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POTENTIAL LIABILITY ARISING OUT OF THE USE OF TRADEMARKS IN WEB SITE META TAGS AND ENSURING COVERAGE OF META TAG TRADEMARK INFRINGEMENT CLAIMS UNDER COMMERCIAL INSURANCE POLICIES

Jennifer D. Johnson

The Court is mindful of the difficulty of applying well-established doctrines to what can only be described as an amorphous situs of information, anonymous messenger of communication, and seemingly endless stream of commerce.

The Internet continues to grow each day, changing many aspects of life, including the way business is conducted. The Internet has changed business through advertising on the World Wide Web, and the ability of businesses to reach many more consumers, much more quickly and effectively. One way businesses do this is through the use of meta tags. Meta tags are keywords encoded in the background language of a Web

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2. See Randy K. Paar, Coverage For Losses Arising Out of Use of the Internet, SE64 ALI-ABA 1095, 1111 (2000) (contending that the use of the Internet will cause an explosion in intellectual property claims against businesses, and will also change the types of insurance businesses buy and how they buy it); Robert L. Tucker, Information Superhighway Robbery: The Tortious Misuse of Links, Frames, Metatags, and Domain Names, 4 VA. J.L. & TECH. 8, *2 (1999), at http:/www.vjolt.net/vol4/v4i2a8-tucker.html (commenting on the industrial, technical and societal changes caused by the increased use of the Internet).
3. See Paar, supra note 2, at 1111.
4. See F. Gregory Lastowka, Search Engines, HTML, and Trademarks: What's the Meta For?, 86 VA. L. REV. 835, 835 (2000) (noting that the Internet has evolved from a "vast library" to a "sprawling mall").
5. See Maureen A. O'Rourke, Defining the Limits of Free-Riding in Cyberspace: Trademark Liability for Metatagging, 33 GONZ. L. REV. 277, 278 (1997) (describing the use of meta tags as a way for businesses to inform Internet users that their site exists).
site that search engines read in order to categorize Web sites by content. Meta tags are a valuable tool in sorting out the massive volume of information on the Web.

Meta tags can be misused. For example, some companies take the trademark of a competitor and place it in its own Web site's meta tags so that consumers searching the Web for the competitor's products will reach the wrongful user's Web site. The misuse of meta tags, which lures potential customers away from the original source of a trademark, has led to many lawsuits where the company whose trademark is wrongfully used alleges various trademark violations.

6. See ADAM L. BROOKMAN, GODFREY & KAHN, S.C., TRADEMARK LAW: PROTECTION, ENFORCEMENT AND LICENSING § 7.03 (2000 Supp.) (stating that meta tags are embedded in Web pages hiding the terms from users, but allowing search engines to read them to increase traffic to the site); cf. Creating Web Pages, available at con.law.harvard.edu/property/introtech/construct.html (last visited Apr. 2, 2001) (“If the page contains the term or terms contained in a user's search query, then he may receive a link to your page among his results.”).

7. See Scott Shipman, Trademark and Unfair Competition in Cyberspace: Can These Laws Deter “Baiting” Practices on Web Sites?, 39 SANTA CLARA L. REV. 245, 250 (1998) (commenting that meta tags allow search engines to provide users with a method of searching the Web); O'Rourke, supra note 5, at 282 (“Because of the manner in which search engines work, the metatag has emerged as a key part of Web sites' marketing strategies.”).

8. See O'Rourke, supra note 5, at 278 (describing the way in which one may improperly exploit the way search engines work).

9. See Shipman, supra note 7, at 253-55 (noting that Webmasters will “bait” search engines by filling up Web pages with often-searched terms, whether or not the Web site has anything to do with the term); O'Rourke, supra note 5, at 278 (noting that while Internet users never see meta tags, a search engine may return a search result that has nothing to do with the searched term based on the information given in the meta tags).

On the other hand, not all companies that use another's trademark in meta tags do so wrongfully. Such companies may be acting in good faith, for the purposes of describing their own goods or services. However, since companies started using meta tags for wrongful purposes, claims of trademark infringement have increased, including increased claims against innocent users.

Innocent Web advertisers at risk for inappropriate claims of trademark infringement must ensure that their Commercial General Liability insurance policies cover claims of trademark infringement because defending claims, even when innocent, can be costly. By procuring insurance coverage for such claims, businesses can take advantage of the rich domain of Internet advertising, while simultaneously protecting themselves from the risks involved.

This Comment first discusses the basic principles of trademark law and insurance law applicable to meta tags. Part I of this comment further addresses meta tag case law and insurance coverage for trademark violations. This Comment analyzes and identifies two basic approaches courts have adopted to determine insurance coverage for trademark law violations; including the facial language approach and a more analytical approach that delves beyond insurance policy language to determine insurance coverage. Finally, Part III advocates that businesses with heavy Internet activities ensure that their Commercial General Liability insurance policy's Advertising Injury provisions cover trademark law.

the wrongful use of meta tags has led to litigation).

11. See Lisa T. Oratz, Trademarks and the Internet, available at www.perkinscoie.com/resource/ecomm/trademarks.htm (last visited Sept. 19, 2000) ("Sometimes a Web site will use someone else's trademark in its metatags for legitimate business reasons."); Bitlaw: Trademarks on the Internet, available at www.bitlaw.com/trademark/internet.html (last visited Apr. 2, 2001) (noting that the distinction between an appropriate and inappropriate use of another's trademark on the Web is how the mark is used); BROOKMAN, supra note 6, at § 7.03 (2000 Supp.) ("Meta tags only become an issue, if at all, when they embody a third party's trademark without the third party's permission.").

12. See Oratz, supra note 11; Bitlaw: Trademarks on the Internet, supra note 11 ("For instance, a person who develops a Web site that discusses her experience with Microsoft software may use Microsoft's trademarks to refer to specific products without fear of infringement").

13. See Bitlaw: Trademarks on the Internet, supra note 11 ("In addition to the increased discovery of actual trademark infringers, the expansion of the Internet is also leading to an expansion of inappropriate trademark infringement allegations.").

14. See Paar, supra note 2, at 1097 (noting that the nature of the Internet forces a reevaluation of insurance language in determining policy coverage because it gives rise to new risks and new types of losses); see also BROOKMAN, supra note 6, at § 9.04 (noting that trademark infringement actions can be costly).
Part III suggests steps insurance companies may take to provide insurance policies that adequately meet the needs of businesses on the Internet.

I. TRADEMARK LAW FOR META TAGS AND PRINCIPLES TO DETERMINE INSURANCE COVERAGE

A. The General Principles of Trademark Law Applicable to Meta Tags

A trademark is a word, name, symbol, phrase, product shape, logo, or other device a manufacturer or merchant uses to identify its goods and to distinguish those goods from the goods of others. The distinctive nature of a trademark allows consumers to identify the source of and choose between different products because a trademark provides predictability and consistency for the goods they represent. The more distinctive a trademark, the more protection it is afforded from use by competitors. Allegations of trademark infringement involving the use of meta tags usually include claims of trademark infringement, unfair competition, and trademark dilution.

The Lanham Act outlines the protections afforded trademark holders under federal law. Section 32 of the Act provides a civil remedy against

16. See J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§ 2:3, 3:1, and 3:2 (3d ed. 1996) (noting that trademarks identify the source of goods, helping consumers identify the expected quality of goods, assisting consumers in finding goods that suit their needs, and assisting consumers in returning to the identified product in the future).
17. See Brookman, supra note 6, at § 2.02(A). There are five basic categories of distinction, including: fanciful, arbitrary, suggestive, descriptive, and generic. See id. Devices that are fanciful, arbitrary, and suggestive are considered inherently distinctive and are therefore afforded the most protection. See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992). Descriptive devices are generally not protected, but may gain protection if over time they become so recognizable that they take on a "secondary meaning." See Boston Beer Co. L.P. v. Slesar Bros. Brewing Co., Inc., 9 F.3d 175, 180 (1st Cir. 1993). A device that is only descriptive on its face acquires secondary meaning when consumers recognize the device as representing the specific product. See First Bank v. First Bank Sys. Inc., 84 F.3d 1040, 1045 (8th Cir. 1996). Generic marks cannot gain trademark protection. See Two Pesos, 505 U.S. at 768. For a more in depth explanation of each of the five levels of distinctiveness, as well as trademark strength factors in general, see Brookman, supra note 6, at § 2.02(A)-(C).
18. See Brookman, supra note 6, at § 7.03 (noting that the use of meta tags may bring about claims of trademark infringement, unfair competition, and trademark dilution).
19. See 15 U.S.C. §§ 1051-1127 (1994). Although state law also protects trademarks, this Comment will focus mainly on the federal protection provided by the Lanham Act because most of the cases concerning trademark law in the meta tag context arise in the
"[a]ny person who shall, without the consent of the registrant . . . use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark . . . in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . ."20 A plaintiff asserting a claim of trademark infringement must prove three elements.21 First, a plaintiff must prove its ownership of a registered trademark.22 Second, a plaintiff must show that the defendant used (or intended to use) the trademark in interstate commerce.23 Third, the plaintiff must show that the defendant’s use of the mark is likely to cause confusion or mistake, or is likely to deceive consumers.24


