (2) misappropriation of advertising ideas or style of doing business.
> Second, it adds two new offenses: "(1) Infringement upon another's copyright, trade dress, or slogan in your advertisement; and (2) the use of another's advertising idea in your advertisement." It also includes a specific definition of "advertisement." Advertisement means "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."

Id. (quoting ISO form CG00010798).

38. *See* Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d at 746-47.

39. Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742 (3d Cir. 1999).

40. *Id.* at 746-47. The court listed as examples: *Elan Pharmaceutical Research Corp. v. Employers Ins.*, 144 F.3d 1372 (11th Cir. 1998); *Iolab Corp. v. Seaboard Surety Co.*, 15 F.3d 1500 (9th Cir. 1994); *Gencor Industries, Inc. v. Wausau Underwriters Insurance Co.*, 857 F. Supp. 1560 (M.D. Fla. 1994); *Atlantic Mutual Insurance Co. v. Brotech Corp.*, 857 F. Supp. 423 (E.D. Pa. 1994), *aff'd*, 60 F.3d 813 (3d Cir. 1995); *National Union Fire Insurance Co. v. Siliconix, Inc.*, 729 F. Supp. 77 (N.D. Cal. 1989). Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d at 747 n.3.

41. Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d at 746-47. The court listed as examples: *Advance Watch Co. v. Kemper National Insurance Co.*, 99 F.3d 795 (6th Cir. 1996); *Union Insurance Co. v. Knife Co.*, 897 F. Supp. 1213 (W.D. Ark. 1995); *Poof Toy Products, Inc. v. United States Fidelity & Guarantee Co.*, 891 F. Supp. 1228 (E.D. Mich. 1995). Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d at 747 n.4. In addition to those examples cited by the Third Circuit, see *Palmer v. Truck Insurance Exchange*, 988 P.2d 568 (Cal. 1999); *Industrial Indemnity Co. v. Apple Computer, Inc.*, 83 Cal. Rptr. 2d 866 (Ct. App. 1999), *superseded by* 981 P.2d 41 (Cal. 1999).

42. Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d at 746-47. The court listed: *Simply Fresh Fruit, Inc. v. Continental Insurance Co.*, 94 F.3d 1219 (9th Cir. 1996); *Sentex Systems, Inc. v. Hartford Accident & Indemnity. Co.*, 882 F. Supp. 930 (C.D. Cal. 1995), *aff'd*, 93 F.3d 578 (9th Cir. 1996), as examples of misappropriation of trade secrets or other confidential information. Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d at 747 n.5.

43. Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d at 746-47. The court cited *Granite State Insurance Co. v. Aamco Transmissions, Inc.*, 57 F.3d 316 (3d Cir. 1995) as an example of actions alleging harm to consumers. *Id.* at 747 n.6.

against the insured can rationally be said to fall within such coverage, the insurer must defend the entire action. Thus, it is important to understand the scope of advertising injury insurance coverage in Iowa.[44] The scope is being narrowed according to recent decisions in other jurisdictions.[45]

C. *Entitlements and Elements Under Advertising Injury Insurance*

Based on advertising injury insurance policies under the 1986 ISO CGL Policy Coverage, the policyholder generally is entitled to defense and indemnification of damages if three conditions apply.[46] First, the damages are ones that the insured is legally obligated to pay.[47] Second, damages arise out of an offense listed in the policy and was committed during the policy period.[48] Finally, the damages must have occurred in the course of the insured's advertising activities.[49] Insurance companies most often deny coverage because they determine the offense claimed did not occur in the course of the insured's advertising activities or because the offense claimed is not a covered offense.[50]

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44. *See* A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607, 627 (Iowa 1991). *But see* Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co., 591 N.W.2d 17, 18 (Iowa 1999) (stating where there is no obligation to defend, there is per se no obligation to indemnify the insured for any judgment in, or settlement of, the underlying action).

45. *See infra* Part III. While examining the thirty-seven cases that addressed coverage for intellectual property cases that arose in 1999, David A. Gauntlett and Committee Number 654 found "22 were officially published, 15 were not." *See* Gauntlett, *supra* note 9.

> Of the 22 published cases, policyholders prevailed in 6, while insurers prevailed in 15. Of the 16 unpublished cases, policyholders prevailed in 4, while insurers prevailed in 11. When insurers lose, they generally do not seek publication. They also do not seek publication if they win if they are concerned about issues they lost, i.e., patent.

Id.

46. These elements apply "under either the 1976 BFE or the 1986 CGL Policy Form." Lisa A. Small, Note, *Offensive and Defensive Insurance Coverage for Patent Infringement Litigation: Who Will Pay?*, 16 CARDOZO ARTS & ENT. L.J. 707, 714 (1998).

47. Commercial General Liability Coverage Form CG 00 01, *supra* note 24.

48. *Id.*

49. *Id.*; *see* David A. Gauntlett, *Patents and Insurance: Who Will Pay for Reimbursement?*, 4 B.U. J. SCI. & TECH. L. 6, ¶ 2 (1998).

50. Small, *supra* note 46, at 714. There are four required elements an insured must prove to be entitled to "advertising injury" coverage. *Id.* The insured must establish: "(1) the offense claimed is a covered offense; (2) the covered offense arises out of the advertising activities of the insured; (3) the covered offense occurs in the course of the advertising activities of the insured; and (4) the covered offense occurs during the policy period." *Id.* A more skeptical view is taken by other authors. *See* Horkovich & Passannante, *supra* note 11, at 126-27.

> Interestingly, when advertising is covered, the insurance industry argues that mailing letters is not advertising. When advertising is excluded, however, the insurance industry argues that mailing letters is advertising. So goes the insurance

Courts have tried to incorporate these general conditions into elements that identify an advertising injury claim.[51] Under one approach insureds have a reasonable expectation of coverage under the policies for an alleged advertising injury if they satisfy three elements: (1) the insured was engaged in advertising activity during the policy period when the alleged advertising injury occurred; (2) the allegations raise a potential for liability under one of the offenses enumerated in the policies; and (3) there is a causal connection between the alleged injury and the advertising activity.[52] Alternatively, one court phrased the words differently and determined advertising injury requires proof of three elements: "an advertising injury as defined in the policy, a 'course of advertising' . . . and proof of a causal relationship between the first two elements."[53] Part II explores the newest case developments in this area of the law, and how they have defined key terms. Part III examines the implications of the nationwide litigation in this area to see whether claims made by policyholders in Iowa will eventually be within the definition of advertising injury.

II. Recent Case Development in Advertising Injury

In the course of this Article, it will become apparent the absence of bright-line rules or standard definitions governing what is meant by advertising or advertising injury, thus creating considerable confusion. Advertising injury cases are tremendously fact-specific and defy a general broad-based approach. For instance, if a company misappropriates a secret idea for a new product and subsequently advertises a product embodying the idea, are the allegations of such conduct against an insured sufficient to bring the underlying claims within the ambit of the predicate advertising injury offenses of "misappropriation of

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> industry's story. What is incredible is that the insurance industry uses policyholder premium dollars to pay insurance company counsel to find hypertechnical interpretations of any issue so long as it results in a denial of coverage.

Id.

51. *See, e.g.*, New Hampshire Ins. Co. v. R.L. Chaides Constr. Co., 847 F. Supp. 1452, 1455 (N.D. Cal. 1994) (establishing the elements of an advertising injury).

