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When an Idea is More Than Just an Idea: Insurance Coverage of Business Method Patent Infringements Suits Under Advertising Injury Provisions of Commercial General Liability Policies

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WHEN AN IDEA IS MORE THAN JUST AN IDEA: INSURANCE COVERAGE OF BUSINESS METHOD PATENT INFRINGEMENT SUITS UNDER ADVERTISING INJURY PROVISIONS OF COMMERCIAL GENERAL LIABILITY POLICIES

*Grace N. Witte**

TABLE OF CONTENTS

I.	INTRODUCTION	633
II.	BACKGROUND.....	636
	A. COMMERCIAL GENERAL LIABILITY INSURANCE POLICIES.....	636
	1. <i>Purpose</i>	636
	2. <i>Advertising Injury Provisions</i>	636
	a. <i>Standard Language</i>	636
	b. <i>Interpretations</i>	636
	c. <i>Three-Prong Test</i>	637
	d. <i>Applicability to Intellectual Property Claims</i>	640
	3. <i>Duty to Defend Versus Duty to Indemnify</i>	645
	B. PATENT INFRINGEMENT.....	645
	1. <i>Definition of Patent</i>	645
	2. <i>Business Method Patents</i>	646
	a. <i>Machine or Transformation Test</i>	647
	b. <i>Categorical Exclusion</i>	648
	c. <i>Abstract Ideas</i>	649
	3. <i>Under CGL Insurance Policies</i>	650
III.	ANALYSIS.....	651
	A. <i>HYUNDAI UNDERMINED THE INTENT OF THE CONTRACTING PARTIES</i>	652
	B. <i>HYUNDAI MISCONSTRUED THE INFRINGED PATENT</i>	654
	C. <i>HYUNDAI SHOULD HAVE LABELED THE PATENT A COMPUTERIZED PROCESS PATENT</i>	655

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D.	<i>HYUNDAI</i> IMPROPERLY LABELED THE PATENT INFRINGEMENT AS PART OF AN ADVERTISING ACTIVITY	657
E.	<i>HYUNDAI</i> IS ANALOGOUS TO <i>AUTO SOX</i> AND SHOULD NOT HAVE CREATED A DUTY TO DEFEND UNDER AN ADVERTISING INJURY PROVISION	657
IV.	CONCLUSION	658

I. INTRODUCTION

Technology changes everything. Once upon a time, car purchasers had to trek to a car dealership and deal with pushy salesmen. In modern society, customers can log onto a website and build the car of their dreams.¹ This privilege did not come without a fight, however. The patent holder of the design of the original build-your-own-car website has been buckling down on companies that have been infringing on its patent.²

Hyundai has experienced the pain that many modern businesses have felt; it was sued for infringing someone else's patent.³ As technology develops and businesses get more and more creative in reaching out to customers and attracting business, companies frequently step on one another's toes via their innovative processes and products.

Fortunately, the business community is no stranger to risk. These days, virtually every risk is insurable.⁴ Short of criminal prosecution, stealing another company's idea could be very lucrative, as long as the insurance company pays in the event that the infringing company gets caught.

Hyundai got caught and it turned to its safety net, its insurance company.⁵ Of course, as any good business would, the insurance company tried to avoid the expense of getting involved.⁶ Understandably, the insurance company did not expect a business insurance policy to cover losses resulting from the insured's choice to steal someone else's website design. Hyundai and the Ninth Circuit thought differently, apparently.⁷

The ideas underlying the *Hyundai* case are not new. Businesses are faced with new ideas every day.⁸ Patents have existed for years,⁹ serving to protect inventors and to encourage innovation to help make society and the economy

¹ See, e.g., Build Your Own Hyundai, <http://www.hyundaiusa.com/build-your-hyundai/>.

² See, e.g., Orion IP, LLC v. Mercedes-Benz USA, LLC, No. 6:05CV322, 2008 U.S. Dist. LEXIS 103607, at *3 (E.D. Tex. Dec. 22, 2008), *rev'd in part, aff'd in part, vacated in part* Orion IP, LLC v. Hyundai Motor Am., 605 F.3d 967 (Fed. Cir. 2010) (involving suit Orion brought against Hyundai and other alleged patent infringers, resulting in jury verdict finding no infringement of the relevant patent and appeal of finding of infringement of other patent).

³ *Id.*

⁴ See, e.g., Belinda Goldsmith, *Football Star Troy Polamalu's Hair Insured for \$1 Million*, REUTERS, Aug. 31, 2010, <http://www.reuters.com/article/idUSTRE67U0PX20100831> (describing Head & Shoulders' million dollar insurance policy on the hair of a football star).

⁵ Hyundai Motor Am. v. Nat'l Union Fire Ins. Co., 600 F.3d 1092 (9th Cir. 2010).

⁶ *Id.* at 1096.

⁷ *Id.* at 1104.

⁸ See, e.g., Business 2.0, *The 31 Best Business Ideas in the World*, CNNMONEY, Aug. 11, 2006, <http://money.cnn.com/2006/07/27/technology/bestbizideaslist0727.biz2/index.htm> (listing business ideas from around the world and encouraging businesses to try them).

⁹ Press Release, United States Patent and Trademark Office, First U.S. Patent Issued Today in 1790 (July 31, 2001), <http://www.uspto.gov/news/pr/2001/01-33.jsp>.

grow.¹⁰ Of course, when inventors choose to invent, they take on the risk of failure themselves.¹¹ When businesses take on risk, they often pay someone else, usually insurers, to cover any resulting losses.¹² When the two worlds combine, who should pay? If the business does not want to pay, should its risk not be clearly covered by its insurance policy before the court makes the insurance company pay?

The problem of who pays for patent infringement can now be solved by drafting express, clear insurance policy contracts.¹³ However, when an old policy lacking such clear language applies, the interpretation of the policy can mean millions of dollars saved or lost.¹⁴ Seemingly straightforward contracts are now being litigated to cover problems that were not anticipated at the time the contracts were drafted.¹⁵ On the one hand, businesses deserve to be protected from all the risks they undertake. That is the purpose of purchasing insurance policies in the first place.¹⁶ On the other hand, if risks are unanticipated, insurance companies run the risk of being bankrupted since their financial strategies do not account for covering those risks.¹⁷ So who wins? Should businesses be covered or should insurance companies' expectations be honored? Under current precedent, it depends.

It depends on the court. It depends on the case. Some patent infringement is simply too obvious. Profiting by selling products that infringe on a patented design is not covered under an insurance policy that pays for losses resulting from business risks.¹⁸ Risk involves uncertainty, and there is no uncertainty that infringing a patent is not allowed.

A different form of patent infringement is the subject of this Note. Some patents can be used in ways that can arguably be incorporated into business methods, but the Supreme Court of the United States has consistently said that

¹⁰ Jay Dratler, Jr., *Does Lord Darcy Yet Live? The Case Against Software and Business-Method Patents*, 43 SANTA CLARA L. REV. 823, 842 (2003).

¹¹ *Id.* at 845.

¹² Business Insurance Now, *Affordable General Liability and Property Insurance Coverage*, <http://www.businessinsurancenow.com/general-liability>.

¹³ ALAN R. THIELE, JUDITH R. BLAKEWAY & CHARLES M. HOSCH, *THE PATENT INFRINGEMENT LITIGATION HANDBOOK: AVOIDANCE AND MANAGEMENT* 48 (American Bar Association 2010).

¹⁴ *See, e.g.*, *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 600 F.3d 1092, 1096, 1104 (9th Cir. 2010) (finding a duty to defend a patent infringement suit that resulted in \$34 million owed to patent-holder).

¹⁵ *See, e.g.*, *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1137–38 (9th Cir. 2003) (alleging coverage under advertising injury provision of CGL policy for sales of patent-infringing product).

¹⁶ Melvin Simensky & Eric C. Osterberg, *The Insurance and Management of Intellectual Property Risks*, 17 CARDOZO ARTS & ENT. L.J. 321, 321 (1999) (explaining that insurance transfers the risk of loss from the business to the insurance company).

¹⁷ *See id.* at 321–22 (explaining insurance companies' strategies of evaluating risk potential of insured companies and pricing policies according to predicted risk of loss).

