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**CGL Insurance Coverage for Patent Infringement**

**Jason A. Reyes**

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# CGL Insurance Coverage for Patent Infringement†

Jason A. Reyes\*

## 1. Introduction<sup>1</sup>

Whether commercial general liability ("CGL") insurance provides coverage for acts that constitute patent infringement has become one of the most "hotly litigated topics in insurance coverage law."<sup>2</sup> In determining whether CGL insurance covers patent infringement, courts across the country have been emphatic in their collective opinion of late: "no." Nevertheless, insureds continue to advance arguments in court for why their insurance policies should defend against patent infringement lawsuits.<sup>3</sup> [1]

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\* B.S., 1987, Massachusetts Institute of Technology; J.D., 1995, Boston University School of Law. Mr. Reyes is an associate at Fish & Richardson, P.C., Boston, Massachusetts, where he practices intellectual property law.

<sup>1</sup> This Column is an update to Jason Reyes, *Note, Patents and Insurance: Who Will Pay for Infringement*, 1 B.U. J. SCI. & TECH. L. 3 (1995). This note provides useful background information on the relationship between patents and three different types of insurance policies, including commercial general liability insurance policies.

<sup>2</sup> *Clary Corp. v. Union Standard Ins. Co.*, 32 U.S.P.Q.2d (BNA) 1131, 1132 (Cal. App. 1994); see also Reyes, *supra* note 1, at para. 7.

<sup>3</sup> See *Techmedica, Inc. v. Vanguard Underwriters Ins. Co.*, No. 93-56441, 1995 U.S. App. LEXIS 15609 (9th Cir. June 21, 1995); *Ameron, Inc. v. Ins. Co. of N. Am.*, No. 93-56180, 1995 U.S. App. LEXIS 6450 (9th Cir. Mar. 29, 1995); *Aqua Queen Mfg. Co. v. Charter Oak Fire Ins. Co.*, 33 U.S.P.Q.2d (BNA) 1681 (9th Cir. 1995); *Continental Ins. Co. v. Del Astra Indus., Inc.*, No. 93-15245, 1994 U.S. App. LEXIS 24375 (9th Cir. Sept. 6, 1994); *Travelers Indem. Co. v. Levi Strauss & Co.*, No. 91-16747, 1994 U.S. App. LEXIS 20213 (9th Cir. July 29, 1994); *Proxima Corp. v. Federal Ins. Co.*, No. 92-56320, 1994 U.S. App. LEXIS 14843 (9th Cir. June 7, 1994); *Intex Plastics Sales Co. v. United Nat'l. Ins. Co.*, 23 F.3d 254 (9th Cir. 1994); *Rymal v. Woodcock*, 896 F. Supp. 637 (W.D. La. 1995); *Owens-Brockway Glass Container, Inc. v. Int'l Ins. Co.*, 884 F. Supp. 363 (E.D. Ca. 1995); *I.C.D. Indus., Inc. v. Federal Ins. Co.*, 879 F. Supp. 480 (E.D. Pa. 1995); *United Nat'l. Ins. Co. v. Bradleys' Electric Inc.*, 35 U.S.P.Q.2d (BNA) 1559 (S.D. Tex. 1995); *State Farm Fire & Casualty Co. v. Yukiyo Ltd.*, 870 F. Supp. 292 (N.D. Ca. 1994); *Gencor*

CGL insurance generally insures against "advertising injury," which is the language often construed to include intellectual property claims.<sup>4</sup> The insurance policy will usually define advertising injury as an "injury arising out of an offense committed during the policy period occurring in the course of the named insured advertising activities if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright."<sup>5</sup> [2]

## 2. *Classic Argument Rejected*

The classic formulation of the insured's argument—that the terms "piracy" and "unfair competition" can encompass claims for patent infringement if the acts of piracy or unfair competition occurred in the course of the insured's advertising activities<sup>6</sup>—has been squarely rejected across the board,<sup>7</sup> with courts repeatedly referring to a constructive requirement now known as the "causal connection."<sup>8</sup> Under this construction, advertising-injury coverage applies only to injuries from advertising, not to "injuries arising out of other activities that coincidentally were advertised."<sup>9</sup> California courts have taken to granting summary judgment in this regard.<sup>10</sup> [3]

