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Advertising Injury Coverage Analysis for Trademark and Trade Dress Infringement Claims in Texas: As Easy as One, Two, Three

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**ADVERTISING INJURY COVERAGE ANALYSIS
FOR TRADEMARK AND TRADE DRESS
INFRINGEMENT CLAIMS IN TEXAS: AS
EASY AS ONE, TWO, THREE**

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INTRODUCTION

Insurance for business risks has its roots in the 17th century where, at Edward Lloyd's Coffeehouse, merchants and underwriters met to construct contracts to insure the risk of loss of cargo sent by ship to the New World and the Far East.¹ Liability coverage for businesses developed later and did not reach prominence in this country until the 1880s.² Early on, each insurance carrier drafted its own coverage form, leading to considerable confusion.³ In 1940, the first standard "comprehensive general liability" policy was released.⁴ This voluntary standardization was a collaborative effort of industry organizations.⁵ The industry's cooperation has continued through the development of standardized forms by the Insurance Services Office ("ISO").⁶

ISO first introduced its Commercial General Liability policy ("CGL") form in 1985.⁷ This standardized policy form consists mainly of two coverage components, "Coverage A" and "Coverage B."⁸ The vast majority of litigated coverage disputes between insureds and insurance companies regarding coverage under the CGL have been under Coverage A and its exclusions, which provide all-risk type coverage for "bodily injury" or "property damage" caused by an "occurrence."⁹ On the other hand, Coverage B provides coverage for damages because of "personal injury" or "advertising injury," terms that are specifically defined by the policy.¹⁰ The definitions of these terms encompass a wide range of specified offenses that "often result in neither bodily injury nor damage to tangible property and consequently are not insured under Coverage A of the CGL coverage form."¹¹ Recently, coverage litigation has increased under Coverage B as insureds have discovered additional coverages for claims thought either not covered or excluded from coverage under Coverage A.¹² For instance, litigants have sought determination of whether certain unfair trade claims are covered as "advertising injury" under the

1. See BARRY D. SMITH ET AL., PROPERTY AND LIABILITY INSURANCE PRINCIPLES 69 (2d ed. 1994).

2. See 7A JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4491 (Walter F. Berdal ed., rev. vol. 1979).

3. See 1 ERIC MILLS HOLMES & MARK S. RHODES, HOLMES'S APPLEMAN ON INSURANCE § 1.15, at 65 (2d ed. 1996).

4. See 2 ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 10.03[2] (1999).

5. See HOLMES & RHODES, *supra* note 3, § 1.15, at 65.

6. ISO is "a service organization whose membership consists exclusively of property/casualty insurers." *Id.* at 66.

7. See 2 LONG, *supra* note 4, § 10.03[2].

8. See *id.* § 10.01[2].

9. See JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 14.05 (2d ed. Aspen Law & Bus. 1999).

10. See [CASUALTY & SURETY VOLUME] THE NATIONAL UNDERWRITER CO., THE FIRE CASUALTY & SURETY BULLETINS § A.4-1 Public Liability (1996).

11. *Id.*

12. See STEMPEL, *supra* note 9, § 14.05(a).

CGL.¹³ Specifically, many courts have been called upon to determine if trademark or trade dress infringement claims are covered.¹⁴

Only two federal district courts in Texas have addressed the issue head-on.¹⁵ Other jurisdictions have addressed the issue but have reached varying decisions.¹⁶ Texas courts should not make the determination that trademark and trade dress infringement claims should be unconditionally covered as advertising injury because Texas common law, its rules of policy construction, and general trademark and trade dress law militate against such a finding. Rather, each claim should be analyzed case-by-case, based on the particular allegations made and the coverage afforded. The purpose of this Comment is to provide a framework to assist the courts in analyzing coverage for trademark and trade dress claims under the CGL in Texas.

I. BACKGROUND ON ADVERTISING INJURY COVERAGE AND TRADEMARK AND TRADE DRESS CLAIMS

A. *Trademark and Trade Dress Infringement*

The Lanham Act¹⁷ defines “trademark” as “any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.”¹⁸ To qualify as a trademark, a mark must satisfy three requirements. First, the mark must be a tangible symbol: a word, name, symbol, or device or any combination of these; second, the manufacturer or seller must adopt and actu-

13. *See id.* § 14.06.

14. *See id.*

15. *See Industrial Molding Corp. v. American Mfrs. Mut. Ins. Co.*, 17 F. Supp. 2d 633, 639 (N.D. Tex.), *vacated*, 22 F. Supp. 2d 569 (N.D. Tex. 1998) (granting unopposed motion to vacate pursuant to settlement); *Gemmy Indus. v. Alliance Gen. Ins. Co.*, No. 3-98-CV-0014-BD, 1998 WL 804698 (N.D. Tex. Nov. 17, 1998), *aff'd mem.*, 200 F.3d 816 (5th Cir. 1999).

16. *Compare Union Ins. Co. v. Knife Co.*, 897 F. Supp. 1213, 1215-16 (W.D. Ark. 1995) (concluding that trademark infringement constitutes advertising injury under the commercial general liability policy), *with Advance Watch Co. v. Kemper Nat'l Ins. Co.*, 99 F.3d 795, 802 (6th Cir. 1996) (holding that the definition of advertising injury within the commercial general liability policy does not include trademark or trade dress infringement).

17. 15 U.S.C. §§ 1051-1127 (1994). The purpose of the Lanham Trade-Mark Act was to generally simplify trademark law through its codification into a single legislative act. *See S. Rep. No. 1333*, at 4 (1946). At the time of the proposed Act, trademark law consisted primarily of common law protections that varied from state to state and a hodgepodge of federal protections contained in different laws. *See id.* at 3-4. An analysis of the various aspects, protections, and remedies available under the Lanham Trade-Mark Act is beyond the scope of this paper.

18. *Id.* § 1127.

ally-use the symbol; and, third, the mark must identify and distinguish the seller's goods from goods made or sold by others.¹⁹

Generally, the trademark serves four basic functions:

1. To identify one seller's goods and distinguish them from goods sold by others;
2. To signify that all goods bearing the trademark come from or are controlled by a single, albeit anonymous, source;
3. To signify that all goods bearing the trademark are of an equal level of quality; and
4. As a prime instrument in advertising and selling the goods.²⁰

Additionally, the trademark serves as a symbol of goodwill developed by a company.²¹ If a customer is satisfied with and prefers a company's product, the trademark serves as an identification of the product in future purchases.²² Through this identification, a trademark "makes effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage. Without some such method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist."²³ In addition to serving as an identification of the source of the product, the trademark serves to signify the consistent quality of that product.²⁴ The trademark also serves as a prime element in the advertising of a product.²⁵ Examples of trademarks include sport team emblems,²⁶ Nike, Inc.'s "swoosh" symbol, and its "Just Do It" slogan.²⁷

The concept of trade dress, while similar in respect to the concept of the trademark in that it identifies the source of a product, is a much broader concept.²⁸ Traditionally, trade dress "includes the appearance of labels, wrappers, and containers used in packaging a product

19. See 1 J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 3:1 (4th ed. 1999).

20. *Id.* § 3:2.

21. See 1 MCCARTHY, *supra* note 19, § 3:2.

22. See *id.*

23. *Smith v. Chanel, Inc.*, 402 F.2d 562, 566 (9th Cir. 1968).

24. See *El Greco Leather Prods. Co. v. Shoe World, Inc.*, 806 F.2d 392, 395 (2d Cir. 1986) ("One of the most valuable and important protections afforded by the Lanham Act is the right to control the quality of the goods manufactured and sold under the holder's trademark." (citing *Menendez v. Faber*, 345 F. Supp. 527 (S.D.N.Y. 1972), *aff'd in relevant part*, 485 F.2d 1355 (2d Cir. 1973), *modification rev'd sub nom.* *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 862 (1976))).

25. See *Northam Warren Corp. v. Universal Cosmetic Co.*, 18 F.2d 774, 774-75 (7th Cir. 1927) (holding that a trademark is a species of advertising used to fix the product and its producer in the minds of consumers).

26. See *National Football League Props., Inc. v. Wichita Falls Sportswear, Inc.*, 532 F. Supp. 651, 662 (W.D. Wash. 1982) (holding that replica jerseys violated the NFL's trademarks).

27. See *Nike, Inc. v. "Just Did It" Enters.*, 6 F.3d 1225, 1226 nn.1-2 (7th Cir. 1993).

28. See 1 MCCARTHY, *supra* note 19, § 8:1.

as well as displays and other materials used in presenting the product to prospective purchasers.”²⁹ However, over the years, the definition has been expanded to include the totality of the elements that combine to create the whole image of the product as presented to the consumer.³⁰ Trade dress has also been defined as “the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.”³¹ Thus, although trade dress formerly referred to the packaging of a product, its definition now includes the shape and design of the actual product.³² Examples of trade dress include a design for a magazine cover,³³ the design of a restaurant,³⁴ the use of a lighthouse as part of a golf course hole design,³⁵ the design of a video game console,³⁶ and the shape and appearance of a golf club head.³⁷

Despite the distinctions between the concepts protected, trademark and trade dress laws are intertwined. The purpose of both is “to enable a business to identify itself efficiently as the source of a given product through the adoption of a mark which may be in the form of a slogan, symbol, ornamental design or other visual insignia.”³⁸ Most courts apply similar tests for trademark and trade dress infringement.³⁹ Distinctions between the two are sometimes difficult to determine:

The reason for making a semantic distinction between “trademarks” and “trade dress” is largely historical. Early in the development of the law, a distinction was drawn between the law of “trademarks” and the law of “unfair competition” with the latter encompassing, among other things, trade dress. But today, any such distinctions have largely disappeared. Today, many types of design-

29. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 cmt. a (1995).

