The Coverage Inkwell

Emerging Coverage Issues in Intellectual Property, Privacy, and Cyber Liability

White and Williams LLP

Joshua A. Mooney
mooneyj@whiteandwilliams.com

March 22, 2013

NO ACROBATICS: BUZZ-WORDS AND PHRASES DO NOT CREATE COVERAGE

Attempts to pin insurance coverage on the use of buzz-words and catch phrases are not uncommon, especially in the context of underlying actions that involve claims of copyright, trademark, and/or trade dress infringement. The latter two forms of intellectual property, in particular, are used in marketing and are widely associated with advertising. Some courts even hold that a trademark is an advertising idea. Therefore, many assume that because trademarks and trade dress (or other forms of intellectual property) are used in advertising, allegations of that intellectual property's infringement constitute advertising injury. Such conclusions place too much emphasis on certain words in isolation, hoping that they might conjure some spectacular show. In reality, the conclusions require leaps in logic that plummet when scrutinized. Simply because an infringed product (and the intellectual property attached to it) is advertised does not mean that an advertising injury has occurred (or is even alleged).

Purplus, Inc. v. Hartford Cas. Ins. Co., No. 12-3689 (N.D. Cal. Mar. 19, 2013), addresses this issue. There, the California federal court rejected that notion that references to advertising in copyright and trademark infringement claims did not constitute an advertising injury to implicate an insurance carrier's duty to defend. Importantly, the Court rejected the notion that the use of certain phrases or references could transform a claim or create coverage.

Adobe sued Purplus alleging copyright and trademark infringement for Purplus's alleged sale of pirated versions of Adobe's software. In its complaint, Adobe alleged that Purplus had engaged in a "systematic, unauthorized copying, distribution and use of Adobe's software products in interstate commerce through sales through various Internet sites." (Slip. op., p. 5.) Adobe claimed that Purplus, "through Internet sites, including but not necessary [*sic*] limited to www.purplus.net (the 'Website') have made, offered for sale, sold, and distributed unauthorized copies of Adobe Software (the 'Unauthorized Software Product') including at least Adobe Acrobat 9.0 Professional (the 'Adobe Software') and likely other products." (*Id.*, pp. 5-6.) According to Adobe, Purplus's actions, "commonly known as software piracy," were willful and caused "substantial damage to Adobe and to the software industry." (*Id.*, p. 5.)

Purplus had a business liability policy that provided coverage for "personal and advertising injury," which was defined in part as injury arising out of "[c]opying, in your 'advertisement,' a person's or organization's 'advertising idea' or 'style of advertisement." (*Id.*) The policy defined "advertisement" in part as "the widespread public dissemination of information or images that has the purpose of inducing the sale of goods, products or services...." (*Id.*, p. 4.) "Advertising idea" was defined as "any idea for an 'advertisement." (*Id.*) The policy also had an intellectual property exclusion, which provided that the insurance did not apply to "personal and advertising injury" arising out of:

> Arising out of any violation of any intellectual property rights such as copyright, patent, trademark, trade name, trade secret, service mark or other designation of origin or authenticity.
>
> However, this exclusion does not apply to infringement, in your "advertisement," of
>
> (a) Copyright;
>
> (b) Slogan, unless the slogan is also a trademark, trade name, service mark or other designation of origin or authenticity[.]

(*Id.*, p. 5.)

Purplus tendered its defense to its carrier, which denied coverage under the policy. Purplus and Adobe ultimately settled the underlying action "for a five-figure amount," (i*d.*, p. 2), and Purplus thereafter commenced a DJ action to obtain defense and indemnity coverage. The insurer successfully moved to dismiss for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6).

In the coverage litigation, both parties agreed that the business policy provided coverage for advertising injury, which was an infringement, in the insured's advertisement, of another's advertising idea. (*Id.*, p. 7.) Purplus argued that it was entitled to coverage because certain words or phrases in Adobe's complaint, like "advertising, sale and/or offer for sale," showed the infringement of an advertising idea in its advertisement and, therefore, implicated the insurer's duty to defend. (*Id.*, p. 8.) The Court disagreed.