21. See BROOKMAN, supra note 6, at § 9.01(A).

22. See Calamari Fisheries, Inc. v. Village Catch, Inc., 698 F. Supp. 994, 1006 (D. Mass. 1988) (“Under this section, plaintiff is required to prove . . . the ownership of a distinctive mark entitled to trademark protection.”); see also BROOKMAN, supra note 6 at § 9.01(A) (citing to Beauty Time v. VU Skin Sys., 118 F.3d 140 (3d Cir. 1997) and Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277 (3d Cir. 1991)). Ownership of a trademark exists because trademark law provides the owner of the mark with an exclusive right to use the mark. See MCCARTHY ON TRADEMARKS, supra note 16, at § 2:14. This exclusive right can be categorized as a property right, sometimes referred to as “valuable business assets.” See id. (quoting Justice Douglas in Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)). However, the “property” right created by a trademark is different from other property rights because this property right is defined by consumer perception, rather than physical boundaries or physical possession. See id. Thus “property” rights or “ownership” in a trademark is determined by the relevant mental state of consumers. See id. Further, in a legal sense, trademark laws technically do not protect a trademark from infringement; what the law actually protects is the public’s right to be free of confusion regarding the owner of a mark. See id. Because the property right associated with trademarks is not physical but more part of the “bundle of rights” associated with property law, ownership of a trademark deals with intangible intellectual property. See id. The ownership of a trademark is directly linked to the property right involved in the owner’s ability to exclude others from using that trademark; if one cannot exclude others from using his or her trademark, there can be no ownership in the mark. See id.


(1) Any person who shall, without the consent of the registrant—
(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

Id.

24. Id.
The key element in a trademark infringement action is the "likelihood of confusion" about the origin of the trademark as a result of a defendant's use of the mark.25 There are roughly eight factors for determining the likelihood of confusion, including: (1) the overall similarity of the two marks; (2) the similarities of the products involved; (3) the strength of the plaintiff's mark; (4) evidence of actual confusion; (5) the intent of the defendant; (6) geographic location of the two products in the marketplace; (7) likely awareness of consumers; and (8) likelihood of market expansion in the products or services.26

In addition to claiming trademark infringement under Section 32 of the Lanham Act, a plaintiff may also allege unfair competition under Section 43(a) of the Lanham Act.27 Section 43(a) "constitutes an unfair

25. See Calamari, 698 F. Supp. at 1006 ("The basis for an action under this section is use of a mark in interstate commerce which is likely to cause confusion or to deceive purchasers concerning the origin of the goods or services."); McCarthy on Trademarks, supra note 16, at § 2:8 ("Whatever route one travels, whether by trademark infringement or unfair competition, the signs give direction to the same enquiry—whether defendant's acts are likely to cause confusion."); see, e.g., Bitlaw: Trademark Infringement, available at www.bitlaw.com/trademark/infringe.html (last visited Apr. 2, 2001) ("In a nutshell, a plaintiff in a trademark case has the burden of proving that the defendant's use of a mark has created a likelihood-of-confusion about the origin of the defendant's goods or services.").

26. See Bitlaw: Trademark Infringement, supra note 25 (noting that a plaintiff must show a likelihood of confusion). These factors form from a variety of case law and are often called the Polaroid factors. See Polaroid Corp. v. Polarad Elec. Corp., 287 F.2d 492, 495 (2d Cir. 1961) (holding that a trademark owner's chance of success depends upon the following factors: "the strength of [the owner's] mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers"); see also New York State Soc'y of Certified Pub. Accountants v. Eric Louis Assoc., Inc., 79 F. Supp. 2d 331, 340 (S.D.N.Y. 1999) (stating further that likelihood of confusion will be presumed when there is evidence that the defendant intentionally copied the mark). Cf. Playboy Enters., Inc. v. Terri Welles, Inc., 78 F. Supp. 2d 1066, 1074 (S.D. Cal. 1999) (referring to the Ninth Circuit's similar eight factor test as the Sleekcraft test).

(a) Civil action
(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false of misleading description of fact, or false or misleading representation of fact, which —
(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
(B) in commercial advertising or promotion misrepresents the nature, characteristics, qualities, or geographic origin or his or her or another person's goods, services, or commercial activities,
competition catchall.” In contrast to trademark infringement under Section 32, the unfair competition provision does not require a plaintiff to claim ownership of a trademark. The plaintiff “need only plead some false, deceptive, or misleading act on the part of the defendant, which act results in a likelihood of confusion or deception as to the origin or sponsorship of goods, services, or commercial activities and which causes damage to the plaintiff.” Similar to trademark infringement, the gravamen of unfair competition is the likelihood of confusion. The same eight factors applied to determine likelihood of confusion under trademark infringement also apply when reviewing unfair competition claims.

Trademark dilution is another means to attack improper use of a trademark in meta tags. Trademark dilution statutes exist in about half

shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

Id. Unfair competition generally encompasses a wide variety of activity, of which various forms of trademark infringement are only one part. See Brookman, supra note 6, at § 9.01(b) (including, inter alia, in the definition of unfair competition infringement of trademarks and service marks; dilution of goodwill in trademarks; use of confusingly similar names, titles, or containers and packaging; infringement of the right of publicity; theft of trade secrets; misappropriation of valuable business ideas; unreasonable rejection of goods shipped under contract; and false representation and false advertising).

28. See Brookman, supra note 6, at § 9.01(B)(1) (noting that the provision proscribes “false designation of origin, false or misleading description of fact or false or misleading representation of fact that is likely to cause confusion, mistake, or deception as to the affiliation, connection, or association with another person or as to the origin, sponsorship, or approval of goods, services, or commercial activities”) (citing 15 U.S.C. § 1125(a)).

29. See id. (noting that rather than requiring proof of ownership, unfair competition only requires proof of a false, deceptive, or misleading act by the defendant resulting in a likelihood of consumer confusion).

30. Id. (citing to Lipton v. Nature Co., 71 F.3d 464 (2d Cir. 1995); Waldman Pub’g Corp. v. Landoll, Inc., 43 F.3d 775 (2d Cir. 1994); King v. Innovation Books, 976 F.2d 824 (2d Cir. 1992)).

31. See id. (noting that a plaintiff in an unfair competition action must prove likelihood of consumer confusion as a result of the defendant’s act).

32. See id. Common law unfair competition laws may also include “misappropriation.” See Toho Co., Ltd. v. Sears, Roebuck & Co., 645 F.2d 788, 794 (9th Cir. 1981). Under California common law for unfair competition, for example, misappropriation of a trademark does not require a likelihood of confusion, but instead “prohibits the substantial copying of another’s commercial labors even when there is no likelihood of confusion.” Id.

of the states.\textsuperscript{34} Dilution occurs when a defendant's use of the mark "lessen[s] . . . the capacity of the famous mark to identify and distinguish the plaintiff's goods or services."\textsuperscript{35} Many state statutes follow the 1964 Model State Trademark Bill.\textsuperscript{36} The Bill provides for injunctive relief on the basis of likelihood of dilution of the distinctive quality of a registered trademark.\textsuperscript{37} The Bill permits injunctive relief regardless of the absence of competition between the parties or the absence of confusion by consumers.\textsuperscript{38}

As of 1996, plaintiffs may also assert a claim of dilution under federal law.\textsuperscript{39} The federal statute, found within the Lanham Act, provides injunctive relief when another business' commercial use of a famous mark causes dilution of the mark's distinctiveness in the marketplace.\textsuperscript{40} Thus, a plaintiff may only seek relief for the dilution of a mark that is


\textsuperscript{35} Brookman, supra note 6, at § 1.02(C)(2).