30. See 1 MCCARTHY, *supra* note 19, § 8:1.

31. John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983). This definition has been embraced by the Supreme Court in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 764 n.1 (1992).

32. See 1 MCCARTHY, *supra* note 19, § 8:5.

33. See Reader’s Digest Ass’n v. Conservative Digest, Inc., 821 F.2d 800, 804-05 (D.C. Cir. 1987) (upholding the trial court’s determination that the overall design and layout of a magazine cover was protectable trade dress).

34. See *Two Pesos*, 505 U.S. at 767 (upholding that the “inherently distinctive” décor, color, and style of a Taco Cabana restaurant is protectable as trade dress).

35. See *Pebble Beach Co. v. Tour 18 I, Ltd.*, 942 F. Supp. 1513, 1554-61 (S.D. Tex. 1996) (holding that the replication of famous and distinctive golf course holes, including the famous “Lighthouse Hole” at Harbour Town, constituted trade dress infringement), *judgment aff’d as modified*, 155 F.3d 526 (5th Cir. 1998).

36. See *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 447-48 (4th Cir. 1986) (holding that the intentional copying of a video poker game console constituted trade dress infringement).

37. See *Callaway Golf Co. v. Golf Clean, Inc.*, 915 F. Supp. 1206, 1212 (M.D. Fla. 1995) (holding that the “inherently distinctive” design of Big Bertha golf club irons was protected as trade dress).

38. *Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 935-36 (7th Cir. 1989).

39. See WILLIAM E. LEVIN, *TRADE DRESS PROTECTION* § 1:4 (West 1996).

nations protectable as “trade dress” are also registerable as “trademarks.” Today, unregistered trade dress is protectable under the federal Lanham Act § 43(a) under the same rules as are trademarks. Thus, the American law throughout much of the Twentieth Century is the gradual disappearance of distinctions between the law of “trade dress” and that of “trademarks.”⁴⁰

B. *Historical Development of Advertising Injury Coverage*

The first appearance of coverage for advertising injury was under umbrella insurance coverage in the 1940s.⁴¹ Coverage became more common under a frequently purchased “Broad Form CGL endorsement” that insurers began offering in the 1950s.⁴² This endorsement⁴³ and its successors could be purchased at an additional cost and attached to the standard CGL. In 1973, the language of the endorsement was revised to read, “‘Advertising injury’ means injury arising out of an offense committed during the policy period occurring in the course of the named insured’s advertising activities, if such an injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title, or slogan.”⁴⁴

Much of the coverage litigation during this period revolved around the definition of “unfair competition.”⁴⁵ However, the 1986⁴⁶ CGL, developed by ISO, included the broad coverage for advertising injury afforded by endorsement as part of the standard CGL.⁴⁷

C. *Advertising Injury Coverage Under the Modern CGL and Courts’ Interpretations and Application of Coverage*

Under the 1986 form, the policy covers damages because of an “advertising injury” caused by an offense committed in the course of advertising.⁴⁸ The policy defines advertising injury as injury arising out of:

40. 1 MCCARTHY, *supra* note 19, § 8:1.

41. *See* STEMPER, *supra* note 9, § 14.06.

42. *See id.*

43. An endorsement is a supplement attached to a standardized policy, which broadens, extends, or limits coverage of the standardized policy. *See* 1 PAT MAGARICK & KEN BROWNLEE, CASUALTY INSURANCE CLAIMS § 2.9 (4th ed. 1995).

44. 1973 Standard Broad Form Comprehensive Liability Endorsement § II D, *reprinted in* 2 LONG, *supra* note 4, § 11A.100[2].

45. *See* BARRY R. OSTRAGER & THOMAS R. NEWTON, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 7.04[b][2] (9th ed. 1994).

46. ISO’s 1985 CGL coverage form is commonly referred to as the 1986 form since most recent insurers did not put it to use until that year. *See* 2 LONG, *supra* note 4, § 10.03[2].

47. *See* STEMPER, *supra* note 9, § 14.06.

48. *See id.*

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- 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 idea or style of doing business; or
- d. Infringement of copyright, title or slogan.⁴⁹

With the advent of the new policy language, a new round of litigation ensued as policyholders sought to broaden coverage under advertising and personal injury coverage.⁵⁰ Many coverage disputes turn on whether trademark or trade dress infringement is covered under the CGL's "advertising injury" definition of "misappropriation of advertising idea or style of doing business."⁵¹ In making coverage determinations under the advertising injury provision, a three-step approach is generally used: (1) the underlying complaint must raise potential for liability under a covered offense; (2) the insured must have engaged in advertising activities; and (3) there must be a causal connection between the injury alleged and the advertising activity.⁵² Many courts have used this analysis in some form or fashion.⁵³ While this three-step analysis appears to be the generally accepted test for evaluating advertising injury under the CGL policy, courts are in disagreement over the interpretation of the different elements. This division is best exemplified through two cases: *Advance Watch Co. v. Kemper National Insurance Co.*⁵⁴ and *Lebas Fashion Imports v. ITT Hartford Insurance Group.*⁵⁵

49. Insurance Services Office, Inc., "Commercial General Liability Policy Form" No. CG 00 01 11 85 § V(1) (1984), *reprinted in* 2 LONG, *supra* note 4, § 11A.100[3] [hereinafter CGL Policy Form].

50. See STEMPER, *supra* note 9, § 14.06.

51. See *infra* Part II.A.

52. See *Sentex Sys., Inc. v. Hartford Accident Indem. Co.*, 882 F. Supp. 930, 939 (C.D. Cal. 1995), *aff'd*, 93 F.3d 578 (9th Cir. 1996).

53. See *Industrial Molding Corp. v. American Mfrs. Mut. Ins. Co.*, 17 F. Supp. 2d 633, 637 (N.D. Tex.) (referring to the three-prong "Sentex test"); *vacated*, 22 F. Supp. 2d 569 (N.D. Tex. 1998) (granting unopposed motion to vacate pursuant to settlement); *Poof Toy Prods., Inc. v. United States Fidelity & Guar. Co.*, 891 F. Supp. 1228, 1232, 1234 (E.D. Mich. 1995) (holding that to afford coverage, the court must find "allegations of the fact constituting one of the enumerated 'advertising injury' offenses" and "a causal element, i.e., that advertising activities/offenses caused the alleged injuries."); *St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc.*, 824 F. Supp. 583, 585 (E.D. Va. 1993) (requiring a determination that a predicated offense exists prior to determining if the offense resulted from advertising), *aff'd mem.*, 21 F.3d 424 (4th Cir. 1994); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553, 557-59 (W.D.N.Y. 1993) (where the court determined that trademark infringement was covered under "advertising injury," the complaint specifically alleged the use was in an advertisement, and that the causal connection between "advertising activity" and "advertising injury" was met), *vacated as a condition of settlement*, 153 F.R.D. 36, 37-38 (W.D.N.Y. 1994).

54. 99 F.3d 795 (6th Cir. 1996).

55. 59 Cal. Rptr. 2d 36 (Ct. App. 1996).

II. ADVERTISING INJURY ANALYSIS: DIFFERENT JURISDICTIONS, DIFFERENT PERSPECTIVES

A. *Advance Watch*

At one end of the spectrum, the Sixth Circuit has concluded that no trademark or trade dress claims are covered under the CGL's advertising injury coverage. This conclusion was reached in the landmark case of *Advance Watch Co. v. Kemper National Insurance Co.*⁵⁶ In 1994, A.T. Cross Company and A.T.X. International, Inc. (collectively "Cross") sued Advance Watch Company, Ltd. ("Advance Watch") for trade dress and trademark infringement.⁵⁷ Cross alleged Advance Watch copied the design and style of the top of Cross's pen, which was a registered trademark.⁵⁸ Cross further alleged that Advance Watch published a catalog depicting the imitation pens.⁵⁹ After Advance Watch's insurance carrier denied a demand for defense and indemnity under its policy, Advance Watch settled the claims with Cross.⁶⁰ Advance Watch then brought suit against its carrier seeking indemnification for the settlement.⁶¹

The *Advance Watch* court held that the advertising injury definition of "misappropriation of advertising ideas or style of doing business" only included "the unauthorized taking or use of interests other than those which are eligible for protection under statutory or common-law trademark law."⁶² In reaching this conclusion, the court first determined there was no ambiguity in the policy provision because the terms within the definition could be determined either through case law or common usage.⁶³ Specifically, "misappropriation" referred to a specific common-law tort; the ordinary meaning of "advertising idea" could be understood "as an idea for calling public attention to a product or business"; and "style of doing business" was established in case law as "a company's comprehensive manner of operating its business."⁶⁴

In analyzing the first prong of the advertising injury coverage determination framework, the court distinguished the common law tort of misappropriation and trademark or trade dress infringement.⁶⁵ The court pointed out that trademark and trade dress infringement require a showing that the public is or might be confused by the infringing conduct, which is an element not required for a misappropriation

56. 99 F.3d 795 (6th Cir. 1996).

57. *See id.* at 798.