¹⁸ *Bank of the West v. Superior Court*, 833 P.2d 545, 551 (Cal. 1992) (defining "unfair competition" as passing off your own goods as those of another).

business methods are not patent eligible.¹⁹ Recent developments, however, suggest that the Court may be changing that generalization.²⁰ In recent years the business community has been faced with unclear expressions of whether and how business methods are patentable subject matter.²¹ All the while, businesses still face patent infringement lawsuits for what may or may not be patentable subject matter.²² No one unifying theme directs businesses, insurance companies, patent holders, and courts.²³

This Note argues that the *Hyundai* court got it wrong. Advertising injury provisions should apply to the ideas behind the advertisement not to the technology and patented systems incidentally used in advertisements. Applying advertising injury provisions to a patent infringement case not only undermines the intent of the contracting parties, it misconstrues the patent and ignores the values the patent process is intended to protect. It is one thing to patent a software program.²⁴ Indeed, the website design that Hyundai used was a patentable and patented computer system.²⁵ However, using a computer system to attract customers is not the advertising injury that Hyundai's commercial general liability (CGL) insurance policy was intended to cover.²⁶ Moreover, finding loopholes in insurance contracts is not a service that courts should be performing.²⁷ Instead, courts should uphold the expectations of the contracting parties and should apply the common sense meanings of the language used in patents and contracts.²⁸

Part II of this Note will provide the necessary background for an evaluation of the *Hyundai* decision through a discussion of the history of CGL policies and of the considerations behind the patentability of business methods. An

¹⁹ *Bilski v. Kappos*, 130 S. Ct. 3218, 3232 (2010) (Stevens, J., concurring) (stating that business methods have not been patentable for centuries).

²⁰ *Id.* at 3229.

²¹ See, e.g., *id.* at 3227, 3229–30 (describing one test that may be used to define business method patents and leaving open the possibility that other business method patents may be patentable if they are more than merely abstract ideas).

²² See, e.g., *Ultramercial, LLC v. Hulu, LLC*, No. CV09-06918RGK(PLAx), 2010 WL 3360098, at *5 (C.D. Cal. Aug. 13, 2010) (invalidating a patent on a method of distributing copyrighted material in exchange for viewing advertisements).

²³ Cameron H. Tousi & Ralph P. Albrecht, *Do Business Method Patents Hurt or Help?: A Financial Industry Perspective*, 14 VA. J.L. & TECH. 147, 158 (2009) (noting that patent examiners, judges, and juries have all reached different conclusions about what is patentable subject matter).

²⁴ See *In re Beauregard*, 53 F.3d 1583, 1584 (Fed. Cir. 1995) (finding that computer programs may be patentable if they are embodied in a tangible medium).

²⁵ See U.S. Patent No. 5,615,342 (filed Feb. 5, 1996).

²⁶ *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co.*, 600 F.3d 1092, 1096–97 (9th Cir. 2010) (listing offenses covered under “advertising injury” provision and explaining importance of parties’ intent and application of ordinary meaning of terms).

²⁷ See, e.g., *Discover Fin. Servs. LLC v. Nat'l Union Fire Ins. Co.*, 527 F. Supp. 2d 806, 818 (N.D. Ill. 2007) (applying the standard that courts should give unambiguous words in a contract their ordinary meanings and construe ambiguous provisions in favor of the insured).

²⁸ *Id.*

overview of relevant case law will establish the framework for the analysis in Part III. Part IV will conclude by arguing that the *Hyundai* decision should be overruled.

II. BACKGROUND

A. COMMERCIAL GENERAL LIABILITY INSURANCE POLICIES

1. *Purpose.* Commercial general liability (CGL) insurance policies were developed in response to businesses' need to have one policy that covered all or most of their liability insurance needs.²⁹ The Insurance Services Office (ISO), an industry-run organization, created and subsequently amended the standard language in a typical CGL policy.³⁰ CGL policies usually cover "bodily injury," "property damage," and "advertising injury."³¹

2. *Advertising Injury Provisions.* Advertising injury provisions in CGL policies were originally added to cover injuries resulting from "libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan."³² Subsequently, the ISO amended its standard CGL policy to expand its description of advertising injury, removing piracy, and unfair competition and adding misappropriation of advertising ideas or style of doing business.³³

a. *Standard Language.* Many CGL insurance policies now cover injuries arising out of offenses that fit into one of four categories:

- (1) 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;
- (2) oral or written publication of material that violates a person's right of privacy;
- (3) misappropriation of advertising ideas or style of doing business; or
- (4) infringement of copyright, title, or slogan.³⁴

b. *Interpretations.* Many theories of contract interpretation are helpful in applying CGL policies to alleged advertising injuries. First, courts will look for

²⁹ Todd M. Rowe, *Specialty Insurance for Intellectual Property: Additional Security for Owners of Intellectual Property Assets*, 19 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 3 (2008).

³⁰ Simensky & Osterberg, *supra* note 16, at 331.

³¹ Rowe, *supra* note 29, at 3.

³² Simensky & Osterberg, *supra* note 16, at 331.

³³ *Id.* at 331–32.

³⁴ *Id.* at 332.

clear and explicit contract language.³⁵ Second, any ambiguous or uncertain terms must be interpreted in the way that the promisor believed the promisee understood the terms.³⁶ If any ambiguity remains after applying the first two contract interpretation standards, that ambiguity will be construed against the promisor.³⁷ Finally, in determining which contract terms are reasonably ambiguous, courts apply ordinary, common sense meanings of the words.³⁸ Despite these general contract interpretation guidelines, businesses insured by CGL policies with standard advertising injury provisions have tried many creative theories in an attempt to force their insurance companies to defend them in patent infringement lawsuits.³⁹

One example of a court applying the foregoing contract interpretation guidelines is seen in *Owens-Brockway Glass Container, Inc. v. International Insurance Co.*⁴⁰ There, the district court explained that since the term “patent” was missing from the insurance policy in question, a reasonable insured would not assume that patent infringement would be covered by the advertising injury provision in the policy.⁴¹ The *Owens-Brockway* court also rejected the plaintiff’s argument that patent infringement should be covered under the policy’s “infringement of title” clause.⁴² The plaintiff argued that “title” should be read to mean “ownership of property such as a patent.”⁴³ The court countered by looking at the surrounding text of the policy and explained that “title” was meant to refer to the “name of a literary or artistic work, rather than to ownership of an invention or other thing.”⁴⁴

c. Three-Prong Test. Courts have inconsistently interpreted the advertising injury provision in CGL insurance policies.⁴⁵ Many courts have adopted a three-prong test to determine if a particular claim constitutes an advertising injury.⁴⁶ The three prongs are: “(1) the suit must have alleged a cognizable advertising injury; (2) the infringing party must have engaged in advertising activity; and (3) there must have been some causal connection between the

³⁵ See *Owens-Brockway Glass Container, Inc. v. Int’l Ins. Co.*, 884 F. Supp. 363, 366 (E.D. Cal. 1995) (citing CAL. CIV. CODE § 1638 and *Bank of the West v. Superior Court*, 833 P.2d 545, 552 (Cal. 1992)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 366–67.

³⁹ See, e.g., *Everest & Jennings, Inc. v. Am. Motorists Ins. Co.*, 23 F.3d 226, 230 (9th Cir. 1994) (alleging insurer must defend patent infringement suit under CGL policy’s clause covering disparagement of title).

⁴⁰ 884 F. Supp. 363 (E.D. Cal. 1995).

⁴¹ *Id.* at 367–68.

⁴² *Id.*

⁴³ *Id.* at 367.

⁴⁴ *Id.* at 368.

⁴⁵ Rowe, *supra* note 29, at 6.

⁴⁶ *Id.* at 7.

advertising injury and the advertising activity.”⁴⁷ Each prong has led to its share of inconsistent interpretations and applications of similar insurance policy provisions.⁴⁸

For example, courts have considered several different definitions of the term “advertising” when analyzing the second prong of the test.⁴⁹ Advertising could be defined narrowly as “widespread announcement or distribution of promotional materials,”⁵⁰ which is similar to the definition used by the court in *Hyundai*.⁵¹ Alternatively, “advertising” could be defined broadly as “any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business,”⁵² as the court did in *Amazon.com International, Inc. v. American Dynasty Surplus Lines Insurance Co.*⁵³ Additionally, the definition of “advertise” could encompass public announcements, particularly printed notices and broadcasts, intended to call to the public’s attention the desirable characteristics of a given product or service with the purpose of creating desire within the public to consume that product or service.⁵⁴ However, the Second Circuit rejected the argument that the packaging of a product amounted to the advertising of a product.⁵⁵ The court reasoned that “defining advertising so broadly as to include any form of calling public attention . . . stretch[es] the term . . . in a way that had no natural stopping point short of absurd results.”⁵⁶

The third prong of the three-part test looking for a causal connection between the injury and the advertisement.⁵⁷ Thus, an injury that is made known to the injured party through the advertisement is generally not enough.⁵⁸ Rather, the advertisement itself must cause the injury.⁵⁹

For example, in *Frog, Switch & Manufacturing v. Travelers Insurance Co.*, the Third Circuit held that the insurance company had no duty to defend the lawsuit alleging theft of trade secrets, unfair competition, and reverse passing

⁴⁷ *Id.*

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 14.

⁵⁰ *Id.* (quoting *Acuity v. Bagadia*, 750 N.W.2d 817, 827 (Wis. 2008)).

⁵¹ 600 F.3d 1092, 1098 (9th Cir. 2010) (citing *Hameid v. Nat’l Fire Ins.*, 71 P.3d 761, 766 (Cal. 2003)) (defining “advertising” as “widespread promotional activities usually directed to the public at large”).

