

S104157

IN THE SUPREME COURT OF CALIFORNIA

MOHAMMED A. HAMEID,

Plaintiff and Appellant,

vs.

NATIONAL FIRE INSURANCE OF HARTFORD,

Defendant and Respondent.

After a Decision by the Court of Appeal, Fourth Appellate District,
Division Three, Case No. GO26525

**RESPONSE OF MOHAMMED A. HAMEID TO AMICUS CURIAE
BRIEFS OF:**

- (1) NATIONAL FIRE INSURANCE OF HARTFORD,**
 - (2) THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS,**
 - (3) LUMBERMENS MUTUAL CASUALTY COMPANY,**
 - (4) AMERICAN INTERNATIONAL COMPANIES, AND**
 - (5) THE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION**
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I. INTRODUCTION

Despite the meager amount at issue in the underlying case, the legal issues generated by this dispute have attracted no fewer than five *amici* for insurers, including two associations purporting to represent a plethora of insurers with their vast resources. Nevertheless, Insurer *Amici* prove themselves no friends of this Court. Their legal analysis emanates from a series of fundamental flaws.

The first and most critical of these flaws is the fact that their coverage analysis is divorced from consideration of how liability would attach in the underlying action, as well as the role played by advertising therein.¹ Absent some understanding of the character of the tort at issue, speculation about the coverage consequences of such liability is meaningless.

Second, in the underlying action, complicating the coverage analysis herein is the fact that several of the torts asserted in the underlying action are themselves not separate causes of action in the traditional sense but either remedies for other underlying tortious acts which are not independently alleged (interference with prospective economic advantage) or umbrella terms for wrongful acts which trigger liability under any tortious theory that falls within its ambit (unfair competition).

Third, these amorphous torts must then be analyzed to gauge whether they fall within the generic and lay offenses of “misappropriation of advertising ideas or style of doing business.” Courts have offered many variant plain English definitions for their scope and

¹*Hameid v. National Fire Ins. of Hartford* (2001) 94 Cal.App.4th 1155, 1160 [114 Cal.Rptr.2d 843, 846], review granted (2002) 45 P.3d 243 [119 Cal.Rptr.2d 296] (The underlying torts asserted herein, as noted by the Court of Appeal’s decision, include “misappropriation of trade secrets, unfair competition, breach of contract, breach of the implied covenant of good faith and fair dealing, and interference with prospective economic advantage, seeking damages and an injunction.”).

their drafter, Insurance Services Office (“ISO”), has conceded their breadth in public pronouncements. Hameid’s promotional use of marketing data also falls within at least one such definition adopted by the Ninth Circuit in *Sentex II*² – “misappropriation of advertising ideas” (i.e., “use of marketing ideas in advertisements”). Indeed, in the most recent case to consider this issue, the Kansas Supreme Court let stand the Kansas Court of Appeals’ ruling finding a defense on analogous facts.³

Fourth, Insurer Amici fail to focus on the facts found by the Court of Appeal, including reasonable inferences drawn from the KWP complaint and pertinent extrinsic evidence of KWP’s claims. It is Hameid’s allegedly wrongful use of KWP’s marketing data in its promotional activities that allegedly gave Hameid an unfair advantage in competing with KWP.⁴

Fifth, to answer the question framed by the issue for review, this Court must define “advertising”⁵ and ascertain how liability would arise for the underlying alleged wrongful

²*Sentex Sys., Inc. v. Hartford Acc. & Indem. Co.* (9th Cir. 1996) 93 F.3d 578 (hereafter “*Sentex II*”).

³*Aselco, Inc. v. Hartford Ins. Group* (Kan.App. 2001) 21 P.3d 1011, 1018-19, review den. (Kan., Sept. 26, 2001, No. 99-84476-A) 2001 Kan. LEXIS 773.

⁴*Hameid v. National Fire Ins. of Hartford, supra*, 94 Cal.App.4th 1155, 1160, 1162, 1163. See also *KWP, Inc. v. Howard* (Cal.Sup.Ct., Mar. 25, 1999, No. 807303) (hereafter “KWP Complaint”), ¶¶ 10, 13 & 19; Prayer, ¶ 2.

⁵Advertising has also been broadly defined outside the coverage context. *Ford & Vlahos v. ITT Commercial Fin. Corp.* (1994) 8 Cal.4th 1220, 1227 [36 Cal.Rptr.2d 464] (“[Advertising includes] all efforts to alert possible buyers . . . , including . . . brochures circulated to a narrower audience.”); *Ford Dealers Ass’n v. DMV* (1982) 32 Cal.3d 347, 359 [185 Cal.Rptr. 453], citing *Feather River Trailer Sales, Inc. v. Sillas* (1979) 96 Cal.App.3d 234, 248-49 [158 Cal.Rptr. 26] (“[Advertising is] broad enough to include oral representations made on a one-to-one basis.”).

acts asserted and what role advertising would play in creating liability therein, and as a consequence of these facts, what potential coverage was implicated.

Sixth, even where the policy language was defined to require “widespread public dissemination,” the term “advertising” was defined more broadly than the Insurer *Amici* urge herein.⁶ Indeed, non-coverage cases similarly construe “advertising” broadly.⁷

Seventh, in short, Insurer *Amici* urge this Court to adopt minority positions without any supporting logical analysis. Instead, the focus should be upon a lay person’s understanding in ascertaining the meaning of undefined policy terms to justify their limited construction.⁸

At the end of the day, the Insurer *Amici* simply ask this Court for clarity in interpreting the scope and meaning of their policies. That this Court can readily provide by doing two things. First, adopt the contextually appropriate definition of “advertising,” which *amici*

⁶*Bear Wolf, Inc. v. Hartford Ins. Co.* (2002) 819 So.2d 818, 820 [2002 Fla.App. LEXIS 5718, at p. *4] (trade show display satisfies “widespread public distribution”); *Elan Pharm. Research Corp. v. Employers Ins. of Wausau* (11th Cir. 1998) 144 F.3d 1372, 1377 (“A plain and ordinary reading of the definition of advertising activity in Wausau’s policies would include an insured’s dissemination of information to promote a product or service. . . . The dissemination of clinical studies to develop a market for one of Elan’s products [is] advertising activity . . .”).

⁷*Ford Dealers Ass’n v. DMV, supra*, 32 Cal.3d 347, 359.

⁸To meet the Insurer *Amici*’s construction, the policy language would read:

“Advertising injury” means injury ~~caused by arising out of~~ one or more of the following ~~torts offenses~~: . . . (c) misappropriation of advertising **ideas** or a **comprehensive** style of doing business **occurring in an oral or written publication of material that includes an express statement causing damages directly** in the course of advertising your goods, products or services **through the text or logo of the advertisement.**

themselves cite on a number of occasions, by Chief Judge Patel.⁹ Second, find any of the plain English definitions for the “misappropriation” offense by Justice Croskey.¹⁰

For all the above reasons, the opinion of the Court of Appeal should properly be affirmed and clarified in the manner suggested by *amicus* United Policyholders herein.

II. THE ADVERTISING ACTIVITIES REQUIREMENT AND A NEXUS BETWEEN SAME AND AN ENUMERATED “ADVERTISING INJURY” OFFENSE IS MET HEREIN

A. Hameid’s Pervasive and Sustained Promotional Activities Meet Any Reasonable Definition of “Advertising” this Court May Adopt

Perspectives differ on the meaning of “advertising.” Both common sense and the standardized policy language¹¹ adopted by most insurers dictate recognition of the fact that “advertising injury” coverage requires some form of advertising activity by the insured. There has been significant disagreement between policyholders and insurers as to precisely what types of activities qualify as advertising. Insurers often argue that advertising is limited to “widespread promotional activities directed to the public.”¹² Policyholders counter that

⁹*New Hampshire Ins. Co. v. Foxfire, Inc.* (N.D.Cal. 1993) 820 F.Supp. 489 (hereafter “*Foxfire*”).

¹⁰*Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group* (1996) 50 Cal.App.4th 548, 562 [59 Cal.Rptr.2d 36] (hereafter “*Lebas*”) (Plain English definitions were necessary to give operative effect to the language of the “misappropriation” offense. The court found it applied equally to “theft of an advertising plan,” as well as “the wrongful taking of the *manner or means* by which another advertises its goods or services.”

¹¹1976 ISO policies provide, “Advertising injury means injury arising out of an offense committed during the policy period occurring in the course of the named insured’s advertising activities”; the 1986 ISO policy form states, “This insurance applies to ‘advertising injury’ only if caused by an offense committed in the course of advertising your goods, products or services.” (Gauntlett, Insurance Coverage of Intellectual Property Assets (2001-02 supp.) (hereafter “Gauntlett”) § 1.01, subd. [A]&[B], pp. 1-3 to 1-5).

¹²See, e.g., *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1277 [10 Cal.Rptr.2d 538] (hereafter “*Bank of the West*”) (dicta); *USX Corp. v. Adriatic Ins. Co.*

the term is not defined in the policy¹³ and should thus be given a broad construction, encompassing any activities designed to advertise, publicize or promote a particular good, product or service.¹⁴

Distinguishing “solicitation” from “advertising” is as arbitrary as contending that all advertising must include a “publication” of a statement.¹⁵ Neither restriction is compelled by a fair reading of the policy language. This meaning is satisfied by Hameid’s dissemination of flyers highlighting the services offered by his new hairstylists.¹⁶

(W.D.Pa. 2000) 99 F.Supp.2d 593, 618; *GAF Sales & Service, Inc. v. Hastings Mutual Ins. Co.* (Mich.Ct.App. 1997) 568 N.W.2d 165, 168 (“The term ‘advertising’ is not defined in the policy. Not surprisingly, the parties propose divergent definitions. [Insurer] proposes a definition that would limit advertising to those ‘widespread promotional activities directed to the public at large.’ [The policyholder] proposes a definition that would include ‘any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business.’”).

¹³This deficiency was remedied in the 1998 ISO standard policy form which defines “advertising” as “a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.” *Amicus United Policyholders’ Request for Judicial Notice* (hereafter “RJN”) ¶ 1, Ex. “A,” p. 10 of 13. It would be ironic if this Court would adopt a definition urged by Insurer *Amici* that was narrower than the limited definition of the term “advertisement” in the 1998 ISO policy form. **Such a result would have the Court (1) rewriting a policy and (2) adopting policy language more narrow than the drafter adopted when it rewrote its policy.**

¹⁴See fn. 6, 7, *ante*.

¹⁵See fn. 103, *post*.

