Patent Infringement Claims May Be Covered Under CGL Policies

by Peter S. Selvin[1]

Several very recent cases from the US highlight how claims for patent infringement may be covered under the "advertising injury" portion of a CGL policy. These cases also illustrate the tie-in between an insured's "advertising activities" and patent infringement, especially where the insured utilizes an advertising technique that is itself subject to patent protection.

Amazon.com International, Inc. vs. American Dynasty Surplus Lines Insurance Company, 120 Wash.App. 610 (2004) involved a suit by Intouch Group, which held a patent for software which allowed customers to preview music products online. Intouch sued Amazon for patent infringement on the theory that Amazon used Intouch's technology to enable customers to preview music available for purchase.

After Amazon's primary and excess carriers declined to cover the claim, Amazon brought suit against its excess carrier, which was thereafter settled. As part of that settlement, the excess carrier received an assignment of Amazon's rights against its primary carrier. That primary carrier had issued a CGL policy to Amazon which included a grant of "advertising injury" coverage.

The key issue in the case was whether a claim arising from Amazon's use of an advertising technique which was itself patented could fit within the grant of "advertising injury" coverage under the policy. The Court answered that question in the affirmative, holding that Amazon's use of the advertising technique fit within the policy offense of "misappropriation of advertising ideas or style of doing business". The Court further held that because there was a causal relationship between Amazon's use of the advertising technique and Intouch's alleged damages, coverage would be found for the patent infringement claim under Amazon's CGL policy.

The Court reached a similar conclusion in **Hyundai Motor America vs. National Union Fire Insurance Company of Pittsburgh, PA**, 600 F.3d 1092 (9th Cir. 2010). There the advertising technique was Hyundai's "Build Your Own Vehicle" feature, which allowed customers to navigate through a series of questions on Hyundai's website in order to select various options (such as colors, engine and transmission types) for a customized vehicle. As in **Amazon.com,** the Court found that the underlying patent claim fit within the policy offense of "misappropriation of advertising ideas" and hence was presumptively covered.

Finally, and to illustrate how far US courts may go in this area, consider a decision from last year, **Dish Network Corporation vs. Arch Specialty Insurance Company**, 659 F.3d 1010 (10th Cir. 2011). In that case the advertising technique at issue was customer service telephone system that allowed customers to perform pay-per-view ordering and customer service over the phone. Concluding that Dish had allegedly committed patent infringement by using the patent owner's technology to sell its satellite television products and services, the Court that the plaintiff's complaint to be broad enough to

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potentially allege “misappropriation of advertising ideas”. For this reason, coverage under the CGL was found.