\textsuperscript{36} See id. at § 9.01(B)(4)(a) (stating that Section 12 of the 1964 Model State Trademark Bill is the basis for many state statutes).

\textsuperscript{37} See id. The applicable portion of the Bill provides:

\textbf{SECTION 12. INJURY TO BUSINESS REPUTATION; DILUTION.}

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this Act, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

\textit{Id.} (quoting 1964 Model State Trademark Bill).

\textsuperscript{38} See id.

\textsuperscript{39} See 15 U.S.C. § 1125(c) (West Supp. 1997) (including the remedy for dilution). Federal dilution law does not preempt state law; a plaintiff may assert either or both of the claims in an action for relief. See Brookman, supra note 6, at § 9.01(B).

\textsuperscript{40} 15 U.S.C. § 1125(c) (West Supp. 1997). The statute states that

(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection.

\textit{Id.}
both famous and distinctive. The federal statute defines dilution itself as “the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of... competition... or... likelihood of confusion, mistake, or deception.” Blurring is found where the mark is used by another on dissimilar products, lessening the original mark’s value. Tarnishment takes place where another links the mark with unrelated products that are of reduced quality or image, causing the public to associate the plaintiff’s product with the lower quality product or image.

A successful plaintiff in a trademark action is “entitled to injunctive relief and may also be entitled to monetary damages.” Monetary damages may be awarded in an amount equal to the profits gained by the infringer due to the unauthorized use of the mark. Further, damages may be awarded for unjust enrichment, or to compensate the plaintiff for

41. Id. The statute lists some factors a court may consider in determining whether or not a mark is famous and distinctive:
   (A) the degree of inherent or acquired distinctiveness of the mark;
   (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;
   (C) the duration and extent of advertising and publicity of the mark;
   (D) the geographical extent of the trading area in which the mark is used;
   (E) the channels of trade for the goods or services with which the mark is used;
   (F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks’ owner and the person against whom the injunction is sought;
   (G) the nature and extent of the use of the same or similar marks by third parties, and
   (H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

Id.

43. See Franklin Res., Inc. v. Franklin Credit Mgmt. Corp., 988 F. Supp. 322, 338 (S.D.N.Y. 1997) (noting that a showing of either blurring or tarnishment is sufficient to prove a likelihood of dilution).
44. See Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 43 (2d Cir. 1994) (noting that blurring involves “the whittling away of an established trademark’s selling power through its unauthorized use by others upon dissimilar products”).
45. See id. ("‘Tarnishment’ generally arises when the plaintiff’s trademark is linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context likely to evoke unflattering thoughts about the owner’s product").
46. See BROOKMAN, supra note 6, at § 9.05 (stating that a successful plaintiff is generally “entitled to injunctive relief and may also be entitled to monetary damages”).
47. See id. at § 9.05(B) (noting that damages may not be available where the plaintiff files suit before the defendant has obtained any benefit from the infringement).
lost profits caused by the infringement.\textsuperscript{48} There are no definitive rules to determine the circumstances under which a court may grant monetary relief.\textsuperscript{49} Some courts require a finding of willfulness (i.e., intentional infringement) on the part of the defendant.\textsuperscript{50} Other jurisdictions, however, do not require willfulness or actual damage to the plaintiff, but rather determine the applicability of monetary damages based on the overall circumstances of the case.\textsuperscript{51}

Fair use is an affirmative defense in a trademark infringement claim.\textsuperscript{52} The Lanham Act outlines a three-prong test to establish the fair use defense under the Act: “(1) Defendant’s use of the term is not as a trademark or service mark; (2) Defendant uses the term ‘fairly and in good faith;’” and “(3) Defendant uses the term ‘only to describe’ its goods or services.”\textsuperscript{53} Thus, the use of another’s mark to describe goods or services is permissible when done in good faith.\textsuperscript{54}

\textbf{B. The Use of Meta Tags}

A Web page’s meta tags are invisible to an Internet user.\textsuperscript{55} A Web

\textsuperscript{48} See id. (noting that a plaintiff may recover for lost profits directly caused by the infringement and that because actual damages are difficult to prove recovery can be based on unjust enrichment).

\textsuperscript{49} See id.

\textsuperscript{50} See Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A. Inc., 80 F.3d 749, 753 (2d Cir. 1996) (noting that for a plaintiff to recover damages and attorney’s fees based on defendant’s profits as a result of the infringement, the plaintiff must prove that the defendant acted in bad faith).

\textsuperscript{51} See Adray v. Adry-Mart Inc., 76 F.3d 984, 991 (9th Cir. 1995) (holding a court may also consider a plaintiff’s unclean hands to determine the appropriate remedy in a trademark infringement action).

\textsuperscript{52} See Brookman, supra note 6, at § 10.02(H) (“The fair use defense, can be generally equated to a claim of non-trademark use”).

\textsuperscript{53} Playboy Enters., Inc. v. Terri Welles, Inc., 78 F. Supp. 2d 1066, 1074 (S.D. Cal. 1999) (quoting 1 J. McCarthy, Trademarks and Unfair Competition, at § 11.49 (1999)). Significant to a later analysis regarding competitor use of meta tags in Part II of this Comment, when describing what may constitute evidence of bad faith (precluding the defense based on element two), the court again quotes McCarthy, stating that “a defendant’s use with the intent to ‘trade upon and dilute the good will’ of a plaintiff’s mark,” is evidence of bad faith. Id.

\textsuperscript{54} See id.

\textsuperscript{55} See Oratz, supra note 11 (noting that although meta tags are visible to search engines, they are not visible to users). Cf. Creating Web Pages, supra note 6 (“Metatags are written into the HTML document, but they do not appear on the user’s screen.”). It is important to note that the World Wide Web and Internet, though often used interchangeably, are not the same thing. See How the Web Works, available at eon.law.Harvard.edu/property/introtech/webworks.html (last visited June 1, 2001). They serve two distinct functions; the Internet is actually made up of over 100,000 interconnected networks all over the world. See id.; see also Technical Glossary, available
page is created using Hypertext Markup Language (HTML), a simple
code that describes the content of a Web page and provides display
instructions to a Web browser.\textsuperscript{56} When accessing a Web page, a user sees
text and graphics, while HTML is a hidden code that describes how those
text and graphics are arranged.\textsuperscript{57} A Web page developer places
the page's meta tags within this hidden code.\textsuperscript{58}

One of the purposes of meta tags is to guide search engines in indexing
Web pages.\textsuperscript{59} When a Web user enters a search term into a search
engine, the search engine compiles results by matching the search term
with Web page meta tags.\textsuperscript{60} Thus, the search engine results include those
pages in which the meta tags match the user's search term.\textsuperscript{61} For
example, if a Web user wants to search for Web pages containing
information on Nike shoes, the user places "Nike" as a search term in a
search engine. Search engines will then return results containing a list of

\textit{at} eon.law.harvard.edu/property/introtech/webworks.html (last visited June 1, 2001). The
information on the World Wide Web is only one type of information transported over the

56. \textit{See Creating Web Pages, supra} note 6 and accompanying text ("All web pages are
written in a standard format known as hypertext markup language, or HTML."). \textit{Cf.}
Oratz, supra note 11 ("Metatags are part of the HTML code of a Web site. . ."). A Web
browser is a software program that provides access to the Web, such as Microsoft Internet
Explorer and Netscape Navigator. \textit{See Surf the Web: Web Browsers, available at}

57. \textit{See BROOKMAN, supra} note 6, at § 7.03.

58. \textit{See Creating Web Pages, supra} note 6. There are two different types of meta tags;
keyword meta tags and description meta tags. \textit{See Shipman, supra} note 7, at 246. For the
purposes of this Comment, there is no need to distinguish between keyword and
description meta tags.

59. \textit{See BROOKMAN, supra} note 6 at § 7.03 ("Meta tags are hidden text ‘buried’ in
the coding behind a Web page."). \textit{See also Creating Web Pages, supra} note 6 (noting that
meta tags may improve the chances that a Web site will end up at the top of a search query
list); Oratz, supra note 11 (noting that meta tags are visible to search engines, which act as
a guide for users searching the World Wide Web). There are two different types of search
Directories, such as Yahoo, categorize Web sites into different groups. \textit{See id.} For more
specific information, there are also Web indexes. \textit{See id.} Indexes actually look to the
content of the page and are also called "spiders" or "robots" because they search the
entire Web actually indexing each word on the Web. \textit{See id.} These indexes, like Alta
Vista and Lycos, read meta tags and find the individual Web pages that match a search
term. \textit{See id.}

60. \textit{See BROOKMAN, supra} note 6, at § 7.03 (stating that meta tags are embedded in
Web pages hiding the terms from users, but allowing search engines to read them in order
to increase traffic to the site). \textit{See also. Creating Web Pages, supra} note 6 ("If the page
contains the term or terms contained in a user’s search query, then he may receive a link
to your page among his results.").