52. *See id.* In *New Hampshire Insurance Co.*, the court held an advertising injury consists of three elements: (1) an advertising activity by the named insured; (2) allegations that fit into one of the offenses enumerated in the policy; and (3) an injury that arises out of one of those offenses which was committed during the policy period and in the course of the advertising activity. *Id.*

53. *See* GAF Sales & Serv., Inc. v. Hastings Mut. Ins. Co., 568 N.W.2d 165, 167 (Mich. Ct. App. 1997).

advertising ideas or style of doing business?"[54] This Article suggests businesses might reasonably expect insurers to deny coverage for intellectual property claims because of the ambiguity of policy terms and judicial interpretation of these terms.

Not surprisingly, the way advertising is defined makes a big difference.[55] The offenses occurring in advertising activities arise in a variety of contexts. For the purposes of this Article the specific offenses will help point out how the trend is changing.[56] As the Third Circuit noted: "The definition of 'advertising injury' in standard business insurance policies has troubled and in some cases confounded courts for years."[57] Based on the trouble these policies have caused courts, should courts resolve the ambiguity against the insurer and require insurance companies to defend these lawsuits?

III. DEFINITIONS OF ADVERTISING ACTIVITIES

Many policies fail to define advertising activities, and some argue when left undefined the phrase should be construed broadly.[58] Courts have struggled

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54. Keville, *supra* note 23, at 927; *see also* Misuraca, *supra* note 2, at 142-43 (proposing other examples of problematic situations may arise under advertising activities). *Compare* Winklevoss Consultants, Inc. v. Federal Ins. Co., 991 F. Supp. 1024, 1038 (N.D. Ill. 1998) (finding that theft of "mathematical formulas and raw data input questions" for a computer program did "not fall within the covered offense 'misappropriation of advertising ideas'"), *and* Atlantic Mut. Ins. Co. v. Badger Med. Supply Co., 528 N.W.2d 486, 491 (Wis. Ct. App. 1995) (finding theft of customer lists by an employee does not constitute "misappropriation of advertising ideas and style of doing business"), *with* Merchants Co. v. American Motorists Ins. Co., 794 F. Supp. 611, 617 (S.D. Miss. 1992) (holding policy includes coverage for misappropriation of customer lists), *and* John Deere Ins. Co. v. Shamrock Indus., Inc., 696 F. Supp. 434, 442 (D. Minn. 1988) (holding coverage for advertising injury includes alleged theft of idea by a former employee), *aff'd*, 929 F.2d 413 (8th Cir. 1991).

55. "The phrase 'advertising activities' is undefined in many liability insurance policies and should be construed broadly." Horkovich & Passannante, *supra* note 11, at 94.

56. "Potentially covered 'offenses' include: copyright violations, trademark or 'trade dress' infringement, patent infringement or 'piracy,' antitrust violations, slander, libel, defamation, privacy violations, or unfair competition." *Id.* For an in depth treatment of cases divided by causes of action, see *Insurance Coverage for Intellectual Property Lawsuits*, *supra* note 12, §§ 29.06[2]–.11, at 29-81 to -268 (giving a breakdown of availability of coverage under the Standard 1976 CGL Policy Form with analysis and availability of coverage under the 1986 ISO CGL Policy). *See also* Gauntlett, *supra* note 49, ¶ 2 (providing analysis for patent infringement under advertising injury coverage); Horkovich & Passannante, *supra* note 11, at 83 (providing an analysis of potentially covered offenses and the legal issues associated with them).

57. Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 744 (3d Cir. 1999); *see also* Bank of the West v. Superior Court, 833 P.2d 545, 560 n.9 (Cal. 1992) (noting courts disagree on the definition of "advertising").

58. *See* Horkovich & Passannante, *supra* note 11, at 94; Keville, *supra* note 23, at 924. The court in *Zurich Insurance Co. v. Sunclipse, Inc.* noted: "This broad reading of the term

with how to interpret the undefined advertising activities. In *Simply Fresh Fruit, Inc. v. Continental Insurance Co.*,[59] the Ninth Circuit stated in order to invoke the coverage of the policy, "the *advertising activities* must *cause* the injury—not merely expose it."[60] It is interesting to note what courts have determined to be advertising activities causing injury. The current trend is that many claims are not court-ordered to be defended by insurers.[61]

Courts have relied upon numerous cases as authority for holding "'advertising' involves the widespread distribution of promotional material to the public at large."[62] Certain cases have held very little advertising in the alleged facts of the complaint or petition triggers coverage under the advertising injury coverage provision.[63] The ISO has proposed a new definition in which

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'advertising' comports with the basic rule of construction in insurance contracts that terms contained within an insuring provision be interpreted broadly, with any doubts as to coverage to be resolved in favor of the insured." Zurich Ins. Co. v. Sunclipse, Inc., 85 F. Supp. 2d 842, 853 (N.D. Ill. 2000). *But see* Houston Gen. Ins. Corp. v. BSM Corp., 843 F. Supp. 1264, 1266 (N.D. Ill. 1994) (recognizing the key in determining whether advertising injury coverage exists is "whether the . . . complaint sounds in one of the enumerated areas defined exclusively as covered advertising injury").

59. Simply Fresh Fruit, Inc. v. Continental Ins. Co., 94 F.3d 1219 (9th Cir. 1996).

60. *Id.* at 1223. In *Bank of the West v. Superior Court*, the California Supreme Court held any "'advertising injury' must have a causal connection with the insured's 'advertising activities' before there can be coverage." Bank of the West v. Superior Court, 833 P.2d at 560.

61. *See infra* Part III.

62. *See* American States Ins. Co. v. Vortherms, 5 S.W.3d 538, 542 (Mo. Ct. App. 1999) (citing Playboy Enters., Inc. v. St. Paul Fire & Marine Ins. Co., 769 F.2d 425, 429 (7th Cir. 1985)); *see also* Bank of the West v. Superior Court, 833 P.2d at 559 (stating advertising is broad and includes many activities); International Ins. v. Florists Mut. Ins., 559 N.E.2d 7, 10 (Ill. App. Ct. 1990) (holding advertising refers to the widespread distribution of promotional material); Smartfoods, Inc. v. Northbrook Property & Cas. Co., 618 N.E.2d 1365, 1368 (Mass. App. Ct. 1993) (stating advertising is a public announcement to proclaim the qualities of a product or point of view); GAF Sales & Serv., Inc. v. Hastings Mut. Ins., 568 N.W.2d 165, 167 (Mich. Ct. App. 1997) (explaining advertising requires widespread promotional activities directed to the public at large); Fox Chem. v. Great Am. Ins., 264 N.W.2d 385, 386 (Minn. 1978) (stating advertising contemplates public or widespread distribution of material).