58. *See id.*

59. *See id.*

60. *See id.* at 799.

61. *See id.* at 797.

62. *Id.* at 802.

63. *See id.* at 802.

64. *See id.* at 801.

65. *See id.* at 802.

claim.⁶⁶ Also, the court pointed out that the doctrine of misappropriation was well established and referred to a category of actionable conduct apart from trademark or trade dress infringement.⁶⁷

The court also cited historical factors relevant to its conclusion. The court concluded, relying on Judge Posner's statements, that a broad, overall reading of the definition of advertising injury that included trademark and trade dress infringement would expand the "advertising injury" definition to include non-verbal conduct, which would be contrary to the ordinary meaning of "advertising."⁶⁸ Furthermore, the *Advance Watch* court pointed out that both trademark and trade dress infringement are distinct categories of actionable conduct and if they were intended to be covered, they would have been referred to specifically in the policy, as were the distinct categories of infringing activity, including "infringement of copyright, title or slogan."⁶⁹

The court then analyzed the third prong in the analysis: whether the required nexus existed between the alleged ground of liability and advertising activity.⁷⁰ The court noted that Cross's allegations contained a statement that alleged the infringing pens appeared in an advertisement.⁷¹ Even so, the court held that the requirement of some connection between the ground for the alleged liability and the insured's advertising activity was not satisfied.⁷² The court determined that Cross's claim was provoked, not by *Advance Watch*'s advertising in itself, but by the fact that each advertisement depicted a pen similar in style and appearance to Cross's.⁷³ *Advance Watch* argued that the simple appearance of the pen in an advertisement satisfied the causal connection requirement.⁷⁴ However, the court stated, "[T]his argument proves too much, for it would invoke advertising injury coverage and the duty to defend whenever a product is merely exhibited or displayed."⁷⁵

B. *Lebas*

At the other end of the spectrum, a California appellate court, after extensive analysis, reached the conclusion that all trademark and trade dress claims are covered under the CGL. Perfume manufac-

66. *See id.* at 801.

67. *See id.* at 802.

68. *See id.* at 802-03 (citing *Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.* 43 F.3d 1119, 1123 (7th Cir. 1994) (holding the advertising injury provision is mainly concerned with harmful speech)).

69. *See id.* 99 F.3d at 803 (citing *St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc.*, 824 F. Supp. 583, 585 (E.D. Va. 1993), *aff'd mem.*, 21 F.3d 424 (4th Cir. 1994)).

70. *See id.* at 806.

71. *See id.*

72. *See id.*

73. *See id.* at 806-07.

74. *See id.* at 807.

75. *Id.*

turer Parfums Guy Laroche (“Guy Laroche”) sued Lebas Fashion Importers (“Lebas”) alleging Lebas was infringing its trademark, “DRAKKAR.”⁷⁶ The plaintiffs in the underlying case alleged Lebas used the trademark on its clothing products.⁷⁷ Lebas tendered the claim to its insurance company, ITT Hartford Insurance Group (“Hartford”), for defense and indemnity under its policy, but the carrier denied coverage.⁷⁸ Lebas settled the claim with Guy Laroche and then brought suit against Hartford for breach of contract and bad faith refusal to defend.⁷⁹ The court held advertising injury coverage extended to the claim for trademark infringement.⁸⁰

Without extensive comment or analysis, the *Lebas* court determined the allegations satisfied the “nexus” requirement of the third prong. The court indicated a “trademark is but a species of advertising.”⁸¹ Because of this, advertising a good or service is a way in which the infringement may, and often does, occur.⁸² Through this reasoning, the court accepted as true the allegation that the infringement occurred in the course of advertising and that the “required nexus existed.”⁸³

In analyzing the second prong, the court first determined that the policy was ambiguous.⁸⁴ Because an ambiguity was found, the court applied the California insurance policy rule of construction that states when insurance contract terms are ambiguous, a court looks to the reasonable expectation of the insured in determining if the conduct is covered.⁸⁵ In its interpretation of how a layperson would interpret the words in the policy, the court determined that misappropriation simply meant, “to take wrongfully.”⁸⁶ Furthermore, the court concluded that because one of the functions of a trademark is to advertise, trademarks are advertising ideas.⁸⁷ For the same reason, the court also concluded, “a trademark could reasonably be considered an integral part of an entity’s ‘style of doing business.’”⁸⁸ Thus, under the reasonable expectation test, the court concluded the policy provision covers trademark infringement claims.⁸⁹

76. See *Lebas Fashion Imports v. ITT Hartford Ins. Group*, 59 Cal. Rptr. 2d 36, 38 (Ct. App. 1996).

77. See *id.*

78. See *id.* at 39.

79. See *id.*

80. See *id.* at 38.

81. *Id.* at 41 (citing *Northam Warren Corp. v. Universal Cosmetic Co.*, 18 F.2d 774, 774 (7th Cir. 1927)).

82. See *id.*

83. *Id.*

84. See *id.* at 42.

85. See *id.*

86. *Id.* at 44 (quoting *Dogloo, Inc. v. Northern Ins. Co. of New York*, 907 F. Supp. 1383, 1388-89 (C.D. Cal. 1995)).

87. See *id.*

88. *Id.*

89. See *id.* at 46.

III. TEXAS SHOULD FOLLOW A MORE NARROW INTERPRETATION
OF ADVERTISING INJURY COVERAGE IN ANALYZING
COVERAGE FOR TRADEMARK/TRADE
DRESS CLAIMS

A. *Step One—Coverage Under an Enumerated Offense—The
Misappropriation of Advertising Idea or Style of Doing
Business Definition Should Be
Narrowly Construed*

The threshold determination in the analysis of whether any claim made for coverage under “advertising injury” should be to determine if the allegations raise a potential for coverage by falling under one of the enumerated offenses listed in the definition of advertising injury. As discussed above, courts are divided on the issue of whether trademark or trade dress infringement qualifies as “misappropriation of an advertising idea or style of doing business.”⁹⁰ Rather than simply following either side of the divide, Texas courts will likely engage in independent analysis under Texas law.

1. Ambiguity and the Texas Rules of Policy Construction

Insurance policies are contracts and under Texas law are generally governed by the rules of construction applicable to contracts.⁹¹ However, one distinction pertaining to construction of insurance policies and other contracts is that when the insurance policy language “is susceptible of more than one construction, such policies should be construed strictly against the insurer and liberally in favor of the insured.”⁹² But, if the language of the insurance contract is clear and unambiguous, “a court cannot resort to the various rules of construction.”⁹³ Determination of an ambiguity is a question of law for the court to decide.⁹⁴ Because of this, it will be the role of Texas courts to determine if the phrase “misappropriation of advertising idea or style of doing business” is ambiguous, and if so, to apply the applicable rule

90. *Compare Lebas Fashion Imports*, 59 Cal. Rptr. 2d at 38 (holding that trademark and trade dress infringement claims are covered under a “misappropriation of advertising idea or style of doing business” advertising injury offense), *with Advance Watch Co. v. Kemper Nat’l Ins. Co.*, 99 F.3d 795, 802 (6th Cir. 1996) (holding that trademark and trade dress claims are not covered under this policy provision).

91. *See National Union Fire Ins. Co. v. CBI Indus.*, 907 S.W.2d 517, 520 (Tex. 1995).

92. *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987) (citing *Glover v. National Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977); *Ramsay v. Maryland Am. Gen. Ins. Co.*, 533 S.W.2d 344, 349 (Tex. 1976); *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 180 (Tex. 1965)).

93. *Id.* at 665 (citing *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984)).

94. *See National Union Fire*, 907 S.W.2d at 520 (citing *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983); *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980)).

of construction to resolve the ambiguity. Whether the language is ambiguous is another disputed area among the several courts addressing the issue.

2. In the Absence of Finding an Ambiguity, a Court Should Likely Find Coverage Does Not Extend to Trademark or Trade Dress Infringement

If no ambiguity is found, courts should not afford coverage. As with other contracts, in the absence of an ambiguity, the insurance policy terms are to be given their “plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense.”⁹⁵ In Texas, if a contract is worded so that it can be given an exact or certain legal interpretation, it is not ambiguous.⁹⁶

It can and has been argued that the exact and legal meaning of the word “misappropriation” contained in the definition of advertising injury refers to the common law tort of misappropriation. In *International News Service v. Associated Press*,⁹⁷ the United States Supreme Court first recognized the doctrine of misappropriation.⁹⁸ Misappropriation is an unfair competition doctrine, established by common law.⁹⁹ The elements are: (1) a substantial investment of time, labor, skill, and money in the creation of a product; (2) the defendant’s competitive use of the product against the plaintiff; and (3) damages.¹⁰⁰ Misappropriation is a distinct category of unfair trade, apart from trademark or trade dress infringement.¹⁰¹ Moreover, Texas has long recognized the tort of misappropriation. In 1925, Texas courts first followed the United States Supreme Court’s decision in *International News Service* and recognized the tort of misappropriation in *Gilmore v. Sammons*.¹⁰² The recognition of this subsection of unfair trade has also been recently applied in *United States Sporting Products, Inc. v. Johnny Stewart Game Calls, Inc.*¹⁰³ Johnny Stewart Game Calls, Inc. (“Game Calls”) alleged United States Sporting Products had copied certain animal recordings made by Game Calls for use by hunters and

95. *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996) (citing *Western Reserve Life Ins. Co. v. Meadows*, 261 S.W.2d 554, 557 (Tex. 1953)).