¹⁶KWP charged Hameid with “utilizing plaintiff’s [customer list, price list, pricing policies, and information regarding suppliers] to undercut [KWP].” KWP Complaint, ¶¶ 10 & 19, Prayer, ¶ 2.

B. Advertising in Relation to Business Tort Claims

The ease with which the “advertising activity” requirement is met is dependent on the nature of the claims for which coverage is sought, the specific facts which have been pled, and the “advertising” definition employed. At one end of the spectrum are trademark claims which almost always meet the advertising requirement. Most courts concede that it is virtually impossible to allege trademark infringement without satisfying this requirement because trademarks are themselves a form of advertising.¹⁷ Furthermore, because trademark infringement under the Lanham Act requires use in interstate commerce, the allegations made in support of infringement claims will invariably evidence some degree of “advertising activity.”

The broad range of wrongful acts encompassed within business torts that may fall within the ambit of “advertising injury” offense liability means that the question of whether “advertising activity” is present will be answered only through case-specific factual analysis. Courts addressing “unfair competition” claims have found that the following factual scenarios meet the “advertising activity” requirement:

¹⁷See, e.g., *Lebas, supra*, 50 Cal.App.4th at pp. 557-58 (“[A] trademark infringement by the insured can and often does occur in the course of the insured’s act of advertising its products. Thus, we do not have the problem, presented in other circumstances (see e.g., *Bank of the West . . .*), of determining whether a nexus exists between the insured’s advertising activity and the alleged infringement.”); *Northam Warren Corp. v. Universal Cosmetic Co.* (7th Cir. 1927) 18 F.2d 774 (“A trade-mark is but a species of advertising, its purpose being to fix the identity of the article and the name of the producer in the minds of the people who see the advertisement . . .”). See also Dratler, *Intellectual Property Law: Commercial, Creative and Industrial Property* (1997) section 9.01[1], page 9-2.

1. A printer manufacturer's use of package inserts warning against damages which could result from use of non-OEM refilled ink cartridges.¹⁸
2. An ambulance service's conduct in organizing a boycott of a competitor's services for the purpose of obtaining a monopoly.¹⁹
3. A bank credit card servicing arm makes disparaging statements to customers for the purpose of directing Mastercard accounts to its alternative member banks.²⁰

Here, but for the promotional solicitation of KWP clients by Hameid through his new hairstylist employees, no claim for use of proprietary information would be assertable.²¹ Thus, the advertising element and the nexus to an enumerated "advertising injury" offense is satisfied.

¹⁸*Hewlett-Packard Co. v. CIGNA Prop. & Cas. Ins. Co.* (N.D.Cal., Aug. 24, 1999, No. 99-20207 SW) 1999 U.S. Dist. LEXIS 20655, at p. *14 (citation omitted) ("If there is no evidence that parties intended any technical or special meaning for relevant insurance policy provisions, court must examine the words used in their ordinary or popular sense. The package inserts are 'advertising' as that terms is commonly used. See Black's Law Dict. 54 (6th ed. 1990) . . .").

¹⁹*Curtis-Universal, Inc. v. Sheboygan Emerg. Med. Servs., Inc.* (7th Cir. 1994) 43 F.3d 1119, 1123 ("[I]f one may judge from the insurance company's concession that [the insured] was engaged in advertising activities, this requirement is easily satisfied, perhaps by any firm that conducts marketing activities of any sort in support of its sales.").

²⁰*CNA Cas. of Cal. v. Seaboard Sur. Co.* (1986) 176 Cal.App.3d 598, 613 [222 Cal.Rptr. 276] ("[I]t is clear that the factual allegations in the Salveson complaint referred at least potentially to misrepresentations, defamations and disparagements made to the public. Part of WSBA's function was to serve as the advertising arm of its member banks, and the entire question of the use or misuse of the Mastercard 'service mark' was central to the Salveson lawsuit.").

²¹The Prayer in KWP's Complaint sought to enjoin Hameid from both soliciting KWP's customers and also inducing those customers to patronize Hameid's salon through use of KWP's marketing data.

III. “ADVERTISING INJURY” OFFENSE

A. Determining the Potential for Coverage

As noted above, “advertising injury” insurance provides what is commonly referred to as “offense based” coverage. CGL policies contain a list of specifically enumerated “advertising injury” offenses. If the allegations asserted in the third-party complaint do not, at least potentially, fall within one of the listed offenses, there can be no “advertising injury” coverage. Most insurers use standardized policy language developed by the ISO. Thus there is substantial similarity in the “advertising injury” provisions of policies issued by different insurers. As noted by *Amici United Policyholders*,²² ISO made significant revisions to the “advertising injury” portions of CGL policies in 1976,²³ 1986,²⁴ 1998,²⁵ and 2001.²⁶ The

²²Gauntlett, *Insurance Coverage of Intellectual Property Assets (2001-02 supp.) Coverage under Advertising Injury Provisions of Standard Form Comprehensive and Commercial General Liability Policies*, section 1.01, pages 1-3 - 1-9; [Gauntlett and Maxin, *Tort Claims and Insurance in Cyberspace \(2001\) ACCA Docket at 22, fn. 7.*](#)

²³The 1976 ISO “advertising injury” offenses are “libel,” “slander,” “defamation,” “violation of right of privacy,” “piracy,” “unfair competition,” and “infringement of copyright or slogan.” (Gauntlett, *supra*, § 1.01, subd. [A], p. 1-3.)

²⁴The 1986 ISO “advertising injury” offenses are “oral or written publication of material that slanders or libels a person or organization’s goods, products or services,” “oral or written publication of material that violates a person’s right of privacy,” “misappropriation of advertising ideas or style of doing business,” and “infringement of copyright, title, or slogan.” (Gauntlett, *supra*, § 1.01, subd. [B], pp. 1-4 to 1-5.)

²⁵The 1998 ISO form deletes the “infringement of title” and “misappropriation of advertising ideas or style of doing business” offenses and replaces them with “infringement upon another’s copyright, trade dress or slogan in your ‘advertisement’” and “use of another’s advertising idea in your ‘advertisement.’” (Gauntlett, *supra*, § 1.01, subd. [D], pp. 1-8 to 1-9.)

²⁶Gauntlett, *Broker Exposure to Intellectual Property and Antitrust Lawsuits* (Spring 2002) CGL Reporter at 1400-1, § D(2), at page 6. The 2001 ISO form specifically excludes coverage for copyright, patent, trademark, trade secret or other intellectual property rights. However, the exclusion has an exception for infringement, in the insured’s advertisement, of copyright, trade dress, or slogan.

specific “advertising injury” offenses therefore will vary dependent on the particular ISO policy form used by the insurer(s). For analytic purposes, “advertising injury” offenses can be divided into two broad categories: (1) offenses that match recognized torts and (2) offenses which generically describe categories of conduct capable of creating liability.

B. Policy Offenses Which Mirror Recognized Torts

The first category includes such offenses as “libel,” “slander,” and “infringement of copyright.” There are two basic ways that allegations asserted in a third-party complaint will fall within these offenses. If there is an expressly articulated cause of action for libel or copyright infringement, there can be little doubt that the “advertising injury” offense requirement is met. It is facts not labels which determine coverage.²⁷ Thus, the legal theory of recovery asserted by the third-party plaintiff is less important than the facts alleged in support of that theory.

As long as the facts alleged in the third-party complaint would potentially support a claim falling within the policy offenses, a duty to defend arises.²⁸ This can occur either because the fact elements asserted read on a recognized tort such as libel by asserting

²⁷*McCormack Baron Mgmt. Servs., Inc. v. American Guar. & Liab. Ins. Co.* (Mo. 1999) 989 S.W.2d 168, 171 (“The word ‘offense’ cannot be read to limit coverage only to a particular ‘cause of action’ or ‘claim.’ The word ‘offense’ simply does not have this meaning in either common usage or legal usage.”).

²⁸*Curtis-Universal, Inc. v. Sheboygan Emerg. Med. Servs., Inc., supra*, 43 F.3d at p. 1122 (emphasis added; citations omitted) (“The plaintiff’s complaint, upon which the insurer’s duty depends, need not even set forth the plaintiff’s legal theories. **What is important is not the legal label that the plaintiff attaches to the defendant’s (that is, the insured’s) conduct, but whether that conduct as alleged in the complaint is at least arguably within one or more of the categories of wrongdoing that the policy covers.** So, for example, if the complaint alleges facts that if proved would show that the insured had infringed the plaintiff’s copyright, the policy kicks in even if the complaint charges the insured only with fraud or intentional infliction of emotional distress.”).

sufficient facts to discern that such a claim is pled or because the tort is itself but an umbrella term of underlying torts which create liability for the claims asserted, such as the tort of interference with prospective economic advantage,²⁹ invasion of privacy,³⁰ or disparagement,³¹ which may include injurious falsehood, trade libel, or product disparagement, to name but a few of its incarnations.

C. Generically Worded Offenses

By contrast, the second category of “advertising injury” offenses are generically worded and include lay terminology. Thus, the offense of “misappropriation of advertising ideas or style of doing business” does not mirror any modern torts. Determining whether a particular set of fact allegations – or, where extrinsic evidence can be considered, factual assertions that are part of the claims that underlie the lawsuit – fall within these offenses requires an additional layer of analysis. Because these offenses do not equate directly with particular legal theories, the first question that must be answered is – what types of wrongful

²⁹*COMSAT Corp. v. St. Paul Mercury Ins. Co.* (D. Minn., Mar. 6, 1998, No. 97-2236) 1998 U.S. Dist. LEXIS 2916, at p. *15 (“The bulk of cases involving interference . . . also involved the commission of some independent tort. Thus in many cases interference with contract is not so much a theory of liability in itself as it is an element of damages resulting from the commission of some other tort.’ *Employers Mutual Cas. Co. v. Cedar Rapids Television Co.*, 552 N.W.2d 639, 641 (Iowa 1996).”).

³⁰*Fibreboard Corp. v. Hartford Acc. & Indem. Co.* (1993) 16 Cal.App.4th 492, 515 [20 Cal.Rptr.2d 376] (“Fibreboard has not identified any tort alleged against it which would fall within the ambit of the invasion of privacy torts.”).