63. California federal courts have given the term "advertising" a broad construction, finding that calling to public attention by any means whatsoever—even one-to-one representation—is advertising. American States Ins. Co. v. Canyon Creek, 786 F. Supp. 821, 828 (N.D. Cal. 1991) (citing Nichols v. Great Am. Ins. Cos., 215 Cal. Rptr. 416 (Ct. App. 1985)). *Canyon Creek* and *John Deere* seem to have allowed the term "advertising" to encompass personal solicitations. *See Insurance Coverage for Intellectual Property Lawsuits*, *supra* note 12, § 29.06[2][b], at 29-85; American States Ins. Co. v. Canyon Creek, 786 F. Supp. at 828; John Deere Ins. Co. v. Shamrock Indus., Inc., 696 F. Supp. 434, 439-40 (D. Minn. 1988), *aff'd*, 929 F.2d 413 (8th Cir. 1991) (stating three letters and a demonstration to one potential customer constitutes advertising); *see also* New Hampshire Ins. Co. v. R.L. Chaides Constr. Co., 847 F. Supp. 1452, 1456 (N.D. Cal. 1994) (holding audiences can be small if significant percentage of client base). *But see* Monumental Life Ins. Co. v. USF&G, 617 A.2d 1163, 1173-74 (Md. Ct. Spec. App. 1993)

advertisement means, "[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."[64]

An example of very little advertising arises in *John Deere Insurance. Co. v. Shamrock Industries, Inc.*[65] The plaintiff in the lawsuit alleged claims for a single false representation in letters sent to a customer.[66] All contracts required John Deere to defend the insured against suits alleging advertising injury.[67] The court stated: "At one extreme are *Playboy* and *Fox* which may be read as requiring 'wide dissemination' of material for a finding of 'advertising activity.' On the other extreme is the dictionary's broad definition seemingly encompassing almost any form of solicitation."[68] The court held in *John Deere Insurance Co*. "[i]f Deere wanted to limit covered advertising activity to 'wide dissemination of materials,' Deere could have so provided in its policy."[69] The court found there is "more than one reasonable interpretation of the meaning of 'advertising activity,' and therefore the policy is ambiguous and must be construed against the insurer."[70] Advertising activity is one issue; fitting within the advertising injury definition is another. Because these types of cases are fact intensive, it is helpful to look at how courts have dealt with the definition of advertising injury since 1999 within the four clauses that define the term.

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*

Some cases do not fit easily into the advertising injury category. In assessing a duty to defend, courts look to see if the alleged facts fit into the personal injury provision of the CGL.[71] A Maryland court decided *Warfield-*

(wide-spread "one-to-one" solicitation of competitor's policyholders is not public in nature and, therefore, not considered advertising).

64. *See* Gauntlett, *supra* note 9.

65. John Deere Ins. Co. v. Shamrock Indus., Inc., 696 F. Supp. 434 (D. Minn. 1988), *aff'd*, 929 F.2d 413 (8th Cir. 1991).

66. *Id.* at 435.

67. *Id.* at 437.

68. *Id.* at 439. The cases which the court refers to are *Playboy Enters., Inc. v. St. Paul Fire & Marine Ins.*, 769 F.2d 425, 429 (7th Cir. 1985) and *Fox Chem. Co. v. Great Am. Ins. Co.*, 264 N.W.2d 385, 386 (Minn. 1978).

69. John Deere Ins. Co. v. Shamrock Indus., Inc., 696 F. Supp. at 440.

70. *Id.*

71. *See, e.g.*, Warfield-Dorsey Co. v. Travelers Cas. & Sur. Co., 66 F. Supp. 2d 681, 688 (D. Md. 1999) ("[D]efendant's duty to defend can arise here only under the personal injury definition of the Policy.").

Dorsey Co. v. Travelers Casualty & Surety Co.,[72] in which plaintiff Warfield was an insurance broker and Travelers was an insurer which provided Warfield with commercial general liability insurance policies.[73] The dispute arose when it was alleged that Warfield had made false representations in a letter to clients of another agency run by McCarthy.[74] Warfield made other disparaging remarks to people about McCarthy's business as well.[75] The court found "the allegations of the underlying complaint present the potentiality that the 'personal injury' sustained by McCarthy arose out of oral or written publication of material that disparaged services rendered by McCarthy."[76] The defendant Travelers argued "it had no duty to defend plaintiff because none of the counts included in McCarthy's complaint alleged claims of libel, slander or disparagement."[77] The court found "no 'advertising injury' occurred as that term was defined."[78] However, the court did note "the allegations of the underlying complaint presented the potentiality the 'personal injury' sustained by McCarthy arose out of oral or written publication of material that disparaged services rendered by McCarthy."[79] Would the court have found a duty to defend if there was not a personal injury provision?[80] This hypothetical presents the type of cases that do not fit neatly into another category and so the insured would have to try to squeeze into the advertising injury section.

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72. Warfield-Dorsey Co. v. Travelers Cas. & Sur. Co., 66 F. Supp. 2d 681 (D. Md. 1999). Iowa law, as stated in *Employers Mutual Casualty Co. v. Cedar Rapids Television Co.*, requires, in case of doubt as to whether the suit alleges a claim that is covered by the policy, the doubt is to be resolved in favor of the insured. Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 641 (Iowa 1996) (citing A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607, 627 (Iowa 1991)). Maryland does not follow the rule adopted in Iowa, and many other jurisdictions that an insurance policy is to be construed most strongly against the insurer. Rather, Maryland courts follow "the rule applicable to the construction of contracts generally," in that the parties' intention should be ascertained if reasonably possible from the policy as a whole. *See* Warfield-Dorsey Co. v. Travelers Cas. & Sur. Co., 66 F. Supp. 2d at 685.

73. Warfield-Dorsey Co. v. Travelers Cas. & Sur. Co., 66 F. Supp. 2d at 683.

74. *Id.* at 687.

75. *Id.*

76. *Id.* at 688.

77. *Id.*

78. *Id.*

79. *Id.*

80. "'Personal injury' was defined, in pertinent part, as: injury, other than 'bodily injury,' arising out of one or more of the following offenses: . . . [o]ral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." *Id.* at 684.

B. *Oral or Written Publication of Material That Violates a Person's Right of Privacy*

Pushing the envelope farther than most was the interesting case in which an insured tried to obtain coverage for the unauthorized practice of law in an attorney general's suit.[81] *State Farm Fire & Casualty Co. v. Martinez*[82] examined Martinez's attempts to bring in the advertising injury and personal injury coverage of the policy by framing the case as a privacy rights violation.[83] The court held the attorney general's motives in bringing the action is not the relevant inquiry.[84] Instead, the court found the question is whether the specific allegations are covered injuries under the policy.[85] The court did not accept the privacy rights argument of Martinez and stated: "The unauthorized practice of law does not fit within any of the covered events found within the policy: bodily injury, property damage, personal injury, or advertising injury."[86]

Tradesoft Technologies, Inc. v. Franklin Mutual Insurance Co.[87] was a declaratory judgment action arising out of the advertising injury coverage of the casualty and general liability policy issued by the defendant, Franklin Mutual Insurance Company (Franklin), to plaintiff, Tradesoft Technologies, Inc. (Tradesoft).[88] The court held the exclusion of advertising injury coverage for injury from oral or written publication of material for the first time prior to the policy applied to all forms of advertising injury.[89] In addition, the court held the policy did not cover alleged "patent infringement, whether by offer to sell or otherwise," alleged breach of contract, or alleged tortious interference with contractual relationships.[90] It held the policy did cover alleged misappropriation of confidential information.[91] "The exclusion must be read to give effect to the plain meaning of 'advertising injury.'"[92] The court pointed out "[a]t least one court has held that the misappropriation definition is sufficiently ambiguous to