⁵² *Rowe*, *supra* note 29, at 14. *Accord* *Acuity v. Bagadia*, 750 N.W.2d 817, 828 (Wis. 2008), and *Fireman’s Fund Ins. Co. v. Bradley Corp.*, 660 N.W.2d 666, 679 (Wis. 2003).

⁵³ 85 P.3d 974 (Wash. Ct. App. 2004).

⁵⁴ *R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co.*, 287 F.3d 242, 247 (2d Cir. 2002) (quoting *QSP, Inc. v. Aetna Casualty & Sur. Co.*, 773 A.2d 906, 921 (Conn. 2001)).

⁵⁵ *Elite Brands, Inc. v. Pa. Gen. Ins. Co.*, 164 F. App’x 60, 62 (2d Cir. 2006).

⁵⁶ *Id.* (quoting *EKCO Grp., Inc. v. Travelers Indem. Co.*, 273 F.3d 409, 413–14 (1st Cir. 2001)) (internal quotation marks omitted).

⁵⁷ *Rowe*, *supra* note 29, at 7.

⁵⁸ *See, e.g., Everest & Jennings, Inc. v. Am. Motorists Ins. Co.*, 23 F.3d 226, 229 (9th Cir. 1994).

⁵⁹ *Hyundai Motor Am. v. Nat’l Union Fire Ins. Co.*, 600 F.3d 1092, 1103 (9th Cir. 2010).

off.⁶⁰ The insured argued that theft of trade secrets should be covered by the clause protecting “misappropriation of advertising ideas or style of doing business.”⁶¹ The court reasoned that the theft in this case involved the design of a product and not an idea about advertising that product.⁶² Thus, no duty to defend was triggered, and the court affirmed the district court’s order granting summary judgment in favor of the insurance company.⁶³

The Court of Appeals of California considered this same issue in *Gitano Group, Inc. v. Kemper Group*.⁶⁴ The court held that the insurance companies had no duty to defend a patent infringement suit against the insured, nor did they have a duty to indemnify the insured’s losses resulting from the suit. Specifically, the court held that “no separate harm from the advertising could be shown and the requisite causal connection [was] lacking.”⁶⁵ In *Gitano*, the alleged infringer was sued for advertising acid-washed jeans.⁶⁶ The patent-holder sued for patent infringement and inducement of infringement of the method patent that protected the process of making jeans that appeared to be acid-washed or randomly faded.⁶⁷ In its analysis, the court relied on *Meyers & Sons v. Zurich American Insurance*.⁶⁸ The *Meyers* court explained that “a general comprehensive liability policy, with an advertising injury provision identical to the one [in *Gitano*], applies to false or misleading advertising and does not apply to advertising done as part and parcel of patent infringing manufacture and sale.”⁶⁹

The *Gitano* court concluded that “advertising as an element of patent infringement does not produce a separate harm.”⁷⁰ The court explained that enforcing advertising injury coverage would encourage coverage for lawsuits litigating any harmful act that was advertised, extending coverage under the advertising injury clause past any reasonable expectations of the insured.⁷¹

The court in *Gitano* also looked to *Bank of the West v. Superior Court*⁷² to determine the causal connection inquiry.⁷³ In *Bank of the West*, the insured argued that the advertising injury provision of the CGL insurance policy should

⁶⁰ 193 F.3d 742, 744 (3d Cir. 1999).

⁶¹ *Id.* at 747.

⁶² *Id.* at 749.

⁶³ *Id.* at 744.

⁶⁴ 31 Cal. Rptr. 2d 271 (1994).

⁶⁵ *Id.* at 277.

⁶⁶ *Id.* at 272.

⁶⁷ *Id.*

⁶⁸ 545 N.E.2d 1206 (N.Y. 1989).

⁶⁹ *Gitano*, 31 Cal. Rptr. 2d at 275 (citing *Meyers*, 546 N.E.2d at 1207–09).

⁷⁰ *Id.* at 276 (citing *Nat’l Union Fire Ins. Co. v. Siliconix, Inc.*, 729 F. Supp. 77, 78 (N.D. Cal. 1989), *superseded by statute*).

⁷¹ *Id.*

⁷² 833 P.2d 545 (Cal. 1992).

⁷³ *Gitano*, 31 Cal. Rptr. 2d at 276–77.

trigger the insurance company's duty to indemnify.⁷⁴ The insured based its argument on the causal connection between the advertisements and the practices that harmed the plaintiffs, arguing that the advertisements themselves need not harm the plaintiff.⁷⁵ The Supreme Court of California rejected this argument, instead holding that the advertising injury must have a causal connection to the advertising activities.⁷⁶

The plaintiffs in *Gitano* did not allege injuries causally connected to the alleged infringer's advertising activities.⁷⁷ Rather, the pleadings alleged injuries resulting from the use of a patented method.⁷⁸ Those pleadings tied the injury to the sale of the jeans, but the court held that selling an infringing product does not sufficiently create a causal connection between the advertisements and the infringing process.⁷⁹

While a causal connection between the advertising activities and the alleged harm is generally required when applying CGL policies to patent infringement lawsuits, some courts have held that, depending on the language of the contract, a causal connection may not be required.⁸⁰ For instance, the district court in *Owens-Brockway* held that no causal connection was required.⁸¹ There, the court pointed to the absence of any language stating that the injury must arise out of advertising activities as reason enough to dispense with the causal connection requirement.⁸²

Ultimately, each court should look to the terms of the specific contract involved. Even terms seen in multiple contracts may be subject to differing interpretations. A general consensus across jurisdictions regarding interpretation of each term, and the advertising injury provision as a whole, has not yet been reached.⁸³

d. Applicability to Intellectual Property Claims. While courts have struggled to interpret advertising injury provisions, courts also have trouble with finding a place for intellectual property rights infringement within the scope of advertising injury insurance coverage.⁸⁴ This is particularly true for patent infringement claims.⁸⁵ “[O]ne of the most ‘hotly litigated topics in insurance

⁷⁴ *Bank of the West*, 833 P.2d at 549.

⁷⁵ *Id.* at 559.

⁷⁶ *Id.*

⁷⁷ *Gitano*, 31 Cal. Rptr. 2d at 277.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Owens-Brockway Glass Container, Inc. v. Int'l Ins. Co.*, 884 F. Supp. 363, 368 (E.D. Cal. 1995).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Rowe*, *supra* note 29, at 10, 13.

⁸⁴ *Id.* at 20–22.

⁸⁵ *See Simply Fresh Fruit, Inc. v. P & C Servs.*, 94 F.3d 1219, 1222 (9th Cir. 1996) (stating generally that patent infringement does not occur through advertising activities).

coverage law” is whether patent infringement lawsuits should be covered under business insurance policies.⁸⁶ Courts have used strong language to exclude coverage of patent infringement suits under advertising injury provisions in CGL policies.⁸⁷ But, in 1994 Congress amended the Patent Act to include the act of offering to sell an infringing product as a form of direct patent infringement.⁸⁸ Where advertisements are considered offers to sell, they can trigger direct patent infringement action.⁸⁹ For the advertising injury provision of a CGL insurance policy to apply to a patent infringement claim, the patented object must be “itself an element of the complained of advertisement.”⁹⁰ In fact, advertising injury provisions are generally more applicable to trade dress infringement claims than any other type of intellectual property claim.⁹¹ Courts and legal scholars alike are in agreement that, generally speaking, patent infringement is not covered under any advertising injury provision in a CGL insurance policy.⁹²

However, that generally accepted principle is starting to face opposition. In April 2010, the Ninth Circuit of the U.S. Court of Appeals decided that unlawfully using a patented software program,⁹³ and thereby infringing the patent, as the method of selling products to customers online is an advertising injury under a CGL insurance policy.⁹⁴ Consequently, the insurer was required to defend the insured patent infringer in the resulting civil suit.⁹⁵ The applicable insurance policy contained this relevant portion:

⁸⁶ Jason A. Reyes, *CGL Insurance Coverage for Patent Infringement*, 2 B.U. J. SCI. & TECH. L. 14, ¶ 1 (citing *Clary Corp. v. Union Standard Ins. Co.*, 32 U.S.P.Q.2d (BNA) 1131, 1132 (Cal. App. 1994)).

⁸⁷ See, e.g., *Owens-Brockway*, 884 F. Supp. at 369 (noting that there is no similarity between patent infringement and advertising activities).

⁸⁸ See 35 U.S.C. § 271(a) (providing that patent infringement includes making, using, offering to sell, or selling a patented invention).

⁸⁹ *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1139 (9th Cir. 2003).

⁹⁰ *DISH Network Corp. v. Arch Specialty Ins. Co.*, 2010 U.S. Dist. LEXIS 85400, at *29 (D. Colo. Aug. 19, 2010). See also *Union Ins. Co. v. Land & Sky, Inc.*, 529 N.W.2d 773, 778 (Neb. 1995) (finding a duty to defend where inducement to infringe was caused by the insured’s advertising).

