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The 11th Circuit Finds Insurance Coverage for Internet Copyright Claims

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In its recent decision in *St. Luke's Cataract & Laser Institute, P.A. v. Zurich American Insurance Co.*, 2013 WL 461347 (11th Cir. Feb. 7, 2013) (unpublished), the United States Court of Appeals for the Eleventh Circuit found insurance coverage under the "advertising injury" provisions of commercial general liability ("CGL") policies for the insured's infringement of copyrighted web site content. Each of the policies at issue provided coverage for "advertising injury liability," which was defined to include copyright infringement in the insured's advertisements. The insurers' principal defense as to the alleged copyright infringement was the "unauthorized use" exclusion. In a well-reasoned opinion, the court carefully analyzed this exclusion, found it not ambiguous, and held that it could not be read so broadly as to eviscerate the copyright infringement coverage of the policies.

The explosion of intellectual property litigation over the past several years makes the Eleventh Circuit's confirmation that there is often coverage for such claims of heightened significance for corporate policyholders. The broader lesson to be drawn from this decision is that coverage is often available for internet copyright infringement claims under the "advertising injury" provision of CGL policies.

The Copyright Claim and Pursuit of Coverage

The policyholder in *St. Luke's*, Dr. James C. Sanderson, was an oculoplastic surgeon at St. Luke's Cataract and Laser Institute. *St. Luke's*, 2013 WL 461347, at * 1. St. Luke's webmaster registered domain names, including LASERSPECIALIST.com, and the web site carried copyright notices identifying St. Luke's as its owner. *Id.* After Sanderson resigned from St. Luke's and opened his own practice, he relaunched the LASERSPECIALIST.com web site with content virtually identical to the St. Luke's web site. *Id.* The copyright disclaimer on Sanderson's web site identified him, and not St. Luke's, as the owner. *Id.*

St. Luke's filed a complaint alleging, *inter alia*, that Sanderson infringed its copyright in the site and that he removed the St. Luke's copyright notice in violation of the Digital Millennium Copyright Act ("DMCA"). *Id.* Sanderson sought coverage under the advertising injury coverage of his CGL policies. *Id.*

A jury returned a verdict in favor of St. Luke's on all claims except copyright infringement, having found that St. Luke's copyright registrations were invalid. *Id.* at *2. St. Luke's filed a revised copyright registration on the web site, and then filed a new infringement lawsuit against Sanderson. *Id.* Sanderson and St. Luke's settled for a $2.4 million final judgment against Sanderson. *Id.*

Sanderson and St. Luke's jointly sued Sanderson's insurers for breaching their contracts by wrongfully denying coverage and failing to indemnify Sanderson. *Id.* The district court granted summary judgment for the insurers, based on an exclusion precluding coverage for any "advertising injury" claim "arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers." *Id.*

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11th Circuit Restricts Scope of Exclusion

The Eleventh Circuit reversed the district court's ruling, holding that the "unauthorized use" exclusion could not be read so broadly as to "swallow the clear coverage provisions for copyright and website claims" in the CGL policies. *Id.* at *6. Importantly, the court found the language of the exclusion to be unambiguous and did not apply the rule that ambiguous policy language should be interpreted against the drafter. *Id.* at *3.

The court's decision focused on three key issues raised by the insurers in asserting their "unauthorized use" exclusion. First, the court rejected the insurers' argument that Sanderson's copyright infringement was an "unauthorized use" for purposes of the exclusion. Second, the court held that the copyright infringement could not be characterized as "arising out of" Sanderson's unauthorized use of St. Luke's domain name in order to bar coverage under the exclusion. Third, the court held that the DMCA claim was outside of the scope of the "unauthorized use" exclusion.

Did Copyright Infringement Constitute "Unauthorized Use"?

In addressing the insurers' "unauthorized use" defense, the court distinguished Sanderson's alleged copyright infringement from the specific conduct described in the policy exclusion, namely, "the unauthorized use of another's ***name or product*** in your ***e-mail address, domain name or metatag***"[1] (emphases added). *Id.* at *3. The court held that the copyright infringement claim against Sanderson was based on his use of the "contents, layout, and design" of St. Luke's web site, not his use of St. Luke's "name or product." *Id.* Further, Sanderson was alleged to have copied the web site contents, layout, and design for display on his own web site, not in his "e-mail address, domain name or metatag." *Id.* Because the copyright claim did not allege that Sanderson used St. Luke's "name or product" in his "e-mail address, domain name or metatag," his infringement could not constitute the type of "unauthorized use" which the exclusion specifically barred from insurance coverage. *Id.*