81. State Farm Fire & Cas. Co. v. Martinez, 995 P.2d 890, 891 (Kan. Ct. App. 2000).
82. State Farm Fire & Cas. Co. v. Martinez, 995 P.2d 890 (Kan. Ct. App. 2000).
83. *Id.* at 895-96.
84. *Id.*
85. *Id.*
86. *Id.*
87. Tradesoft Techs., Inc. v. Franklin Mut. Ins. Co., 746 A.2d 1078 (N.J. Super. Ct. App. Div. 2000).
88. *Id.* at 1080.
89. *Id.* at 1083-84.
90. *Id.* at 1086, 1085-87.
91. *Id.* at 1087.
92. *Id.* (citing Applied Bolting Tech. Prods., Inc. v. USF&G, 942 F. Supp. 1029, 1037 (E.D. Pa. 1986)).

encompass 'offer to sell' patent infringement."[93] In the final analysis, it was determined an "offer to sell" patent infringement is not encompassed by the advertising injury coverage of this policy.[94]

C. *Misappropriation of Advertising Ideas or Style of Doing Business*[95]

In *Precision Automation, Inc. v. West American Insurance Co.*,[96] the Ninth Circuit, looking at Oregon law, held a patent infringement action did not result from an advertising injury within the meaning of a comprehensive general liability policy.[97] Under Oregon law, if a single allegation listed in the insured's complaint potentially falls within the scope of the insurance policy, the insurer is obligated to defend the entire action.[98] Precision sued their insurance company, alleging breach of contract for failure to defend.[99] The district court granted West's motion to dismiss finding the underlying action did not arise out of advertising activity, as required by the policy.[100] The Ninth Circuit rejected Precision's contention the policy language "misappropriation of advertising ideas or style of doing business" is ambiguous and should be construed to provide coverage.[101] The Ninth Circuit found: "While a number of cases have indeed found ambiguities in this language, there is no case involving purported ambiguity over whether this phrase encompasses patent infringement."[102]

The Ninth Circuit also weighed in on scope, which is crucial in this coverage area. In *Sentex Systems, Inc. v. Hartford Accident & Indemnity Co.*,[103] when addressing the scope of the offense of "'misappropriation of advertising ideas or style of doing business,'" the court held: "This policy's language, given

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93. *Id.* at 1086 (citing Everett Assocs. v. Transcontinental Ins. Co., 57 F. Supp. 2d 874, 880-81 (N.D. Cal. 1999)).

94. *Id.*

95. In general, the phrase "misappropriation of advertising ideas or style of doing business" refers, at least, to trade dress-type claims. *See, e.g.*, Nortek v. Liberty Mut. Ins. Co., 858 F. Supp. 1231, 1237 (D.R.I. 1994).

96. Precision Automation, Inc. v. West Am. Ins. Co., D.C. No. CV-98-921-JO, 1999 WL 1073819, at *1 (9th Cir. Nov. 24, 1999) (unpublished decision).

97. *Id.* at *2.

98. *See* Timberline Equip. Co. v. St. Paul Fire & Marine Ins. Co., 576 P.2d 1244, 1247 (Or. 1978).

99. Precision Automation, Inc. v. West American Ins. Co., 1999 WL 1073819, at *2.

100. *Id.*

101. *Id.*

102. *Id.* (citing *Simply Fresh Fruit, Inc. v. Continental Ins. Co.*, 94 F.3d 1219, 1222 (9th Cir. 1996) for the proposition as a matter of law, patent infringement cannot occur in the course of an insured's advertising activities).

103. Sentex Sys., Inc. v. Hartford Accident & Indem. Co., 93 F.3d 578 (9th Cir. 1996), *aff'g* 882 F. Supp. 930 (C.D. Cal. 1995).

its ordinary meaning, does not limit itself to the misappropriation of an actual advertising text. It is concerned with 'ideas,' [as] a broader term."[104] The newest ISO form deletes misappropriation of advertising ideas altogether so scope may be less important in future litigation.

Under Minnesota law, the Eighth Circuit examined *Callas Enterprises v. Travelers Indemnity Co. of America.*[105] "Callas brought this action for declaratory relief with regard to Travelers' duty to defend and indemnify it in a lawsuit brought against it by Sbemco, Inc. (Sbemco)."[106] Sbemco's complaint alleged Callas acted with knowledge when it created false advertisements.[107] Sbemco asserted Callas, the insured, breached the agreement by selling non-Sbemco products to Sbemco customers.[108] The court held the policy exclusion for advertising injuries arising out of breach of contract barred coverage in the case.[109] Furthermore, the court found an alleged trademark infringement was neither "misappropriation of advertising ideas or style of doing business"[110] nor "infringement of copyright, title, or slogan."[111] Finally the court decided the policy exclusion for defamation committed with knowledge of its falsity also barred coverage.[112]

It can be argued *Callas Enterprises*, together with the Sixth Circuit cases *ShoLodge, Inc. v. Travelers Indemnity Co.*,[113] and *Advance Watch Co. v. Kemper National Insurance Co.*,[114] support the argument that misappropriation cannot be included within advertising injury because it is not specifically mentioned in the definition of advertising injury.[115] However, the holding in *Employers Mutual Casualty Co. v. Cedar Rapids Television Co.*[116] makes it clear a court must reject

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104. *Id.* at 580.

105. Callas Enters. v. Travelers Indem. Co. of Am., 193 F.3d 952 (8th Cir. 1999).

106. *Id.* at 954.

107. *Id.*

108. *Id.*

109. *Id.* at 955.

110. *Id.* at 956 (quotations omitted) (citing Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795, 802 (6th Cir. 1996)).

111. *Id.* (quotations omitted) (citing ShoLodge, Inc. v. Travelers Indem. Co., 168 F.3d 256, 259-60 (6th Cir. 1999) (basing its finding in part on the "absence of any express reference to trademark or service mark infringement" in the insurance agreement)).

112. *Id.* at 957.

113. ShoLodge, Inc. v. Travelers Indem., 168 F.3d 256 (6th Cir. 1999).

114. Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795 (6th Cir. 1996).

115. *See* Callas Enters. v. Travelers Indem. Co. of Am., 193 F.3d at 955-57; ShoLodge, Inc. v. Travelers Indem. Co., 168 F.3d at 259-60; Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d at 803-05.

116. Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 642-44 (Iowa 1996) (holding an insured's duty to defend is based on facts alleged and not a specific legal theory).

the decisions in *Callas Enterprises*, *ShoLodge*, and *Advance Watch* as contrary to Iowa law, to the extent they imply a cause of action must be specifically included within the definition of advertising injury to permit coverage.[117]

In *American Employers' Insurance Co. v. DeLorme Publishing Co.*,[118] the court rejected the argument if the offense of trademark infringement were covered by the policy, it would have been specifically included in the definition of advertising injury.[119] The court labeled this argument "untenable" and noted there is "no such separate offense entitled infringement of . . . title or slogan."[120] The court found if the insurance companies had wanted to limit their exposure to suits arising under the common law tort of misappropriation, it would have been a simple matter to do so.[121]

In *American States Insurance Co. v. Vortherms*,[122] the court held insureds' alleged theft and use of competitor's computer software for estimating mezzanines was not "misappropriation of advertising idea or style of doing business" and was outside advertising injury coverage.[123] The court analyzed the question of the meaning of advertising injury in terms of insured's "style of doing business."[124] The court found this "term has been held to unambiguously refer to the insureds comprehensive manner of operating its business."[125] The court concluded, "a misappropriation of an advertising idea involves the wrongful taking of another's manner of advertising."[126] For their definition the court determined "'advertising idea' implicates one calling public attention to a product or business, particularly by reference to its desirable qualities so as to increase sales or patronage."[127]

In an unpublished opinion, *Assurance Co. of America v. J.P. Structures Inc.*,[128] the Sixth Circuit determined an advertising injury did not arise from the

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117. *See supra* text accompanying notes 105-15.