⁹¹ See Rowe, *supra* note 29, at 25 (finding trademark or trade dress infringement as more similar to advertising than are copyright or patent infringement); see also *DISH Network*, 2010 U.S. Dist. LEXIS 85400, at *32 (explaining that some courts find misappropriation of style of doing business as synonymous to misappropriation of contested product’s trade dress).

⁹² See, e.g., *Simensky & Osterberg*, *supra* note 16, at 331 (explaining that “the law appears settled that patent infringement is not covered” by CGL policies); Rowe, *supra* note 29, at 25 (noting that the law is settled that patent infringement is not covered under the advertising injury clause); Reyes, *supra* note 86, ¶ 1 (explaining that CGL insurance does not cover patent infringement).

⁹³ See U.S. Patent No. 5,615,342 (filed Feb. 5, 1996).

⁹⁴ *Hyundai Motor Am. v. Nat’l Union Fire Ins. Co.*, 600 F.3d 1092 (9th Cir. 2010).

⁹⁵ *Id.*

COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement
 - a. . . . We [Defendants] will have the right and duty to defend the insured against any “suit” seeking those damages [caused by, among other things, “advertising injury”]. . . .
 - b. This insurance applies to: . . .
 - (2) “Advertising injury” caused by an offense committed in the course of advertising your goods, products or services . . .

SECTION V -- DEFINITIONS

1. “Advertising injury” means injury arising out of one or more of the following offenses:
 - 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 ideas or style of doing business; or
 - d. Infringement of copyright, title, or slogan.⁹⁶

The Ninth Circuit defined “advertising” as “widespread promotional activities usually directed to the public at large,” noting that “it does not encompass solicitation,” emphasizing the difference between seeking one customer and seeking many customers.⁹⁷ In *Hyundai*, the court explained that this software program, a build-your-own car website, fit into the definition of advertising and was not solicitation, since it was “widely distributed to the public at large, to millions of unknown web-browsing potential customers.”⁹⁸ The court then explained that this patent infringement was a “misappropriation of advertising ideas.”⁹⁹ It reasoned that the method of advertising, here, the software program through which customers were reached, was the subject of the infringement rather than the advertised product being the subject of infringement, as seen in prior cases.¹⁰⁰

⁹⁶ *Id.* at 1096.

⁹⁷ *Id.* at 1098 (emphasis and internal quotation marks omitted).

⁹⁸ *Id.* at 1099.

⁹⁹ *Id.* at 1102.

¹⁰⁰ *Id.*

Finally, the court noted that in order to trigger a duty to defend on the part of the insurer, “a causal connection must link the advertisement and the alleged advertising injury.”¹⁰¹ Neither advertising a patent-infringing product nor alerting the patent-holder to infringement through advertising is enough to establish a causal connection between the advertisement and the alleged advertising injury.¹⁰² The court said that a causal connection requires using the patented software as the means to market the goods for sale.¹⁰³ The court held that misappropriating the patented software was not enough to constitute an advertising injury; rather, “the infringement [must] occur[] in the advertising itself.”¹⁰⁴

The court in *Hyundai* relied heavily on the persuasive authority in *Amazon.com International, Inc. v. American Dynasty Surplus Lines Insurance Co.*¹⁰⁵ In that case, a patentholder sued Amazon for infringing its software, a program that allowed portions of songs to be played on a website to attract potential buyers.¹⁰⁶ Amazon sought to be defended by its insurance companies, American Dynasty Surplus Lines Insurance Company and Atlantic Mutual Insurance Company.¹⁰⁷ Amazon’s insurance policy from Atlantic Mutual covered advertising injury but not patent infringement specifically.¹⁰⁸ The policy listed the following as included in the definition of advertising injury:

- 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 ideas or style of doing business; or
- d. Infringement or [sic] copyright, title or slogan.¹⁰⁹

The court in *Amazon* defined “advertising” as “any oral, written, or graphic statement made by the seller in any manner in connection with solicitation of business.”¹¹⁰ The court concluded that the use of a software program on a website with the intent of alluring customers in order to make sales was an

¹⁰¹ *Id.*

¹⁰² *Id.* at 1102, 1103.

¹⁰³ *Id.* at 1104.

¹⁰⁴ *Id.*

¹⁰⁵ 85 P.3d 974 (Wash. Ct. App. 2004).

¹⁰⁶ *Id.* at 975.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 976 (emphasis omitted).

¹¹⁰ *Id.*

advertising injury and was covered under the policy.¹¹¹ Thus, the insurance companies had a duty to defend the insured patent infringer.¹¹²

The Washington Court of Appeals distinguished *Amazon* in *Auto Sox USA, Inc. v. Zurich North America*.¹¹³ In *Auto Sox*, the insured manufactured and sold a rooftop advertising sign that was subject to an improvement patent. The court held that the patent at issue related to a product used to advertise and not to an advertising idea, as had been the case in *Amazon*.¹¹⁴ Thus, the insurer had no duty to defend the patent infringement suit under the advertising injury provision of its CGL policy.¹¹⁵ The *Hyundai* court applied reasoning similar to that of the *Amazon* court and concluded that the build-your-own-car website was an advertising technique, imposing a duty to defend on the insurer.¹¹⁶

Since *Hyundai*, other courts have considered the Ninth Circuit's broad view of advertising injuries, which includes infringement of a patented method.¹¹⁷ In *DISH Network Corp. v. Arch Specialty Insurance Co.*, the district court granted summary judgment in favor of defendant insurers, finding that DISH's use of a patented customer service telephone system did not constitute an advertising injury under DISH's CGL and umbrella insurance policies.¹¹⁸ The *DISH* court distinguished its facts from those in *Hyundai* by labeling the patented telephone system a means of conveying information to customers, rather than an element of the advertisement itself.¹¹⁹

Under the *Hyundai* approach, other patent infringers arguably may have been eligible for insurance company defense via coverage under the advertising injury provision of their CGL policies. For example, Microsoft may have been covered under its CGL policy when it infringed Walker Digital's reverse auction patent¹²⁰ on its Expedia travel service website.¹²¹ This case, involving use of a software program on a website to attract customers, may be more closely analogized to *Hyundai*, thus requiring a defense from the CGL insurer, than to *DISH*, where the patented system was deemed simply a customer service tool and not an advertising method. This case also shows that the problem of

¹¹¹ *Id.* at 978.

¹¹² *Id.*

¹¹³ 88 P.3d 1008, 1011 (Wash. Ct. App. 2004).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1012.

¹¹⁶ *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co.*, 600 F.3d 1092, 1102 (9th Cir. 2010).

¹¹⁷ *See, e.g.*, *DISH Network Corp. v. Arch Specialty Ins. Co.*, 734 F. Supp. 2d 1173, 1184 (D. Colo. 2010).

¹¹⁸ *Id.* at 1185.

¹¹⁹ *Id.* at 1184.

¹²⁰ U.S. Patent No. 5,794,207 (filed Sept. 4, 1996).

¹²¹ *See* Tousi & Albrecht, *supra* note 23, at 157.

patent infringement may often be easily solved by seeking a licensing agreement.¹²²

3. *Duty to Defend Versus Duty to Indemnify.* In patent infringement suits under businesses' CGL policies, the duty to defend will inevitably be implicated more frequently since it "is broader than the duty to indemnify."¹²³ The duty to defend is triggered when a complaint alleges infringement that potentially fits within the terms of the insurance policy.¹²⁴ An insurance company will have an obligation to defend unless "the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage."¹²⁵ This is a broad standard.¹²⁶ In fact, the Court of Appeals of Michigan stated that the duty to defend "is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage."¹²⁷ Further, that court held that an insurance company cannot rely on the language in the pleadings but rather must look beyond that language to see if any coverage is possible, and any "doubt must be resolved in the insured's favor."¹²⁸ Making the duty to defend a broad duty ensures the protection of the reasonable expectations of the insured.¹²⁹

B. PATENT INFRINGEMENT

The purpose of patents is to protect against the specific evils of "[i]ntentionally copying a patented product, or making only tiny differences to a patented product."¹³⁰ Patents encourage innovation and grant limited time monopoly rights to patent holders.¹³¹ The merits of the patent system and its applicability to different industries are seemingly never settled debates.

1. *Definition of Patent.* Patentable subject matter is delineated in Section 101 of the Patent Act, which states: "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the

¹²² See *id.* (noting that in 2001 Walker Digital and Microsoft reached a settlement and licensing agreement for the use of the reverse auction patent).

¹²³ *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1139 (9th Cir. 2003) (quoting *Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 795 (Cal. 1993)).

¹²⁴ *Id.* at 1139 (citing *Gray v. Zurick Ins. Co.*, 419 P.2d 168, 176 (Cal. 1966)).

¹²⁵ *Hyundai Motor Am. v. Nat'l Union Fire Ins. Co.*, 600 F.3d 1092, 1097 (9th Cir. 2010) (quoting *Lebas Fashion Imps., Inc. v. ITT Hartford Ins. Group*, 59 Cal. Rptr. 2d 36, 40 (Cal. Ct. App. 1996) (internal quotation marks omitted)).