³¹*McCormack Baron Mgmt. Servs., Inc. v. American Guar. & Liab. Ins. Co.*, *supra*, 989 S.W.2d 168, 172 (“Coverage could be limited to specific and formal causes of action. In this particular policy, however, we do not find that the use of the term ‘offense’ prior to the words ‘disparages a person’s . . . services’ is sufficient to create such a limited coverage that would defeat McCormack’s right to a defense when sued for statements alleging ‘insubordination’ of an employee and asking that the employer fire that employee.”).

conduct or claims fall within the ambit of the offense?³² For example, the offense of “misappropriation of advertising ideas or style of doing business” included in a 1986 ISO policy has been construed as encompassing torts such as trademark/trade dress infringement³³ and common law misappropriation.³⁴ Courts have had to redefine these offenses in plain English to give them an operative meaning that permits assessment of whether the articulated claims in a lawsuit trigger a defense or not. Courts have found determining coverage in this area of law particularly challenging as most of the “offenses” are limited to a singular “tort.”³⁵

The “misappropriation of advertising ideas” offense encompasses:

1. The idea of claiming a revolutionary new design as an enticement to customers.³⁶

³²*Tinseltown Video, Inc. v. Transportation Ins. Co.* (1998) 61 Cal.App.4th 184, 195 [71 Cal.Rptr.2d 371] (“To the extent the listed offenses [in the policy] are framed in generic terms, they should be construed broadly to encompass all specific torts which reasonably could fall within the general category.” (brackets in original) (Although the court was discussing “personal injury” offenses, the analysis is equally applicable to “advertising injury” offenses.)).

³³*Lebas, supra*, 50 Cal.App.4th 548, 565; *Flodine v. State Farm Ins. Co.* (N.D.Ill., Feb. 27, 2001, No. 99 C 7466) 2001 U.S. Dist. LEXIS 2204, at pp. *25-31; *Federal Ins. Co. v. Southwestern Wire Cloth, Inc.* (N.D. Okla., Oct. 14, 1997, No. 95-C-689-K) 1997 U.S. Dist. LEXIS 22343; *Sorbee Int’l v. Chubb Custom Ins. Co.* (Pa. 1999) 735 A.2d 712.

³⁴*Advance Watch Co. v. Kemper Nat’l Ins. Co.* (6th Cir. 1996) 99 F.3d 795.

³⁵*EKCO Group v. Travelers Indem. Co.* (1st Cir. 2001) 273 F.3d 409, 410 (citation omitted) (“This case presents, once again, the vexing question of how to interpret an ‘advertising injury’ clause in a general commercial liability (‘GCL’) policy.”); *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.* (3d Cir. 1999) 193 F.3d 742, 744, 747 (“The definition of ‘advertising injury’ in standard business insurance policies has troubled and in some cases confounded courts for years . . . [especially when it is applied to] intellectual property litigation, which often proceeds under a bewildering variety of different labels covering the same material facts.”).

³⁶*Frog, Switch & Mfg. Co. v. Travelers Ins. Co., supra*, 193 F.3d 742, 748.

2. The wrongful use of the manner or means by which another advertises goods or services.³⁷
3. Capitalizing on the goodwill associated with how the marketing idea is used to persuade consumers to buy certain goods.³⁸
4. Thoughts about how to make the public more aware of something.³⁹

D. The Proper Role of the Ambiguity Doctrine

There has been ongoing debate about whether these offenses are ambiguous. Those courts that confront the multiple reasonable meanings which courts have found for these terms, as well as the fact that they need to be redefined to apply, have readily found ambiguity.⁴⁰ This follows because where there are multiple reasonable definitions in context, and courts have had to redefine policy language in plain English to apply it to given factual scenarios, the phrase is ambiguous.⁴¹ The inherently vague character of the phrase “advertising idea,” which offers no contextual clue as to what connectives may exist between the words “advertising” and “idea,” creates the need for careful policy construction.⁴² There

³⁷*Lebas, supra*, 50 Cal.App.4th at p. 562.

³⁸*Flodine v. State Farm Ins. Co., supra*, at pp. *19-22.

³⁹*EKCO Group v. Travelers Indem. Co., supra*, 273 F.3d at p. 413.

⁴⁰*Winklevoss Consultants, Inc. v. Federal Ins. Co.* (N.D.Ill. 1998) 991 F.Supp. 1024, 1037.

⁴¹*Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, 763, 765-66 [110 Cal.Rptr.2d 844] (“[A]mbiguous terms are resolved in the insureds’ favor, consistent with the insureds’ reasonable expectations.” (*Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal. 4th 871, 879.) . . . An insured should not be expected to know the subtle legal distinctions between the concepts of ordinary negligence and gross negligence.”).

⁴²Hartford misstates United Policyholders’ grammatical arguments and also misses their point. Levi, *The Syntax and Semantics of Complex Nominals* (1978), noted that complex nominals (noun-noun compounds and the adjective-noun expressions which are only superficially different from them) can have at least a dozen interpretations. **The noun-noun compound “advertising idea” could mean for starters an idea (made of); (used for); (containing); (which are); (from); (with); (causing); (about); advertising.** Neither Insurer *Amici* nor Hartford clarify why this range of meanings is not available to an insured.

is nothing about the phrase “advertising idea” that limits the range of connective prepositions that might be interposed between these terms to give them proper contextual meaning even if the term advertising functions as an objective in this phrase. Nor can courts limit the meaning of ambiguous offenses to a particular tort which is distinct from the actual offense (i.e., limiting misappropriation of advertising ideas or style of doing business to common law misappropriation).⁴³

The drafter’s failure to include a given tort like trademark infringement or trade secret misappropriation⁴⁴ means that the offense may not encompass claims falling within those legal labels. Such a construction is compelled by a fair reading of the policy language.⁴⁵

Downing, *The Creation and Use of English Compound Nouns* (1977) 53 *Language* 810-842, and Clark, *When Nouns Surface As Verbs* (1979) 55 *Language* 767-811, showed that such expressions are grammatically extremely vague, and their interpretation in context is limited only by what a hearer might think a speaker meant by them. Consequently, “concepts used to publicize a business” is a reasonable interpretation of “advertising ideas,” and “the misuse of any concept used to publicize a business” is a plausible interpretation of “misappropriation of advertising ideas,” and, in the context, a salient one.

⁴³*Advance Watch Co. v. Kemper Nat’l Ins. Co.*, *supra*, 99 F.3d 795. This case has been severely criticized for ignoring the real contours by which liability attaches for the wrongs alleged that trigger potential coverage. *Lebas*, *supra*, 50 Cal.App.4th at p. 567; *American States Ins. Co. v. Hayes Specialties, Inc.* (Mich. Cir. Ct., Mar. 5, 1998, No. 97-020037 CK4) 1998 WL 1740968 (unpublished opn.); *Home-Owners Ins. Co. v. Thomas Lowe Ventures, Inc.* (Mich. Cir. Ct., Aug. 27, 1998, No. 97-158-CK) 1998 WL 1856221 (unpublished opn.).

⁴⁴*Lebas*, *supra*, 50 Cal.App.4th at p. 566, fn. 13 (“Those draftsmen had it within their power to make clear the full scope of the coverage offered as well as any limitations they wished to place thereon. . . . (*Union Ins. Co. v. The Knife Co., Inc.* (W.D.Ark. 1995) 897 F.Supp. 1213, 1216.)”); indeed, that is precisely what happened in 2001 when ISO rewrote its policy to include an offense for infringement of copyright, trade dress, title or slogan. See fn. 26, *ante*.

⁴⁵*Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.* (1993) 5 Cal.4th 854, 868 [21 Cal.Rptr.2d 691] (“[A] word with a broad meaning or multiple meanings may be used for that very reason – its breadth – to achieve a broad purpose.”).

Insurance policy drafters must be required to say what they mean.⁴⁶ By listing the offense in terms of conduct, rather than a recognized (and inherently limited) statutory cause of action, such as trademark infringement, the only reasonable inference is that the drafter of the policy intended to provide the broadest coverage possible.⁴⁷ The limitation arises because the misappropriation must occur in the course of the insured's advertising.

As the 1986 ISO form was adopted by ISO accompanied by the express pronouncement that "no change in scope" of the new coverage was intended,⁴⁸ reading the new offenses at least as broadly as the prior offenses is sensible.⁴⁹ It would hardly come as a surprise to a layman that expressly asserted claims for unfair competition triggered a defense under a "misappropriation of advertising ideas" offense that was as broad in scope as the predecessor offense covering "unfair competition."⁵⁰ A further issue is what the term

⁴⁶*Safeco Ins. Co. v. Robert S.*, *supra*, 26 Cal.4th 758, 764 ("[W]e cannot read into the policy what Safeco has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted." (emphasis added)).

⁴⁷*Lebas*, *supra*, 50 Cal.App.4th at p. 559 (coverage found for trademark infringement even though "trademark" was not an expressly listed advertising injury offense).

⁴⁸*Bank of the West*, *supra*, 2 Cal.4th at pp. 1264-65 ("[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.").

⁴⁹Gauntlett, *supra*, Policy Interpretation, section 9.03[C]-[D], pages 9-35 - 9-43 (This treatise pre-dates the inception of this case and references ISO publicly disseminated pronouncements as to the effect of changes in its policy language. See also *Atlapac Trading Co., Inc. v. American Motorists Ins. Co.* (C.D. Cal., Sept. 19, 1997, No. CV 97-0781 CBM) 1997 U.S. Dist. LEXIS 21943, at pp. *21-22; *Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.* (S.D.Tex. 1999) 61 F.Supp.2d 611, 617.

⁵⁰*CNA Cas. of Cal. v. Seaboard Sur. Co.*, *supra*, 176 Cal.App.3d 598, 608; *Foxfire*, *supra*, 820 F.Supp. 489, 496.

“misappropriation” means. Insurers urge it is necessarily limited to a wrongful taking;⁵¹ policyholders contend that it can include misuse or wrongful use.⁵² Dictionary definitions which address its common meaning as understood by lay persons support the latter view.⁵³

IV. “MISAPPROPRIATION OF AN ADVERTISING IDEA” MAY ENCOMPASS ADVERTISEMENTS DIRECTED TO CUSTOMERS WHOSE IDENTITY AND BUYING CHARACTERISTICS ARE MISAPPROPRIATED

A. Each of the Insurer *Amici* Misstate the Facts Before this Court and Misdirect the Issue for Resolution

The Insurer *Amici* do not seek to ascertain whether use in promotional marketing materials of proprietary information regarding a customer’s particularized needs, wants, identity, and past service needs to contact a former customer was a basis for liability under the claims charged. These are the very facts brought to light in KWP’s quest for injunctive relief against Hameid.⁵⁴ Hartford was chargeable with knowledge of all these facts. The risk that an insurer takes when it denies coverage without a reasonably thorough investigation is that a reasonable investigation would have uncovered evidence to establish coverage or a potential for coverage. In that case, the insurer will be “charged with constructive notice of

⁵¹*EKCO Group v. Travelers Indem. Co.* (D.N.H. 2000) 2000 DNH 249, revd. (1st Cir. 2001) 273 F.3d 409.

