LOS ANGELES
Daily Journal
www.dailyjournal.com
THURSDAY, JUNE 2, 2011

LITIGATION

Opportunities for Insurance Coverage in Intellectual Property Disputes

By Peter Selvin

In any dispute involving intellectual property, counsel should immediately assess the opportunities for coverage, especially under commercial general liability (CGL) and directors and officers policies. Recent cases have underscored that there are opportunities for finding insurance coverage in a variety of intellectual property contexts.

Several cases have found coverage under CGL policies for patent infringement where the underlying technology is used as part of an insured's advertising activities. See *Amazon.com International v. American Dynasty Surplus Lines Ins. Co.*, 120 Wash.App. 610 (2004) (patent infringement covered under "misappropriation of advertising ideas" offense where infringed software itself constituted or embodied the advertising technique); *Hyundai v. National Union Fire Ins. Co.*, 600 F.3d 1092 (9th Cir. 2010) (coverage for infringement of business method patent arising out of Hyundai's "build your own vehicle" feature on its Web site).

Coverage for patent infringement claims is even more likely to be found under a company's directors and officers policy. This is because the trigger for coverage under such a policy is sufficiently broad to extend over a wide range of alleged or actual wrongdoing, whether negligent, reckless or even intentional. Thus, in a recent New York case, patent infringement claims were held to be potentially within the coverage provision applicable to "wrongful acts." *American Century Services Corp. v. American International Specialty Lines Ins. Co.*, 2002 WL 1879947 (S.D.N.Y. Aug. 14, 2002)

Claims of intellectual property theft or misappropriation of trade secrets are difficult to fit into the coverage parameters of typical CGL or directors and officers policies. Nevertheless, a minority of cases have found coverage under the "advertising injury" provisions of CGL policies. See *The Merchants Company v. American Motorists Insurance Co.*, 794 F.Supp. 611 (S.D.Miss. 1992); *Sentex Systems Inc. vs. Hartford Accident & Indemnity*, 882 F.Supp. 930 (C.D.Cal. 1995); *John Deere Ins. Co. v. Shamrock Industries Inc.*, 696 F.Supp. 434 (D.Minn. 1988). Because insurance law is matter of state and not federal law, practitioners need to be cognizant that the substantive law in this area will vary depending on the particular jurisdiction involved.

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Where misappropriation of trade secrets overlaps a claim for unfair competition, there may be additional coverage opportunities. For example, the "disparagement" by one company of another's goods, products or services may trigger coverage under the "personal injury" portion of a CGL policy. See *Michael Taylor Designs Inc. v. Travelers Property Casualty Company of America*, 2011 US Dist. LEXIS 8004 (N.D.Cal. 2011); *Amquip Corp. v. Admiral Ins. Co.*, 2005 US Dist. LEXIS 5462 (E.D. Pa. March 31, 2005)

Finally, there may be significantly greater opportunities for coverage under a directors and officers policy. See *Acacia Research Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pa*, 2008 WL 4179206 (C.D.Cal. Feb. 8, 2008) (directors and officers policy carrier obligated to reimburse company and its officer for defense fees and settlement paid in intellectual property theft/trade secrets case); *MedAssets Inc. v. Federal Ins. Co.*, 705 F.Supp.2d 1368 (N.D.Ga. 2010) (claim alleging misappropriation of confidential information was covered under directors and officers policy).

The "violation of right of privacy" offense contained in a CGL policy's "advertising injury" coverage has found application in a number of statutory contexts that involve intellectual property issues. For example, a recent case held that coverage applied for alleged violations by an insured of the Electronic Communications Privacy Act. See N*etscape Communications Corp. v. Federal Ins. Co., 2007 US Dist*. LEXIS 78400 (N.D.Cal. Oct. 10, 2007) (claims arising from Netscape's alleged use of software program to track information about customer's Internet activities for use in marketing efforts); *Creative Hospitality Ventures Inc. vs. United States Liability Ins. Co.*, 655 F.Supp.2d 1316 (S.D.Fla. 2009) (violation of right of privacy offense in CGL policy triggered by vendor's "publication" of information contained on credit card receipts).

These cases illustrate the opportunities that traditional insurance coverage offer in the context of intellectual property cases. Careful practitioners will spot opportunities to obtain coverage for their clients in this area.

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