¹²⁶ *St. Paul Mercury Ins. Co. v. Med. Lab. Network, Inc.*, 690 F. Supp. 901, 903 (C.D. Cal. 1988).

¹²⁷ *Detroit Edison Co. v. Michigan Mut. Ins. Co.*, 301 N.W.2d 832, 835 (Mich. Ct. App. 1980).

¹²⁸ *Id.* See also *Aetna Cas. & Sur. Co. v. Centennial Ins. Co.*, 838 F.2d 346, 350 (9th Cir. 1988).

¹²⁹ *St. Paul Mercury*, 690 F. Supp. at 903.

¹³⁰ THIELE, BLAKEWAY & HOSCH, *supra* note 13, at 14.

¹³¹ *Id.* at 235.

conditions and requirements of this title.”¹³² Congress generated a broad scope of patentable subject matter by choosing generic, comprehensive terms and by modifying those terms with the indefinite article “any.”¹³³ Yet the Federal Circuit explained that “even if a claim may be deemed to fit literally within one or more of the statutory categories, it may not be patent eligible.”¹³⁴ The invention must still be novel, non-obvious, and fully and particularly described so “as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same.”¹³⁵

The application process for a patent requires many intricate details. For example, one patent attorney provided this explanation:

Patent claims are required by 35 U.S.C. § 112 and are “word pictures” which describe exactly what invention the patent covers. The patent claims provide the concise legal definition of the invention. Only the “claims” of a patent are legally enforceable. Infringement can be determined only by evaluating the claims.

The claims “describe and point out the invention by a series of limiting words or phrases” called “limitations.” The law is well-settled that, “to establish infringement of a patent, every limitation set forth in a claim must be found in an accused product or process.”¹³⁶

Thus, each piece of the patent application is important.¹³⁷ Each piece must be evaluated not only in the application process to establish the patent initially but also in any litigation process determining the validity of the patent or any potential infringement thereof.¹³⁸

2. *Business Method Patents.* Patents allegedly falling under the “process” category of Section 101 are arguably the most difficult to identify, distinguish, and litigate. The definition of “process” under Section 100(b) of the Patent Act is a “process, art or method and includes a new use of a known process, machine, manufacture, composition of matter, or material.”¹³⁹ In recent years, litigated business method patent applications have generally been struck down

¹³² 35 U.S.C. § 101 (2010).

¹³³ See *Bilski v. Kappos*, 130 S. Ct. 3218, 3225 (2010) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980)).

¹³⁴ *In re Ferguson*, 558 F.3d 1359, 1363 (Fed. Cir. 2009).

¹³⁵ 35 U.S.C. §§ 102, 103, 112 (2010).

¹³⁶ Thomas J. Stueber, *Insurance Coverage for Patent Infringement*, 17 WM. MITCHELL L. REV. 1055, 1057 (1991).

¹³⁷ THIELE, BLAKEWAY & HOSCH, *supra* note 13, at 24 (explaining that a patent is infringed if every element of at least one of its many claims is infringed).

¹³⁸ *Id.*

¹³⁹ 35 U.S.C. § 100(b) (2010).

for three reasons. First, some courts have applied a machine or transformation test, requiring the business method patent to either be “tied to a particular machine,” or “transform[] an article.”¹⁴⁰ Second, some courts categorically exclude business method patents.¹⁴¹ The Supreme Court in *Bilski v. Kappos* rejected both of these first two formulations.¹⁴² Finally, business method patent applications are often viewed as mere attempts to patent abstract ideas that are otherwise unpatentable.¹⁴³

a. Machine or Transformation Test. In deciding *In re Bilski*, the United States Court of Appeals for the Federal Circuit rejected the test used by the court in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.* to define a patentable process.¹⁴⁴ The *State Street* court required a “useful, concrete, and tangible result” for a process to be patent-eligible.¹⁴⁵ The Court of Appeals in *In re Bilski* adopted the machine or transformation test as the only test creating patent eligibility for processes, requiring that a process claim either be “tied to a particular machine, or . . . transform[] an article.”¹⁴⁶ In order to satisfy either the machine or transformation prong of the test, the patent application must “impose meaningful limits on the claim’s scope.”¹⁴⁷ The court further narrowed the satisfaction of the machine or transformation test by specifying that “the involvement of the machine or transformation in the claimed process must not merely be insignificant extra-solution activity.”¹⁴⁸

In *Bilski v. Kappos* the Supreme Court overturned the conclusion from *In re Bilski* that the machine or transformation test was the only test for business method patentability.¹⁴⁹ In the later case, the Court said that “the machine-or-transformation test is a useful and important clue, an investigative tool, for determining whether some claimed inventions are processes under § 101.”¹⁵⁰ The Court left open the possibility that a process could be patent-eligible despite failing the machine or transformation test.¹⁵¹ The Court based its conclusion on precedent interpreting the statute, citing *Diamond v. Diehr*¹⁵² as supporting the proposition that any limitations or conditions ascribed to patent

¹⁴⁰ Fort Props., Inc. v. Am. Master Lease, LLC, 609 F. Supp. 2d 1052, 1055 (C.D. Cal. 2009). See also *In re Bilski*, 545 F.3d 943, 961 (Fed. Cir. 2008) (en banc).

¹⁴¹ See *In re Bilski*, 545 F.3d 943, 998–1008 (Fed. Cir. 2008) (en banc) (Mayer, J., dissenting) (outlining history of business method patents and policies behind patentability).

¹⁴² *Bilski v. Kappos*, 130 S. Ct. 3218, 3227–29 (2010).

¹⁴³ *Id.* at 3229–30.

¹⁴⁴ *In re Bilski*, 545 F.3d 943, 959–60 & n.19 (Fed. Cir. 2008) (en banc).

¹⁴⁵ *State Street Bank & Trust Co. v. Signature Finan. Group, Inc.*, 149 F.3d 1368, 1373 (1998). See also *AT&T Corp. v. Excel Commc’ns Inc.*, 172 F.3d 1352, 1357 (Fed. Cir. 1999).

¹⁴⁶ *In re Bilski*, 545 F.3d 943, 961 (Fed. Cir. 2008) (en banc).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 962 (citing *Parker v. Flook*, 437 U.S. 584, 590 (1978)).

¹⁴⁹ *Bilski v. Kappos*, 130 S. Ct. 3218, 3224 (2010).

¹⁵⁰ *Id.* at 3227.

¹⁵¹ *Id.*

¹⁵² 450 U.S. 175, 182 (1981). See also *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980).

laws must adhere to express legislative statements.¹⁵³ The Court concluded that since the legislature had defined “process” under Section 100(b), any further restrictions on the meaning of the term were invalid.¹⁵⁴

b. Categorical Exclusion. The Supreme Court in *Bilski v. Kappos* rejected the notion that business method patents are categorically invalid.¹⁵⁵ The Court pointed to a defense for alleged patent infringers codified in 35 U.S.C. § 273(b)(1).¹⁵⁶ That statute provides a defense to an action for infringement under Section 271 for any person who “acting in good faith, actually reduced the subject matter to practice at least 1 year before the effective filing date of such patent, and commercially used the subject matter before the effective filing date of such patent.”¹⁵⁷ The United States Code defines “method” for purposes of that section as “a method of doing or conducting business.”¹⁵⁸ Thus, the Supreme Court held that business methods must be patent-eligible if the defense provided for under Section 273 is to have any effect.¹⁵⁹ Specifically, an alleged patent infringer would need no defense if business methods are not patentable. Thus, since there is a defense, business methods must be patentable.

Justice Stevens, in his concurring opinion, disagreed with this part of the Court’s analysis.¹⁶⁰ He explained that the purpose behind Section 273 was to limit potential liability for businesses infringing business method patents that they did not think were valid.¹⁶¹ He further argued that the Court went too far in its majority opinion by allowing the actions of a subsequent Congress to serve as an explanation of the intent of a previous one.¹⁶²

Patent attorneys have their own opinions on whether business methods should be patentable. One example is the opinion of Michael Glenn, a patent attorney, addressing Hastings College of the Law:

We’ve recognized for a long time in the patent area that if something new comes along, it’s new. You don’t say, “Well, it’s different somehow, so it can’t be patented.” Well, this has been the cry about business methods and software by people who got caught up short, like Oracle Corporation and others who thought they didn’t need patents. You get caught up short, and then you say, “Well, patents shouldn’t be going for software and methods

¹⁵³ *Bilski v. Kappos*, 130 S. Ct. 3218, 3226 (2010).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 3228.

¹⁵⁶ *Id.*

¹⁵⁷ 35 U.S.C. § 273(b)(1) (2010).

¹⁵⁸ *Id.* § 273(a)(3).

¹⁵⁹ *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010).

¹⁶⁰ *Id.* at 3250 (Stevens, J., concurring).