⁵²*Applied Bolting Tech. Prods., Inc. v. United States Fidelity & Guar. Co.* (E.D.Pa. 1996) 942 F.Supp. 1029.

⁵³The common dictionary definition of the term “misappropriate” supports the policyholder argument that the offense must be construed broadly in order to reflect the reasonable insured’s expectations of coverage. As defined by Random House, misappropriate simply means “1. to put to a wrong use. 2. to apply wrongfully or dishonestly, as funds entrusted to one’s care.” Random House Unabridged Dictionary (2d ed. 1993) at page 1228.

⁵⁴Application for Temporary Restraining Order and Preliminary Injunction (File 156-191).

facts that it might have learned if it had pursued the requisite investigation.”⁵⁵ Instead, the Insurer *Amici* mischaracterize the issue as whether a “misappropriation of a claimant’s customer list” amounts to a potentially covered “advertising injury” where the offense includes “misappropriation of advertising ideas.”⁵⁶ Hameid does not contend that all customer lists are advertising ideas. It depends upon the context in which they are used, their precise content, and the role they play in soliciting new business.⁵⁷

Thus, United National Group (“United National”) states boldly that the offense is “misappropriation of **an** advertising **idea**.”⁵⁸ Then it claims the appellate court held that

⁵⁵*KPFF, Inc. v. California Union Ins. Co.* (1997) 56 Cal.App.4th 963, 973 [66 Cal.Rptr.2d 36]; *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 37 [221 Cal.Rptr. 171].

⁵⁶**United National Group Amicus Curiae Brief** (hereafter “United National Brief”), p. 1 (“The Court of Appeal herein correctly included that Hameid’s alleged misappropriation of customer information constitutes the predicate offense of ‘misappropriation of advertising ideas’”); **Complex Insurance Claims Litigation Association Amicus Curiae Brief** (hereafter “Litigation Association Brief”), pp. 4-5 (“The Court of Appeal also concluded that the wrongful taking of customer lists and other confidential information can somehow qualify as ‘misappropriation of advertising ideas’ under the National Policy. (*Id.* at p. 1163.)”); **National Association of Independent Insurers and Lumbermens Mutual Casualty Company Amicus Curiae Brief** (hereafter “NAII & Lumbermens Brief”), p. 1 (“[The Court of Appeal] held that this advertising injury coverage extends to an offense – misappropriation of a customer list – that does *not* occur in the course of advertising and did not do so in this case.”); **American International Companies Amicus Curiae Brief** (hereafter “Int’l Cos. Brief”), p. 7 (“[T]he Court of Appeal held that because KWP alleged that the defendants misappropriated its confidential customer list to identify and solicit clients about whom it kept private information, the claimed ‘misappropriation of trade secrets related to marketing, not performance of services or manufacturing of a product,’ . . .”).

⁵⁷The Eleventh Circuit in *Hyman v. Nationwide Mut. Fire Ins. Co.* (11th Cir., Sept. 6, 2002, No. 01-15497) ___ F.3d ___ [2002 U.S. App. LEXIS 18511, at pp. *21-23] (applying Florida law), followed Hameid’s analysis, holding that *Advance Watch*’s erroneous interpretation of the “misappropriation” offense is not the majority rule, is contrary to decisions of Michigan state courts, and is broad enough to encompass any claim alleging customer confusion regarding the source or nature of products or services.

⁵⁸**United National Brief**, p. 1.

customer information, in and of itself, is an “advertising idea,”⁵⁹ and then misdefines the offense as requiring “an idea for a statement about a product or service (i.e., characterizing this as “an idea concerning ‘advertising’”).⁶⁰ Thus, without reference to case law, dictionary definitions, or other indicia of a layman’s understanding of the meaning of this term. United National also presumes that the term has only one singular definition and proper meaning, selects the one it prefers, and then narrowly construes that definition as applied to an aspect of the facts in Hameid.

B. An “Advertisement” Need Not Be a Statement Nor Even Involve Oral or Written Publication of Material

The notion that an advertisement must make a “statement” about a subject would require adding limiting language not set forth in the policy. It would be equivalent to requiring that this offense only include “oral or written publication of material” despite the fact that offenses (a) and (b) **but not (c)** in the policy at issue include that precise language. To read the offense in this manner would be improper, however, as that offense has regularly been found to apply to trademark/trade dress infringement claims for **merely** verbal and physical conduct.⁶¹ Indeed, a trade dress infringement may be actionable where there is no “oral or written publication” of any kind at issue. Nevertheless, courts have readily found

⁵⁹**United National Brief**, p. 1 (“The court thus implicitly held that customer information is an ‘advertising idea.’”).

⁶⁰**United National Brief**, p. 1 (“[A] customer list is not an idea for a *statement* about a product or service, i.e., it is not an idea concerning ‘advertising.’”).

⁶¹*Lebas, supra*, 50 Cal.App.4th at p. 563, fn. 11 (“A wide variety of business styles have been protected under trademark law. . . . The styles of doing business that are protected under trademark and unfair competition law assume many forms, including: building and restaurant styles . . .; performing styles . . .; product styles . . .; and sales techniques . . .”).

that in such cases an “advertisement” has occurred.⁶² An “advertisement” can well include a design, printed material, information, or images contained in, on or upon packaging or labeling of any goods or products. Such a definition can dovetail with trade dress claims and not involve any statement, yet still be advertising.⁶³

Ziman v. Fireman’s Fund Ins. Co. (1999) 73 Cal.App.4th 1382, 1388 [87 Cal.Rptr.2d 397], does not support United National’s erroneous “statement” analysis. A display can be infringing, but the display in that case was not related to the products, goods, or services promoted therein. Liability for copyright infringement could not attach to the display of the picture in the building lobby because the picture did not advertise the building; it was only one of many amenities present in the building. It was at most an advertisement for the painting itself and no more.⁶⁴

United National seeks to include limitations on the meaning of terms that would require a re-definition of the policy language. It posits one of the many possible definitions for the noun-noun compound “advertising idea” – “an idea concerning ‘advertising’” – and

⁶²*El-Com Hardware, Inc. v. Fireman’s Fund Ins. Co.* (2001) 92 Cal.App.4th 205, 218-19 [111 Cal.Rptr.2d 670] (“A manufacturer’s display and presentation of its products to a significant number of its client base, particularly at a site other than the manufacturer’s factory or showroom, would be commonly understood to fall within the definition of advertising, to wit, calling public attention to the merits of one’s product so as to encourage purchase of the product.”).

⁶³See *John H. Harland Co. v. Clarke Checks, Inc.* (11th Cir. 1983) 711 F.2d 966, 980 (the design of the product itself may constitute protectable trade dress under § 43(a) of the Lanham Act); *Warner Bros., Inc. v. Gay Toys, Inc.* (2d Cir. 1981) 658 F.2d 76 (distinctive color and symbols on toy car protected under § 43(a)); *Harlequin Enters., Ltd. v. Gulf & Western Corp.* (2d Cir. 1981) 644 F.2d 946 (distinctive book covers protected against trade dress infringement).

⁶⁴Black’s Law Dictionary’s (5th ed. 1979) (at p. 50) definition of “statement,” requiring “an oral, written or graphic statement made by the seller in any manner in connection with the solicitation of business . . .,” is not as limited as United National argues.

assumes without analysis that this definition is the only one contextually available under the policy's language for claims like those asserted against Hameid herein.⁶⁵

C. Insurer *Amici* Citations to Out-of-State Cases Suggesting That a Product Can Never Be an Advertisement for Itself Are Both Distinguishable and Not in Accord with California Law

Neither the court in *Farmington Cas. Co. v. Cyberlogic Techs., Inc.* (E.D.Mich. 1998) 996 F.Supp. 695, 705 (hereafter “*Cyberlogic*”), nor *Select Design Ltd. v. Union Mutual Fire Ins. Co.* (Vt. 1996) 674 A.2d 798, 802 (hereafter “*Select Design*”), supports United National's bold assertion that a statement is a necessary element of every advertisement. Any reference to the term “statement” in these cases at most uses it as a synonym for the content of the communication that was deemed promotional regarding goods or services, rather than a technical requirement that the form of that communication be a “statement.” United National concedes as much, noting that in each instance graphic messages or themes that convey a more subtle message about products are within the meaning of their definition of statement. Nonetheless, if such is the case, United National's use of the term “statement” as a limitation on the scope of “advertising injury” coverage is misleading and unnecessary.

The *Cyberlogic* court misperceived that **display** of an object could not be a copyright infringement.⁶⁶ It states this purported legal proposition as if it were self-evident and without any reference to copyright law.⁶⁷ To the contrary, a court, focusing on how liability properly

⁶⁵**United Policyholders *Amicus Curiae* Brief** (hereafter “United Policyholders Brief”) § IV, pp. 20-24.

⁶⁶**United Policyholders Brief** § III(B), at pp. 8-14.

⁶⁷*Cyberlogic, supra*, 996 F.Supp. at p. 703 and fn. 12 (emphasis added; footnotes omitted) (“*Cyberlogic* implies that the facts of the present case are directly comparable to the factual scenario in which an advertisement uses copyrighted material, such as text, pictures, or music, in order to attract, entice, or otherwise persuade the relevant audience to buy the

attaches, recently held that where actively displayed for an advertising purpose, a product can be an advertisement.⁶⁸ Cases that do not analyze coverage in light of a full understanding of how liability would attach in the underlying action or which analyze only one aspect of it provide little appropriate guidance to this Court.