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*Indus., Inc. v. Wausau Underwriters Ins. Co.*, 857 F. Supp. 1560 (M.D. Fla. 1994); *Davila v. Arlasky*, 857 F. Supp. 1258 (N.D. Ill. 1994); *Atlantic Mutual Ins. Co. v. Brotech Corp.*, 857 F. Supp. 423 (E.D. Pa. 1994); *Classic Corp. v. Charter Oak Fire Ins. Co.*, 35 U.S.P.Q.2d 1726 (C.D. Ca. 1994); *Clary Corp.*, 32 U.S.P.Q.2d at 1131; *Met-Coil Sys. Corp. v. Columbia Casualty Co.*, 524 N.W.2d 650 (Ia. 1994); *Polaris Indus., L.P. v. Continental Ins. Co.*, 539 N.W.2d 619 (Minn. App. 1995); *Union Ins. Co. v. Land & Sky, Inc.*, 529 N.W.2d 773 (Neb. 1995); *Synergystex Int'l, Inc. v. Motorists Mut. Ins. Co.*, 1994 Ohio App. LEXIS 3354 (July 27, 1994).

<sup>4</sup> Bradford P. Lyerla & Manuel A. Abascal, *Insurance Coverage for Intellectual Property Claims: The California vs. The New York Approach*, 19 A.I.P.L.A. Q.J. 189, 192 (1991).

<sup>5</sup> *Id.*

<sup>6</sup> *Aetna Casualty & Sur. Co. v. Watercloud*, No. SA CV 88-200 AHS (RWRx), 1988 U.S. Dist. LEXIS 17572 (C.D. Cal. Nov. 17, 1988); see Reyes, *supra* note 1, at para. 10.

<sup>7</sup> *I.C.D. Indus.*, 879 F. Supp. at 480; *Polaris*, 539 N.W.2d at 619; *Atlantic Mut.*, 857 F. Supp. at 423; *Classic Corp.*, 35 U.S.P.Q.2d at 1726; *Davila*, 857 F. Supp. at 1258; *Intex Plastics*, 23 F.3d at 254; *Synergystex*, 1994 Ohio App. LEXIS 3354.

<sup>8</sup> See *Owens-Brockway*, 884 F. Supp. at 365.

<sup>9</sup> *Polaris*, 539 N.W.2d at 622.

<sup>10</sup> *Ameron Inc.*, 1995 U.S. App. LEXIS 6450; *Aqua Queen*, 33 U.S.P.Q.2d at 1681; *Intex Plastics*, 23 F.3d at 254; *Continental*, 1995 U.S. App. LEXIS 24375.

### 3. *New Theories Rejected*

#### A. "Look" of Product Within Scope of Claims

In response, insureds have devised new theories for obtaining coverage, but the same result obtains: courts consistently reject such attempts to stretch the language of CGL insurance contracts to cover patent infringement actions. For example, in *Travelers Indem. Co. v. Levi Strauss & Co.* and *Techmedica, Inc. v. Vanguard Underwriters Ins. Co.*, the insureds argued that their infringement was more "closely connected to advertising than in other cases."<sup>11</sup> The *Travelers* insured, a maker of "stone-washed" jeans, asserted that because the patent-in-suit covered the actual look of the jeans, there was a sufficient causal connection between the advertising and the injury to warrant coverage under the policy,<sup>12</sup> and argued that prior cases were distinguishable because they concerned claims bearing no relationship to advertising.<sup>13</sup> The insured's alleged infringement, on the other hand, was of a patent that covered the distinctive look of the product independent of the process.<sup>14</sup> Because it featured this look prominently in its advertising, the insured argued that the alleged infringement occurred "in the course of . . . advertising activities."<sup>15</sup> [4]