61. \textit{See BROOKMAN, supra} note 6, at § 7.03.
Web pages that list "Nike" as a keyword in their meta tags. This process of matching search terms with meta tag keywords is a valuable way for some search engines to sort through millions of Web pages, making it easier for users to locate relevant pages.62

Meta tags are useful tools for search engines to index Web pages.63 However, consider a variation on the above example concerning a user who wishes to search for information on Nike shoes. If Reebok knows that thousands of Web users employ the search term "Nike" daily to search for sneakers, Reebok (or some other competitor) might place the keyword "Nike" in its meta tag source code to compete with Nike. Now, not only do some search engines return results listing Web pages that provide information on Nike shoes, but they also return results listing Web pages that provide information on Reebok shoes as well. This example illustrates a competitor's (Reebok) use of another company's (Nike) trademark in its meta tags. The example is similar to recent cases where one company alleges trademark infringement, unfair competition, and/or trademark dilution against another for the wrongful use of its meta tags.64

C. General Insurance Law Principles and Precedent Applied to Claims of Trademark Law Violations

Not all situations involving one company’s use of another’s trademark...
in its meta tags constitutes trademark infringement,\textsuperscript{65} there are some legitimate purposes for such use.\textsuperscript{66} Unfortunately, the increase in discovery of actual trademark infringers has led to an increase in lawsuits inappropriately alleging trademark infringement violations against companies that properly use the trademarks of others on their Web pages.\textsuperscript{67} Thus, situations may arise where an innocent user must defend against an allegation of trademark infringement.\textsuperscript{68} For these innocent users, it is important to determine whether or not their commercial insurance policy implicates a duty of the insurance company to defend them against a trademark infringement claim.\textsuperscript{69}

Generally, courts require an insurer to defend its insured when the facts alleged by the claimant bring the incident within policy coverage.\textsuperscript{70} The circumstances that implicate an insurance company's general duty to defend its insured are extremely liberal in favor of the insured.\textsuperscript{71} As long as there is a potential that claims against an insured fall under the Commercial General Liability (CGL) policy protections, an insurer is required to defend.\textsuperscript{72} To determine whether the alleged claims may fall

\textsuperscript{65} See Oratz, supra note 11 ("Sometimes a Web site will use someone else's trademark in its metatags for legitimate business reasons."). \textsuperscript{66} See Oratz, supra note 11; see also Bitlaw: Trademarks on the Internet, supra note 11 (noting that the distinction between an appropriate and inappropriate use of another's trademark on the Web is how the mark is used); Brookman, supra note 6, at § 7.03 (2000) ("Meta tags only become an issue, if at all, when they embody a third party's trademark without the third party's permission.").

\textsuperscript{67} See Bitlaw: Trademarks on the Internet, supra note 11.

\textsuperscript{68} See id. ("In addition to the increased discovery of actual trademark infringers, the expansion of the Internet is also leading to an expansion of inappropriate trademark infringement allegations.").

\textsuperscript{69} See Paar, supra note 2, at 1097 (noting that the nature of the Internet forces a reevaluation of insurance language in determining policy coverage because it gives rise to new risks and new types of losses).


\textsuperscript{71} See, e.g., Maxtech, 1999 U.S. App. LEXIS 299778, at *4 (stating that "[a]ny doubt as to whether the facts give rise to a duty to defend should be resolved in the insured's favor").

\textsuperscript{72} See J.P. Structures, 1997 U.S. App. LEXIS 34565, at *8 (requiring insurance
under the policy, an insurer must consider the policy language along with the complaint against the insured. The duty to defend an insured is quite broad, but if the acts alleged are clearly not within the policy coverage, the insurer is not required to defend.

CGL policies generally include an "Advertising Injury" provision. These provisions provide protection against claims or injuries arising from a business' advertising activities. Depending upon the wording of the policy, some CGL policies include coverage for trademark infringement, while others do not have this provision.

CGL policies may also contain exclusions from policy coverage, such as prior acts exclusions or exclusions for intentional acts. Prior acts exclusions deny coverage for any claims arising out of acts that took

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company to defend when underlying claims "arguably fall within the language of the policy"); see also Federated Mut. Ins. Co. v. Power Lift, Nos. 97-55242, 97-55254, 1998 U.S. App. LEXIS 13602, at *4 (9th Cir. June 22, 1998) (noting that although current allegations indicate coverage exclusion, the potential that a subsequent amended complaint may bring the allegations within coverage implicates the duty to defend).

73. See Nationwide Ins. v. Zavalis, 52 F.3d 689, 694 (7th Cir. 1995) (noting that the duty to defend depends primarily upon the face of the underlying complaint); United Servs. Auto. Ass'n v. Elitzky, 517 A.2d 982, 985 (Pa. 1986) ("As long as the complaint comprehends an injury which may be within the scope of the policy, the company must defend the insured until the insurer can confine the claim to a recovery that the policy does not cover.").


75. See ENCYCLOPEDIA OF AMERICAN INSURANCE LAW, supra note 70, at 497; see also Novell, Inc. v. Fed. Ins. Co., 141 F.3d 983, 986-87 (10th Cir. 1998) (noting the existence of "Advertising Injury" language in standard policy forms published by the Insurance Services Office). The Novell court set forth an example of standard Advertising Injury clause language:

When used with respect to insurance under this policy: ADVERTISING INJURY means injury arising solely out of one or more of the following offenses committed in the course of advertising your goods, products or services:
1. oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
2. misappropriation of advertising ideas or style of doing business;
3. infringement of copyrighted advertising materials, titles or slogans.

Id. at 986.

76. See Novell, 141 F.3d at 986.

77. See id. at 987.

78. See Beacon Ins. Co. v. Kleoudis, 652 N.E.2d 1, 4 (Ohio 1995) (holding that intentional acts exclusion did not apply where injury was neither expected nor intended); Federated Mut. Ins. Co. v. Power Lift, Nos. 97-55242, 97-55254, 1998 U.S. App. LEXIS 13602, at *4 (9th Cir. June 2, 1998) (supporting the premise that intentional acts may be excluded from coverage); Maxtech, 1999 U.S. App. LEXIS 29978, at *5-*6 (reviewing a prior acts exclusion).
place prior to the effective date of the policy.\textsuperscript{79} Intentional acts exclusions preclude coverage of claims based on an insured's intentional violation of the law.\textsuperscript{80}

The question of whether a CGL policy covers trademark infringement depends upon the language of the Advertising Injury provision.\textsuperscript{81} Some policies explicitly cover trademark infringement;\textsuperscript{82} however, many policies do not specifically include or exclude trademark infringement.\textsuperscript{83} Because CGL policies often do not specifically include or exclude coverage for trademark infringement, insured parties often argue that coverage exists under the Advertising Injury provision of their CGL policy.\textsuperscript{84} "Advertising injury" generally includes in its definition coverage for "misappropriation of advertising ideas or style of doing business" and "infringement of copyright[ed] [advertising materials,] title[s] or slogan[s]."\textsuperscript{85} These are the two elements under which insured parties argue that trademark infringement may fall.\textsuperscript{86}

\textsuperscript{79} See Maxtech, 1999 U.S. App. LEXIS 29978, at *6. The Ninth Circuit held in Maxtech that there was no duty for the insurance company to defend for claims of trademark violations. See id. Although the policy at issue specifically covered "infringement of trademarked or service marked titles or slogans," coverage was nonetheless excluded. See id. at *5-*6. The court held that the policy's prior acts exclusion precluded coverage because the insured's first publication of the material causing the injury occurred prior to the beginning of the policy. See id. at *6. Therefore, although the claim itself was covered, the prior acts exclusion precluded coverage. See id.

\textsuperscript{80} See DESKBOOK ENCYCLOPEDIA OF AMERICAN INSURANCE LAW, supra note 70, at 497.

\textsuperscript{81} See Novell, 141 F.3d at 985-86 (stating that to determine coverage the court must analyze the offense in relation to the Advertising Injury provision).