The *Cyberlogic* court sought to distinguish *Amway*, stating:

[T]he court found that videotapes produced by the insured were both products and advertisements. They were “products” in that they were sold to “down-line distributors” in the Amway pyramid scheme, who make up a significant customer base. **They were “advertisements” in that they were used by those down-line distributors “to promote motivational rallies and conventions[,] to recruit new distributors[, and] to sell Amway products.”** 1997 WL 816367, at *9. This Court does not find that the holding in *Amway* is inconsistent with the finding that the FIX Driver is not both a product and an advertisement. **The videotape at issue in *Amway*, unlike the software program at issue here, was not said to be an advertisement for itself, but for a variety of other products and events.**

advertiser’s wares. See, e.g., *Amway*, 1997 WL 816367. . . . Cyberlogic’s claim for a defense thus rests on the premise that the FIX Driver is not merely a product but also an advertisement. The Court rejects that premise and finds that Cyberlogic’s claim for a defense must fail. . . . [T]he competing definitions agree in that they require that an ‘advertisement’ make a statement about its subject. **The product itself cannot meet this requirement. It does not convey an independent message about the product; it simply is the product.”**)

⁶⁸*Ryland Group, Inc. v. Travelers Indem. Co.* (W.D. Tex. (Austin Div.), Oct. 25, 2000, No. A-00-CA-233 JRN) 2000 U.S. Dist. LEXIS 21412, at pp. *16-17 (emphasis added) (“KFA’s Complaint in the Underlying Lawsuit alleged that Ryland infringed KFA’s copyrighted architectural plans (1) by constructing and selling houses based on the copyrighted works, *and* (2) by using non-pictorial depictions of the copyrighted works in promotional and advertising materials. . . . **KFA’s Complaint expressly alleged that Ryland’s use of ‘non-pictorial representations of the Copyrighted Works in promotional and advertising materials as described above has infringed and is infringing KFA’s copyrights’** . . . and that ‘Ryland’s use of non-pictorial depictions of such derivative works in promotional and advertising materials as described above has infringed and is infringing KFA’s Copyright.’ . . . Thus, the advertisements and promotional materials infringed KFA’s copyright and did not merely ‘expose’ the infringement. **Accordingly, the Court finds that there is a causal connection between the advertising activity and KFA’s claim for copyright infringement.”**)

Cyberlogic, supra, 996 F.Supp. at page 703, footnote 16 (emphasis added).

The *Cyberlogic* court's distinction is a meaningless one because it does not relate to the way in which products are marketed. More critically, the whole analysis misses a key element: it does not discuss how the liability for copyright infringement would be triggered by the form of advertisement at issue. Copyright infringement can be accomplished by a **display** or **distribution** of product which in and of itself has a capacity to infringe.⁶⁹ A product can be an advertisement for itself. Each provides a separate basis for liability. These acts may implicate advertising as a basis for liability **without** reference to the "content" or the "text" of a particular advertisement.

Select Design, supra, 674 A.2d 798, 802, is equally distinguishable for similar reasons. The argument therein that all forms of promotional solicitation using a "customer list" have nothing to do with the content of any "advertising" misperceives that the wrongful conduct at issue in this coverage dispute is not the taking of a customer list, but its use as marketing data such as customer preference characteristics in advertising media. Where, as here, it is alleged that the list of customers contained selected, preferred customers,⁷⁰ or if marketing the product or service requires overcoming substantial customer resistance,⁷¹ then

⁶⁹Engaging in or authorizing any of the following five activities without the copyright owner's permission violates the exclusive rights of the copyright owner and constitutes infringement of the copyright: reproduction (copying, distribution, preparation of derivative works), adaptation, public performance and public display. (17 U.S.C. § 106.)

⁷⁰*American Credit Indemnity Co. v. Sacks* (1989) 213 Cal.App.3d 622, 631 [262 Cal.Rptr. 92, 97] (customer list "allow[ed] a competitor to direct sales efforts to the elite 6.5 percent of those potential customers which already ha[d] evinced a predisposition to purchase credit insurance").

⁷¹*American Credit Indemnity Co. v. Sacks, supra*, at p. 638 (creditor insurance policy lists trade secret in part "because of the unique nature of the insurance and the product resistance which must be overcome before this type of insurance can be sold or renewed.").

the list may represent significant marketing investment and therefore may be protected.⁷² Liability can readily attach for **distribution**⁷³ or **display**⁷⁴ of this marketing information.⁷⁵ The *Cyberlogic* court’s analysis fails to address how liability would attach in the underlying action, rendering its coverage analysis meaningless.⁷⁶

GAF Sales & Service, Inc. v. Hastings Mutual Ins. Co., supra, 568 N.W.2d 165, looked only at the question of whether a customer list is per se an advertising idea without use of same being actionable conduct. The distinction is that in offense-based coverage it is the conduct that determines the applicability of the offense. The court did concede that direct mail solicitation to a targeted audience would be “advertising” within the policy’s

⁷²*Hollingsworth Solderless Terminal Co. v. Turley* (9th Cir. 1980) 622 F.2d 1324, 1333 (courts either protect substantial effort involved in creating market for unique product or service or recognize that “a list of people who have already purchased a product is substantially more valuable than a list of people who only might be interested in purchasing the product.”).

⁷³**Distribution.** *Williams Electronics, Inc. v. Arctic Int’l, Inc.* (3d Cir. 1982) 685 F.2d 870, 876 (The defendant distributed video games with circuit boards containing admittedly unauthorized copies of plaintiff’s computer program procured from a third party).

⁷⁴**Display.** Unauthorized public telecommunication of computer databases (which constitute “literary works”) infringe the copyright holder’s display right as does unauthorized public showing of individual images of an audiovisual work non-sequentially. These acts may constitute advertisements in an appropriate context as such works must be publicly displayed to be actionable.

⁷⁵*Select Design* also required an advertising nexus between advertising and injury, which is contrary to Hartford’s policy language as well as the requirements of offense-based coverage. See *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (Ct.App. 2002) 123 Cal.Rptr.2d 256, 267 (hereafter “Lamb”) (“[C]overage . . . is triggered by the *offense*, not the injury or damage which a plaintiff suffers.”).

⁷⁶While sale of products alone may not be advertisement, that conduct is distinct from the use of materials in advertisements to attract customers back to their former stylists. Here, the content of communications to former salon customers promoted former hairstylists associated with a new salon to attract these former patrons to become clients of the new salon.

meaning. *Id.* at 168. It found that customer lists were used only to transfer software and used machines, not to promote the insured's software to the marketplace. *Ibid.*

Notably, *Amerisure Ins. Co. v. Gold Coast Marine Distributors, Inc.* (Fla.App. 2000) 771 So.2d 579, as well as *Western States Ins. Co. v. Wisconsin Wholesale Tire, Inc.* (7th Cir. 1999) 184 F.3d 699, 702, applying, respectively, Florida and Wisconsin law, did not focus on any facts beyond the base of the pleadings under the applicable "complaint allegations" rule in each jurisdiction. Thus, the court's focus on the statements in the complaint cannot guide this Court's jurisprudence as it is not limited to such evidence in reviewing the potential for coverage in this case. The misappropriation of customer lists and customer information was not limited to taking but included use.

Both cases fail to distinguish a number of earlier cases solidly equating "marketing" with "advertising" and finding the causal relationship required by the policy's "occur in the course of the insured's advertising of goods, products or services" language was met by allegations of "marketing."⁷⁷ While "marketing" may not always include "advertising," once

⁷⁷*Poof Toy Products, Inc. v. United States Fidelity & Guar. Co.* (E.D.Mich. 1995) 891 F.Supp. 1228, 1235 ("While the underlying complaint does not on its surface appear to allege any advertising activities, the complaint is replete with the term 'marketing.' . . . Webster's Third New International Dictionary, unabridged, 31 (1986) . . . defines 'marketing,' among other definitions, as 'an aggregate of functions involved in transferring title and in moving goods from producer to consumer.' *Id.* at 1383. This definition would include advertising activities."); *Ben Berger & Son, Inc. v. American Motorists Ins. Co.* (S.D.N.Y., June 29, 1995, No. 94 Civ. 3250 (DC)) 1995 U.S. Dist. LEXIS 8976, at p. *11 ("The third claim is for copyright infringement. McKinney alleged that . . . Berger infringed on her copyright by copying [her copyrighted Christmas designs] for its own use. In addition, Berger allegedly marketed the infringing designs in its catalogue. . . . This claim clearly falls within the scope of the Policy"); *Federal Ins. Co. v. Microsoft Corp.* (W.D. Wash. (Seattle Div.), Apr. 14, 1993, No. C92-610D) 1993 U.S. Dist. LEXIS 5468, at p. *11 ("[T]he Court held that [a duty of defense arose because] 'Microsoft had infringed Apple's copyrights by marketing, distributing and licensing Windows . . . ,' showed that advertising as part of marketing could be alleged to have infringed Apple copyrights.").

the term is referenced as a basis for liability, it is the insurer's burden to establish that advertising plays no role in the "marketing" activity alleged.⁷⁸ Here, the marketing activity included as one of its mechanisms advertisements, i.e., specifically directed promotional materials which took into account the needs and qualities of the customer to whom it was directed.

D. An "Advertising Idea" May Encompass a Range of Distinct and Contextually Reasonable Meanings Beyond Those Urged by the Insurer *Amici*

United National's conclusion that "the key is that the product itself does not make the statement, but rather some material relating to or associated with the product makes or implies it" is nonsense. Similarly, Hartford's contention that an "advertising idea" can only be understood by evaluating whether the idea is "an idea for advertising" is equally unsupported by reference to rules of grammar, case law, or common sense.⁷⁹

The promotional use of customer lists to solicit clients implicates "misappropriation of an advertising idea" because:

⁷⁸According to the Oxford English Dictionary, "marketing" is defined as including the "action, business or process of promoting and selling a product, etc., including market research, *advertising* and distribution." (Oxford English Dict. Online (Dec. 2000 ed.) <<http://dictionary.oed.com/cgi/entry/003>> (as of Oct. 12, 2001) (emphasis added)). Thus, the term "marketing," as used in the complaint, could be construed to include "advertising."

⁷⁹*Lebas* noted that the word "idea" means "presentation of sense, concept, or representation," "an object of a concept," "a conception or standard of any perfection," "a visible representation of a conception," and "a product of reflection or mental concentration: a formulated thought or opinion." (*Lebas, supra*, 50 Cal.App.4th at p. 560, fn.7, quoting Webster's Third New International Dictionary (1981) at p. 1442.) It is clear from these definitions that an idea has to involve a concept. This concept can be the marketing data contained in a customer list.

- (a) customer lists could be used to identify and solicit clients;⁸⁰
- (b) their use to generate and target delivery of particularized marketing data was a use in advertising; and
- (c) did not involve the performance of services or manufacturing of a product.

Indeed, Justice Croskey, in a Court of Appeal decision in which this Court denied review, so found:

[Hartford] further contends that the misappropriation of an “advertising idea” which is covered by the policy is limited to the circumstance where **one party is presented with an idea or plan for an advertising campaign or promotion by another, who has a protectable property interest in that idea, and the first party uses the idea without compensation to its creator.**
 . . .

. . . Hartford insists that the ordinary and popular usage of the terms “misappropriation,” [and] “advertising idea” . . . suggests only one meaning, thus precluding a conclusion of ambiguity. We disagree. . . .