118. American Employers' Ins. Co. v. DeLorme Publ'g Co., 39 F. Supp. 2d 64 (D. Me. 1999).

119. *Id.* at 78.

120. *Id.* (quotations omitted).

121. *Id.*

122. American States Ins. Co. v. Vortherms, 5 S.W.3d 538 (Mo. Ct. App. 1999).

123. *Id.* at 543-44.

124. *Id.* at 543.

125. *Id.*

126. *Id.*; *see also* Fluoroware, Inc. v. Chubb Group of Ins. Cos., 545 N.W.2d 678, 682-83 (Minn. Ct. App. 1996) (defining "misappropriation of advertising ideas" as the "wrongful taking of another's manner of advertising" in cases concerning patent infringement).

127. American States Ins. Co. v. Vortherms, 5 S.W.3d at 543.

128. Assurance Co. of Am. v. J.P. Structures, Inc., Nos. 95-2384, 96-1010, 96-1027, 1997 WL 764498 (6th Cir. Dec. 3, 1997) (unpublished decision). The opinion published was *Advance Watch Co. v. Kemper National Insurance Co.* which held the policy language did not

breach of contract which was based on the failure to pay royalties.[129] The court held Assurance had a duty to defend under the terms of the contact.[130] The plaintiff claimed "'but for' the breach of the contract, the contract would not have been terminated, and defendant would not have been unauthorized to use the trademark."[131] The court reasoned:

> Such a connection between the contract breach and the trademark infringement is, in our opinion, too remote. Defendants' breach of the contract caused its termination. Defendants' intentional unauthorized use of the mark caused the trademark infringement. The contract merely withdrew the authorization to use it. The advertising injury did not arise from the breach of contract which was the failure to pay royalties.[132]

D. *Infringement of Copyright, Title, or Slogan*[133]

Many states have found under their law the general commercial liability insurer had no duty to defend the insured in patent infringement suit under their policy's advertising injury provision.[134] It is possible for a comprehensive general liability insurer to be obligated to defend its policyholder in copyright

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extend to claims of trademark or trade dress infringement. Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795, 804-07 (6th Cir. 1996).

129. Assurance Co. of Am. v. J.P. Structures, Inc., 1997 WL 764498, at *3.

130. *Id.* at *5.

131. *Id.*

132. *Id.* One of the areas where policyholders seem to be obtaining coverage is in trademark and trade dress infringement claims. *See* Energex Sys. Corp. v. Fireman's Fund Ins. Co., No. 96 Civ. 5993 (JSM), 1997 WL 358007, at *3-4 (S.D.N.Y. June 25, 1997) (unpublished decision); Dogloo, Inc. v. Northern Ins. Co., 907 F. Supp. 1383, 1388-90 (C.D. Cal. 1995); Union Ins. Co. v. Knife Co., 897 F. Supp. 1213, 1215-16 (W.D. Ark. 1995); Poof Toy Products, Inc. v. United States Fidelity & Guaranty Co., 891 F. Supp. 1228, 1232-34 (E.D. Mich. 1995); American Economy Ins. Co. v. Reboans, Inc., 900 F. Supp. 1246, 1253 (N.D. Cal. 1994); P.J. Noyes Co. v. American Motorists Ins. Co., 855 F. Supp. 492, 495 (D.N.H. 1994).

133. The phrase infringement of copyright, title, or slogan has been held not to encompass trademark infringement. Novell, Inc. v. Federal Ins. Co., 141 F.3d 983, 986-87 (10th Cir. 1998). It is important to note the amendment of 35 U.S.C. section 271(a), effective January 1, 1996, which expressly included an offer to sell as a patent infringement. 35 U.S.C. § 271(a) (Supp. 1998). Prior to that amendment, the courts were virtually unanimous in concluding a patent infringement was not a covered advertising injury under the "copyright, slogan, or title" or similar formulations. *See id.*; Microtec Research, Inc. v. Nationwide Mut. Ins. Co., 40 F.3d 968, 971 (9th Cir. 1994); Intex Plastics Sales Co. v. United Nat'l Ins. Co., 23 F.3d 254, 256 (9th Cir. 1994); Everest & Jennings, Inc. v. American Motorists Ins. Co., 23 F.3d 226, 229 (9th Cir. 1994); Iolab Corp. v. Seaboard Surety Co., 15 F.3d 1500, 1505 (9th Cir. 1994).

134. *See, e.g.*, U.S. Test, Inc. v. NDE Envt'l Corp., 196 F.3d 1376, 1384 (Fed. Cir. 1999) (holding no duty to defend where no waiver has been done).

infringement actions. In Illinois, *Western American Insurance Co. v. Moonlight Design, Inc.*,[135] dealt with Moonlight, a distributor of bridal dresses, who was named in an infringement suit brought by Milady Bridals.[136] The claim stated Moonlight infringed Milady's copyrights on bridal dress designs and falsely represented and designated the origin of the designs.[137] To assist them, Moonlight gave the Milady complaint to Western American for defense under the advertising injury provision of its policy.[138] The court held under New York law the allegations in the Milady complaint related to advertising of the designs and was sufficient to trigger the advertising injury clause in the Western American policy.[139] Furthermore, copyright infringement was expressly included among the enumerated offenses in the policy.[140]

In *Delta Computer Corp. v. Frank*,[141] the insured, Telephone Electronics Corporation (TEC), and thirty of its subsidiaries were sued for copyright infringement.[142] TEC and its subsidiaries then brought an action against their CGL insurer, United States Fire Insurance Company, alleging the claim against them was covered under their CGL policy.[143] Delta Computer Corporation, the plaintiff in the copyright infringement suit, had developed copyrighted computer software for the purpose of generating long distance resale bills, which included a feature that allowed the generated bills to include advertisements.[144] TEC allegedly misappropriated this software.[145] TEC and its insurer, United States Fire Insurance Company, disagreed whether the CGL policy covered advertising injury liability.[146] The court held, "No such causal connection exists in the case at bar, and the coverage requirements of Louisiana law are not met because the underlying pleading states nothing about advertising."[147] The court found Delta Computer Corporation had not complained of any injury suffered in the course of the TEC parties' advertising, and a reference to advertising could not be fairly inferred from the language of the pleadings.[148] The court concluded any

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135. Western Am. Ins. Co. v. Moonlight Design, Inc., No. 9865206, 2000 WL 126901 (N.D. Ill. Feb. 1, 2000) (mem.).
136. *Id.* at *1.
137. *Id.*
138. *Id.*
139. *Id.* at *5.
140. *Id.*
141. Delta Computer Corp. v. Frank, 196 F.3d 589 (5th Cir. 1999).
142. *Id.* at 590.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 591.
148. *Id.*

advertising done through use of the software was incidental to Delta's core complaint and their "claim [was] essentially for infringement of its copyrighted software program, which was developed primarily for billing purposes, not for advertising activity."[149]