Acknowledging that this difference made for a "closer case" than previous ones, the Ninth Circuit called the argument "creative," but "not persuasive."<sup>16</sup> While the Ninth Circuit recognized that advertising may be a "greater factor" when the patent covers a process with a distinctive look,<sup>17</sup> it reiterated that under current law patent infringement claims are based solely on the use or sale of a patented product, and not on how it is advertised.<sup>18</sup> The Ninth Circuit did find that in *Travelers*, the alleged infringement claim was based in part on the product's

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<sup>11</sup> *Techmedica*, 1995 U.S. App. LEXIS 15609 at \*5. See *Travelers*, 1994 U.S. App. LEXIS 20213 at \*5-6.

<sup>12</sup> *Travelers*, 1994 U.S. App. LEXIS 20213 at \*6.

<sup>13</sup> *Id.* at \*5-6.

<sup>14</sup> *Id.* at \*6.

<sup>15</sup> *Id.* (quoting *Intex Plastics*, 23 F.3d at 256).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*6-7 (citing *Intex Plastics*, 23 F.3d at 256).

appearance;<sup>19</sup> it required, however, that the infringement claim actually make reference to the advertising of the product.<sup>20</sup> Because the claim did not do so, it failed to supply the requisite causal connection to advertising injury.<sup>21</sup> In reaching this result, the court applied a standard that requires an "objectively reasonable insured" to expect that its advertising insurance would cover patent infringement, or even the look of the patented process—a standard that the insured had not met.<sup>22</sup> The Ninth Circuit also noted dicta in *Iolab Corp. v. Seaboard Sur. Co.*<sup>23</sup> concerning a hypothetical merging between advertising and infringing sales, but found no reason to extend such reasoning to the case before it.<sup>24</sup> [5]

## B. Advertisement Included Order Form

In *Techmedica*, the insured argued that its advertising merged with its patent infringement claim because the advertisements for its custom-made product included an order form.<sup>25</sup> The insured attempted to distinguish prior cases by arguing that the order form on the advertisement provided the required causal connection.<sup>26</sup> Because the products were custom-made for each customer, the "very existence" of the infringing product flowed from the advertisement.<sup>27</sup> The Ninth Circuit found the insured's argument "novel," but again "not persuasive."<sup>28</sup> The court noted that irrespective of the advertisement, the infringement stemmed from the manufacture and sale of the product;<sup>29</sup> it concluded that the case was

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<sup>19</sup> *Id.* at \*7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (citing *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1505 (9th Cir. 1994)).

<sup>22</sup> *Id.* (citing *Bank of the West v. Superior Ct.*, 833 P.2d 545, 560 (Cal. 1992)).

<sup>23</sup> *Iolab*, 15 F.3d at 1500.

<sup>24</sup> *Id.* (citing *Iolab*, 15 F.3d at 1507 n.5).

<sup>25</sup> *Techmedica*, 1995 U.S. App. LEXIS 15609, at \*4-5.

<sup>26</sup> *Id.* at \*5.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

indistinguishable from precedent, which had consistently found no advertising injury in such situations.<sup>30</sup> [6]

### C. Other Clauses in Insurance Policy

In constructing their arguments, other insureds have looked to other parts of their insurance policies, such as "infringement of title" clauses. It would seem natural for such a clause to be invoked by a policyholder seeking coverage from a claim of patent infringement: Has not the policyholder violated an individual's title to his or her patent by advertising an allegedly infringing product?<sup>31</sup> In *Clary Corp. v. Union Standard Ins. Co.*, the insured was sued for patent infringement. It asked the insurance company to defend the claim under its CGL insurance policy, arguing that the liability for inducing patent infringement was sufficient to raise the possibility of advertising injury coverage. When the insurer denied protection, the insured brought a claim for breach of contract against the insurer for its refusal to defend. The original bench trial found that the insurer possessed no duty to defend.<sup>32</sup> [7]