. . . [W]hile the misappropriation of an “advertising idea” certainly would include the theft of an advertising plan from its creator without payment, it is also reasonable to apply it to wrongful taking of the *manner or means* by which another advertises its goods or services.⁸¹

Even if one narrow definition of the noun-noun compound phrase “advertising idea” were adopted as the only reasonable definition here, “the wrongful taking of another’s manner of advertising,” that definition is met here.⁸² Other equally plausible definitions for this offense, however, include: (1) the “wrongful taking of the **manner or means** by which

⁸⁰A customer list is a marketing tool, and even the format of such a list may contain some demographic information that would facilitate marketing to particular customers (e.g., does the shop cater to younger or older customers, does it also stock Paul Mitchell products?).

⁸¹*Lebas, supra*, 50 Cal.App.4th at pp. 558-63 (emphasis added; citation omitted).

⁸²The Missouri court cites no authority for its adoption of the narrow definition in *American States Ins. Co. v. Vortherms* (Mo.App. 1999) 5 S.W.3d 538, 543.

[the insured] advertises its goods or services,”⁸³ as well as (2) “the defendant’s **use of the plaintiff’s . . . idea for calling public attention to a product or business**, especially by proclaiming desirable qualities so as to increase sales or patronage.”⁸⁴

Insurer *Amici* failed to apprise this Court that: (1) both the “misappropriation of advertising ideas” offense and the “advertising” provision have been found ambiguous by the majority of jurisdictions to address coverage of same because of their multiple reasonable definitions in context;⁸⁵ and (2) the reasonable definitions found plausible by the majority of courts are far broader than those urged by the Insurer *Amici* herein.⁸⁶

⁸³*Lebas, supra*, 50 Cal.App.4th at p. 562, cited in *Winklevoss Consultants, Inc. v. Federal Ins. Co.*, *supra*, 991 F.Supp. 1024, 1038 (also supports finding a defense herein).

⁸⁴*Atlantic Mutual Ins. Co. v. Badger Med. Supply Co.* (Wis.App. 1995) 528 N.W.2d 486, 490 (emphasis added).

⁸⁵Contextual interpretations of “misappropriation of advertising ideas” find it ambiguous, resulting in broader definitions than those urged by the Insurer *Amici* herein. *Lebas, supra*, 50 Cal.App.4th at pp. 561-63; *Merchants Co. v. American Motorists Ins. Co.* (S.D.Miss. 1992) 794 F.Supp. 611, 618; *P.J. Noyes Co. v. American Motorists Ins. Co.* (D.N.H. 1994) 855 F.Supp. 492, 494-95; *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Massachusetts Bay Ins. Co.* (W.D.N.Y. 1993) 818 F.Supp. 553, 557, vacated by reason of settlement (W.D.N.Y. 1994) 153 F.R.D. 36; *Union Ins. Co. v. Knife Co.* (W.D.Ark. 1995) 897 F.Supp. 1213, 1215-16; *Adolfo House Distrib. Corp. v. Travelers Prop. & Cas. Ins. Co.* (S.D.Fla. 2001) 165 F.Supp.2d 1332, 1339-40; *Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, *supra*, 61 F.Supp.2d 611, 617; *B.H. Smith, Inc. v. Zurich Ins. Co.* (Ill.App. 1996) 676 N.E.2d 221, 223 (applying New York law).

⁸⁶Most jurisdictions analyzing the meaning of the term “advertising” have found it does not require “widespread public dissemination.” A number of California coverage cases have broadly defined advertising. *American States Ins. Co. v. Canyon Creek* (N.D.Cal. 1991) 786 F.Supp. 821, 828 (“To advertise, however, is ‘to . . . inform, make known, publish’ or to ‘call to the public attention by any means whatsoever.’ Black’s Law Dictionary 50 (5th ed. 1979)”); *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 774-75 [215 Cal.Rptr. 416] (“[S]tatements [that there was ‘nothing wrong’ with sale of investigator devices capable of intercepting HBO, made in offers to sell] fall within the realm of advertising [n4] and of defamatory statements made in the course of, or related to, *advertising* on behalf of the named insured [n.4: ‘Advertising: . . . [The] action of calling something (as a commodity for sale, a service offered or desired) to the attention of

Merchants Co. v. American Motorists Ins. Co., *supra*, 794 F.Supp. 611, 618, was the first case to address possible meanings for the term “advertising idea.” It adopted a definition from case law which the insurer, American Motorists Insurance Co., relied upon for its definition of “advertising idea.”⁸⁷

the public esp. by means of printed or broadcast paid announcements.” (Webster’s New Internat. Dict. (3d ed. 1961) p. 31.)”); *Foxfire*, *supra*, 820 F.Supp. 489, 494 (“Advertising activity must be examined in the context of the overall universe of customers to whom a communication may be addressed. Where the audience may be small, but nonetheless comprises all or a significant number of a competitor’s client base, the advertising activity requirement is met.”); *Merchants Co. v. American Motorists Ins. Co.*, *supra*, 794 F.Supp. at p. 619 (“[U]s[ing] the customer list of another . . . to send direct mail solicitations [is advertising].”); *Ross v. Briggs & Morgan* (Minn.Ct.App. 1994) 520 N.W.2d 432, 435, *revd.* on other grounds (Minn. 1995) 540 N.W.2d 843 (single letter sent to client base); *Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, *supra*, 61 F.Supp.2d at pp. 615-16 (product packaging); *Interface, Inc. v. Standard Fire Ins. Co.* (N.D.Ga., Aug. 10, 2000, No. 1:99-CV-1485-MHS) 2000 U.S. Dist. LEXIS 14019 (display of carpet products at trade show as a form of marketing was advertising); *United States Fidelity & Guar. Co. v. Star Techs., Inc.* (D.Or. 1996) 935 F.Supp. 1110, 1114 (“The majority of courts, however, have broadly construed ‘advertising activity’ to encompass a variety of business solicitations.”); *Erie Ins. Group v. Sear Corp.* (7th Cir. 1996) 102 F.3d 889, 894; *Amway Distrib. Benefits Ass’n v. Federal Ins. Co.* (W.D.Mich. 1997) 990 F.Supp. 936, 944 (“[A] number of courts have held that advertising need not be widespread or aimed at the general public, but may include solicitation of only a few potential customers.”). *John Deere Ins. Co. v. Shamrock Indus., Inc.* (D.Minn. 1988) 696 F.Supp. 434, 440, *affd.* (8th Cir. 1991) 929 F.2d 413 (Insured’s acts of sending three letters to one customer promoting insured’s product arguably constituted “advertising activity.”); *Sentex Sys., Inc. v. Hartford Acc. & Indem. Co.* (C.D.Cal. 1995) 882 F.Supp. 930, 939, *affd.* (9th Cir. 1996) 93 F.3d 578 (“The better view . . . is that the term ‘advertising’ encompasses . . . one-on-one and group solicitations . . .”). Other courts have adopted a similar broad definition contextually. *Attorneys’ Title Guar. Fund, Inc. v. Maryland Cas. Co.* (N.D.Ill., Aug. 23, 1991, No. 90 C 3916) 1991 WL 171339, at p. *4 (“Advertising activity” covered direct solicitation of lenders and property owners for the purpose of inducing switch to competitor.); *Flodine v. State Farm Ins. Co.*, *supra*, 2001 U.S. Dist. LEXIS 2204, at p. *31 (“product’s label [and packaging] . . . considered advertising”); *Charter Oak Fire Ins. Co. v. Hedeem & Cos.* (7th Cir. 2002) 280 F.3d 730, 736-37 (letter to limited commercial audience sufficient).

⁸⁷*Merchants Co. v. American Motorists Ins. Co.*, *supra*, 794 F.Supp. at p. 618 (emphasis added) (“**In its brief, American states that misappropriation of ideas ‘refers to the tort of appropriation of a “valuable but uncopyrightable idea which plaintiff has uncovered by great effort and expense.”**” (citing *Decorative Aides Corp. v. Staple Sewing*

Here, marketing materials which promoted the merits of the Hameid Salon by reference to how well the stylists could service the distinct needs of individual customers in accord with their past preferences is precisely how marketing occurred.

In *Sentex II*, the Ninth Circuit addressed factual assertions that Sentex’s employee used ESSI customer lists, marketing techniques and other inside and confidential information to solicit ESSI’s customers. ESSI’s president contended that the misappropriation of trade secrets claim was premised, in part, upon Sentex’s use of this information in its sales materials.⁸⁸

E. The Reasonable Inferences Arising from KWP’s Pleadings and Other Extrinsic Evidence Available to Hartford Triggered a Defense under the “Misappropriation of Advertising Ideas” Offense

An insurer must do precisely what Hartford refused to do here, where the facts asserted in the pleadings evidenced potential coverage – offer a defense until it can establish undisputed facts to conclusively demonstrate no potential for coverage.⁸⁹ Any fact assertions which directly or by inference arguably place part of the underlying claim within the policy

Aids, 497 F. Supp. 154 (S.D.N.Y. 1980)). Applying American’s definition to the customer list in question, the Court holds that the customer list was such a ‘valuable but uncopyrightable idea’. Insofar as Merchants is charged with misappropriating that idea, the Court concludes that there is a basis for coverage and a duty to defend under the misappropriation of advertising ideas language of the subject policies.”).

⁸⁸*Sentex II, supra*, 93 F.3d 578, 580 (“Although ESSI’s president disclaimed having seen its trade secrets in Sentex’s written sales materials, he testified that the information was used to market Sentex products in other ways. In this day and age, advertising cannot be limited to written sales materials, and the concept of marketing includes a wide variety of direct and indirect advertising strategies.”).

⁸⁹*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819 [169 Cal.Rptr. 691] (“[I]t is essential that an insurer fully inquire into possible bases that might support the insured’s claim.”).

trigger the defense.⁹⁰ Hartford’s construction of the duty of defense is contrary to California law.⁹¹

Once the insured shows a potential of coverage, the burden shifts to the insurer to “establish *the absence of any such potential.*”⁹² To do so, the insurer must point to evidence that “presents **undisputed facts** which *conclusively eliminate* a potential for [covered] liability.”⁹³ “Any doubt as to whether the facts give rise to a duty to defend is resolved in the insured’s favor.”⁹⁴

⁹⁰*Garvis v. Employers Mutual Cas. Co.* (Minn. 1993) 497 N.W.2d 254, 258 (“[I]f the insurer is aware of facts indicating that there may be a claim, either from what is said directly or inferentially in the complaint, . . . then the insurer must either accept tender of the defense or further investigate the potential claim.”).

⁹¹Pursuant to it, policyholders would have to:

- (1) demand clarification with specificity of each and every basis for an insurer’s denial;
- (2) conduct an ongoing investigation of all facts bearing on coverage to protect its rights;
- (3) conduct the investigation the insurer failed to perform and advise the insurer each time new facts arise in the underlying action that may potentially trigger a defense even though those facts were available to the insurer had it conducted the investigation required of it at the time of tender.