In *Merchants Co. v. American Motorists Insurance*,[150] the court reviewed the claims of misappropriation of a trade secret by taking a customer list.[151] The court reviewed the applicable policy language and concluded the existing coverage was consistent with the plain language of the policy.[152] The court found the claim of misappropriation of the customer list fell within the policy's coverage for "infringement of copyright, title or slogan" and within the coverage for "misappropriation of advertising ideas."[153] The court concluded misappropriation of trade secrets allegations are sufficiently similar to the misappropriation of advertising ideas language of the policy to raise a duty to defend and to provide coverage under the policy.[154] In this case, as opposed to *Delta Computer Corp.*, enough ambiguity was found to rule in favor of the policyholder and raise the duty to defend on the part of the insurance company.[155]

In *Palmer v. Truck Insurance Exchange*,[156] "[l]imited partnerships and general partner against whom judgment had been entered in an action for an infringement of registered mark[ ] brought suit against [their] insurer under their comprehensive umbrella liability policy."[157] They sought "declaratory relief and damages for breach of contract and covenant of good faith."[158] Palmer argued the underlying action fell within coverage for title and slogans, notwithstanding exclusion for trademark infringement.[159] The court held the policy's coverage for advertising liability covered only infringement of names of literary or artistic works or names are slogans, and no other names.[160] Simply, the court concluded that a trade name is only a name, not a title.[161]

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149. *Id.*
150. Merchants Co. v. American Motorists Ins., 794 F. Supp. 611 (S.D. Miss. 1992).
151. *Id.* at 618.
152. *Id.* at 617.
153. *Id.* at 618.
154. *Id.*
155. *Id.*; *see also* Liberty Life Ins. Co. v. Commercial Union Ins. Co., 857 F.2d 945, 951 (4th Cir. 1988) (prohibiting insurer from escaping coverage under its definition of occurrence).
156. Palmer v. Truck Ins. Exch., 988 P.2d 568 (Cal. 1999).
157. *Id.* at 568.
158. *Id.*
159. *Id.* at 575-76.
160. *Id.* at 573.
161. *Id.*

> The outcome of *Palmer*, and the rejection of strained interpretations for common policy terms, determined that liabilities for trademark infringement are not covered under the advertising injury provisions of a . . . ("CGL") policy that (1) includes coverage for "infringement of copyright [or] title" but (2) excludes coverage for "infringement of trademark, [or] trade name, other than titles . . . ."[162]

In *Allou Health & Beauty Care, Inc. v. Aetna Casualty & Surety Co.*,[163] the insureds' corporation marketed and sold lower priced imitations of brand name hair care products.[164] Allou brought a declaratory judgment action against their insurer.[165] The gist of the action was that the plaintiffs had imitated Nexxus's trademarks and marketed and advertised their products in a manner intended to deceive the public into believing that the plaintiffs' products are manufactured by or associated with Nexxus.[166] Allou sought determination its insurer was obligated to indemnify and defend it in an underlying trademark infringement action brought by Nexxus under the advertising injury coverage.[167] Although the

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162. Mark C. Goodman, Palmer v. Truck Insurance Exchange*: California Supreme Court's Finding That a Name Is Indeed a Name, and a Title Is Not*, MEALEY'S EMERG. INS. DISP., Feb. 25, 2000, at 46, 46-47 (reporting under California law, abstract dictionary meanings must yield to meaning illuminated by context) (emphasis added).

> The four other appellate opinions nationally that have applied similar policy language reached the opposite result [as the overturned court]. The first, *Parameter Driven Software v. Massachusetts Bay Ins. Co.* . . . holds that a trademark infringement suit regarding a registered company name and logo need not be defended nor indemnified. The second, *ShoLodge, Inc. v. Travelers Indemnity Co.* . . . finds that the term "title" must be defined as "the non-copyrightable title of a book, film or other literary or artistic work" and not as a business name. The third, *Julian v. Liberty Mutual Ins. Co.* . . . reaches the same result. The fourth, *Industrial Indemnity Company, et al. v. Apple Computer, Inc.* . . . agreed, reasoning: To include business names as "titles" would ignore the express exclusion of coverage for claims of trade name infringement. The parties to the insurance contract could not reasonably have contemplated both that trade name infringement was excluded and that infringement of "title," including trade names, was covered. The only reasonable construction of the . . . exclusion is that infringement of registered trademarks, . . . and trade names is not covered unless the mark or name in question is . . . a "title" in the narrower and more ordinary sense of the designation given to a work of art or other publishable matter. This interpretation fits well with the policy's coverage provision, which groups infringement of title together with copyright infringement.

Id.

163. Allou Health & Beauty Care, Inc. v. Aetna Cas. & Sur. Co., 703 N.Y.S.2d 253, 254 (App. Div. 2000).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

policy includes "misappropriation of advertising ideas and style of doing business" as a category of "advertising injury," it does not define the terms "advertising ideas" or "style of doing business."[168] Under New York law, "in construing an insurance policy to determine the scope of coverage, courts apply the test of common speech and focus on the reasonable expectations of the average insured."[169] "After the defendants disclaimed coverage, the plaintiffs commenced this action."[170] The court stated, "Where there is ambiguity as to the existence of coverage, doubt is to be resolved in favor of the insured and against the insurer."[171] The defendants argued the supreme court erred in finding that they have a duty to defend the plaintiffs because trademark infringement and related claims are not covered by the "advertising injury" coverage of the policy.[172] The appellate division found "there is a sufficient causal connection between the injury alleged in the underlying action and the plaintiffs' advertising activities to afford coverage under the policy."[173] The court held the Supreme Court of New York properly found "the defendants are obligated to defend the plaintiffs."[174] The issue of whether trademark infringement can be considered a form of advertising injury, thereby triggering an insurer's duty to defend, has divided the courts which have addressed it and it continues to cause litigation.[175]

IV. ADVERTISING INJURY ANALYSIS UNDER IOWA LAW

Expectation of a universal definition of advertising injury with standards and clear definitions is not likely in Iowa. There are many versions of advertising injury definitions and exclusions that are in current policies and future policies to be written. Of the thirty-seven contested cases that arose in 1999,

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168. *Id.*

169. *Id.* at 255.

170. *Id.* at 254-55.

171. *Id.* at 255.

172. *Id.*

173. *Id.* at 256.

174. *Id.*; *see* Hugo Boss Fashions, Inc. v. Federal Ins. Co., No. 98 Civ. 6454 HB, 1999 WL 993689, at *2-5 (S.D.N.Y. Nov. 2, 1999) (holding a "causal connection between the ground of alleged liability and the insured's advertising activities before there is coverage or a duty to defend" and in this case Federal failed to meet its burden of showing no possible basis for liability and accordingly, has a duty to defend plaintiffs against BMC's suit).

175. *See* Callas Enterprises, Inc. v. Travelers Indem. Co. of Am., 193 F.3d 952, 956-57 (8th Cir. 1999); Letro Prod., Inc. v. Liberty Mut. Ins. Co., No. 96-55219, 1997 WL 272245, at *1-2 (9th Cir. May 21, 1997) (unpublished decision); Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795, 799-804 (6th Cir. 1996); American Employers' Ins. Co. v. DeLorme Publ'g Co., 39 F. Supp. 2d 64, 65 (D. Me. 1999).