96. *See Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997) (citing *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996); *National Union Fire*, 907 S.W.2d at 520).

97. 248 U.S. 215 (1918).

98. *See id.* at 240.

99. *See* 2 McCARTHY, *supra* note 19, § 10:47.

100. *See United States Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214, 218 (Tex. App.—Waco 1993, writ denied). *See also International News*, 248 U.S. at 239-40; *Gilmore v. Sammons*, 269 S.W. 861, 863 (Tex. Civ. App.—Dallas 1925, writ ref’d).

101. *See Johnny Stewart Game Calls*, 865 S.W.2d at 217.

102. 269 S.W. 861, 863 (Tex. Civ. App.—Dallas 1925, writ ref’d).

103. 865 S.W.2d 214, 218 (Tex. App.—Waco 1993, writ denied).

photographers in order to lure animals into close range.¹⁰⁴ In reaching its decision that the tapes were protectable under the independent cause of action for misappropriation, the Waco Court of Appeals clearly pointed out that Texas embraces the doctrine.¹⁰⁵ The court stated that, while “misappropriation does not extend any property interest to matters in the public domain,” the product of one’s effort is a recognized property right.¹⁰⁶

Thus, Texas courts recognize misappropriation as a distinct tort, separate and apart from other causes of action within the concept of unfair competition. As a result, the term has been given a meaning that is unambiguous and does not include trademarks or trade dress protection claims. This being the case, the definition of advertising injury clearly refers to and provides coverage for two types of claims under the tort of misappropriation—advertising ideas and style of doing business.

Even if a court does not accept the definition as applying to the well-established tort of misappropriation, all trademark and trade dress infringement should not be included in this definition. However, two federal district courts in Texas have reached this conclusion.¹⁰⁷ Each of these cases either relies on conclusions reached by other courts with little independent analysis or applies rules of construction not recognized in Texas.

In *Gemmy Industries, Corp. v. Alliance General Insurance Co.*,¹⁰⁸ a federal magistrate judge for the Northern District of Texas, in an unpublished opinion, found the word “misappropriate” unambiguous.¹⁰⁹ Rather than engage in independent analysis under Texas law, the court relied on the conclusions of “most courts” in determining that trademark or trade dress infringement is covered by the definition of “misappropriation.”¹¹⁰ Fun-Damental Too, Ltd. (“Fun-Damental”) brought claims against Gemmy Industries Corp. (“Gemmy”) for, among other things, trade dress infringement and Lanham Act violations.¹¹¹ After its insurance companies denied coverage for the claims, Gemmy settled the claims with Fun-Damental and brought suit against its carriers.¹¹² In determining whether advertising coverage existed, the court first analyzed if an enumerated offense oc-

104. *See id.* at 216.

105. *See id.* at 217-18.

106. *Id.* at 218.

107. *See Industrial Molding Corp. v. American Mfrs. Mut. Ins. Co.*, 17 F. Supp. 2d 633, 639 (N.D. Tex.), *vacated*, 22 F. Supp. 2d 569, 569-70 (N.D. Tex. 1998) (granting unopposed motion to vacate pursuant to settlement); *Gemmy Indus. v. Alliance Gen. Ins. Co.*, No. 3-98-CV-0014-BD, 1998 WL 804698, at *5 (N.D. Tex. Nov. 17, 1998), *aff’d mem.*, 200 F.3d 816 (5th Cir. 1999).

108. 1998 WL 804698.

109. *See id.* at *4.

110. *See id.*

111. *See id.* at *1.

112. *See id.*

curred. The court discussed and then rejected the *Advance Watch* court's reasoning based on the independent tort of misappropriation.¹¹³ After determining the plain and ordinary meaning of "misappropriate" to be "to take wrongfully," the court concluded that "[t]here is no ordinary distinction between misappropriations that are actionable under trademark law and those that are not."¹¹⁴ This conclusion appears incorrect because, in Texas, the tort of misappropriation includes appropriations other than those covered under statutory trademark law or other forms of unfair competition.¹¹⁵

In *Industrial Molding Corp. v. American Manufacturers Mutual Insurance Co.*,¹¹⁶ the Texas Federal District Court in Lubbock also analyzed the issue. Industrial Molding Corp. ("IMC") was sued for trade dress infringement.¹¹⁷ IMC tendered the claim to its insurance carrier, which denied coverage.¹¹⁸ IMC settled the claims.¹¹⁹ In analyzing whether the claim was covered in the subsequent suit against the insurance carriers, the court simply glossed over the meaning of misappropriation.¹²⁰ However, the court concluded that "style of doing business" referred to trade dress.¹²¹ To reach this conclusion, the court applied the "reasonable expectation" rule of policy construction used by the *Lebas* court.¹²² This rule of construction has not only been formally rejected in Texas,¹²³ it has been criticized.¹²⁴ Further-

113. *See id.* at *4.

114. *Id.*

115. *See* United States Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc., 865 S.W.2d 214, 218 (Tex. App.—Waco 1993, writ denied).

116. 17 F. Supp. 2d 633 (N.D. Tex.), *vacated*, 22 F. Supp. 2d 569 (N.D. Tex. 1998) (granting unopposed motion to vacate pursuant to settlement).

117. *See id.* at 634.

118. *See id.*

119. *See id.* at 635.

120. *See id.* at 638. The court simply indicated that the prior policy did not limit the term to the common law tort of misappropriation and if the drafters wanted to do this, they would have. *See id.*

121. *See id.*

122. *See id.*; *Lebas Fashion Imports v. ITT Hartford Ins. Group*, 59 Cal. Rptr. 2d 36, 42 (Ct. App. 1996).

123. One federal district court has applied the rule of construction in a diversity case finding that

[t]he better and more carefully reasoned of these non-Texas cases apply the "reasonable expectations" test in this type of situation. This position is logically appealing and the Court is persuaded that it is the view courts in Texas and other states will take in the future when faced with this problem.

Fritz v. Old Am. Ins. Co., 354 F. Supp. 514, 516-17 (S.D. Tex. 1973) (footnote omitted). However, when presented with the opportunity more than 20 years later, the Texas Supreme Court rejected the reasonable expectation test in *Forbau v. Aetna Life Insurance Co.*, 876 S.W.2d 132 (Tex. 1994). In a dissenting opinion, Justice Dogget pointed out that while on a motion for rehearing, the vote had switched, leading to a different conclusion than that announced earlier. Believing that the court's prior decision was correct, Justice Dogget incorporated that former majority opinion into his dissent. *See id.* at 135 (Dogget, J., dissenting). The opinion of the court's first hearing

more, while the rule has been adopted in California,¹²⁵ other jurisdictions have specifically rejected it.¹²⁶

In discussing the policy phrase, “style of doing business,” the *Industrial Molding* court applied rules of construction despite not specifically finding the phrase ambiguous.¹²⁷ The court, relying on a California case, simply determined that because the term is not defined, the “reasonable expectation test” should be applied.¹²⁸ This again is not the law of Texas. Even if the reasonable expectation test was an accepted policy construction rule in Texas, to apply it or any rule of construction, there must be a finding of an ambiguity in the language of the policy.¹²⁹ Here no ambiguity was found.

3. If an Ambiguity is Found, a Court Should Still Find Coverage Does Not Extend to All Trademark or Trade Dress Infringement

Even if the language in the policy is found to be ambiguous and the rules of policy construction are applied, “misappropriation of advertising ideas or style of doing business” should not be interpreted to include coverage for all trademark or trade dress infringement claims. A provision is ambiguous if it is reasonably susceptible to more than one meaning.¹³⁰ In Texas, courts only apply the rules of contract construction if an ambiguity is found.¹³¹

A federal district court in Texas found such an ambiguity in this phrase in *Bay Electric Supply, Inc. v. The Travelers Lloyds Insurance*

of the case in 1992 is reproduced *id.* at 136 Appendix A. In that opinion, the court, when faced with an ambiguity in the policy language of group medical insurance policy, had used the reasonable expectation test to find coverage. *See id.* at 142; *but see* Yancey v. Floyd West & Co., 755 S.W.2d 914, 925 (Tex. App.—Forth Worth, writ denied) (noting that the policy language could not be construed in favor of the insured and that it did not require the use of the reasonable expectation doctrine).

124. *See e.g.*, Susan M. Popik & Carol D. Quackenbos, *Reasonable Expectations After Thirty Years: A Failed Doctrine*, 5 CONN. INS. L.J. 425 (1998) (discussing generally the problems with the reasonable expectation test).

125. *See* Century Bank v. St. Paul Fire & Marine Ins. Co., 482 P.2d 193, 194 (Cal. 1971).

126. *See* Allen v. Prudential Prop. & Cas. Ins. Co., 839 P.2d 798, 805 (Utah 1992) (recognizing an “uneasiness” with the concept of the reasonable expectations doctrine); Foremost Ins. Co. v. Putzier, 627 P.2d 317, 321 (Idaho 1981) (noting that Idaho had not adopted the “reasonable expectation” doctrine); Sterling Merch. Co. v. Hartford Ins. Co., 506 N.E.2d 1192, 1196 (Ohio Ct. App. 1986) (noting that Ohio “has not implicitly adopted the theory of recovery known as the reasonable expectations doctrine.”).