On appeal, the Fourth Circuit analyzed the phrase "infringement of title" in context, and found it no more indicative than previously-used policy clauses of a duty for insurers to provide defenses to patent infringement under CGL policies.<sup>33</sup> The court reasoned that while the use of the word "title" in CGL advertising injury coverage related to "infringement" actions,<sup>34</sup> neither slander nor disparagement properly fell within the ordinary meaning of infringement, which implies the concept of a violation of some zone.<sup>35</sup> The court found instead that disparagement of title, when viewed broadly, referred to an action taken by someone that identified a third party's property, indicating that the title of that property was in some way faulty. Such a scenario was not likely to involve advertising.<sup>36</sup> The court added that the phrase "'infringement of title' accordingly referred to claims based on the confusion of names or designations, not the slander or disparagement of a third

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<sup>30</sup> *Id.* (citing *Iolab*, 15 F.3d at 1500; *Everest & Jennings v. American Motorists Ins. Co.*, 23 F.3d 226 (9th Cir. 1994)).

<sup>31</sup> *Clary*, 32 U.S.P.Q.2d at 1132.

<sup>32</sup> *Id.* at 1133.

<sup>33</sup> *Id.* at 1137-38.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

party's legal title to its property,"<sup>37</sup> and that even if "infringement of title" could mean slander, this still would differ from patent infringement.<sup>38</sup> Therefore, the Fourth Circuit concluded that the "two claims ar[o]se under entirely different sets of law."<sup>39</sup> [8]

Courts have also noted the absence of the word "patent" in the policy language.<sup>40</sup> It would be a matter of improper construction to find that parties intended these insurance policies to cover patent infringement claims, when they explicitly cover infringement of "copyright, title or slogan," and are silent with respect to patent.<sup>41</sup> There is further difficulty in finding that patent infringement or inducement of patent infringement is covered by the "title" phrase of "infringement of copyright, title or slogan."<sup>42</sup> Common sense dictates that the word "patent" would explicitly appear in "infringement" clauses if patent infringement or inducement of infringement were protected under the policy.<sup>43</sup> [9]

Instead, courts have concluded that "infringement of title" refers to a literary or artistic work.<sup>44</sup> The term "infringement of title" is part of a list that includes copyright and slogan.<sup>45</sup> Therefore, defining "infringement of title" with respect to "infringement of copyright and slogan" dictates that the word "title" refer to a name, such as the name of a literary or artistic work, rather than to ownership of an invention or other thing.<sup>46</sup> Furthermore, patentees who sue for infringement are not claiming that the alleged infringer took action that cast doubt on the validity or ownership of the patent.<sup>47</sup> [10]

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37 *Id.* at 1133.

38 *Id.*

39 *Id.*

40 *Owens-Brockway*, 884 F. Supp. at 367 (citations omitted).

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* at 368; *Atlantic*, 857 F. Supp. at 429; *Clary Corp.*, 32 U.S.P.Q.2d at 1135.

45 *Owens-Brockway*, 884 F. Supp. at 368.

46 *Id.*

47 *Clary Corp.*, 32 U.S.P.Q.2d at 1138; *Proxima Corp.*, 1994 U.S. App. LEXIS 14843 at \*8.

#### 4. *New Ground for Denial of Coverage: Coverage is Objectively Unreasonable*

Perhaps to head off further attempts by insureds to end-run denial of coverage, courts also have appealed to a separate, and arguably broader, ground: namely, that it is simply not "objectively reasonable" for these clauses to cover patent infringement. For example, the court in *Travelers* noted that "an objectively reasonable insured would not expect 'advertising injury' to cover the infringement of a patent on a process for stone washing apparel, or even the resulting look."<sup>48</sup> The court in *Classic Corp v. Charter Oak Fire Ins. Co.* echoed a similar sentiment, stating that "[n]o reasonable person would read 'piracy' [or 'unfair competition' or 'infringement of title'] in the context of 'advertising injury' and conclude that it refers to direct patent infringement, contributory patent infringement or inducement of patent infringement."<sup>49</sup> [11]