> five of the cases discuss the scope of coverage under the old 1976 ISO coverage for "advertising injury" and "advertising liability" that encompasses the offenses of "Infringement of copyright or of title of slogan," but excluded coverage "with respect to advertising activities" or "infringement of registered trademark, service mark, or trade name." The exclusion, however, did not relate to titles or slogans.[176]

In addition, the new proposals delete the following offenses: "(1) infringement of title and (2) misappropriation of advertising ideas or style of doing business."[177] Instead the new changes would read as: "(1) Infringement upon another's copyright, trade dress, or slogan in your advertisement and (2) the use of another's advertising idea in your advertisement."[178] There are two good reasons why Iowa policyholders need to check their policies. First, intellectual property rights are important in a competitive marketplace and the ramifications of not having the proper coverage can be devastating. Second, the variable policies a policyholder could purchase or has purchased could contain liability insurance language in the advertising injury coverage provision that may not cover the appropriate business risk. To help Iowa attorneys, businesses, and insurance decision-makers, a brief survey of Iowa law as it stands today follows.

A. *Duty to Defend*

"An insurer has a duty to defend whenever there is potential or possible liability to indemnify the insured based on the facts [apparent] at the outset of the case."[179] "If any claim alleged against the insured can rationally be said to fall within such coverage, the insurer must defend the entire action."[180] The scope of inquiry also may extend to "any other admissible and relevant facts in

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176. *See* Gauntlett, *supra* note 9. In the report it was stated that

> 32 of the 37 cases applied coverage under a 1986 ISO policy form, or a variation thereon, which included coverage for 'infringement of copyright or title of slogan' as the 1976 ISO form, but which did not include any exclusion for "trademark, trade name or service mark" claims and expressly provided coverage for "misappropriation of advertising ideas or style of doing business."

Id.

177. *See* Gauntlet, *supra* note 9.

178. *Id.*

179. First Newton Nat'l Bank v. General Cas. Co., 426 N.W.2d 618, 623 (Iowa 1988). Where there is no obligation to defend, there is per se no obligation to indemnify the insured for any judgment in or settlement of the underlying action. *See* Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co., 591 N.W.2d 17, 18 (Iowa 1999).

180. A.Y. McDonald Indus. Inc. v. Insurance Co. of N. Am., 475 N.W.2d 607, 627 (Iowa 1991).

the record."[181] In case of doubt as to whether the suit alleges a claim that is covered by the policy, the doubt is resolved in favor of the insured.[182] The Eighth Circuit, in *John Deere Insurance Co. v. Shamrock Industries, Inc.*, advanced the proposition "[a]n insurer seeking to avoid . . . a defense carries a burden of demonstrating that all parts of the cause of action fall clearly outside the scope of coverage."[183] In determining whether there is a duty to defend, a court must give the benefit of the doubt to the insured.[184]

In advertising injury claims, there is a problem with ambiguity of terms.[185] In assessing ambiguity, the Iowa Supreme Court stated: "The policy is to be construed as a whole, giving the words used their ordinary, not technical meaning to achieve a practical and fair interpretation."[186] "The test is an objective one: Is the language fairly susceptible to two interpretations?"[187]

The Iowa law is clear that the claim in the underlying action need not allege a claim specifically enumerated in the policy.[188] The Iowa Supreme Court addressed this issue in an en banc decision in *Employers Mutual Casualty Co. v. Cedar Rapids Television Co.*, and concluded that the duty to defend arises from the facts alleged in the underlying action and not from the legal theory pled in the suit.[189] As the Iowa Supreme Court noted: "Insurance coverage is predicated on the assessment of the risk involved should the insured participate in a

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181. First Newton Nat'l Bank v. General Cas. Co., 426 N.W.2d at 623.

182. *Id.* at 628.

183. John Deere Ins. Co. v. Shamrock Indus., Inc., 929 F.2d 413, 418 (8th Cir. 1991) (citations omitted).

184. A.Y. McDonald Indus., Inc. v. Insurance Co. of N. Am., 475 N.W.2d at 627.

185. It is a matter of state law to determine whether the language in an insurance policy is ambiguous. *See* Sargent Const. Co. v. State Auto. Ins. Co., 23 F.3d 1324, 1326 (8th Cir. 1994) (stating if an insurance policy is ambiguous, the policy shall be construed against the insurer).

186. Morgan v. American Family Mut. Ins. Co., 534 N.W.2d 92, 99 (Iowa 1995) (holding "when the terms of an insurance policy are ambiguous, the court construes them against the insurer"). "[T]he mere fact that the parties disagree on the meaning of a particular term does not establish ambiguity." *Id.*

187. North Star Mut. Ins. Co. v. Holty, 402 N.W.2d 452, 454 (Iowa 1987).

188. *See, e.g.*, Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d 639, 642-44 (Iowa 1996) (holding the theory of recovery does not need to be mentioned in the policy for a duty to defend to exist); Essex Ins. Co. v. Fieldhouse, Inc., 506 N.W.2d 772, 775 (Iowa 1993) (stating that in analyzing the potential duty to defend, which is broader than the duty to indemnify, the appropriate starting point is the allegations contained in the petition).

189. *See* Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d at 642-44. The Sixth Circuit noted "regardless of whether [the underlying petition or] complaint includes the term 'advertises' in general, the complaint must allege that [the policyholder] specifically committed one of the four types of 'advertising injury' specified in the policy before [the insurer] has a duty to defend." United Nat'l Ins. Co. v. SST Fitness Corp., 182 F.3d 447, 450 (6th Cir. 1999).

particular type of conduct and not the risk of the plaintiff's choice of legal theories."[190] A look at two federal courts of appeals cases will help illuminate the possible action that could occur under Iowa law when a court interprets whether an action arises out of an advertising injury.

In *John Deere Insurance Co. v. Shamrock Industries, Inc.*, the court decided a coverage question involving underlying claims of "patent infringement, misappropriation of trade secrets, unfair competition, and breach of contract."[191] The claim in the underlying action involved an allegation the insured had copied features of another company's machine, had disclosed, disseminated, and published trade secrets and proprietary information, "through direct communication and/or through the sale and distribution of machines," including information regarding "business practices, design plants, and contemplated future improvements."[192] The court concluded the insurer had an obligation to defend the insured on the claims under the advertising injury portions of the policy.[193]

Compared to *John Deere*, a case falling on the outer edge of the spectrum is *Frog, Switch & Manufacturing Co. v. Travelers Insurance Co.*, in which the insured was sued for "theft of trade secrets, unfair competition and reverse passing off."[194] These claims were based upon the insured's misappropriation of design drawings for dipper buckets, and the subsequent advertisement of dipper buckets created from the stolen plans.[195] The Third Circuit found no advertising injury coverage.[196] The court found that "to be covered by the policy, allegations of unfair competition or misappropriation have to involve an advertising idea, not just a nonadvertising idea that is made the subject of advertising."[197]

For example, district courts have tried to follow the reasoning of the appellate courts. The district court in Illinois stated in *Western American Insurance Co. v. Moonlight Design, Inc.*,

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190. Employers Mut. Cas. Co. v. Cedar Rapids Television Co., 552 N.W.2d at 644.

191. John Deere Ins. Co. v. Shamrock Indus., Inc., 696 F. Supp. 434, 435 (D. Minn. 1988), *aff'd*, 929 F.2d 413 (8th Cir. 1991).