127. *See* Industrial Molding Corp. v. American Mfrs. Mut. Ins. Co., 17 F. Supp. 2d 633, 638 (citing American Econ. Ins. Co. v. Reboans, Inc., 900 F. Supp. 1246, 1254-55 (N.D. Cal. 1994)).

128. *See id.*

129. *See* Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663, 665 (Tex. 1987).

130. *See id.*

131. *See* General Am. Indem. Co. v. Pepper, 339 S.W.2d 660, 661 (Tex. 1960).

Co.¹³² In this case, Bay Electric Supply, Inc. (“Bay Electric”) and FAE, Inc. (“FAE”) sued their insurance carrier seeking a declaratory judgment that the advertising injury provision of their commercial general liability policy covered an underlying trademark and trade dress action filed against them by a competitor, American Circuit Breaker Corp. (“ACB”).¹³³ The Federal District Court in Galveston acknowledged that the opinion in *Industrial Molding* was vacated,¹³⁴ but found “the reasoning of the *Industrial Molding* court to be highly persuasive”¹³⁵ and relied heavily upon the opinion. The *Bay Electric* court noted the insurance company’s heavy reliance on the *Advance Watch* decision but dismissed the argument that the misappropriation of advertising ideas or style of doing business definition is limited to the common law tort of misappropriation.¹³⁶ “If the drafters of this insurance policy 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.”¹³⁷ However, this statement begs the question: If the drafters of the insurance policy meant to cover trade dress or trademark infringement claims, why did they not list the types of infringing activity included within this definition? It would have been a simple matter to do so. This argument is supported in decisions regarding coverage for patent infringement claims.

Courts have determined that patent infringement claims are not covered under the advertising injury provision of the policy because, if the policy intended such coverage, patent infringement would be specifically listed as a covered offense.¹³⁸ The defendant in *Bay Electric* made a similar argument against coverage for trademark and trade dress infringement claims.¹³⁹ However, the court found the cases making this argument simply did not apply to trademark or trade dress claims.¹⁴⁰ Through this conclusion, the court seems to indicate that intellectual property claims of patent infringement and intellectual property claims of trademark or trade dress are simply different and therefore should be analyzed differently. The court dismissed the *Advance Watch* court’s conclusion that the coverage was limited to the common law tort of misappropriation because the *Bay Electric* court

132. 61 F. Supp. 2d 611, 617 (S.D. Tex. 1999).

133. *See id.* at 613-14.

134. *See id.* at 615.

135. *Id.*

136. *See id.* at 616-17.

137. *Id.* at 617 (citing *Industrial Molding Corp. v. American Mfg. Mut. Ins. Co.*, 17 F. Supp. 2d 663, 638 (N.D. Tex.), *vacated*, 22 F. Supp. 2d 569 (N.D. Tex. 1998) (granting unopposed motion to vacate pursuant to settlement)).

138. *See Gencor Indus., Inc. v. Wausau Underwriters Ins. Co.*, 857 F. Supp. 1560, 1564 (M.D. Fla. 1994) (citing *St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc.*, 824 F. Supp. 583, 586 (E.D. Va. 1993), *aff’d mem.*, 21 F.3d 424 (4th Cir. 1994)).

139. *See Bay Electric*, 61 F. Supp. 2d at 616.

140. *See id.*

did “not believe that the average insured is required to know the obscure distinctions between common law business torts.”¹⁴¹ However, the court seems to believe the average insured is required to distinguish the admitted technical term “trade dress”¹⁴² and other business torts such as patent infringement.

In its analysis under step one—whether a covered offense is alleged—the court noted that numerous courts across the country, including the court in *Lebas*, have agreed with Bay Electric and FAE’s position that advertising injury coverage for misappropriation of advertising ideas or style of doing business includes trademark and trade dress claims.¹⁴³ Citing a Texas appellate court case, the court indicated that under Texas law it “is required to adopt the objectively reasonable interpretation most favorable to the insured.”¹⁴⁴ The court found Bay Electric and FAE proposed an objectively reasonable interpretation and one that has been accepted by several other courts.¹⁴⁵ Because the interpretation was reasonable, the *Bay Electric* court stated it was “required” to accept the interpretation of the insured.¹⁴⁶ The rule of construction relied upon by the *Bay Electric* court is strikingly similar to the reasonable expectations test used by the *Industrial Molding* court, on which the court heavily relied. However, while “[t]he court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent,”¹⁴⁷ the provision being interpreted in this case was not one of exclusion or limitation but one granting coverage. As noted by one court:

It is important to recognize different rules of construction governing the interpretation of policy provisions which extend coverage as opposed to policy provisions which exclude coverage. When a case involves an exception or limitation to an insurer’s liability under a policy, a more stringent construction against the insurer is required than a case involving a coverage provision.¹⁴⁸

While the general rule remains that in the case of an ambiguity, the policy “should be construed strictly against the insurer and liberally in favor of the insured,”¹⁴⁹ the stringent construction against the carrier

141. *Id.* at 617.

142. *See id.* at 616 n.1.

143. *See id.* at 616.

144. *Id.* at 617 (citing *American States Ins. Co. v. Arnold*, 930 S.W.2d 196, 200 (Tex. App.—Dallas 1996, writ denied)).

145. *Id.*

146. *See id.*

147. *National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (emphasis added).

148. *Warrilow v. Norrell*, 791 S.W.2d 515, 525 (Tex. App.—Corpus Christi 1989, writ denied).

149. *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987).

utilized by the *Bay Electric* court may not be required. Furthermore, “[t]his general rule does not affect another general rule of construction of all contracts, to-wit: that all parts of a contract are to be taken together, and that such meaning shall be given thereto as will carry out and effectuate to the fullest extent the intention of the parties.”¹⁵⁰

Because courts may not be required to use the strict rule applied by the *Bay Electric* court, Texas courts might utilize other rules of policy construction if an ambiguity is found. One such rule looks to the contract as a whole and requires that any policy construction not be done piecemeal, but as a whole, using each clause to help interpret others.¹⁵¹ Using this Texas rule, the other enumerated offenses within the definition of “advertising injury” would be used to interpret “misappropriation of advertising ideas or style of doing business.” The *Advance Watch* court used this type of analysis to conclude that the definition did not include trademark or trade dress infringement.¹⁵² This court noted that the other enumerated offenses contained within the definition of advertising injury mainly involved harmful speech.¹⁵³ The *Industrial Molding* court rejected this argument as flying “in the face of common sense and experience with advertising.”¹⁵⁴ The *Industrial Molding* court missed the point. Each of the CGL’s other definitions of advertising injury includes some requirement of spoken or written word. The first two definitions expressly require an oral or written publication.¹⁵⁵ The fourth definition includes “infringement of copyright, title or slogan”¹⁵⁶—all of which require written words. To expand this definition to include all trademark or trade dress infringement would expand coverage to include conduct that did not include words or speech, such as copying a registered symbol or a product’s design or characteristics.

Also, each of the enumerated offenses covered under the definition of advertising injury point to the exact legal claims covered. The first offense refers to libel or slander,¹⁵⁷ the second to violations of the right of privacy,¹⁵⁸ and the last to copyright, title or slogan infringe-

150. *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 180 (Tex. 1965).

151. *See Western Indem. Co. v. American Physicians Ins. Exch.*, 950 S.W.2d 185, 188 (Tex. App.—Austin 1997, no writ).

152. *See Advance Watch Co. v. Kemper Nat’l Ins. Co.*, 99 F.3d 795, 802-03 (6th Cir. 1996).

153. *See id.* at 803 (citing *Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.*, 43 F.3d 1119, 1123 (7th Cir. 1994)). The court pointed out that while Judge Posner’s opinion revolved around the policy’s definition of “unfair competition” under the previous policy, it was persuasive in reading the definition in the current form “in an integrated manner.” *Id.* at 803 n.5.

154. *Industrial Molding Corp. v. American Mfrs. Mut. Ins. Co.*, 17 F. Supp. 2d 633, 639 (N.D. Tex.), *vacated*, 22 F. Supp. 2d 569, 569-70 (N.D. Tex. 1998) (granting unopposed motion to vacate pursuant to settlement).

155. *See CGL Policy Form, supra* note 49, § V(1)(a)-(b).

156. *Id.* § V(1)(d).

157. *See id.* § V(1)(a).

158. *See id.* § V(1)(b).

ment.¹⁵⁹ To interpret the “misappropriation” definition to not include the common law tort of misappropriation, but to include trademark and trade dress infringement, would ignore the other enumerated offense provisions and their references to specific legal claims. Texas requires the use of each clause of a contract to be used in interpreting others.

Even if the rule of construction requiring the use of other policy provisions to define an ambiguous provision is not employed to reach the conclusion that trademark and trade dress claims are not covered, interpreting the provision of the policy in the manner of the *Lebas* court should not be followed in Texas. The *Lebas* court, after determining the clause was ambiguous,¹⁶⁰ construed the meaning of misappropriation of advertising ideas and style of doing business to be trademark infringement.¹⁶¹ The court first determined it would be equally reasonable to define misappropriation as “to take wrongfully” as it would be to define it as the common law tort.¹⁶² The court then pointed out that it was reasonable to interpret the misappropriation of an “advertising idea” to include the manner or means by which one advertises products, and because advertising is one of the functions of a trademark, “advertising idea” includes trademarks.¹⁶³ In resolving this ambiguity, the court relied heavily on the reasonable expectation test.¹⁶⁴

However, another reasonable interpretation of advertising idea is that it implies a marketing plan or scheme. The *Lebas* court noted this interpretation.¹⁶⁵ The court characterized misappropriation of advertising ideas to include trademark and trade dress infringement but also recognized that the provision “would include the theft of an advertising plan from its creator without payment”¹⁶⁶ The *Lebas* court equated the manner by which a good or service is advertised, e.g., through the use of a trademark, with an idea for an advertisement itself. Such an interpretation is strained. A pure marketing theme is not protectable under either trademark or trade dress.¹⁶⁷ In responding to this argument, the *Lebas* court noted that slogans, such as Nike’s “Just Do It,” the milk industry’s “Got Milk,” and the Eveready

159. *See id.* § V(1)(d).