Further, the court in *Owens-Brockway* advocated interpreting the policy language "in the context of [its] use" and "in the light of common sense."<sup>50</sup> Accordingly, in that case the court rejected the insured's arguments, stating that

the term "advertising" should not be understood as a word in common usage but as a collection of letters defined for the first time in the policy. This is not a reasonable approach to policy interpretation. The term was chosen for a reason, that reason was to cover advertising related injuries, and patent infringement is a tort that does not normally occur in connection with advertising.<sup>51</sup> [12]

#### 5. *Other States Generally In Agreement With California*

Courts in other states that have examined the relationship of CGL insurance law to patent infringement have, for the most part, echoed California's conclusions. One federal district court in Pennsylvania noted that "[t]he courts in all these jurisdictions employed virtually universal principles of insurance contract interpretation and reason in finding that patent infringement is not reasonably

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<sup>48</sup> *Travelers*, 1994 U.S. App. LEXIS 20213 at \*7.

<sup>49</sup> *Classic Corp.*, 35 U.S.P.Q.2d at 1728.

<sup>50</sup> *Owens-Brockway*, 884 F. Supp. at 367.

<sup>51</sup> *Id.* at 368.

encompassed in the term 'unfair competition' as used in policies such as those at issue."<sup>52</sup> [13]

Other courts have similarly concluded that previous cases have dispelled any ambiguity surrounding the policy language at issue, and have consistently denied coverage.<sup>53</sup> In *Synergystex Int'l, Inc. v. Motorists Mut. Ins. Co.*, for instance, the insured argued that the insurer should indemnify and defend the insured in a patent infringement suit pursuant to the "advertising injury" coverage.<sup>54</sup> The court rejected the claim, stating that there was no "causal connection" between the patent infringement claim and the insured's advertising.<sup>55</sup> In *Davila v. Arlasky*, the insurers intervened in a patent infringement action, seeking a declaration that they had no duty to defend or indemnify the insured.<sup>56</sup> Like the court in *Synergystex*, the *Davila* court also concluded that the insured failed to show any causal connection between the alleged infringement and any advertising activity.<sup>57</sup> [14]

In *Polaris Indus., L.P. v. Continental Ins. Co.*, the insured was sued for alleged trade secret misappropriation, patent infringement, and consumer protection violations upon developing electronic fuel-injected snowmobiles.<sup>58</sup> The insured requested the insurer to defend against the suit based on its advertising liability coverage.<sup>59</sup> The court held that the insurer did not have a duty to defend, because the coverage was limited to injuries caused by advertising, and did not extend to injuries from other activities "that coincidentally were advertised."<sup>60</sup> The court concluded that an interpretation of the policy that denied coverage would match the insured's reasonable expectations.<sup>61</sup> [15]

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<sup>52</sup> *Atlantic*, 857 F. Supp. at 429 (later cited with approval in another case in the Eastern District of Pennsylvania, *I.C.D.*, 879 F. Supp. at 485-86).

<sup>53</sup> *Synergystex*, 1994 Ohio App. LEXIS 3354 at \*8-9; *Davila*, 857 F. Supp. at 1263.

<sup>54</sup> *Synergystex*, 1994 Ohio. App. LEXIS 3354 at \*2.

<sup>55</sup> *Id.* at 7.

<sup>56</sup> *Davila*, 857 F. Supp. at 1258.

<sup>57</sup> *Id.* at 1263.

<sup>58</sup> *Polaris*, 539 N.W.2d at 621.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 622.

<sup>61</sup> *Id.*

6. *Bucking the Trend: Nebraska and Louisiana*

Courts in at least two other states, on the other hand, recently have opened the door to extending CGL insurance coverage to patent infringement claims. In *Union Ins. Co. v. Land & Sky, Inc.*, the insured manufactured flexible liquid storage containers, which were alleged to infringe a patent on waterbed mattresses. The insured advertised the product in the wholesale and retail markets and distributed instruction sheets describing the manner in which its product could be incorporated into a patented waterbed frame.<sup>62</sup> The insurer refused the insured's request for defense and indemnification from a subsequent patent infringement suit. The Supreme Court of Nebraska framed the issues as follows: (1) whether the insured's "primary" or "excess" policy covered liability for patent infringement, and (2) whether the insurer had a duty to defend inducement of infringement claims arising under insured's advertising activities.<sup>63</sup> The court denied coverage for direct infringement, but found a duty to defend with respect to inducing or contributing to infringement in the instruction sheets.<sup>64</sup> [16]