192. *Id.* at 436.

193. *Id.* at 440.

194. Frog, Switch & Mfg. Co. v. Travelers Ins. Co., 193 F.3d 742, 744 (3d Cir. 1999).

195. *Id.* at 744-45.

196. *Id.* at 748.

197. *Id.* (emphasis omitted); *see also* Atlantic Mut. Ins. Co. v. Badger Med. Supply Co., 528 N.W.2d 486, 490 (Wis. Ct. App. 1995) (an advertising idea is an "idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage").

> [m]any jurisdictions require a tight causal connection between the underlying injury and advertising activity, and frequently hold that an insurer is not obligated to defend even where the underlying complaint contains allegations of advertising activity, so long as the ultimate source of the allegations is the manufacture, design or sale of an infringing product.[198]

The Illinois court pointed out New York law differs from Illinois in that "[a]ll that is needed under New York law are allegations the insured has advertised a 'knock-off' product and thereby caused harm."[199] The source of the lawsuit was "Moonlight's design and sale of bridal dresses," but the court found "the copyright claims of the Milady complaint also contain numerous allegations pertaining to Moonlight's . . . advertising, promoting, offering for sale, selling and distributing bridal dresses . . . that are piratical copies."[200] The court found "[u]nder New York law, these allegations are sufficient to trigger a duty to defend."[201]

B. *Iowa Influence*

The Iowa Supreme Court in *Kalell v. Mutual Fire & Automobile Insurance Co.*,[202] stated "[c]ourts construing *coverage* clauses give the words 'arising out of' a broad, general, and comprehensive meaning. They are commonly understood to mean originating from, growing out of, or flowing from, and require only that there be some causal relationship between injury and risk for which coverage is provided."[203] In *Dairyland Insurance Co. v. Concrete*

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198. Western Am. Ins. Co. v. Moonlight Design, Inc., No. 98C5206, 2000 WL 126901, at *6 (N.D. Ill. Feb. 1, 2000). The cases cited for this proposition were: *Advance Watch Co. v. Kemper National Insurance Co.*, 99 F.3d 795, 806-07 (6th Cir. 1996); *Davila v. Arlasky*, 857 F. Supp. 1258, 1262-63 (N.D. Ill.1994); *Bank of the West v. Superior Court*, 833 P.2d 545, 558-59 (Cal. 1992). Western Am. Ins. Co. v. Moonlight Design, Inc., 2000 WL 126901, at *6 n.7.

199. Western Am. Ins. Co. v. Moonlight Design, Inc., 2000 WL 126901, at *6. The court explained:

> Breaking from the majority position, courts in New York have held that "it would be artificial to deny coverage by constructing a distinction between the injuries arising from the manufacture and sale of infringing goods and injuries arising from the marketing of these same goods by means of display or advertisement of the goods."

Id. (quoting Massachusetts Bay Ins. Co. v. Penny Preville, Inc., No. 95 Civ. 4845, 1996 WL 389266, at *7 (S.D.N.Y. July 10, 1996) (unpublished decision)).

200. *Id.* at *5 (citation and quotations omitted).

201. *Id.*

202. Kalell v. Mutual Fire & Auto. Ins. Co., 471 N.W.2d 865 (Iowa 1991).

203. *Id.* at 867 (stating, however, "a narrow or restrictive construction is required" for an exclusion clause). "Insurance policy exclusions are strictly construed against the insurer." Hickman v. IASD Health Servs. Corp., 572 N.W.2d 165, 167 (Iowa Ct. App. 1997).

Products Co.,[204] the Iowa Supreme Court interpreted the words "arising out of" broadly to include coverage.[205]

It can probably be assumed there will be some type of causation required. "Virtually every business that sells a product or service advertises, if only in the sense of making representations to potential customers. If no causal relationship were required between 'advertising activities' and 'advertising injuries,' then 'advertising injury' coverage, alone, would encompass most claims related to the insured's business."[206] Do these cases point Iowa toward New York or more toward Ohio in its view of what type of causal nexus is required?

> Some carriers and specialty lines are now writing endorsements or special policies to cover what they have successfully argued is not covered by general liability policies. Their objection has not been principle, but premium—even though the carriers have sometimes characterized the issue as one of moral hazard or public policy.[207]

Various provisions in general liability coverage forms try to restrict coverage. The tension between the idea of broad protection for business and insurance companies only paying sums they are legally obligated to pay involve the courts to allocate the vast amounts of money usually at stake. The existence of a free market does not eliminate the need for the courts; no matter how the policy is drawn up there will be disputes. As Milton Friedman observed, "government is essential both as a forum for determining the 'rules of the game' and as an umpire to interpret and enforce the rules decided on."[208]

V. Conclusion

Will a general business liability carrier have a duty to defend, and possibly to indemnify, for damages awarded to a competitor in intellectual property disputes?

> A couple of hunters chartered a plane to fly them into forest territory. Two weeks later the pilot came to take them back. He took a look at the animals they had shot and said, "This plane won't take more than one wild buffalo. You'll have to leave the other behind."
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> "But last year the pilot let us take two in a plane this size," the hunters protested.

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204. Dairyland Ins. Co. v. Concrete Prods. Co., 203 N.W.2d 558 (Iowa 1973).
205. *See id.* at 561, 563.
206. Bank of the West v. Superior Court, 833 P.2d 545, 560 (Cal. 1992).
207. Misuraca, *supra* note 2, at 140.
208. Milton Friedman, Capitalism and Freedom 15 (1962).

> The pilot was doubtful, but finally he said, "Well, if you did it last year I guess we can do it again."
>
> So the plane took off with the three men and two buffaloes. But it couldn't gain height and crashed into a neighboring hill. The men climbed out and looked around. One hunter said to the other, "Where do you think we are?" The other inspected the surroundings and said, "I think we're about two miles to the left of where we crashed last year."[209]

Assumptions are dangerous. "Insurers usually offer their policies on a 'take it or leave it' basis."[210] It could be like trusting the two hunters. New determinations under Iowa law will help determine which policies could be the ones that crash a business or an insurance company into a mountain. Policyholders should carefully review their existing coverage to determine whether their policies will protect them from liability arising out of their existing procedures.

The extent of coverage and the duty to defend may not be as comprehensive as businesses would like. It seems advertising injury coverage policies are being increasingly read narrowly. Some cases allowed ambiguities to be construed against the insurer. These cases should not allow businesses to load two buffaloes into the plane without realizing the possibility of crashing. Just like the pilot in the story who was doubtful, comprehensive policies should be scrutinized for what is explicitly provided for under the advertising injury provision. Whether Iowa courts will construe undefined policy language broadly to include most intellectual property claims is a possibility based upon precedent and policy. The easier route may be to support narrow reading of phrases encompassing only the offenses listed in the policy. As Paul asks, "[I]f the trumpet does not sound a clear call, who will get ready for battle?"[211] With the large amount of money at stake and uncertain "sounds" in the advertising injury polices, both insureds and insurers will be preparing for battle.

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209. ANTHONY DE MELLO, TAKING FLIGHT 40 (1988).

210. *Insurance Coverage for Intellectual Property Lawsuits*, *supra* note 12, § 29.11, at 29-268.

211. 1 Corinthians 14:8 (New International).