\textsuperscript{82} See Maxtech, 1999 U.S. App. LEXIS 29978, at *5; see also supra nn. 75-77 and accompanying text.

\textsuperscript{83} See supra nn. 75-77 and accompanying text.

\textsuperscript{84} See Maxtech, 1999 U.S. App. LEXIS 29978, at *2 (avoiding the issue of coverage for trademark violations based on an Advertising Injury provision by excluding coverage based on a prior acts exclusion); Novell, 141 F.3d at 989 (holding that the insurer had no obligation to defend the insured on trademark violations); Federated Mut. Ins. Co. v. Power Lift, Nos. 97-55242, 97-55254, 1998 U.S. App. LEXIS 13602, at *2-*3 (9th Cir. June 22, 1998) (holding that a potential for coverage requires the insurer to defend the insured on trademark violations).

\textsuperscript{85} See Novell, 141 F.3d at 987; Power Lift, 1998 U.S. App. LEXIS 13602, at *3 (noting that in 1986 the Insurance Services Office, which provides standard insurance forms, added "misappropriation of . . . style of doing business" to the standard insurance policy language, which already included "infringement of copyright, title, or slogan").

\textsuperscript{86} See Power Lift, 1998 U.S. App. LEXIS 13602, at *2 (noting that allegations of trademark infringement may fall under "misappropriation of advertising ideas or style of doing business" in a Commercial General Liability (CGL) policy Advertising Injury clause); ShoLodge, Inc. v. Travelers Indem. Co., 168 F.3d 256, 258-59 (6th Cir. 1999) (alleging unsuccessfully that coverage for trademark law violations based on both "misappropriation of advertising idea or style of doing business," and "infringement of
In *Federated Mutual Insurance Co. v. Power Lift*, the Ninth Circuit reversed a lower court ruling that the language ""misappropriation of advertising ideas or style of doing business"" did not cover trademark violations. The Ninth Circuit announced that the law of California dictated that trademark violations are within the scope of the misappropriation provision of a CGL policy.

The Ninth Circuit further ruled that coverage of a claim alleging trademark infringement triggered an insurance company's duty to defend, even when the underlying complaint alleged an insured party's intentional trademark violation. Despite the existence of an intentional acts exclusion in Power Lift's CGL policy, the court found a basis for insurance coverage because intentional wrongdoing is not a necessary element of trademark infringement. Therefore, the intentional acts exclusion did not apply. The Ninth Circuit also noted that since some uses of another's trademark are legitimate in advertising, and wrongful use is not always willful, California law would not preclude coverage.

Thus, although intentional acts are generally excluded from CGL policy coverage, under the Ninth Circuit's ruling on California law, an insurance company is required to defend the insured party even where the complaint alleges only intentional trademark infringement.

However, the Sixth Circuit, in *ShoLodge, Inc. v. Travelers Indemnity Co.*, held that neither the ""misappropriation of advertising ideas or style of doing business"" nor the ""infringement of copyright, title, or slogan"" language of Advertising Injury provisions cover trademark infringement. The Sixth Circuit reasoned that if Travelers intended to include trademark infringement as a covered offense, the company

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88. See id. at *1-*2 (reversing the district court ruling that there was no duty to defend in Lanham Act violations).
90. See id. at *4.
91. See id.
92. See id.
93. See id. at *5 (""Similarly, if use of the trademarks is ultimately found to be wrongful, that does not mean that the wrong must necessarily have been willful."").
94. See id. (holding that in California there is a duty to defend even where a claim of trademark infringement alleges only intentional infringement).
95. 168 F.3d 256 (6th Cir. 1999).
96. See id. at 250-60 (relying on *Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795 (6th Cir. 1996)*).
would have enumerated it in the policy as specifically as it listed copyright infringement. In reaching this decision, the Sixth Circuit relied heavily on Advance Watch Co. v. Kemper National Insurance Co., in which the court expressly held that "misappropriation of advertising ideas or style of doing business" does not extend coverage to trademark law violations.

D. Trademark Law Precedent Regarding Meta Tags

The first meta tag usage disputes ended in settlement, making it difficult to determine the state of the law on the subject. However, courts have adjudicated a small number of cases involving meta tags. Several of these cases deal with other forms of alleged infringement in addition to the limited area of meta tags, nevertheless they are instructive on the state of the law regarding meta tag usage.

In the first of the meta tag cases, Playboy Enterprises, Inc. v. Calvin Designer Label, the District Court for the Northern District of California granted Playboy Enterprises injunctive relief against Calvin

97. See id. at 260 ("The absence of any express reference to trademark or service mark infringement in the policy's definition of Advertising Injury further bolsters this interpretation.").
98. 99 F.3d 795, 806-07 (6th Cir. 1996).
99. See ShoLodge, 168 F.3d at 259 (holding that "the decision in Advance Watch is applicable here and defeats the argument made by ShoLodge that service mark infringement falls within the category of 'misappropriation of advertising ideas or style of doing business'").
100. See John R. Warner, Trademark Infringement Online: Appropriate Federal Relief From the Illicit Use of Trademarked Material in Web Site Meta Tags, 22 T. JEFFERSON L. REV. 133, 150 (2000) (noting that the first two meta tag disputes settled before trial and ended in injunctive relief agreed to by the parties).
102. See Warner, supra note 100, at 149-50. Only the Ninth Circuit in Brookfield has specifically discussed trademark infringement through the use of meta tags separately from other forms of trademark infringement. See Brookfield, 174 F. 3d at 1061-66.
Designer Label for Calvin's use of Playboy's trademarked words, "Playboy" and "Playmate," in its meta tags. The Calvin court seemed most influenced by the defendant's blatant attempt to use the trademarks in order to take advantage of Playboy's goodwill and recognition. The court noted the similarity between Calvin's Web site and Playboy's Web site in determining that there was a high likelihood of confusion that may lead consumers to believe Playboy and Calvin were somehow affiliated. Moreover, the court also held that the defendant's willful use of the trademarks constituted dilution of Playboy's trademark because it blurred the distinctiveness of the trademarked words.

After successfully defending its trademarks against Calvin Designer Label, Playboy was victorious in its next meta tag dispute, Playboy Enterprises, Inc. v. AsiaFocus International, Inc. Defendant AsiaFocus, like Calvin, used Playboy's trademarked words, "Playboy" and "Playmate," in its domain name and meta tags. Playboy sued AsiaFocus for trademark infringement, unfair competition, and dilution. The District Court for the Eastern District of Virginia found in Playboy's favor on all three claims. Like the Calvin court, the District Court for the Eastern District of Virginia seemed especially affected by what, in its view, constituted "willful infringement," evidenced by the defendant's purposeful deception. However, rather than granting an injunction against AsiaFocus, the court awarded

104. See id. at 1221-22. Not only were the words "Playboy" and "Playmate" used in the defendant's meta tags, but also in its domain name and within the site itself. See id. at 1221. The trademarks within the site were hidden from the viewer by using buried code, making them invisible in a way similar to meta tags. See id.

105. See id. at 1221-22.

106. See id. (enjoining defendant from using Playboy's trademarks in such a way that would cause consumer confusion and the erroneous belief that the Web sites were related).

107. See id. at 1221 ("Plaintiff PEI has demonstrated a sufficient ... likelihood of success on the merits of its trademark infringement, unfair competition and dilution claims. . . .").


109. See id. at *3.

110. See id. at *1.

111. See id. at *5-7. Further, the court specifically sided with Playboy on the meta tag issue, holding that the use of the meta tags resulted in the dilution of Playboy's trademarks. See id. at *7.