Explaining that buzz words and catch phrases cannot transform a claim or otherwise create coverage, the Court held that because the underlying action did not allege *facts* that showed potential liability for infringement in the insured's advertisement of another's advertising idea, there was no duty to defend:

> However, factual allegations in the underlying complaint may trigger an insurer's duty to defend, even if the underlying "technical legal causes of action" do not reveal a potential for coverage. [Citation omitted.] This Court has not found any facts alleged in the Adobe Complaint that reveal a potential liability for an advertising injury. Purplus argues that certain words or phrases in the Adobe Complaint like "advertising, sale

> and/or offer for sale" triggered Hartford's duty to defend. [Citation omitted.] Certainly, Adobe used the word "advertising" when framing its trademark cause of action. *However, references to the term "advertisement" do not transform trademark infringement allegations into advertising injuries. [Citation Omitted.] Moreover, a party cannot excise particular words or phrases from their context so as to manufacture coverage*. . . .Thus, this Court finds that there are no factual allegations in the Adobe Complaint which could have triggered Hartford's duty to defend.

(*Id.*)

Under California law, an insurer's knowledge of extrinsic facts also may implicate a duty to defend. Here, however, the Court held that Purplus's advertisements did not trigger the duty, because the lawsuit itself did not allege a claim for advertising injury. The duty to defend was not so expansive as to require coverage to a claim factually and legally "untethered" from the complaint:

> Purplus argues that its advertisements relating to Adobe, some of which appeared on its website and others which it sent to Hartford after being served with the Adobe Complaint, constituted extrinsic facts that triggered Hartford's duty to defend. However, there can be "no evidence to impose a duty to defend when the underlying lawsuit sets forth neither the facts nor the legal claims necessary to bring the lawsuit within the terms of the policy." [Citation omitted.] Additionally, "the duty to defend is broad, but not so expansive that it requires an insurer to undertake a defense as to claims that are both factually and legally untethered from the third party's complaint." [Citation omitted.] As discussed above, this Court finds that no legal causes of action or factual allegations in the Adobe Complaint revealed a potential liability for an advertising injury. Thus, this Court finds that Purplus's advertisements could not have triggered Hartford's duty to defend.

(*Id.*, pp. 8-9.)

Finally, the court also held that the intellectual property exclusion also applied to bar coverage—buzz phrases like "advertisement" and "offer for sale" in claims of copyright and trademark infringement did not negate the exclusion:

> The Policy's intellectual property exclusion bars coverage of any intellectual property infringement unless the infringement is a copyright violation of another's advertising idea or style, or an infringement of a non-trademarked slogan. [Citation omitted.] The Adobe Complaint alleged causes of action for copyright infringement of Adobe's software

> and trademark infringement of Adobe trademarks. . . . Neither of these causes of action constituted a copyright infringement of an advertising idea or style, or an infringement of a non-trademarked slogan. As a result, the intellectual property exclusion barred coverage of the claims alleged in the Adobe Action.

(*Id.*, p. 9.)

What does this case mean? In the world of media and cyber liability, too many times an insured (or a plaintiff's attorney with assigned rights) will try to transform an underlying claim into something that it is not. References to advertising or the use of buzz words should not alter the flavor of a lawsuit like salt in a soup. *Purplus* was about the sale of pirated software, not the infringement of intellectual property in an advertisement. The court got it right here.

Questions are welcome.

The Coverage Inkwell

Joshua A. Mooney | Counsel
1650 Market Street | One Liberty Place, Suite 1800 | Philadelphia, PA 19103-7395
Direct 215.864.6345 | Fax 215.399.9613
mooneyj@whiteandwilliams.com | whiteandwilliams.com
Assistant: Dana Genovese | 215.864-6331

White and Williams LLP