The court found that liability could arise from any insured's advertising activities that induced others to infringe.<sup>65</sup> Such liability could be established by "active steps to induce infringement through advertising or by providing instructions."<sup>66</sup> The court found that the insured's actions did constitute such active steps: the insured specifically marketed and advertised its products as particularly suitable for use as waterbed mattresses; used extensive print advertising to direct its product to the waterbed industry and consumers of waterbed products;<sup>67</sup> and provided an instruction sheet to customers demonstrating the preferred method for incorporating its flexible liquid storage container into a waterbed frame.<sup>68</sup> [17]

In another case, ambiguity worked in the insured's favor. A suit for patent infringement, unfair trade practices and misappropriation of trade secrets was

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<sup>62</sup> *Union*, 529 N.W.2d at 775.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 777-78.

<sup>66</sup> *Id.* at 777 (citing *Fromberg, Inc. v. Thornhill*, 315 F.2d 407 (5th Cir. 1963); *Rexnord Inc. v. P Corp.*, 6 U.S.P.Q.2d (BNA) 1817, 1842 (E.D. Wis. 1988)).

<sup>67</sup> *Union Ins.*, 529 N.W.2d at 777-78.

<sup>68</sup> *Id.* at 778.

brought against the insured, who in turn sought to require the insurer to defend against the claims.<sup>69</sup> The insured's claim rested upon its insurance coverage for claims relating to "piracy" and "unfair competition."<sup>70</sup> The United States District Court for the District of Louisiana, citing no authority outside its circuit, found the insurance policy language at issue ambiguous. As a result, the court found that the insurer had a duty to defend an action brought against the insured, and held that where one claim falls within the duty to defend, the insurer must defend the entire case.<sup>71</sup> The court read the piracy and unfair competition language to cover "an injury arising out of an offense committed during the policy period, occurring in the course of advertising activities, if the injury arises out of one of the offenses. Combine this lucid language with the words unfair competition and piracy . . . and the result is a very cloudy coverage question."<sup>72</sup> The court concluded that because language is usually construed against the drafter, allowing the insurer to deny its duty to defend would encourage the drafting of similarly ambiguous language.<sup>73</sup> [18]

## 7. Conclusion

Insureds may have difficulty convincing insurers to cover infringement claims under the "infringement of title" clause of their insurance policies, especially under the "objectively unreasonable" standard courts currently apply. One is tempted to draw a conclusion that CGL insurance coverage for patent infringement is nearly uniformly dead. [19]

These cases, however, come too early to interpret the latest addition to the patent infringement statute. Until recently, only an activity relating to "mak[ing], us[ing], or sell[ing]" a patented product could constitute patent infringement. As of January 1, 1996, however, "offer[ing] to sell" qualifies as well.<sup>74</sup> It is possible that henceforth, "offers to sell" will be construed to encompass "advertising," thus making the accused infringer's "advertising activities" a direct issue in every patent infringement suit.<sup>75</sup> In view of the fact that lawsuit damages incurred in the course

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<sup>69</sup> *Rymal*, 896 F. Supp. at 637.

<sup>70</sup> *Id.* at 638.

<sup>71</sup> *Rymal*, 896 F. Supp. at 638-39 (granting the insured's motion for summary judgment).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4988 (effective January 1, 1996)(codified at 35 U.S.C. § 271 (1994)).

<sup>75</sup> See generally Reyes, *supra* note 1.

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of advertising activities are typically covered by CGL policies, insurers should prepare for a second wave of claims by insureds accused of patent infringement. Insurers might find it useful to try to avoid such claims by drafting coverage language to specifically exclude patent infringement claims. [20]