¹⁶¹ *Id.*

¹⁶² *Id.* (citing *United States v. Price*, 361 U.S. 304, 313 (1960)).

of doing business, because there's something different about it." But that's the whole point of the patent system. There's something different, it should be patented — unless it's naturally occurring.¹⁶³

Business methods often face greater financial stakes than those that are faced in other fields; moreover, "the innovations often appear[] more obvious than in the pure technologies, regardless of their inherent value."¹⁶⁴ The result is fewer patents accorded to business methods since the entire business community benefits from new methods.¹⁶⁵ Innovators in business fields are rewarded less frequently than are innovators in technological fields, thereby reducing incentives to innovate.¹⁶⁶

c. Abstract Ideas. "[L]aws of nature, physical phenomena, and abstract ideas" are not patentable subject matter under Section 101 of the Patent Act.¹⁶⁷ This is because such intangible assets are freely available to all mankind equally.¹⁶⁸ Some would say "that man's creations are not to be equated with God's," citing the greater relative value of something considered God's creation.¹⁶⁹ This greater value of abstract ideas eliminates the right to receive exclusive rights.¹⁷⁰ Some of the more common abstract ideas that alleged inventors have tried to patent include mathematical formulas and algorithms.¹⁷¹ When an inventor seeks a patent on an abstract idea, awarding a patent would injure society and overly benefit the inventor by providing a limited monopoly on that idea.¹⁷²

The Court has seen many theories of what might be added to an abstract idea in order to make the abstract idea a patentable application. Early business methods such as "non-software based business methods, mechanic, electromechanical, and later transistor technology" were so inextricably linked to machines that patentability was never in contest.¹⁷³ In *Parker v. Flook*, the Supreme Court held that restricting the use of an abstract idea to a particular technological environment does not overcome that idea's patent ineligibility.¹⁷⁴ Rather, an inventor must find a novel and non-obvious application of that

¹⁶³ Michael A. Glenn, *Symposium Presentation: Business and Patents and Business Patents*, 22 HASTINGS COMM. & ENT. L.J. 203, 213–14 (2000).

¹⁶⁴ Tousi & Albrecht, *supra* note 23, at 148–49.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ 35 U.S.C. § 101 (2010). See *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

¹⁶⁸ *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948).

¹⁶⁹ Tousi & Albrecht, *supra* note 23, at 153.

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., *Gottschalk v. Benson*, 409 U.S. 63 (1972), and *Parker v. Flook*, 437 U.S. 584 (1978).

¹⁷² Tousi & Albrecht, *supra* note 23, at 153.

¹⁷³ *Id.*

¹⁷⁴ 437 U.S. 584, 595 n.18 (1978). See also *Diamond v. Diehr*, 450 U.S. 175, 191–92 (1981).

abstract idea in order to be eligible for patent protection.¹⁷⁵ Further, according to the United States Court of Appeals for the Federal Circuit, mental processes themselves are not patentable unless they are associated with some other statutory subject matter.¹⁷⁶ Even a practical application of the method will not create patent eligibility for a mental process.¹⁷⁷ The Court of Appeals for the Federal Circuit has explained that “the application of only human intelligence to the solution of practical problems is no more than a claim to a fundamental principle.”¹⁷⁸ Ultimately, this may lead to confusion if one tries to distinguish the patent-ineligible method that is deemed to be an abstract idea from the application of that idea, which is patentable.

3. *Under CGL Insurance Policies.* While patent infringement is generally not covered under the advertising injury provision of a CGL policy, typical advertising injury provisions do cover the “misappropriation of advertising ideas or style of doing business.”¹⁷⁹ Thus, by default, if a business method (as a style of doing business) was patented, and that business method was subsequently misappropriated, the CGL policy would cover patent infringement.

Historically, patent infringement has not been covered by CGL policies.¹⁸⁰ Now, insurers have started including specific exclusion clauses in their CGL policies in order to explicitly state that the policy does not cover patent infringement.¹⁸¹ For example, an exclusion clause might look like the following:

Intellectual Property

This insurance does not apply to any liability arising out of or directly or indirectly related to the actual or alleged publication of utterances of oral or written statements of any type claimed as an infringement, violation, or defense of any of the following rights or laws:

1. copyright, other than infringement of copyrighted advertising materials;
2. patent;
3. trade dress;
4. trade secrets; or

¹⁷⁵ *Diamond v. Diehr*, 450 U.S. at 188 (citing *Mackey Radio & Tel. Co. v. Radio of Am.*, 306 U.S. 86, 94 (1939)).

¹⁷⁶ *In re Comiskey*, 554 F.3d 967, 979 (Fed. Cir. 2009).

¹⁷⁷ *Id.*

¹⁷⁸ *In re Bilski*, 545 F.3d at 965 (en banc) (citing *In re Comiskey*, 499 F.3d 1365, 1377–79 (Fed. Cir. 2007)).

¹⁷⁹ *Simensky & Osterberg*, *supra* note 16, at 332 (quoting a standard 1986 ISO CGL policy).

¹⁸⁰ *Rowe*, *supra* note 29, at 25.

¹⁸¹ THIELE, BLAKEWAY & HOSCH, *supra* note 13, at 48.

5. trademark or service mark or certification mark or collective mark or trade name, other than trademarked or service marked titles or slogans.¹⁸²

Ultimately, the trend in insurance policies may be towards refining and expanding policy language to specifically indicate if and when patent infringement lawsuits will be covered. Had the patent infringer in *Hyundai* had such an updated policy, the lawsuit might never have been filed. Unfortunately, courts will continue to be faced with insurance policies that do not specifically address coverage of patent infringement lawsuits until all of the old, unrefined policies expire and are replaced by newer, more specific policies.

III. ANALYSIS

Patents are intended to foster innovation.¹⁸³ Their purpose is to reward the innovator's contribution to society.¹⁸⁴ But sometimes, innovators feel anything but rewarded.¹⁸⁵

Patents do not protect every forward-thinker equally. Until recently, it had been well-established that business methods were not patent eligible.¹⁸⁶ One of the policy reasons supporting this conclusion was that businesses were able to make returns on their investments in ways that the scientific community could not.¹⁸⁷ The market risk affecting the profitability of the implementation of a particular business method only determines the size of the ultimate return, not whether there will be a payout.¹⁸⁸ Inventors, on the other hand, face technological risk: that even after their investment, they could still have nothing.¹⁸⁹ However, this is not the case with businesses. The most fundamental underlying premise explaining why business methods are not patentable is that business practitioners have plenty of incentive to innovate outside of patent protection.¹⁹⁰ Their innovations will pay returns, even if the innovation simply results in selling the building used for the business and auctioning off the remaining business supplies.¹⁹¹

¹⁸² *Id.*

¹⁸³ *Id.* at 239–40.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 57 (“After a difficult and lengthy lawsuit contesting the facts surrounding the creation of the invention and the meaning of the words and phrases in the claims, requiring the inventor to spend several days on the witness stand, the inventor informed his superiors that he would never submit another invention disclosure.”).

¹⁸⁶ See, e.g., *Lowe’s Drive-In Theatres, Inc. v. Park-In Theatres, Inc.*, 174 F.2d 547, 552 (1st Cir. 1949).

¹⁸⁷ *Dratler*, *supra* note 10, at 846–47.

¹⁸⁸ *Id.* at 845–47.

¹⁸⁹ *Id.* at 845–46.

¹⁹⁰ *Id.* at 846–47.

¹⁹¹ *Id.*

Court opinions such as *Bilski v. Kappos*¹⁹² add some guidance to what may be patent-eligible. The Supreme Court in *Bilski* left open the possibility that some methods, even business methods, may be patentable.¹⁹³ However, business practitioners, and the insurance companies who bear the risk of potential liability creating business activities, are left with little direction in determining what specifically will constitute patentable subject matter or patent infringement.

Business method patents may be protected if they satisfy the machine or transformation test, which the *Bilski* court left open as a satisfactory means of testing the validity of a patent. But this is not the only possible means.¹⁹⁴ For example, the patent infringed in *Hyundai* arguably qualifies as a business method patent, since it was used as a part of Hyundai's overall advertising scheme.¹⁹⁵ Moreover, the Court of Appeals for the Ninth Circuit labeled the patent in question an advertising method patent.¹⁹⁶ Additionally, it may also qualify as a computerized method patent since the advertising technique implements the computer system in the process.¹⁹⁷ The patent itself describes the invention as "a computer-based system [that] dynamically create[s] customized, printed proposals for potential purchasers of a product."¹⁹⁸

The real question is: what makes the computerized business method in *Hyundai* so different from any other computerized business method? Why should this patent infringement be covered under the advertising injury provision of a CGL policy despite years of legislative history deeming patent infringement totally separate from advertising injuries? Answer: it should not.

A. HYUNDAI UNDERMINED THE INTENT OF THE CONTRACTING PARTIES

Upholding the intent of the parties to the contract needs to remain a primary goal in contract interpretation cases. While unanticipated risks are unfortunate for the business that must bear the costs of the loss without the help of its insurance company, unanticipated risks cannot be said to have been contemplated by the contracting parties. In the absence of a catch-all provision, unanticipated risks should not be covered. What the *Hyundai* court has done is to effectively create a catch-all provision for the business that did not think ahead and was not willing to pay for broader insurance coverage. Insurance companies should not be subjected to arbitrary interpretations of their contracts. They should take the *Hyundai* decision as a challenge to fine tune the

¹⁹² 130 S. Ct. 3218, 3218 (2010).