112. See id. at *4, *9 (noting that defendants' active encouragement of other Web sites to promote the infringing site was evidence of willfulness). The court found AsiaFocus' acts willful because they "purposefully employed deceptive tactics to attract consumers to their Web site under the guise that their sites are sponsored by or somehow affiliated with [Playboy]." Id. at *3.
monetary damages for the first time in a meta tag case.\textsuperscript{113}

In a separate meta tag case, \textit{Playboy Enterprises, Inc. v. Terri Welles, Inc.},\textsuperscript{114} Playboy was not as successful.\textsuperscript{115} Terri Welles was a former Playboy model that appeared in several \textit{Playboy} magazines since 1980 and was Playmate of the Year in 1981.\textsuperscript{116} In 1997, Welles started a Web site, www.terriwelkes.com, to promote her modeling career.\textsuperscript{117} Welles' Web site includes Playboy trademarks in both the site itself and the meta tags, including "Playboy," "Playmate," and "PMOY '81" (Playmate of the Year 1981).\textsuperscript{118} Unlike other cases, Welles' Web site contained disclaimers indicating that her Web site was not related to Playboy.\textsuperscript{119} When Welles refused to stop using the trademarks, Playboy sued her for numerous causes of action including trademark infringement, unfair competition, and dilution under the Lanham Act.\textsuperscript{120}

The District Court for the Southern District of California ruled for Welles, upholding her defense of fair use, because she used the trademarked terms in good faith only to describe herself.\textsuperscript{121} As with the court's decisions in both \textit{Calvin} and \textit{AsiaFocus}, the Welles court emphasized the intent of the defendant.\textsuperscript{122} Because Welles' intent to use the trademarked terms was predicated upon good faith as evidenced by disclaimers, the court found no violation of trademark law.\textsuperscript{123}

The District Court for the District of Massachusetts discussed the meta tag issue in \textit{Niton Corp. v. Radiation Monitoring Devices, Inc.}\textsuperscript{124} The

\textsuperscript{113} See \textit{id.} at *9. The court awarded Playboy $500,000 for each of four violations, as well as $1,000,000 for "willful infringement" that was "sufficiently broad, extensive, blatant, and willful" to warrant the maximum damage award. \textit{See id.} at *9.

\textsuperscript{114} 78 F. Supp. 2d 1066 (S.D. Cal. 1999).

\textsuperscript{115} \textit{See id.} at 1070 (granting defendant's motion for summary judgment).

\textsuperscript{116} \textit{See id.} at 1071.

\textsuperscript{117} \textit{See id.} Welles' Web site included photographs of herself, a fan club posting board, an autobiography, and a listing of upcoming events and appearances. \textit{See id.}

\textsuperscript{118} \textit{See id.} at 1072.

\textsuperscript{119} \textit{See id.} at 1080.

\textsuperscript{120} \textit{See id.} at 1072 (noting that Playboy first invited Welles to join Playboy's new "Cyber Club," and that when Welles refused Playboy demanded that she remove Playboy's trademark from her Web site).

\textsuperscript{121} \textit{See id.} at 1079-80. The \textit{Welles} decision is the only meta tag case to date in which the defendant prevailed. \textit{See Warner, supra} note 100, at 165.

\textsuperscript{122} \textit{See Welles,} 78 F. Supp. 2d at 1079-80 ("[T]he court finds that Plaintiff has failed to identify any conduct of Ms. Welles that is sufficiently blameworthy.").

\textsuperscript{123} \textit{See id.} at 1095-96 ("[I]n light of the fact that there is no evidence of an intent by Ms. Welles to trade upon the goodwill of Plaintiff's marks by falsely implying sponsorship by or affiliation with PEI... Plaintiff has failed to raise a material issue of fact concerning the fair use of PEI terms.").

parties involved were direct competitors. The two corporations, Niton and Radiation Monitoring Devices (RMD), produced lead measuring products. While RMD did not specifically use Niton's trademarks, Niton alleged that RMD placed references and links to Niton's Web site in its meta tag code in an attempt to lure Niton's customers to its own site. The court granted Niton relief through a modified injunction, ordering RMD to stop using Niton's references and links in its meta tags, prohibiting attempts to actually claim or give the impression that RMD's site was related to Niton.

While the previous courts discussed meta tags in conjunction with other issues, such as infringement within the visible text of Web sites, the Ninth Circuit in Brookfield Communications, Inc. v. West Coast Entertainment Corp. was the first to specifically address the use of another's trademark in Web site meta tags as a separate issue. Brookfield Communications, Inc. ("Brookfield") created and sold software under the trademark "MovieBuff," while the defendant, West Coast Entertainment ("West Coast"), rented videos and held rights to the domain name moviebuff.com. Brookfield sued West Coast, alleging that West Coast's use of Brookfield's trademark in its domain

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125. See id. at 103.
126. See id.
127. See id.
128. See id. The injunction was tentative because it allowed RMD to seek a change in the order for cause later on, and also allowed RMD to continue its unfair practices upon providing Niton with compensation. See id. at 105. The court's failure to discuss RMD's intent is unusual, especially given the extreme and pervasive nature of the infringement. See id. Niton previously filed suit against RMD for trademark violations through other forms of advertising before discovering the meta tag copying. See id. at 104. Robert Bowley, a Niton employee, learned that RMD's Web site infringed Niton's trademark by chance while servicing Niton's site. See id. Bowley performed a search for "Niton" and discovered that the search returned several results for RMD Web sites. See id. Bowley used Netscape's "View Source" command to discover that RMD's meta tags contained several terms related to Niton, but not to RMD. See id. Further, after performing a search using the phrase "The Home Page of Niton Corporation," the search turned up five matches for RMD's Web sites, revealing that five of RMD's Web sites contained the meta tag "The Home Page of Niton Corporation, makers of the finest lead, radon, and multi-element detectors." See id.
129. 174 F.3d 1036 (9th Cir. 1999).
131. See Brookfield, 174 F.3d at 1042.
name and meta tags constituted trademark infringement.\textsuperscript{132}

The Ninth Circuit found for Brookfield as to the trademark infringement of the MovieBuff term in West Coast's domain name, but further discussed the meta tag issue.\textsuperscript{133} The court found infringement on the meta tag issue based on "initial interest confusion" rather than on the traditional "likelihood of confusion" rationale.\textsuperscript{134} Initial interest confusion, according to the court, meant that consumers looking for Brookfield's Web site would initially be diverted to West Coast's site.\textsuperscript{135} Though the court was confident that these consumers would easily realize the mistake, the court feared that they would stay at West Coast's site.\textsuperscript{136} The court ruled that this initial interest confusion would

\hspace{1cm} \textsuperscript{132} See id. at 1041.

\hspace{1cm} \textsuperscript{133} See id. at 1061-62. A "domain name" is the combination of a Web site owner's "unique" name (such as "terriwelles") and a generic top-level domain (such as ".com", which when combined forms the domain name terriwelles.com). See Technical Glossary, supra note 55. The Ninth Circuit in Brookfield distinguished between the problem with using another's trademark in a domain name and using it in meta tags:

\hspace{1cm} Although entering "MovieBuff" into a search engine is likely to bring up a list including "westcoastvideo.com" if West Coast has included that term in its metatags, the resulting confusion is not as great as where West Coast uses the "moviebuff.com" domain name.... Nevertheless, West Coast's use of "moviebuff.com" in metatags will still result in what is known as initial interest confusion. Web surfers looking for Brookfield's "MovieBuff" products who are taken by a search engine to "westcoastvideo.com" will find a database similar enough to "MovieBuff" such that a sizeable number of consumers who were originally looking for Brookfield's product will simply decide to utilize West Coast's offerings instead. Although there is no source confusion in the sense that consumers know they are patronizing West Coast rather than Brookfield, there is nevertheless initial interest confusion in the sense that, by using "moviebuff.com" or "MovieBuff" to divert people looking for "MovieBuff" to its Web site, West Coast improperly benefits from the goodwill that Brookfield developed in its mark.

\hspace{1cm} Brookfield, 174 F.3d at 1062.

\hspace{1cm} \textsuperscript{134} See Brookfield, 174 F.3d at 1062-63.

\hspace{1cm} \textsuperscript{135} See id. at 1062.

\hspace{1cm} \textsuperscript{136} See id. The court analogized the danger to a company created by initial interest confusion in the meta tag context to improperly placed billboards:

\hspace{1cm} Using another's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store. Suppose West Coast's competitor (let's call it "Blockbuster") puts up a billboard on a highway reading—"West Coast Video: 2 miles ahead at Exit 7"—where West Coast is really located at Exit 8 but Blockbuster is located at Exit 7. Customers looking for West Coast's store will pull off at Exit 7 and drive around looking for it. Unable to locate West Coast, but seeing the Blockbuster store right by the highway entrance, they may simply rent there. Even consumers who prefer West Coast may find it not worth the trouble to continue searching for West Coast since there is a Blockbuster right there. Customers are not confused in the narrow sense: they are fully aware that they are purchasing from Blockbuster and they have no
improperly benefit West Coast, lending to West Coast the goodwill and recognition of Brookfield's established trademark. Thus, the court reversed and remanded the case, ordering a preliminary injunction against West Coast's use of the MovieBuff term.