The burden of proving a duty to defend is considerably lighter than that of establishing a duty to indemnify. See *General Acc. Ins. Co. v. West Am. Ins. Co.* (1996) 42 Cal.App.4th 95, 102 [49 Cal.Rptr.2d 603] (“[T]he insured need only show the bare possibility of coverage to trigger a defense duty.”); *New Hampshire Ins. Co. v. Ridout Roofing Co.* (1998) 68 Cal.App.4th 495, 506 [80 Cal.Rptr.2d 286] (“Even a bare possibility of coverage is sufficient to trigger a duty to defend.”).

⁹²*Montrose Chem. Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300 [24 Cal.Rptr.2d 467].

⁹³*Wausau Underwriters Ins. Co. v. Unigard Security Ins. Co.* (1998) 68 Cal.App.4th 1030, 1037 [80 Cal.Rptr.2d 688] (bold emphasis added).

⁹⁴*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081 [17 Cal.Rptr.2d 210].

The inferences drawn from KWP’s Complaint, supplemented by the extrinsic evidence made available to the insurer, evidence potential coverage herein as the Court of Appeal found. Inferences from facts asserted are properly drawn so long as the facts referenced are in the record. **The inferences themselves need not be of record since they do not purport to be evidence but rather reasonable constructions of the evidence.**⁹⁵

Hartford suggests that no inference can be drawn that “(1) KWP ‘maintained a specialized customer list used to advertise its business’ or that (2) Hameid ‘took the customer list as well as the manner in which the list was used.’” Nevertheless, Hartford concedes KWP claimed in DeSan’s declaration that KWP spent money on “advertising mailers, coupons and other means to attract and keep customers coming back” (File 172, ¶ 3) and that their computer customer list records “the frequency the customer comes in, what services they like, who assisted them when they came in previously, the amount of money spent by the customer and other data, such as birthday, spouse’s birthday, etc.; so that [KWP] can promote [its] services as a gift.” (File 172, ¶ 3) Hartford then contends that since there is no express allegation in the pleadings by KWP that it used the information from its computer customer list records in any aspect of its advertising and promotional activities, no inference can be drawn that such was true. Yet the DeSan declaration notes that mailers were used to attract and keep customers coming back. Whatever the content of such mailers, the identity of the customers,

⁹⁵See *Anthem Electronics, Inc. v. Pacific Employers Ins. Co.* (9th Cir., Sept. 5, 2002, No. 01-16402) ___ F.3d ___ [2002 WL 2022196, at p. *7] (“[The insurers] are relieved of their duty to defend if [claimant’s] complaint ‘can by no conceivable theory raise a single issue which could bring it within the policy coverage.’ . . . The complaint raises an obvious inference that [the claimant] lost the use of its systems because of [the insured’s] defective products.”).

as well as the selection of appropriate coupons and mailers for customers based on their past service preferences, appears reasonably implicated by the information Hartford knew.

The Court of Appeal focused on the use of advertising concepts and ideas inherent in the customer list. Although it did not reach the question of whether or not the “misappropriation of an advertising idea” offense can only be implicated where there is a misuse of the very same marketing methodology employed by the competitor who files suit, the facts here suggest this occurred.

More critically, Hartford presents no evidence on this record that it did not, nor that the inferences drawn by Hameid are impermissible. Had it conducted the investigation required by applicable law, it would have either unearthed evidence of the use of a customer list as the facts suggest or negated that possibility. Had it defended the suit, it would have learned from the conduct of the defense the answer to these questions. Hartford’s approach to coverage places unreasonable burdens upon an insured and narrowly defines the character of what must be alleged to trigger a defense.

While the Third Circuit in *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, *supra*, 193 F.3d 742, 748, found no coverage because the sole act creating liability there at issue was theft, here that is not true. The separate injurious “use” implicated by KWP’s trade secret and unfair competition claims, requires a more careful analysis of the facts. So understood, this case is analogous to a number of decisions where the character of the fact allegations required inferences either because the plaintiff sought to avoid triggering coverage in its

complaint or because the questions asked by the policy were not answered one way or the other on the face of the pleadings and other extrinsic evidence.⁹⁶

V. THE CAUSAL NEXUS BETWEEN THE OFFENSE “MISAPPROPRIATION OF ADVERTISING IDEAS” AND THE INSURED’S ADVERTISING ACTIVITIES IS NOT ADDRESSED IN THE ISSUES CERTIFIED TO THIS COURT BECAUSE IT WAS UNDISPUTED THAT THE NEXUS WAS MET

A. Careful Review of the Cases Cited by Insurer *Amici* Reveals that They Support a Finding that the Causal Nexus Is Between Advertising and Offense, Not Advertising and the Ultimate Damages, Which Need Only “Arise out of” an “Advertising Injury”

United National’s citation to *Simply Fresh Fruit, Inc. v. Continental Insurance Co.* (9th Cir. 1996) 94 F.3d 1219, 1222 (hereafter “*Simply Fresh Fruit*”), turns on its head the

⁹⁶*American Guar. & Liab. Ins. Co. v. Vista Med. Supply* (N.D.Cal. 1988) 699 F.Supp. 787, 794 (emphasis added) (“Wilson has made no allegations in her complaint that can be read as stating facts giving rise to potential liability for defamation. . . . However, in a declaration she made in the underlying state court action, Wilson states that she was ‘repeatedly falsely accused by Dr. Kramer for being responsible for purchase of the computer and the resulting problems [and was] falsely accused of dereliction of my duties in terms of spending excessive amounts on supplies and renovations of buildings. . . . **Wilson’s allegations about false statements made about her could give rise to a claim of defamation.**”); *Dobrin v. Allstate Ins. Co.* (C.D.Cal. 1995) 897 F.Supp. 442, 444 (emphasis added) (“Dobrin recognizes that Raitt did not specifically state ‘libel,’ ‘slander,’ or ‘publication of material damaging to one’s reputation’ as one of the causes of action. Nonetheless, Dobrin argues that the factual allegations demonstrate **that the breach of fiduciary duty claim is premised on the claim that Dobrin misrepresented the nature of the dissolution in order to divert clients away from Raitt, thus causing Raitt damage to his business reputation.** Consequently, a potential claim for personal injury as defined under the policy exists.”); *Lamb, supra*, 123 Cal.Rptr.2d 256, 269-70 (emphasis added) (“The term disparagement has been held to include statements about a competitor’s goods that are untrue or misleading and are made to influence potential purchasers not to buy. . . . **Here, Continental’s complaint alleges that Lamb contacted Continental’s customers and falsely accused Continental’s products of infringing on Lamb’s patent. This clearly constituted a ‘publication of matter derogatory to the plaintiff’s title to his property, or its quality, or to his business in general.’**”).

proper causation test.⁹⁷ It is not the relationship between advertising activity and injury which counts, but rather advertising activity and one of the enumerated offenses that constitute advertising injury. A careful reading of *Simply Fresh Fruit*, which cited *Bank of the West*⁹⁸ for the proposition, evidences same, as *Bank of the West* used the term “advertising injury” to reference “advertising injury” in quotations.⁹⁹

Insurer *Amici*’s focus on the causation analysis of two copyright coverage cases – *Sentry Ins. v. R.J. Weber Co., Inc.* (5th Cir. 1993) 2 F.3d 554, 557; and *Robert Bowden, Inc. v. Aetna Cas. & Sur. Co.* (N.D.Ga. 1997) 977 F.Supp. 1475, 1480 – is misplaced. Both cases are readily distinguishable.¹⁰⁰

B. To the Extent That Any “Advertising Injury” Coverage Case Requires the Injury or Damage Be Complete in the Advertising, Both Such Cases Misstate Jurisprudential Principles Applicable to Offense-Based Coverage

1. The Trigger for “Offense” Based Coverage Is How Liability Is Established under Claims That Fall Within an Enumerated Offense, Not the Damages That Arise out of Same

⁹⁷The court of appeal concluded that the “advertising idea” misappropriation was caused by advertising activities. That issue was not the subject of review to this Court, and that aspect of the decision need not be revisited. United National’s attempt to do so is improper.

⁹⁸*Bank of the West, supra*, 2 Cal.4th 1254.

⁹⁹See **United Policyholders Brief**, § III, pp. 3-14.

¹⁰⁰See *Ryland Group, Inc. v. Travelers Indem. Co., supra*, 2000 U.S. Dist. LEXIS 21412, at pp. *16-17 (“In contrast to *Sentry Insurance* and *Delta Computer*, KFA’s Complaint expressly alleged that Ryland’s use of ‘non-pictorial representations of the Copyrighted Works in promotional and advertising materials as described above has infringed and is infringing KFA’s copyrights’ . . . and that ‘Ryland’s use of non-pictorial depictions of such derivative works in promotional and advertising materials as described above has infringed and is infringing KFA’s Copyright.’”).

The focus in *Simply Fresh Fruit* and *Microtec*¹⁰¹ upon injury rather than offense is inconsistent with the most recent decision by Justice Croskey. See *Lamb, supra*, 123 Cal.Rptr.2d at p. 267 (emphasis added):

2. *Principles of Personal Injury Coverage*

. . . Coverage for personal injury is not determined by the nature of the damages sought in the action against the insured, but by *the nature of the claims* made against the insured in that action. Under the personal injury policy provision, “coverage . . . is triggered by the *offense*, not the injury or damage which a plaintiff suffers.” (*Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, 511; italics added.)

2. *Amici Insurers’ Cases Do Not Stand for the Propositions Cited*

The court in *Peerless Lighting Corp. v. American Motorists Ins. Co.* (2000) 82 Cal.App.4th 995, 1009 and 1011 [98 Cal.Rptr.2d 753], did not adopt any particular definition of advertising, but noted that there was a conflict on its scope. It need not have done so, as therein the insured conceded that its conduct was not advertising.