¹⁹³ *Id.* at 3228.

¹⁹⁴ *Id.*

¹⁹⁵ *Hyundai Motor Am. v. Nat'l Fire Ins. Co.*, 600 F.3d 1092, 1098–99 (9th Cir. 2010).

¹⁹⁶ *Id.* at 1104.

¹⁹⁷ *Id.* at 1095.

¹⁹⁸ U.S. Patent No. 5,615,342 (filed Feb. 5, 1996).

language in their contracts, but they should not be required to pay for something that is not written into the insurance policy.

A court must consider an insured's objectively reasonable expectations.¹⁹⁹ If those expectations include defense of the suit "then the language will be construed against the insurer and [the insurer] will be required to defend the suit."²⁰⁰ When interpreting what the insured's objectively reasonable expectations were, the court should look to typical coverage under advertising injury provisions, not to obscure legal arguments. In *Mez Industries, Inc. v. Pacific National Insurance Co.*, the California Court of Appeals held that "[t]he policy terms 'misappropriation of an advertising idea or style of doing business' . . . simply could not be reasonably read by a layperson to include either patent infringement or the inducement thereof."²⁰¹

Furthermore, in interpreting contracts, "[a] court should avoid any 'technical or strained construction.'"²⁰² When the Ninth Circuit found that the insurance company had a duty to defend the computer system patent infringement suit under the advertising injury provision of a CGL policy, it used a strained construction.²⁰³ Typical advertising injuries are libel, slander, and misappropriation of advertising ideas.²⁰⁴ Insurance companies can expect to pay when an insured company disparages the image of its competitor.²⁰⁵ Insurance companies can expect to pay when an insured company uses its competitor's trademark.²⁰⁶ These are typical advertising injuries. They are the injuries that CGL insurance policies were designed to cover.²⁰⁷ When an insured company steals a patented software design and uses that in the process of displaying its merchandise to potential customers, the company should not be held liable for advertising injuries. Hyundai's infringement was more akin to stealing a printer and using it to make copies of a marketing brochure. The computer system is a product, not a process. Simply because the program was

¹⁹⁹ *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1140 (citing *Bank of the West v. Superior Court*, 833 P.2d 545, 552 (Cal. 1992)).

²⁰⁰ *Id.*

²⁰¹ 90 Cal. Rptr. 2d 721, 733 (Ct. App. 1999). See also *Ziman v. Fireman's Fund Ins. Co.*, 87 Cal. Rptr. 2d 397, 401 (Cal. Ct. App. 1999) (holding that hanging a copied painting in the lobby of a building for lease could not reasonably be construed as an advertising activity).

²⁰² David Syrowik, *Insurance Coverage for Software-Related Patent and Other Intellectual Property Disputes*, 75 MICH. B.J. 502, 504 (1996) (quoting *Hosking v. State Farm Mut. Auto. Ins. Co.*, 499 N.W.2d 436, 437 (Mich. Ct. App. 1986)).

²⁰³ See *Hyundai Motor Am. v. Nat'l Fire Ins. Co.*, 600 F.3d 1092, 1104 (9th Cir. 2010) (finding a duty to defend under "misappropriation of advertising ideas").

²⁰⁴ *Simensky & Osterberg*, *supra* note 16, at 332.

²⁰⁵ See *Ringler Assocs. v. Md. Cas. Co.*, 96 Cal. Rptr. 2d 136, 157 (Cal. Ct. App. 2000) (finding insurance policy's first-publication exclusion barred coverage of defamation claim).

²⁰⁶ See *Lebas Fashion Imps. v. ITT Hartford Ins. Group*, 59 Cal. Rptr. 2d 36, 47 (Ct. App. 1996) (finding duty to defend trademark infringement suit under ambiguous advertising injury provision of commercial general liability policy).

²⁰⁷ *Simensky & Osterberg*, *supra* note 16, at 331–32.

used for the end result of reaching customers does not make it a method of doing business and certainly does not make it an advertising idea. Rather, the Ninth Circuit relied on a “strained contrivance” to include patent infringement under the advertising injury provision in Hyundai’s CGL insurance policy.²⁰⁸

Whenever insurance contracts are ambiguous, those ambiguities are construed against the insurer.²⁰⁹ If multiple reasonable interpretations are available, the court will apply the interpretation that favors coverage.²¹⁰ Without these principles, Hyundai might never have won its lawsuit against its insurer. Unfortunately, the Ninth Circuit never mentioned its generous construction of Hyundai’s CGL policy.²¹¹

B. HYUNDAI MISCONSTRUED THE INFRINGED PATENT

The infringed patent in the *Hyundai* case is not a business method patent. It is a patent on a computer system.²¹² Computer systems are akin to software programs, which are patentable subject matter since they take abstract ideas and put them to useful applications.²¹³ Here, the useful application was the set of instructions to the computer on how to display the features of the cars and how to build the car and present it to the viewing customer.²¹⁴ While this patented system is useful for Hyundai’s advertising purposes, it is not inherently a business method. Unfortunately, the court’s application of the advertising injury provision in Hyundai’s CGL insurance policy to the infringed computer system patent treats the patent like a business method that can be misappropriated. This violates the nature of the patent, a design of a system that could be used in many settings, and the valid purposes for which the patent was granted: protecting the interests of the original designer.

While this patent was used for a business purpose, the particular application of a patent should not change the apportionment of liability for its infringement. Anyone using this computer system without a license should be held liable for infringing the patent. If Hyundai had infringed the patent for its own business purposes, perhaps to allow employees to concoct a benefits plan consisting of a variety of options chosen from a cafeteria-style program, the insurance company would likely not be required to defend the patent infringement suit. The insurer would certainly not be required to defend the suit under the advertising injury provision of its CGL policy.

²⁰⁸ See *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999) (refusing to resort to a strained contrivance in an effort to find an ambiguity).

²⁰⁹ Stueber, *supra* note 136, at 1065.

²¹⁰ *Id.*

²¹¹ See *Hyundai Motor Am. v. Nat’l Union Fire Ins. Co.*, 600 F.3d 1092 (9th Cir. 2010).

²¹² U.S. Patent No. 5,615,342 (filed Feb. 5, 1996).

²¹³ Dratler, *supra* note 10, at 835, 836.

²¹⁴ *Hyundai*, 600 F.3d at 1095–96.

Furthermore, the patent owner would likely never have found out about the infringement if Hyundai had used the patented system for an in house purpose. Thus, this patent infringement is like many others where the advertisement only provided notice to the patent owner and did not cause the injury.²¹⁵ Causation is a long-standing requirement in advertising injury cases.²¹⁶ The *Hyundai* court has essentially disposed of that requirement and rather held that using a system in the process of reaching customers is enough to constitute causation.²¹⁷ This is not the conceived-of causation that insurance companies require in CGL policies. This is more akin to the use of a product in an advertisement, which is not sufficient to establish the required causal connection.²¹⁸

In the *Hyundai* case, the only injury was the loss of the profits to the patent holder from Hyundai using the system without ever paying for it. Hyundai was not profiting from the product in the same way the patent holder would have profited. Hyundai never tried to sell the system. Rather, it was a piece of Hyundai's advertising scheme, and it could have been a piece of a scheme in any aspect of Hyundai's business. The connection between the infringement and the advertisement is too attenuated to constitute causation. Finding a duty to defend in the *Hyundai* case violates the logic upon which the Third Circuit relied in *Frog, Switch & Manufacturing Co. v. Travelers Insurance Co.*²¹⁹ There, the court held that "to be covered by the policy, allegations of . . . misappropriation have to involve an advertising idea, not just a nonadvertising idea that is made the subject of advertising."²²⁰ This was clearly not the case in *Hyundai*.

C. *HYUNDAI* SHOULD HAVE LABELED THE PATENT A COMPUTERIZED PROCESS PATENT

Patenting software programs but not business methods creates an inconsistency in patent law.²²¹ Arguably, there is very little fundamental difference between the two since, in today's highly electronic society, using a computer to perform the steps of any method is an improvement that is obvious to any person having ordinary skill in the art (PHOSITA).²²² For a computerized method to be patentable, the function performed using a

²¹⁵ See, e.g., *Simply Fresh Fruit, Inc. v. Cont'l Ins. Co.*, 94 F.3d 1219, 1220, 1222 (9th Cir. 1996) (holding that infringing use of patented devices and processes during manufacturing did not constitute an advertising injury).

²¹⁶ *Rowe*, *supra* note 29, at 7.

²¹⁷ *Hyundai*, 600 F.3d at 1103.