160. *See Lebas Fashion Imports v. ITT Hartford Ins. Group*, 59 Cal. Rptr. 2d 36, 42 (Ct. App. 1996).

161. *See id.* at 44.

162. *See id.*

163. *See id.*

164. *See id.* at 45.

165. *See id.* at 44.

166. *See id.*

167. *See* 1 MCCARTHY, *supra* note 19, § 8.6 (citing *Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705 (7th Cir. 1972) (holding “image” of feminine hygiene spray not protectable); *Haagen-Dazs, Inc. v. Frusen Gladje, Ltd.*, 493 F. Supp. 73 (S.D.N.Y. 1980) (holding that Haagen-Dazs had no protectable interest in its marketing theme for Scandinavian-type ice cream)).

Battery Company's "Keeps on Going," were "advertising themes" protectable under trademark law and unfair competition law.¹⁶⁸ The point missed by the court in *Lebas* is that these phrases are simply slogans, and while they may be a part of any overall marketing theme, they are not the themes themselves. Also, simply because allegations of infringement of these slogans are not covered under the "misappropriation" definition does not mean that alleged infringement is not covered. Such allegations would likely be covered under the "infringement of copyright, title or slogan" definition of advertising injury.¹⁶⁹

Even if the definition of "advertising idea" is not limited to a marketing plan, problems clearly arise in defining "style of doing business" to include trademark and trade dress infringement claims. The *Gemmy Industries* court used "most courts" as authority in construing this phrase to encompass trademark and trade dress infringement without any independent analysis.¹⁷⁰ One of the cases cited, *Poof Toy Products, Inc. v. United States Fidelity & Guarantee Co.*,¹⁷¹ defined trade dress as "the total image of a product and may include features such as shape, color or color combinations, texture, graphics, or even particular sales techniques."¹⁷² The *Poof Toy* court also defined style of doing business as the "comprehensive manner of operating [a] business."¹⁷³ The court then noted that several courts have found coverage for trademark or trade dress infringement under the phrase.¹⁷⁴ Once again, this interpretation of coverage is strained. While the outward appearance of a product or a business may be protectable under a theory of trade dress,¹⁷⁵ the overall style in which a business is conducted is not.¹⁷⁶

168. See *Lebas Fashion Imports*, 59 Cal. Rptr. 2d at 44 n.10.

169. See CGL Policy Form, *supra* note 49, § V(1)(d) (emphasis added).

170. See *Gemmy Indus., Corp. v. Alliance Gen. Ins. Co.*, No. 3-98-CV-0014-BD, 1998 WL 804698, at *4 (N.D. Tex. 1998) (citing *Union Ins. Co. v. Knife Co.*, 897 F. Supp. 1213, 1215-16 (W.D. Ark. 1995) (holding coverage existed because the insured did not dispute this issue and other courts had concluded the same)), *aff'd mem.*, 200 F.3d 816 (5th Cir. 1999); *Poof Toy Prods., Inc. v. United States Fidelity & Guar. Co.*, 891 F. Supp. 1228, 1233 (E.D. Mich. 1995); *Noyes v. American Motorists Ins.*, 855 F. Supp. 492, 494-95 (D. N.H. 1994); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553, 557-59 (W.D.N.Y. 1993), *vacated as a condition of settlement*, 153 F.R.D. 36, 37-38 (W.D.N.Y. 1994).

171. 891 F. Supp. 1228 (E.D. Mich. 1995).

172. *Id.* at 1232 (quoting *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983)).

173. *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc.*, 824 F. Supp. 583, 585 (E.D. Va. 1993) (internal quotation omitted), *aff'd mem.*, 21 F.3d 424 (4th Cir. 1994)).

174. See *id.*

175. See *supra* Part I.A.

176. See 1 McCARTHY, *supra* note 19, § 8.6 (citing *Prufrock, Ltd. v. Lasater*, 781 F.2d 129, 132 (8th Cir. 1986) (holding that the concept of informal country dining cannot be protected as trade dress)).

Because marketing ideas or themes and styles of doing business are not protectable under trademark or trade dress law, construing the policy provision to mean that they are protectable under such laws renders the provision meaningless. In Texas, an interpretation of an ambiguous provision that “gives a reasonable meaning to all provisions is preferable to one that leaves a portion of the policy useless, inexplicable, or creates surplusage.”¹⁷⁷ While advertising ideas and styles of doing business may not be protectable under trademark or trade dress law, it is reasonable to assume that they may be protected under the common law tort of misappropriation if the elements are met. Misappropriation provides protection for infringing activities that are outside the law of trademarks and trade dress.¹⁷⁸ Such a construction would be reasonable and provide meaning to the provision of the policy.

B. *Step Two—Advertising Activities Should Require Widespread Dissemination*

As with the first prong, courts have reached differing results regarding what type of activities qualify as advertising for purposes of coverage under “advertising injury.”¹⁷⁹ For advertising injury coverage to be afforded, there must be an allegation that the offense occurred in the course of advertising activities.¹⁸⁰ The differences in interpretation of coverage appear to turn on whether the court takes a wide or narrow view in defining the word “advertising.” Some courts take the narrow view that advertising requires widespread distribution to the public at large.¹⁸¹ Other courts find that advertising is a broader concept and can be based on very limited activities.¹⁸² Using such a broad definition has led to the illogical result of equating any sale of a good

177. *Liberty Mut. Ins. Co. v. American Employers Ins. Co.*, 556 S.W.2d 242, 245 (Tex. 1977).

178. *See* 2 MCCARTHY, *supra* note 19, § 10:47.

179. *See* *Lebas Fashion Imports v. ITT Hartford Ins. Group*, 59 Cal. Rptr. 2d 36, 41 (Ct. App. 1996) (holding that “advertising of a good or service is one of the ways . . . [trademark] infringement can occur”); *see also* *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553, 558 (W.D.N.Y. 1993) (holding that it is not possible to state a claim for trademark infringement without also alleging that the activities took place in the course of advertising), *vacated as a condition of settlement*, 153 F.R.D. 36, 37-38 (W.D.N.Y. 1994). *But see* *Advance Watch Co. v. Kemper Nat’l Ins. Co.*, 99 F.3d 795, 806-07 (6th Cir. 1996) (holding that the alleged infringing activity was separate and apart from advertising).

180. *See* OSTRAGER & NEWTON, *supra* note 45, § 7.04[b][1].

181. *See* *Tschimperle v. Aetna Cas. & Sur. Co.*, 529 N.W.2d 421, 425-26 (Minn. Ct. App. 1995) (noting that advertising contemplates widely distributed announcements to the public and thus one-on-one public sales discussions do not qualify).

182. *See* *John Deere Ins. Co. v. Shamrock Indus.*, 696 F. Supp. 434, 439-40 (D. Minn. 1988) (holding that sending three letters to a potential buyer constituted advertising activity within the meaning of the policy), *aff’d*, 929 F.2d 413 (8th Cir. 1991).

or service with advertising, including one-on-one oral representations.¹⁸³

In analyzing “advertising injury” coverage, Texas should take the narrow view in defining “advertising” to mean widespread distribution of a matter to the public at large. One Texas court of appeals has already done this.¹⁸⁴ In *ANR Production Co. v. American Guarantee & Liability Insurance Co.*,¹⁸⁵ the issue was whether alleged misrepresentations as to the ownership of a patent constituted advertising injury and thus were covered under the insurance policy.¹⁸⁶ The plaintiff, ANR Production Company (“ANR”), characterized this conduct as advertising injury.¹⁸⁷ The First District Court of Appeals in Houston distinguished advertising “from other forms of communication in that [advertising] calls a matter to the public’s attention.”¹⁸⁸ In rejecting ANR’s definition of advertising to include representations made, the court stated, “To accept ANR’s definition of advertising would mean that any time parties negotiated any kind of contract, there would be a potential for coverage under advertising injury. . . .”¹⁸⁹ Other jurisdictions have reached similar conclusions—advertising requires dissemination of material to the public at large.¹⁹⁰

However, some courts have reached a different conclusion. In *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Insurance Co.*,¹⁹¹ the Roto-Rooter Corporation (“Roto-Rooter”) sued J.A. Brundage Plumbing & Roto-Rooter, Inc. (“J.A. Brundage”) for violations of New York State and United States trademark law.¹⁹² The complaint contained a number of alleged violations, one of which stated that J.A. Brundage used Roto-Rooter’s name in connection with offering the sale of sewer and drain cleaning services.¹⁹³ The

183. See *Bank of the West v. Superior Court*, 277 Cal. Rptr. 219, 229 (Ct. App. 1991), *rev’d on other grounds*, 833 P.2d 545 (Cal. 1992).