In *Zurich Ins. Co. v. Amcor Sunclipse N. Am.* (7th Cir. 2001) 241 F.3d 605 (hereafter “*Amcor Sunclipse*”) (applying California law), the court noted that it did not have the benefit of any appellate court decisions from California suggesting any broader definition of advertising than that which it adopted. As the United Policyholders *amicus* brief reveals, this was because the policyholder had deficient knowledge of this case law, not because of the absence of such authority. Hartford does not and cannot distinguish a number of reported California Court of Appeal decisions that evidence the breadth of the term “advertising”

¹⁰¹*Microtec Research, Inc. v. Nationwide Mutual Ins. Co., St. Paul Fire & Marine Ins. Co.* (9th Cir. 1994) 40 F.3d 968.

under California law prior to the issuance of a policy to Hameid herein.¹⁰² The distinction between solicitation and advertising Hartford urges based on the analysis in *Ancor Sunclipse* was found not to be persuasive by the two most recent court decisions to address this issue.¹⁰³ This Court need not be so limited in its review of the proper meaning of the term “advertising.”¹⁰⁴

C. New Case Law Supports the Finding of Causal Nexus on the Facts Herein

Even where offenses clearly are covered within the policy, such as copyright infringement, United National’s approach would prohibit coverage for the display of a product that is itself an advertisement, despite case law finding to the contrary in the copyright context. Thus, as one District Court judge applying California law noted:

In the instant case, on the other hand, the marketing demonstrations (i.e., the advertising activity) were at least part of the infringement Woltz alleged. **Physically demonstrating the allegedly copyrighted software to market one’s business is a form of infringement akin to using copyrighted music in an advertisement to market a product.** Both uses represent copyright infringement in and of themselves; they do not merely advertise past infringement.

¹⁰²See fn. 6, 7, *ante*.

¹⁰³*American Safety & Risk Services, Inc. v. Legion Indem. Co.* (E.D.La. 2001) 153 F.Supp.2d 869, 874 (“The Court considers defendant’s proposed definition of ‘advertising’ [excluding individual solicitations] a strained construction of the term, which it notes is nowhere defined in Transportation’s policy.”); *Solers, Inc. v. Hartford Cas. Ins. Co.* (E.D.Va. 2001) 146 F.Supp.2d 785, *affd.* (4th Cir. June 12, 2002, No. 01-1862) 2002 U.S. App. LEXIS 11405. See 2002 U.S. App. LEXIS 11405, at p. *9 (“[T]he term ‘advertising’ might not exclude activity, even directed towards one customer, which involves the unsolicited dissemination of information giving notice of the general nature of one’s business and the services or products available for hire or sale.”).

¹⁰⁴See **United Policyholders Brief**, § V(B), pp. 30-43 (“**Well Established Principles of California Insurance Law Dictate a Broad and Contextual Definition of ‘Advertising’**”).

For example, if a tavern advertises that it plays Grammy-award winning music in its establishment, that advertisement would not constitute an infringement of the music. . . . **If, on the other hand, the tavern attempted to attract patrons by actually playing a Grammy-award winning song in one of its advertisements, that would constitute infringement if the tavern did not have authorization to do so.** Such an advertisement would do more than just reveal that the tavern has infringed the copyright in the past; the advertisement would actually infringe the copyright in order to attract customers. **The infringement would thus be a form of advertising activity.**¹⁰⁵

In *Bear Wolf, Inc. v. Hartford Ins. Co.*, *supra*, 819 So.2d 818 [2002 Fla.App. LEXIS 5718], the court interpreted distinct policy language which defined the term “advertisement” as encompassing “widespread public distribution.” Even its definitions of this broad provision are narrower than those urged by Insurer *Amici* to apply to the undefined “advertising” term pertinent herein.

The insured argues that the trial court gave a narrow definition to the term “widespread public distribution,” when it should have interpreted the term liberally in favor of the insured and strictly against the insurer. . . .

The insured also contends that the trial court wrongfully assumed that the trade show was not open to the public when this fact could not be determined from reading the complaint. We agree. . . .

In addition, it has been held that displaying a copyrighted work at a trade show which is restricted to members of a trade association and qualified buyers would constitute a display of “copyrighted work publicly” under the federal Copyright Act, 17 U.S.C. § 106(5). *Thomas v. Pansy Ellen Prods., Inc.*, 672 F. Supp. 237, 1988 Copr.L.Dec. P26, 235, 5 U.S.P.Q. 2d 1322 (W.D.N.C. 1987).

. . . .
The term “widespread public distribution” must be read in connection with the preceding references to radio, television, etc. . . .

¹⁰⁵*Copart, Inc. v. Travelers Indem. Co.* (N.D.Cal., June 11, 1998, No. C-97-1862-VRW) 1998 U.S. Dist. LEXIS 23454, at pp. *14-15, *affd.* (9th Cir., Apr. 3, 2001, Nos. 99-17380, 99-17470) 2001 U.S. App. LEXIS 6140 (emphasis added).

At oral argument, counsel for the insurer conceded, as well he should have, that if the product had been advertised on a single billboard with very little exposure to the public because of its isolated location, it would qualify under the policy as an advertisement. Along those same lines, an advertisement in a small town newspaper with very limited circulation would also be an advertisement. Given those examples, **we see no reason to read “widespread public distribution” so narrowly as to exclude a display at one of the industry’s largest trade shows, whether it was open to the general public or not.**¹⁰⁶

United National’s approach misperceives the character of offense-based coverage.

It is also out of step with the current case law defining the meaning of “advertising,” and makes distinctions which are unworkable and unmanageable.

VI. ACTIONABLE USE OF MARKETING DATA FOR PROMOTIONAL PURPOSES IS ADVERTISING, AND THE LIABILITY THAT FLOWS FROM SAME MAY BE A “MISAPPROPRIATION OF ADVERTISING IDEAS”

A. *Sentex II* Accurately Reflects California Law

In essence, American International Companies argues that because *Sentex II, supra*, 93 F.3d 578, is inconsistent with *Select Design, supra*, 674 A.2d 798, this Court should elect to ignore *Sentex II* and follow *Select Design*. Precisely the reverse is true. While the *Sentex II* court focused on the wrongful conduct, which was promotional use of the trade secrets constituting customer lists and customer list information, this conduct was chargeable under the Uniform Trade Secrets Act as a distinct basis for liability.¹⁰⁷

¹⁰⁶*Bear Wolf, Inc. v. Hartford Ins. Co., supra*, 819 So.2d 818, 820-21 [2002 Fla.App. LEXIS 5718, at pp. *4-6] (emphasis added).

¹⁰⁷Public disclosure of a trade secret can destroy its value and thereby harm the trade secret owner. *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs., Inc.* (N.D.Cal. 1995) 923 F.Supp. 1231, 1257, fn. 31 (Disclosure of less than entire secret is still misappropriation.).

Similarly, *amici* for the National Association of Independent Insurers and Lumbermens Mutual Casualty Co. misunderstand how liability would attach in the underlying action when they urge that “no covered offense was . . . committed **in** the insured’s advertising,”¹⁰⁸ Insurer *Amici* fail to realize that under applicable trade secret law, misappropriation includes wrongful use – here, of “proprietary information”; in *Sentex II*, of “marketing techniques.”¹⁰⁹ Having failed to focus on how liability attaches in such cases, the Insurer *Amici*’s coverage analysis goes awry.

Where the trade secret at issue is customer preferences and other proprietary customer information, or where marketing a product or service requires overcoming customer resistance, the list may represent a significant marketing investment and be separately protectable.¹¹⁰ “Use” of other proprietary information including the marketing data at issue

¹⁰⁸**NAII & Lumbermens Brief** at p. 3.

¹⁰⁹Under California law, use of information pertaining to customers, such as identity, pricing, and special needs, can be misappropriation because such matters lend to the plaintiff “independent economic value.” *Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514 [66 Cal.Rptr.2d 731] (The use of a customer list by former employees of the plaintiff agency was a violation of the Act constituting “misappropriation.”); *Courtesy Temporary Serv., Inc. v. Camacho* (1990) 222 Cal.App.3d 1278, 1286-92 [272 Cal.Rptr. 352, 357-61] (Issuance of a preliminary injunction to protect plaintiff’s customer list was a sound exercise of discretion because the very character of customer information is that it reduces, from a large universe to a small “proven” universe, the number of potential purchasers of goods or users of services.); *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 17-21 [286 Cal.Rptr. 518, 526-29].

¹¹⁰*Kozuch v. CRA-MAR Video Center, Inc.* (Ind.App. 1985) 478 N.E.2d 110, 113 (list of customers purchasing hardware and memberships from video store was trade secret, based on evidence it could not have been created other than through video store’s business operations).

as well as pertinent in *Sentex II*, whether actively or constructively, is a separate basis for liability under the Uniform Trade Secrets Act in California.¹¹¹

Where underlying claims relate to misappropriation of marketing and sales techniques, courts have held that they are included in the covered risk of “misappropriation of advertising ideas or style of doing business” and considered methods of gaining customers to be “advertising ideas.”¹¹² This approach is consistent with ISO’s pronouncements as to its proper interpretation made in an explanatory memorandum, as well as the plethora of decisional authority relating to this offense, and proper linguistic analysis that evidences the inherent ambiguity of this noun-noun compound phrase.¹¹³

B. A Number of Insurers Have Adopted Express Intellectual Property Exclusions That Eliminate Trade Secret Misappropriation from Coverage

Many insurers who are members of *Amici* have issued such policies over the 1986 ISO form with express “trade secret” exclusions, thereby evidencing that they understood its scope was sufficient to encompass such claims where they bore a causal nexus to the insured’s advertising activities, or else there would have been no need to exclude them from its scope.¹¹⁴ The coverage analysis in *Sentex II* is consistent with Justice Croskey’s

¹¹¹(Civ. Code, § 3426.1, subd. (b).) See also Restatement Third of Unfair Competition (1995) section 40(b)(4).

¹¹²See fn. 85, *ante*.

¹¹³See Gauntlett, *supra*, section 1.02[B][2], pages 1-13 - 1-15.

¹¹⁴See Gauntlett, *supra*, Ch. 15, Coverage for Trade Secrets Under the 1986 ISO CGL Policy Form, section 15.04, “Misappropriation of Trade Secrets Falls Within the Offense of ‘Misappropriation of Advertising Ideas or Style of Doing Business,’” pages 15-9 - 15-15.

articulation of the distinct nature of offense-based coverage in *Lamb, supra*, 123 Cal.Rptr.2d 256.

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VII. CONCLUSION

For all the above reasons, this Court should either dismiss the Petition for Review as improvidently granted or affirm the Court of Appeal's ruling.

Dated: September __, 2002

LAW OFFICES OF BARNARD F. KLEIN

By: _____
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CERTIFICATE OF COMPLIANCE
Pursuant to Cal. Rules of Court, Rule 14(c)(1)
for Appeal No. S104157

I certify that pursuant to California Rules of Court, Rule 14(c)(1), the attached Response brief is proportionately spaced, has a typeface of 13 points, and contains 13,881 words. The preceding word count was obtained by utilizing the word count utility in Corel WordPerfect 8 and does not include the Tables or this Certificate.

Dated: September __, 2002

LAW OFFICES OF BARNARD F. KLEIN

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