The court next rejected the insurers' attempt to characterize Sanderson's infringement as a "similar tactic" for purposes of the exclusion. *Id.* at *4. Invoking the rule of *ejusdem generis*,[2] the court refused to allow the generic catch-all term "similar tactics," appearing in a narrow exclusion that expressly referred only to unauthorized uses in an e-mail address, domain name, or metatag, to swallow the policies' coverage for copyright infringement. *Id.* at *4 n.8. Further, Sanderson's use of the St. Luke's web site content, layout, and design did not implicate the concern at the heart of the exclusion: diverting a competitor's customers to a different web site or implying a false affiliation. *Id.* at *4. Significantly, the court reminded the insurers that if they had wanted the exclusion to sweep so broadly as to preclude coverage for alleged copyright infringement such as Sanderson's, "they could have drafted the exclusion to say so." *Id.*

"Arising Out Of"

Even though the infringement itself did not directly fall within the exclusion, the court still had to consider whether the copyright claim was "arising out of" Sanderson's unauthorized use of the LASERSPECIALIST.com domain name. The Eleventh Circuit interpreted "arising out of" to require some type of causal connection under Florida law. *Id.* at *5.

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[1] Metatags are descriptive terms that do not actually appear on a web site but can work behind the scenes to influence search engine results.

[2] This rule provides that where general words follow an enumeration of specific words, the general words are construed as applying to the same kind or class as those that are specifically mentioned.

The court correctly recognized that there was no such causal connection between Sanderson's use of the LASERSPECIALIST.com domain name and infringement of the web site content: "Sanderson could have committed either of these thefts without committing the other. That is, he could have taken the LASERSPECIALIST.com website content and put it up at SandersonEyes.com, or he could have used LASERSPECIALIST.com as the domain name for a website with completely new content describing his solo practice." *Id.* Therefore, the requisite causal connection between these acts was lacking, and the "arising out of" language failed to bring Sanderson's infringement within the scope of the exclusion. *Id.* at *5-6.

The DMCA Claim

Finally, the court considered whether the exclusion barred coverage for the DMCA claim, which alleged that Sanderson removed St. Luke's copyright notice from the web site content when he displayed it on his own site. As with the copyright claim, the court found the removal of the notice did not constitute "unauthorized use of another's name or product" in an "e-mail address, domain name, or metatag"; nor could it constitute a "similar tactic." *Id.* at *6. Further, the removal of the copyright notice could not be said to "arise out of" Sanderson's use of the LASERSPECIALIST.com domain name, since Sanderson could have committed either of those acts without the other. *Id.*

Conclusion

St. Luke's illustrates, once again, that policyholders facing intellectual property claims related to their advertising activities may be entitled to insurance coverage, even where insurers insist that narrowly drafted exclusions act as complete bars to coverage. Other courts have applied similar reasoning to find that an "unauthorized use" exclusion does not bar coverage for intellectual property claims. In *AMCO Insurance Co. v. Lauren-Spencer, Inc.*, 500 F. Supp. 2d 721, 723 (S.D. Ohio 2007), the policyholder was alleged to have infringed a plaintiff's copyrights in various jewelry designs by selling pieces that were directly copied. The policyholder's web site contained photos of the allegedly infringing pieces. *Id.* at 724. Finding coverage both for the defense of the copyright claim and for indemnification, the court rejected the insurer's argument that the "unauthorized use" exclusion barred coverage. *Id.* at 735. Specifically, the court noted that the "other similar tactics" language was "not so open as to sweep into its scope activities that would not mislead the public, such as the alleged theft of designs constituting copyright infringement." *Id.* Similarly, in *Continental Western Insurance Co. v. Pimentel & Sons Guitar Makers, Inc.*, 2005 WL 6332339, at *7 (D.N.M. Nov. 16, 2005), the court denied an insurer's motion for summary judgment seeking reimbursement for the costs of the defense it had undertaken under a reservation of rights where the underlying claim alleged that the policyholder infringed a trademark by displaying it on its web site, with no allegation that it used the trademark in an e-mail address, domain name, or metatag, or that it employed "any other similar tactics to mislead."[3]

The lesson to be drawn from these cases is that policyholders may benefit from a careful examination of their insurance policies when faced with an insurer denying coverage for an intellectual property claim. Coverage may be available for such claims under general liability policies.

[3] The recent decision *Collegesource, Inc. v. Travelers Indemnity Co. of Connecticut*, No. 11-55708 (9th Cir. Feb. 6, 2013) (unpublished), illustrates an application of the "unauthorized use" exclusion to deny coverage on facts very different from those at issue in *St. Luke's* and the similar pro-coverage rulings. In *Collegesource*, the underlying claim was a trademark action based on the insured's use of a domain name nearly identical to that of a competitor's (collegetransfer.net vs. collegetransfer.com). The court found the allegations "similar" to "unauthorized uses of another's name or product in your e-mail address, domain name, or metatag" and denied coverage.

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