184. See *ANR Prod. Co. v. American Guar. & Liab. Ins. Co.*, 981 S.W.2d 889, 891-92 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing *Smith v. Baldwin*, 611 S.W.2d 611, 614-15 (Tex. 1980) (defining advertising in a DTPA case)).

185. 981 S.W.2d 889 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

186. See *id.* at 890-91.

187. See *id.* at 891.

188. *Id.* at 891-92 (citing *Smith*, 611 S.W.2d at 614).

189. *Id.* at 892.

190. See *Monumental Life Ins. Co. v. United States Fidelity & Guar. Co.*, 617 A.2d 1163, 1174 (Md. Ct. Spec. App. 1993) (holding advertising means widespread public distribution); *Smartfoods, Inc. v. Northbrook Prop. & Cas. Co.*, 618 N.E.2d 1365, 1368 (Mass. App. Ct. 1993) (holding that the objective of advertising is wide dissemination of information); *Fox Chem. Co., v. Great Am. Ins. Co.*, 264 N.W.2d 385, 386 (Minn. 1978) (holding that advertising connotes widespread distribution of promotional material to public at large); *Playboy Enters., Inc. v. St. Paul Fire & Marine Ins. Co.*, 769 F.2d 425, 428 (7th Cir. 1985) (“[Advertising] requires that the presentation of the item to be sold or approved be made in a medium directed to the public at large.”).

191. 818 F. Supp. 553 (W.D.N.Y. 1993), *vacated as a condition of settlement*, 153 F.D.R. 36 (W.D.N.Y. 1994).

192. See *id.* at 554.

193. See *id.* at 558.

complaint at issue in the case alleged that the violations occurred in connection with advertisements, but the court pointed out that, construing the claim liberally, it also alleged that J.A. Brundage's use of the Roto-Rooter designation in simply offering its services for sale was advertising.¹⁹⁴ Because of this, advertising injury coverage was triggered.¹⁹⁵ Other courts have reached similar conclusions.¹⁹⁶

In an opinion released the same month as *ANR Production*, a federal magistrate in a Texas federal district court in *Gemmy Industries v. Alliance General Insurance Co.*¹⁹⁷ approved the broad definition of advertising used in the *J.A. Brundage* decision.¹⁹⁸ Although the court in *Gemmy Industries* used the same definition from *Black's Law Dictionary* as did the court in *ANR Production*,¹⁹⁹ the court appears to reach an entirely different interpretation. The more narrow definition is the better choice. As indicated above, in the absence of an ambiguity, Texas requires words in contracts to be given their popular and usual meaning to the general public.²⁰⁰ It is unlikely the general public defines an advertisement as an offer for sale or the simple display of a product. A layperson is more likely to believe advertising means an announcement in a medium that reaches the public at large. To put it in the words of one Maryland appellate court, "'Advertising' means advertising, i.e., 'widespread distribution or announcements to the public.' Consequently . . . one-to-one solicitations [are] clearly not 'advertising' within the normal meaning of the word. . . ."²⁰¹

194. *See id.*

195. *See id.*

196. *See* *Sentex Sys., Inc. v. Hartford Accident & Indem. Co.*, 882 F. Supp. 930, 939 (C.D. Cal. 1995) (holding advertising can encompass one-on-one solicitations), *aff'd*, 93 F.3d 578 (9th Cir. 1996); *New Hampshire Ins. Co. v. Foxfire, Inc.*, 820 F. Supp. 489, 494 (N.D. Cal. 1993) (holding that a solicitation letter constituted advertising); *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 696 F. Supp. 434, 440 (D. Minn. 1988) (holding that a single letter issued to potential customer constituted "advertising activity"), *aff'd*, 929 F.2d 413 (8th Cir. 1991).

197. No. 3-98-CV-0014-BD, 1998 WL 804698 (N.D. Tex. Nov. 17, 1998), *aff'd mem.*, 200 F.3d 816 (5th Cir. 1999).

198. *See id.* at *3.

199. *See id.* (citing *BLACK'S LAW DICTIONARY* 54 (6th ed. 1990)); *ANR Prod. Co. v. American Guar. & Liab. Ins. Co.*, 981 S.W.2d 889, 891 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (citing *BLACK'S LAW DICTIONARY* 54 (6th ed. 1990)).

200. *See* *Gallup v. St. Paul Ins. Co.*, 515 S.W.2d 249, 251 (Tex. 1974).

201. *Monumental Life Ins. Co. v. United States Fidelity & Guar. Co.*, 617 A.2d 1163, 1174 (Md. Ct. Spec. App. 1993).

C. *Step Three—Nexus Requirement—To Afford Coverage, the Allegations Must State the Injury was Caused by the Advertisement, Not Simply that Infringing Activity Occurred*

Courts generally agree that in most advertising injury claims the injury itself must arise from advertising activities.²⁰² Courts seem to require proof of this causal nexus requirement in claims for coverage under the “advertising injury” provision of the CGL for copyright claims,²⁰³ patent infringement claims²⁰⁴ and claims of unfair business practices.²⁰⁵

A split of authority, however, appears in trademark and trade dress claims. In *Advance Watch*, the court stated that even if the definition of advertising injury included coverage for trademark infringement, the nexus requirement must still be fulfilled.²⁰⁶ The court held that it was not Advance Watch’s advertisements that provoked the infringement claim but rather the allegation that Advance Watch copied the shape and appearance of Cross’s pens.²⁰⁷ The court rejected the argument that the mere appearance of the pens in advertisements and catalogs was sufficient because such reasoning “would invoke advertising injury coverage . . . whenever a product is merely exhibited or displayed.”²⁰⁸ The court held that the policy language required more.²⁰⁹

However, some courts distinguish trademark and trade dress claims from other types of claims brought under “advertising injury” and do

202. See *Poof Toy Prods., Inc. v. United States Fidelity & Guar. Co.*, 891 F.Supp. 1228, 1234 (E.D. Mich. 1995) (“The majority rule is that the advertising injury must have a causal connection with the advertising activity.”); see also *Industrial Molding Corp. v. American Mfrs. Mut. Ins. Co.*, 17 F. Supp. 2d 633, 640 (N.D. Tex.) (recognizing that the plaintiff must prove the alleged advertising activities were causally related to the trade dress claims), *vacated*, 22 F. Supp. 2d 569, 569-70 (N.D. Tex. 1998) (granting unopposed motion to vacate pursuant to settlement); *Advance Watch Co. v. Kemper Nat’l Ins. Co.*, 99 F.3d 795, 806 (6th Cir. 1996) (“The policy therefore requires some nexus between the ground of asserted liability and the insured’s advertising activities before there is coverage or a duty to defend.”); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 533, 557 (W.D.N.Y. 1993) (recognizing a required “causal connection between ‘advertising injury’ and ‘advertising activities’”), *vacated as a condition of settlement*, 153 F.R.D. 533 (W.D.N.Y. 1994).

203. See *Sentry Ins. v. R.J. Weber Co.*, 2 F.3d 554, 557 (5th Cir. 1993) (holding that causal connection is required in a copyright infringement claim).

204. See *Polaris Indus., L.P. v. Continental Ins. Co.*, 539 N.W.2d 619, 622 (Minn. Ct. App. 1995) (requiring a direct causal connection between advertising activity and alleged patent infringement).

205. See *Bank of the West v. Superior Court*, 833 P.2d 545, 560 (Cal. 1992) (holding “that ‘advertising injury’ must have a causal connection with the insured’s ‘advertising activities’ before there can be coverage” in a claim brought by the bank’s customers under federal Truth-in-Lending Act and Unfair Business Practices Act).

206. See *Advance Watch*, 99 F.3d at 806-07.

207. See *id.*

208. *Id.* at 807.

209. See *id.*

not require independent proof of the required causal connection.²¹⁰ The *Poof Toy* court held there could be no trademark or trade dress infringement unless some sort of advertising occurs.²¹¹ The court reached this conclusion through the Lanham Act's requirement that liability for a trademark/trade dress infringement requires conduct that causes, or is likely to cause, confusion or deceives the customer as to the origin of the product.²¹² The court stated, "To have (or potentially cause) this effect, one must clearly advertise (announce to the intended customers) the mark or dress."²¹³ Other courts have reached this same conclusion.²¹⁴

The analysis in *Advance Watch* is better reasoned. Trademark and trade dress infringement allegations do not absolutely require advertising. The Lanham Act imposes liability for trademark or trade dress infringement on those who use "any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services"²¹⁵ Furthermore, actual sales are not required—a mere offer for sale is all that is required to establish liability.²¹⁶ While, as pointed out above, some courts hold that one-on-one oral representations constitute advertising,²¹⁷ the Lanham Act appears to distinguish between the two. The *Poof Toy* analysis should not be used because there are a number of activities actionable under trademark or trade dress law that do not require the infringed good or mark to be advertised.²¹⁸

210. See *Poof Toy Prods., Inc. v. United States Fidelity & Guar. Co.*, 891 F. Supp. 1228, 1235-36 (E.D. Mich. 1995) ("[A]llegations of trademark and trade dress infringement inherently involve advertising activity."); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553, 557-59 (W.D.N.Y. 1993) (holding that it is impossible to allege trademark claim without involving advertising activities), *vacated as a condition of settlement*, 153 F.R.D. 36, 37-38 (W.D.N.Y. 1994).