II. ADVERTISING INJURY PROVISIONS AND TRADEMARK VIOLATIONS FOR META TAG USE — PRECEDENT REVEALS INCONSISTENT ANSWERS

Once a plaintiff alleges trademark infringement against a business for the wrongful use of meta tags in its Web advertising activities, the insured defendant and its insurance carrier must determine whether the insurance company has a duty to defend under the insured business' CGL policy. Trademark infringement in the meta tag context depends upon the intent of the defendant and the likelihood of confusion caused by the use of the plaintiff's trademarked terms. Whether a standard CGL policy covers such claims depends on whether the relevant jurisdiction takes a "facial language" approach or a "look beyond the language" approach.

A. Intent and Likelihood of Confusion Are Significant Factors to Determine if the Use of Another's Trademark as a Meta Tag Constitutes a Trademark Law Violation

Existing case law on meta tag usage heavily favors plaintiffs. With the exception of the Welles decision, courts have been inclined to find trademark infringement, unfair competition, and trademark dilution in

137. See id. (noting an example to show that West Coast would benefit from the acquired goodwill that Brookfield had established in its trademark).
138. See id. at 1066-67.
139. See supra Part I(C) and accompanying notes (discussing general insurance principles and concluding that to determine insurance coverage, one must examine the complaint together with the CGL policy).
140. See infra Part II(A)(1)(a) and (b) and accompanying notes (explaining that both intent and likelihood of confusion are important factors to determine trademark violations for wrongful use of meta tags).
141. See infra Part II(B)(1) and (2) and accompanying notes (discussing both the facial language and look beyond the language approaches and the case law supporting each approach).
142. See supra Part I(D) and accompanying notes (noting that the Welles decision is the only meta tag case where the defendant prevailed).
I. Trademark Infringement and Unfair Competition in a Meta Tag Context

Case law suggests a two-part analysis to consider trademark infringement in the context of meta tag disputes. First, one must consider whether the circumstances support a fair use defense, bringing the defendant's intent for using another's trademark in its meta tags to the forefront. Second, one must determine the likelihood of confusion or initial interest confusion caused by the defendant's use of another's trademark in its meta tags. Both parts of the analysis are required; even the fair use of another's trademark must pass both parts of the analysis.

a. Intent as a Factor in Determining Liability

Prior to Welles, courts consistently ruled that use of a competitor's trademark in a Web site's meta tags violated trademark laws. The
AsiaFocus court, finding trademark violations, ruled in Playboy’s favor because it found that AsiaFocus purposely and willfully misled visitors of its site, giving the impression that it was connected to Playboy Enterprises.\textsuperscript{150} Also finding trademark violations, the court in Niton Corp. v. Radiation Monitoring Devices, Inc. discussed in detail the facts revealing that Radiation Monitoring Devices, Inc. (RMD) purposely diverted users from Niton’s Web site by copying Niton’s meta tags.\textsuperscript{151} Most significantly, the Ninth Circuit, in Brookfield, specifically discussed meta tags, and barred West Coast’s use of Brookfield’s trademark because of initial interest confusion.\textsuperscript{152}

In contrast to prior cases, the defendant in Welles employed the fair use defense, therefore bringing her intent to the forefront of the court’s consideration of the lawful use of a competitor’s trademark in meta tags.\textsuperscript{153} The fair use defense requires that a defendant’s use of another’s mark be done “fairly and in good faith” and is used “only to describe the goods or services.”\textsuperscript{154} Thus, the availability of the fair use defense primarily depends upon the intent of the defendant when using the plaintiff’s mark.\textsuperscript{155} In the Welles case, for example, the court determined that Welles was entitled to the fair use defense, noting that Playboy


150. See AsiaFocus, 1998 WL 724000, at *9 (“The magistrate judge concludes that the willful infringement embodied in the offending web-sites themselves is sufficiently broad, extensive, blatant, and willful to warrant award of the maximum statutory amount of $1,000,000.”).


152. See Brookfield, 174 F.3d at 1061, 1066 (noting that the confusion caused by the use of another’s trademark in one’s meta tags is precisely the type of confusion that trademark law is designed to prevent).

153. See Welles, 78 F. Supp. 2d at 1079-80 (discussing defendant’s intent for using the mark as part of the elements of the fair use defense).

154. 15 U.S.C. § 1115(b)(4) (1994) (emphasis added). The defense also requires that the defendant’s use of the term is “otherwise than as a mark.” 15 U.S.C. § 1115(b)(4) (1994). The Ninth Circuit interprets this provision to mean that to be a non-trademark use, the use “cannot amount to trademark infringement or unfair competition.” Welles, 78 F. Supp. 2d at 1080-81. However, this element is not really at issue in a meta tag dispute. A defendant using another’s trademark as a meta tag does not do so by using the competitor’s trademark as its own. The competitor’s own trademark is more or less a tool used by the defendant in such a way that it actually lures customers away from the competitor. See Brookfield, 174 F.3d at 1064 (noting that in the context of wrongful meta tag usage, the danger is not that consumers will think the plaintiff and defendant are related or that the mark belongs to the defendant, but that the defendant will lure customers away from the plaintiff using the plaintiff’s mark, thereby profiting from the plaintiff’s time and effort).

155. See Welles, 78 F. Supp. 2d at 1095 (finding the Plaintiff’s intent a significant factor in determining the availability of the fair use defense).
failed to show any convincing evidence of bad faith by Welles in connection with her use of the Playboy marks. On the contrary, the court found significant evidence of Welles' good faith, such as her use of disclaimers, in using Playboy's marks to promote her modeling career. The district court also found Welles' willingness to make many changes in her Web page at Playboy's demand in order to avoid litigation as further evidence of good faith. Finally, the court noted, "the unavailability of other phrases to accurately describe Ms. Welles and her business" constituted additional evidence of good faith.

The Welles court was unwilling to attribute bad faith to Welles based on Playboy's assertion that she did not ask Playboy's permission to use the trademarked terms. Rather, the court noted that "[i]f the use is otherwise fair, then no permission need be sought or granted" by the owner of the mark. Thus, the court's finding that Welles possessed the requisite good faith necessary to achieve a successful claim of the fair use defense was a significant factor in determining liability.

The previously discussed cases all involved defendants that purposely attempted to take advantage of the goodwill and recognition created in a trademark by the plaintiffs, while Welles only described herself in good faith to promote her modeling career. Thus, a competitor's intent in

156. See id. ("Furthermore, there is no evidence in this case that Ms. Welles has intended to divert Plaintiff's customers to her website by trading on PEI's goodwill.").
157. See id. at 1080 (noting that Welles clearly took precautions to ensure her use was fair and approved by Playboy).
158. See id. At Playboy's demand, Welles added disclaimers declaring that her site was not affiliated with Playboy, included a hyperlink to Playboy's Web site, took out Playboy's trademarks in some instances, and removed some Playboy images. See id.
159. See id. The Welles court illustrated Welles' lack of descriptive options:

Likewise, given that Ms. Welles is the "Playmate of the Year 1981," there is no other way that Ms. Welles can identify or describe herself and her services without venturing into absurd descriptive phrases. To describe herself as the "nude model selected by Mr. Hefner's magazine as its number-one prototypical woman of the year 1981" would be impractical as well as ineffectual in identifying Terri Welles to the public.

Id. at 1079.
160. See id. at 1080 (rejecting Playboy's argument that a request for permission to use another's trademark is a factor necessary to determine fair use).
161. Id.
162. See id. at 1073-74 (holding that a fair use of another's trademark precludes liability and that good faith is a significant element of the fair use defense).
163. Compare Welles, 78 F. Supp. 2d at 1080 ("Contrary to Plaintiff's unsupported allegations of bad faith, Ms. Welles provides uncontroversed evidence that she sought to take precautions to ensure that her use of PEI's trademarked terms in her website was permitted by PEI.")., with Playboy Enters., Inc. v. AsiaFocus Int'l, Inc., No. 97-734-A, 1998 WL 724000, at *9 (E.D. Va. Apr. 10, 1998) ("The magistrate judge concludes that the
using a plaintiff’s trademark in its meta tags is a crucial factor not only in finding liability, but also in allowing the use of the fair use defense.  

b. Likelihood of Confusion On the Basis of Initial Interest Confusion

As with many claims of trademark infringement and unfair competition under the Lanham Act, a significant factor to determine liability in meta tag disputes is the likelihood of consumer confusion, regardless of the availability of the fair use defense. However, the Ninth Circuit in *Brookfield* held that initial interest confusion, rather than the traditional likelihood of confusion, was a more appropriate standard for trademark violation claims based on meta tag usage.

