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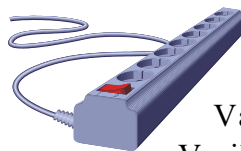
No Insurance Coverage for Copyright and Trademark Infringement Under “Advertising Injury” Insuring Language



In *Varilease Technology Group, Inc. v Michigan Mut. Ins. Co.*, unpublished Michigan Court of Appeals decision of December 16, 2004, the Court found that Michigan Mutual was not required to provide coverage under a general liability policy where the insured, Varilease, was sued for copyright and trademark infringement by Unisys because the claims did not constitute “advertising injury” as defined by the policy.

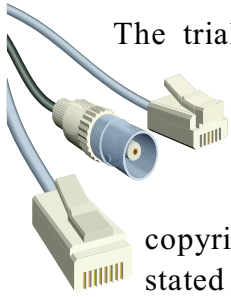
By way of general background, Unisys is a developer and manufacturer of computer systems as well as software that runs on its hardware. Varilease competes with Unisys providing maintenance services on Unisys’ computer systems. In 1998, Unisys filed an action against Varilease alleging that former employees of Unisys copied and retained copyrighted product support materials and diagnostic software, used the materials in their contracts to

perform service and maintenance for their clients, and distributed the materials to several subcontractors. In addition, Varilease allegedly developed or was in the process of developing software that contained copies of, and were otherwise derived from, Unisys proprietary material.



The underlying complaint also alleged that Varilease falsely represented to customers that Varilease’s software materials were Varilease’s original works and that Varilease “is properly licensed or otherwise permitted by Unisys to copy and use” Unisys materials and software to service and maintain Unisys’ computer software. The Unisys complaint alleged copyright infringement and trademark infringement as a consequence.

Eventually, Unisys and Varilease settled the underlying action. Varilease instituted the declaratory action alleging that Michigan Mutual was required to defend and indemnify Varilease in the Unisys action based on a commercial general liability policy issued by Michigan Mutual. That policy provided coverage for “advertising injury.” The pertinent policy language stated that the insurance applies to “advertising injury” caused by “an offense committed in the course of advertising goods, products or services.” “Advertising injury” was defined as “an injury arising out of specified offenses, including “misappropriation of advertising ideas or style of doing business” or “infringement of copyright, title or slogan.”



The trial court denied Michigan Mutual's motion for summary disposition on coverage but the Court of Appeals reversed.

Regarding the underlying copyright claim, the Court of Appeals stated that the Unisys complaint had alleged copyright infringement and Varilease contended that the allegations concerning representations to potential and actual customers involved "a course of advertising." The Court of Appeals said, however, that even if it accepted that position, the complaint failed to allege that copyright infringement was committed in the course of Varilease's advertising, i.e., there was an insufficient causal connection between the claimed injury and advertising. Therefore, the Court of Appeals concluded copyright infringement was not a theory of recovery that "arguably falls" within the scope of coverage under Michigan Mutual's policy, and accordingly, did not trigger Michigan Mutual's duty to defend or indemnity.



Turning to the trademark infringement claim in the Unisys complaint, the Court of Appeals first noted that the claim of trademark infringement in the underlying Unisys complaint was based on the assertion that Varilease falsely presented itself as licensed to use Unisys' diagnostic software and support materials. The Court of Appeals recognized, however, that there are conflicting authorities concerning whether trademark infringement may constitute "misappropriation of advertising ideas or style of doing business. (These cases were from various Federal Court of Appeals decisions including a 6th Circuit decision, *Advance Watch Co. v Kemper National Ins. Co.*, 99 F3d 795, 1996 which held that trademark and trade dress infringement are not misappropriation of advertising ideas or style of doing business.") The Michigan Court of Appeals, however, concluded that it did not need to decide whether "misappropriation of advertising ideas or style of doing business" includes or excludes

trademark or trade dress infringement generally as the *Advance Watch* case held. According to the Court of Appeals "that categorical inclusion or exclusion places too much weight on the label for the claim as opposed to its substance." As articulated by the Michigan Court of Appeals:



"Here, the issue is not whether trademark or trade dress infringement claims as a category involve 'misappropriation of advertising ideas or style of doing business,' but rather whether the specific allegations in the Unisys complaint allege 'misappropriation of advertising ideas or style of doing business.' We conclude that they allege neither. The Unisys complaint does not implicate any Unisys 'advertising ideas.' Moreover, the allegations that plaintiffs falsely represented that they were licensed or permitted by Unisys to use its diagnostic software and support materials do not implicate Unisys' 'style of doing business.' Thus, the trial court erred in concluding that the allegations of trademark infringement involved 'misappropriation of advertising ideas or style of doing business.' Accordingly, a duty to defend was not triggered and defendant was entitled to summary disposition."



Analysis: While the Court of Appeals analysis regarding coverage under the policy for trademark infringement appears to be correct, given the background of the case, its analysis of the copyright infringement coverage under the policy is obtuse and appears to be an unnecessarily restrictive reading of the underlying complaint. The application of this decision to other similar cases, therefore, is of limited value, especially because the Court designated the case as unpublished, thereby having no precedential authority.

To discuss this opinion or any questions you have regarding coverage in trademark, copyright, and patent infringement cases, please contact the authors: **Robert Goldstein** of GLM's Grand Blanc office at 810-695-3700 or **Tim Jordan** of GLM's Detroit office at 313-446-1530.