211. See *Poof Toy*, 891 F.Supp. at 1235-36.

212. See *id.* at 1236 (citing Lanham Trade-Mark Act § 43(a), 15 U.S.C. § 1125(a) (1994)).

213. *Id.*

214. See *Lebas Fashion Imports v. ITT Hartford Ins. Group*, 59 Cal. Rptr. 2d 36, 41 (Ct. App. 1996) (stating that, according to the trademark statute, advertising is one of the ways an act of infringement occurs and that trademark infringement often does occur in the course of advertising); *Gemmy Indus. v. Alliance Gen. Ins. Co.*, No. 3-98-CV-0014-BD, 1998 W.L. 804698, at *3 (stating, under the broad definition of advertising used, it is impossible to allege a Lanham Act claim without claiming they also are advertised), *aff'd mem.*, 200 F.3d 816 (5th Cir. 1999).

215. Lanham Trade-Mark Act § 32(1), 15 U.S.C. § 1114(1)(a) (1994) (emphasis added).

216. See *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1312 (9th Cir. 1997).

217. See *Bank of the West v. Superior Court*, 277 Cal. Rptr. 219, 229 (Ct. App. 1991), *rev'd on other grounds*, 833 P.2d 545 (Cal. 1992).

218. A dealer who does not manufacture the infringing good may be held liable for the simple sale. See 4 McCARTHY, *supra* note 19, § 25:27. Also, companies who simply print or label the infringing good may be held liable. See *id.* § 25:28. Liability also extends beyond those who sell the goods or services, and includes those who contribute to the infringing activity or knowingly cooperate in the illegal and tortious activity

The policy states, “This insurance applies to . . . ‘[a]dvertising injury’ caused by an offense committed in the course of advertising your goods, products or services”²¹⁹ This language seems to clearly require a nexus between the injury and advertising. Such would be the case under the application of the plain meaning rule. One Minnesota court has stated:

That misappropriated information is later advertised does not, by itself, trigger advertising-injury coverage under the policy. If it did the advertising-injury coverage would extend the policy to cover any tortious act, such as products liability, personal injury, or errors or omissions, as long as the alleged harm was advertised in some manner. To allow the policy to be extended in this way would unacceptably distort the relationship between the premium and the risk.²²⁰

The *Bay Electric* court acknowledged the requirement that a causal relationship must exist between the alleged advertising activities and underlying infringement claims.²²¹ In its analysis of the issue, the court looked to the claim of the plaintiff in the underlying case and noted that it alleged that Bay Electric and FAE marketed infringing products that bore the plaintiff’s mark and claimed this constituted a false designation of origin.²²² False designation of origin is a basis for a Lanham Act claim.²²³ Based on this allegation, the *Bay Electric* court found that the plaintiffs met the causal nexus requirement.²²⁴ Because the court engaged in an independent analysis of the causal connection requirement, the *Bay Electric* court appears to have refused to adopt the general statement that all trademark and trade dress claims meet the nexus requirement by implication and are covered under the policy as did the *Poof Toy* court. The analysis in *Poof Toy* effectively eliminates the requirement that the injury be caused by an advertising activity, which is required by the policy language. This interpretation of the nexus requirement would lead to advertising

may also be liable. *See id.* § 25:17. Liability may be imposed on those who knowingly contribute to infringing conduct yet do not sell the goods or services. *See id.* § 25:19. None of these categories of potential infringing parties require that the good or service be advertised.

219. CGL Policy Form, *supra* note 49, § I(B)(1)(b)(2) (emphasis added).

220. *Polaris Indus. v. Continental Ins. Co.*, 539 N.W.2d 619, 622 (Minn. Ct. App. 1995) (citing *Wakefield v. Federated Mut. Ins. Co.*, 344 N.W.2d 849, 853 (Minn. 1984)).

221. *See Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, 61 F. Supp. 2d 611, 618-19 (S.D. Tex. 1999).

222. *See id.* at 619.

223. The Lanham Trade-Mark Act not only imposes liability for infringement of a trademark but also imposes liability for use in commerce of “any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact” in commercial advertising which is likely to cause confusion as to the origin of the product. Lanham Trade-Mark Act § 43(a), 15 U.S.C. § 1125(a) (1994).

224. *See Bay Electric*, 61 F. Supp. 2d at 619.

injury coverage in situations where there were neither advertising activities, nor a causal connection between the offense and advertising. As pointed out by the court in *Advance Watch*, such an argument “would invoke advertising injury coverage and the duty to defend whenever a product is merely exhibited or displayed.”²²⁵ The policy, on the other hand, requires the *injury* be caused by the advertising, not simply that an infringed or misappropriated advertising idea or style of doing business *is* advertised.

CONCLUSION

Texas courts will likely not take the easy path by simply following other jurisdictions’ decisions when faced with the question of whether trademark and trade dress claims are covered under the “advertising injury” coverage afforded by the CGL. This coverage dispute should be decided based on an analysis under Texas law. Analysis of these questions, or any other claim for coverage under this provision, should be analyzed based on a simple three-step framework.

The threshold question in analyzing a claim for coverage under “advertising injury” is whether one of the enumerated offenses is alleged. Determination of whether trademark or trade dress claims will be covered under the enumerated offense of “misappropriation of advertising ideas or style of doing business” is a difficult question. Under Texas law, the term “misappropriation,” for many years, has referred to a type of unfair competition cause of action distinct from trademark or trade dress infringement. Because of this, Texas courts could reach a result similar to the conclusion reached in *Advance Watch*—that this enumerated offense only refers to allegations involving the common law doctrine of misappropriation. Texas courts could also follow other courts that have determined that trademark and trade dress claims are covered under the “misappropriation of advertising ideas or style of doing business” definition. However, to follow these other courts, Texas may need to adopt the reasonable expectation test for insurance policy construction. Relying on rules that require policy construction to favor the insured, Texas courts could also simply accept the insured’s interpretation of this provision. However, because the provision extends coverage rather than excludes coverage, such a reliance on the insured’s interpretation is not required. Furthermore, this reliance ignores other rules of policy construction. If Texas courts were to accept that the definition refers to the common law unfair trade offense of misappropriation, this conclusion should not be interpreted to mean all trademark or trade dress claims would not be covered under the policy. An example would be in the case of slogans. An allegation of infringement of a registered slogan would likely meet the threshold showing that an enumerated offense is alleged under the

225. *Advance Watch Co. v. Kemper Nat’l Ins. Co.*, 99 F.3d 795, 807 (6th Cir. 1996).

advertising injury definition of “infringement of copyright, title or slogan.”²²⁶ Other allegations of infringing activity could also be covered, but the determination of whether such activity falls within one of the enumerated offenses should be made on a case-by-case basis.

Once an allegation is determined to fall under one of the enumerated offenses, the courts should then verify that the alleged offense occurred in the course of the insured’s advertising. The policy language clearly establishes this requirement.²²⁷ As previously noted, some courts have taken the broad approach in defining “advertising” and equated this activity with simply offering a product or service for sale. This is an unreasonable interpretation in light of how common sense says advertising should be defined. Texas courts should continue on their path of requiring widespread dissemination for an activity to qualify as advertising as this is clearly the more reasonable approach. The average person more likely believes that “advertising” requires payment for placing a company’s product or service on display in a medium such as print, television or the Internet. Product displays on the floor of a grocery store or offers of sale from the door-to-door salesman do not raise thoughts of advertising in the traditional sense of the word.

Lastly, once it is determined that an offense has occurred in the course of advertising, a finding that the advertisement caused injury is required. Generally, to afford advertising injury coverage, the policy requires some showing of a nexus between the alleged injury and the advertising of the offensive conduct. This should be no different simply because the claim is infringement of a trademark or trade dress. Infringement of a trademark or trade dress can occur without the necessity of advertising. For example, assuming trade dress infringement was covered under the policy, if a restaurant copied the style, color and décor of a competitor, the injury occurs through this infringement of the competitor’s trade dress. The infringer is appropriating goodwill developed by the competitor through the infringement of its recognizable appearance. Unless this décor is advertised, i.e., distributed widely, there is no coverage for an alleged trade dress violation. Furthermore, if the décor is advertised, there must be a showing that this advertisement caused injury. Simply because advertising is a possible instrument of trade dress infringement does not mean that infringing one’s trade dress necessarily requires advertising of the infringing activity. The same is true for trademarks. A trademark may be infringed in a number of ways, only one of which is the use of an infringing mark in connection with an advertisement.²²⁸ This means liability for trademark infringement is not only imputed to those who advertise but also to those who simply offer a product for sale. For

226. See CGL Policy Form, *supra* note 49, § V(1)(d).

227. See *id.* § I(B)(1)(b).

228. See Lanham Trade-Mark Act § 32(1), 15 U.S.C. §1114(1)(a) (1994).

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example, if an infringing wholesaler were to copy markings on designer jeans he would be subject to liability. However, if he did not advertise the infringing product, there could be no injury caused by an advertisement.

Determination of coverage for an “advertising injury” claim is a complicated procedure requiring analysis of both the underlying allegations of the offensive activity and the rules of insurance policy construction. This process can be somewhat simplified by the use of the three-step process advocated in this Comment. While it certainly would be simpler to follow other courts’ reasoning in making those complicated determinations, Texas will probably follow its own path, and its courts will engage in an independent analysis under Texas law. This path should lead to the conclusion that each trademark and trade dress claim should be analyzed on a case-by-case basis rather than in an over-inclusive determination that all are covered or in an under-inclusive determination that none are covered.

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