²¹⁸ See *Advance Watch Co. v. Kemper Nat'l Ins. Co.*, 99 F.3d 795, 807 (6th Cir. 1996) (holding that appearance of infringing writing instrument in advertisement did not constitute causal connection required under advertising injury provision of insurance policy).

²¹⁹ 193 F.3d 742 (3d Cir. 1999).

²²⁰ *Id.* at 748.

²²¹ *Tousi & Albrecht*, *supra* note 23, at 155, 156.

²²² See *Dratler*, *supra* note 10, at 835 (noting that computer programs are commonly used in business operations).

computer must be novel and nonobvious to a PHOSITA.²²³ In a recent case, the U.S. Court of Appeals for the Federal Circuit found that an alleged patent infringer could avoid liability for infringing a computerized method patent by performing at least one step of the method without a computer.²²⁴ This infringement encouraging requirement differs from the protection allotted to most other patents. Generally, a patent is infringed even if only one of its many claims is infringed.²²⁵ The doctrine of equivalents dictates that a claim of infringement not be applied to the product as a whole but rather “be applied to an alleged infringing product element by element.”²²⁶ This is fundamentally different from the allegation that a process patent has been infringed. Rather than alleging infringement of each step of the process, infringement of a process requires an assertion that every step has been performed.²²⁷ Thus, one could copy a patented process and steal its innovative value with no threat of punishment as long as at least one step in the process was significantly changed or omitted.²²⁸ Patents for anything other than processes are so lenient that “[i]f a device ‘performs substantially the same function in substantially the same way to obtain the same result’ as the claimed invention, then infringement may be found even if the device does not literally infringe each element of a patent claim.”²²⁹ Thus, inventors of processes are not afforded nearly the same protection as other inventors.

The patent allegedly infringed in *Hyundai* was simply a computerized method incorporating a sales method that had already been used for years through paper brochures.²³⁰ Such a computerized method should have its patent validity seriously challenged on the dual grounds of lack of novelty and non-obviousness.²³¹ An invalid patent grants no monopoly right and, thus, cannot be infringed, nullifying any need for a defense, whether from an insurer or otherwise, to a patent infringement lawsuit.

²²³ Tousi & Albrecht, *supra* note 23, at 156.

²²⁴ *Lincoln Nat’l Life Ins. Co. v. Transamerica Life Ins. Co.*, 609 F.3d 1364, 1368 (Fed. Cir. 2010).

²²⁵ THIELE, BLAKEWAY & HOSCH, *supra* note 13, at 24.

²²⁶ *Id.* at 112.

²²⁷ *Lincoln*, 609 F.3d at 1370.

²²⁸ *See, e.g., id.* at 1370–71 (finding no infringement when one step of a process was not performed).

²²⁹ *Stueber*, *supra* note 136, at 1058–59 (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 608 (1950)).

²³⁰ *See* U.S. Patent No. 5,615,342 (filed Feb. 5, 1996).

²³¹ Tousi & Albrecht, *supra* note 23, at 156 (asserting that computerized methods incorporating well-known processes would not be patent-eligible because they lack novelty and non-obviousness).

D. *HYUNDAI* IMPROPERLY LABELED THE PATENT INFRINGEMENT AS PART OF AN ADVERTISING ACTIVITY

Merriam-Webster's online dictionary defines advertising as "the action of calling something to the attention of the public especially by paid announcements."²³² The patented computer system in the *Hyundai* case was not intended to draw the public's attention to Hyundai's products. Rather, the system was intended to replace outdated and unpersuasive brochures, acting as a more effective "salesman."²³³ The personalized system could only be effective for members of the public who chose to visit Hyundai's website. The system had no allure to someone who never visited the website, much like outdated brochures have no allure to a person who never stepped into Hyundai's showroom and thus never received a brochure from a salesman. Therefore, the build-your-own car website at issue in *Hyundai* is more akin to uninsured solicitation than it is to advertising and should not be covered under an advertising injury provision.²³⁴

E. *HYUNDAI* IS ANALOGOUS TO *AUTO SOX* AND SHOULD NOT HAVE CREATED A DUTY TO DEFEND UNDER AN ADVERTISING INJURY PROVISION

The plaintiff in *Auto Sox USA, Inc. v. Zurich North America* sought a defense to a patent infringement suit under the advertising injury provision of its CGL insurance policy.²³⁵ In that case, the Court of Appeals of Washington explained that insurance coverage under the term "misappropriation of advertising ideas" depends on "what the insured has taken."²³⁶ The court went on to explain that an idea for soliciting business would be covered but stealing a patented product and trying to sell it would not be covered.²³⁷ The court held that the claim for patent infringement was not covered by the advertising injury provision of the CGL insurance policy because it was patent infringement of a product used to advertise, not an advertising idea.²³⁸

Similarly, in the *Hyundai* case, the infringed patent was a computer system, which is a product, not an idea.²³⁹ If Hyundai wanted insurance coverage under the advertising injury provision of its CGL insurance policy, it needed to argue

²³² *Advertising Definitions*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/advertising> (last visited June 16, 2011).

²³³ U.S. Patent No. 5,615,342 (filed Feb. 5, 1996).

²³⁴ See *Hameid v. Nat'l Fire Ins.*, 71 P.3d 761, 769–70 (Cal. 2003) (finding no coverage under the applicable insurance policy since soliciting individual customers did not fit the definition of advertising).

²³⁵ 88 P.3d 1008, 1009 (Wash. Ct. App. 2004).

²³⁶ *Id.* at 1011 (citing *Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc.*, 97 F. Supp. 2d 913, 927 (S.D. Ind. 2000)).

²³⁷ *Id.*

²³⁸ *Id.* at 1011–12.

²³⁹ *Hyundai Motor Am. v. Nat'l Fire Ins. Co.*, 600 F.3d 1092, 1095–96 (9th Cir. 2010).

that the patented object was an idea. However, in light of the Supreme Court's insights on patentable subject matter, if the patent at issue in *Hyundai* was an idea, it would not be patentable subject matter. In summary, either the lower court was wrong in upholding the patent since it claims only an abstract idea, or the Ninth Circuit was wrong in providing coverage for a product under an advertising injury provision that only covers ideas.

IV. CONCLUSION

The Ninth Circuit opened the door for greater insurance coverage and easier patent infringement. Its interpretation of the CGL insurance policy did not respect the objectively reasonable expectations of the insured. Rather, Hyundai relied on a broad interpretation of the terms of the insurance policy, and the court adopted that interpretation.²⁴⁰

A patented computer system is a valuable invention. However, using it in an advertising scheme does not make it a business method. Yet, the advertising injury provision in a CGL insurance policy covers the infringement of a business method. Applying the advertising injury provision to the patent infringement lawsuit involving a patented computer system implies that systems are methods and are not products.

Using a patented computer system in an advertisement does not constitute causation as is required under an advertising injury provision in a CGL insurance policy. The advertisement itself has not hurt the patent holder. Rather, it is the use of the system that hurt the patent holder. The patent holder will not lose sales as Hyundai gains them. The patent holder is not a competitor of Hyundai. Rather, Hyundai stole a product—a computer system—and the patent holder discovered the theft via an advertisement. Providing notice of infringement does not constitute causation such that the patent holder in this case suffered an advertising injury.

Finally, the Ninth Circuit did not protect traditional values. Patents are intended to promote innovation and to provide limited monopolies. While Hyundai deserved sanctions for its unauthorized use of a patented computer system, it should not find relief in the protections of its CGL insurance policy. CGL insurance policies are intended to foster business innovation and risk. Stealing a patented computer system is not innovative and should not be covered by a CGL insurance policy.

This topic must be settled now. In recent cases, the Supreme Court of the United States dealt with the issue of patentability of business methods.²⁴¹ Now, it must consider whether insurance policies that cover advertising injuries

²⁴⁰ See *id.* (labeling a website as an advertising technique).

²⁴¹ See, e.g., *Bilski v. Kappos*, 130 S. Ct. 3218 (2010), and *State St. Bank & Trust Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368 (Feb. Cir. 1998).

should cover the infringement of patented business methods. If these methods cannot be patented, then the “misappropriation of styles of doing business” language in CGL policies is useless.²⁴² Anyone can choose any method of doing business without infringing the monopoly rights of any method-implementer who happened to do it first. If these methods can be patented, then patent infringement exclusionary clauses in CGL policies are likely overly broad. CGL policies are intended to protect businesses from the consequences of their risky behavior.²⁴³ Excluding coverage of a costly consequence, particularly one resulting from conduct performed in the regular course of business, nullifies the effectiveness of the policy. Going forward, courts should more clearly define what constitutes a business method, and insurance companies should more clearly define what constitutes an advertising injury. If insurance companies intend to cover losses resulting from misappropriation of ideas, which are not patentable, then courts should uphold that intent. For that reason, *Hyundai* should be overruled.

²⁴² Simensky & Osterberg, *supra* note 16, at 332.

²⁴³ Business Insurance Now, *Affordable General Liability and Property Insurance Coverage*, <http://www.businessinsurancenow.com/general-liability> (last visited Mar. 9, 2011).

