Advertising Injury Coverage for the Unauthorized Use Of Another's Name, Product, or Content on Your Webpage or Domain Name: Two Competing Interpretations of the Scope of the “Unauthorized Use” Exclusion

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Subject to a series of complex exclusions, standard CGL policies cover liability for damages because of “personal and advertising injury,” which is defined in the policy to include “injury . . . arising out of . . . [i]nfringing upon another's copyright, trade dress or slogan in your ‘advertisement.’” The policy defines “advertisement,” in turn, to mean “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 . . . includ[ing] material placed on the Internet or on similar electronic means of communication . . . .”

One of the exclusions that applies to “personal and advertising injury coverage” is entitled “Unauthorized Use Of Another's Name Or Product.” This exclusion eliminates coverage for damages because of:

“Personal and advertising injury” arising out of the unauthorized use of another’s name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

Although this exclusion has not been the subject of much coverage litigation thus far, two recent decisions - one from the Ninth Circuit Court of Appeals and another from the Eleventh Circuit - illustrate that there are two competing interpretations of the scope of the “similar tactics” clause in this exclusion. The difference between the two interpretations is subtle, but could lead to dramatically different results depending on which interpretation is followed in a coverage action.

The first interpretation is that “similar tactics” means the use of another’s name or product in online electronic information or search terms similar to e-mail addresses, domain names or metatags, to mislead potential customers. See St. Luke’s Cataract & Laser Institute, P.A. v. Zurich American Insurance Co., 506 Fed. Appx. 970 (11th Cir. 2013) (unpub.). See also AMCO Ins. Co. v. Lauren-Spencer, Inc., 500 F. Supp. 2d 721, 735-36 (S.D. Ohio 2007) (“similar” refers only to “email address, domain name or metatag”).

The second interpretation is that “similar tactics” means the use of another’s identifying information, similar to another’s name or product, in online electronic information or search terms similar to e-mail addresses, domain names or metatags, to mislead potential customers. See CollegeSource, Inc. v. Travelers Indemnity Co. of Connecticut, No. 10cv1428 (S.D. Cal. March 30, 2011) (unpub.), aff’d, 507 Fed. Appx. 718 (9th Cir. 2013) (unpub).

Set forth below are summaries of the St. Luke’s and CollegeSource decisions, which address the meaning of “similar tactics,” as well as other key issues that relate to the interpretation and application of “unauthorized use” exclusions.
Tactics Involving the Use of Another’s Name or Product in Identifying Electronic Information Similar to Email Addresses, Metatags, or Domain Names


After resigning from St. Luke’s, Sanderson opened his own practice and relaunched the LASERSPECIALIST.com website with content that was virtually identical to the website created for St. Luke’s. Upon realizing that Sanderson was using the LASERSPECIALIST.com domain name and content, St. Luke’s registered its copyright for the site and sued Sanderson for wrongful use of the content, layout, and design of the LASERSPECIALIST.com website.

Sanderson and St. Luke’s settled the case and requested coverage from Sanderson’s CGL insurer, which denied coverage based on an “unauthorized use” exclusion that eliminated coverage for damages because of “‘personal and advertising injury’ arising out of the unauthorized use of another’s name or product in [Sanderson’s] e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.”

The district court agreed with the insurer, holding that Sanderson’s wrongful use of the content, layout and design of the LASERSPECIALIST.com website “arose from Sanderson’s unauthorized use of the St. Luke’s domain name [or similar tactic] to mislead potential St. Luke’s customers . . . .” *Id.* at 974-75.

The appellate court reversed, citing three reasons why the “unauthorized use” exclusion did not eliminate coverage for St. Luke’s claim. First, Sanderson’s use of Sanderson’s copyrighted material on his website was not a “similar tactic,” as the term is used in the unauthorized use” exclusion, because the exclusion only “discusses the use of another’s ‘name or product,’ not any material belonging to another.” *Id.* Moreover, the exclusion applies only to conduct such as the use of another’s name or product in an email address, domain name, or metatag,” which is a misleading way to divert customers to a website. *See id.* The unauthorized use of another’s content on a webpage, without more, “does not implicate these same concerns.” *See id.* As such, the court declined to read the “similar tactics” phrase broadly as a “catch-all exclusion for the use on the internet in any way of material belonging to another.” *Id.*
Third, Sanderson’s unauthorized use of content from the LASERSPECIALIST.com website did not “arise out of” Sanderson’s “unauthorized use of St. Luke’s name or product in a . . . domain name . . .” because Sanderson’s use of St. Luke’s website content did not “flow from” or “grow out of” Sanderson’s use of LASERSPECIALIST.com domain name, and a “causal connection between Sanderson’s use of copyrighted content and his use of St. Luke’s domain name was required for the ‘unauthorized use’ exclusion to apply.” See id. at 978.

Tactics Similar to the Use of Another’s Name or Product in Connection with Identifying Electronic Information Similar to Email Addresses, Metatags, or Domain Names


CollegeSource tendered the claim to its CGL insurer, which denied coverage for several reasons, including that an “unauthorized use” exclusion eliminated coverage. See id. at p. 7. Similar to the “unauthorized use” exclusion at issue in St. Luke’s, the exclusion in CollegeSource’s policy eliminated coverage for damages because of “‘personal and advertising injury’ arising out of the unauthorized use of another’s name or product in [CollegeSource’s] e-mail address, domain name or metatag, or any other similar activities to mislead another’s potential customers.” Id. at p. 5.

CollegeSource’s insurer contended that the use of A-1’s domain name “collegetransfer” in its domain name and substitution of “.com” for “.net” constituted either “the unauthorized use of another’s name or product in your . . . domain name” or “similar activities that mislead another’s potential customers.” See id. at pp. 9-10. According to the insurer, using another’s domain name and changing the extender (“.net” to “.com”), is a similar, if not identical, activity to using another’s “name or product name” in your domain name.” As the insurer argued, an “ordinary person” would construe the claim against CollegeTransfer as alleging the “unauthorized use of another’s name . . . in your . . . domain name.” Id. at p. 10.

In response, CollegeSource argued that the “unauthorized use” exclusion did not apply for two reasons. First, A-1 does not sell a product named “college transfer” or “college transfer.com,” and it is not named “college transfer” or “collegetransfer.com,” so the first part of the exclusion did not apply. Second,
“collegetransfer” by itself is not a domain name, and the exclusion does not apply to the use of “a similar domain name.” See id. at pp. 9-10.

The court disagreed with the insurer’s first argument, holding that because CollegeSource did not specifically use A-1’s name or product in its domain name, CollegeSource’s use of the words “collegetransfer” in its domain name did not constitute the “unauthorized use of [A-1’s] name or product” in its domain name. See id. at p. 20. However, the court found that the second part of the “unauthorized use” exclusion eliminated coverage because CollegeSource’s use of A-1’s trademarked domain name is an activity that is similar to the “unauthorized use of [A-1’s] name or product,” and “to find otherwise would render the ‘similar activities’ clause of the unauthorized use exclusion meaningless.” See id. at pp. 21.