The *Welles* court applied the initial interest confusion standard set forth in *Brookfield*. However, *Welles*’ outcome was different than that of *Brookfield*, because *Welles*’ claim of fair use distinguished the two cases in the application of initial interest confusion. The *Welles* court

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164. See *Welles*, 78 F. Supp. 2d at 1073-74. This analysis follows the policy underlying trademark law. Those who own trademarks do so because they have, through the expenditure of both effort and money, elevated the mark’s status to that of a symbol of goodwill and recognition among consumers. See *McCarthy on Trademarks*, supra note 16, at § 2:4 (“An important purpose underlying trademark law is the protection of the trademark owner's investment in the quality of the mark and the quality of goods.”). To allow another company to use that mark to its advantage in the marketplace without expending the same effort and money would go against the principles of trademark law:

In developing the law of unfair competition and trademark infringement, the courts have taken a logical approach. There is a strong desire to protect the rights of the first user of the mark. This arises from a sense of basic fairness, more than from any particular concept of property law. After all, the first user recognized the value of the mark and went through the effort necessary to establish the mark as a meaningful symbol. To allow others to usurp that mark and gain from the first user’s efforts is unjust.

*Id.* at § 2:9 (quoting from *Jewel Cos. v. Westhall Co.*, 413 F. Supp. 994 (N.D. Ohio 1976)).

165. See *Welles*, 78 F. Supp. 2d at 1093 (“[T]he court must nevertheless address the issue of whether there is a likelihood of confusion, the keystone of whether a use constitutes trademark infringement or unfair competition.”).

166. See *Brookfield Communications, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1062 n.24 (9th Cir. 1999) (noting that the traditional eight-factor test was inappropriate); see also *Welles*, 78 F. Supp. 2d at 1093 (“This particular difficulty was acknowledged by the *Brookfield* court, wherein that court noted that “the traditional eight-factor test is not well-suited for analyzing the metatags issue.””).

167. See *Welles*, 78 F. Supp. 2d at 1092-96.

168. See *id.* at 1093 (“In other words, *Brookfield* is distinguishable from the present case since here both the (1) fair use defense; and (2) the use of trademarks in the metatags are involved, a situation which is unlike the scenario before the *Brookfield* court.”).
set forth three factors to determine initial interest confusion, including

"(1) evidence of the initial interest confusion being 'damaging and wrongful,' (2) evidence that confusion between two products 'will mistakenly lead the consumer to believe there is some connection between the two and therefore develop an interest in the [defendant's] line that it would otherwise not have,' or (3) evidence that the 'situation offers an opportunity for sale not otherwise available by enabling defendant to interest prospective customers by confusion with the plaintiff's product.'"\(^{169}\)

The Welles court determined that none of these factors were present in the case, but further noted the lack of evidence to establish culpable intent on the part of Welles as a reason to decline to declare trademark infringement and uphold the use of the fair use defense.\(^{170}\)

In declining to find neither initial interest confusion nor bad faith intent by Welles, the court determined that Welles' use of Playboy's trademarks in her meta tags constituted fair use.\(^{171}\) Thus, the most significant factors to determine trademark infringement and unfair competition in the meta tag context continue to be (1) whether or not the use is likely to cause initial interest confusion, and (2) whether or not the use is done with the intent of diverting potential customers from a competitor's Web site.\(^{172}\)

2. Trademark Dilution in a Meta Tag Context

In addition to claims of trademark infringement and unfair competition, claims of trademark dilution are also at issue in the meta tag context.\(^{173}\) Dilution occurs when a company uses another's

\(^{169}\) Id. at 1094 (internal citations omitted).

\(^{170}\) See id. at 1094-95.

\(^{171}\) See id. at 1095-96. The court concluded that:

Furthermore, in light of the fact that there is not evidence of an intent by Ms. Welles to trade upon the goodwill of Plaintiff's marks by falsely implying sponsorship or affiliation with PEI, and there is no evidence of actual consumer confusion or likelihood of confusion regarding any implied PEI endorsement, and in light of the court's discussion . . . regarding Ms. Welles' nominative, fair use of the terms to describe her goods and services, the court holds that Plaintiff has failed to raise a material issue of fact concerning the fair use of PEI terms in her metatags.

Id.

\(^{172}\) See supra Part II(A)(1)(a) and (b) and accompanying notes (discussing and analyzing the importance of initial interest confusion and the defendants' intent to claims of trademark violations for the wrongful use of meta tags).

\(^{173}\) See Welles, 78 F. Supp. 2d at 1096 (holding that no trademark dilution occurred); Playboy Enters., Inc. v. AsiaFocus Int'l, Inc., No. 97-734-A, 1998 WL 724000, at *7-*8
trademark in a way that reduces the mark's ability to distinguish the product it represents from other products.\textsuperscript{174} Dilution may occur through either blurring or tarnishment.\textsuperscript{176}

The \textit{AsiaFocus} court specifically held that the defendant's use of Playboy's trademarks in its meta tags rose to the level of intentional and willful blurring, resulting in the dilution of Playboy's trademarks.\textsuperscript{176} Dilution through tarnishment may occur in the meta tag context where the Web site or the product on the Web site is of a lower quality than the Web site or product of the true owner of the trademark.\textsuperscript{177} If the public begins to associate the wrongful user's lower quality Web site or product with that of the true owner, tarnishment may result, reducing consumers' perception of the quality of the mark and its associated products.\textsuperscript{176}

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\textsuperscript{174} See 15 U.S.C. § 1127 (Supp. IV 1998). Dilution is defined in § 1127:
The term "dilution" means the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of—
(1) competition between the owner of the famous mark and other parties, or
(2) likelihood of confusion, mistake, or deception.
\textit{Id.}

\textsuperscript{175} See Franklin Res., Inc. v. Franklin Credit Mgmt. Corp., 988 F. Supp. 322, 338 (S.D.N.Y. 1997) (noting that a showing of either blurring or tarnishment is sufficient to prove a likelihood of dilution). Recall that blurring occurs where the mark is used by another on dissimilar products, lessening the mark's value, and tarnishment occurs where another links the mark with unrelated products that are of reduced quality or image, causing the public to associate the plaintiff's product with the lower quality product or image. \textit{See supra} nn. 42-45 and accompanying text.

\textsuperscript{176} See \textit{AsiaFocus}, 1998 WL 724000, at *7-*8. The court noted that:
The defendants' willfulness is further established by their purposeful tactic of embedding the trademarks PLAYMATE and PLAYBOY in the hidden computer source code. This strategy epitomizes the "blurring" of PEI's trademarks. When a search engine led a consumer to the asian-playmates Web site in response to a search of PEI's trademarks, the consumer would probably believe that the defendants' Web site was affiliated with PEI.
\textit{Id.} at *8. The \textit{Welles} court, however, found no trademark dilution. \textit{See Welles}, 78 F. Supp. 2d at 1096 (holding that there can be no trademark dilution where there is a fair use of the trademarked terms).

[T]he trademark's reputation and commercial value might be diminished because the public will associate the lack of quality or lack of prestige in the defendant's goods with the plaintiff's unrelated goods . . . or . . . reduces the trademark's reputation . . . in the eyes of consumers as a wholesome identifier of the owner's products or service.

\textsuperscript{178} See \textit{id.}.\end{flushleft}
B. Advertising Injury Provisions and Trademark Violation Claims: The Law Remains Unsettled

There are two distinct approaches used to determine whether the Advertising Injury provisions of CGL policies cover trademark law violations. The Sixth Circuit has held that policy verbiage must be strictly construed, such that trademark infringement coverage only exists when coverage is expressly provided for in the CGL Policy. Conversely, the Ninth Circuit advocated a look beyond the language approach where factors beyond the language of the policy can be determinative. These holdings illustrate that the law remains unsettled as to whether or not standard Advertising Injury provisions of commercial insurance policies cover trademark violations.

1. The Sixth Circuit's Facial Language Approach

The approach employed by the Sixth Circuit requires a strict interpretation of policy language. This facial language approach dictates that no trademark infringement coverage exists where there is no express mention of trademark infringement in the Advertising Injury provision of a CGL policy. The Sixth Circuit in ShoLodge, Inc. v. Travelers Indemnity Co. held that the provisions “misappropriation of advertising ideas and style of doing business” do not include trademark infringement.

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180. See ShoLodge, 168 F.3d at 259.


183. See ShoLodge, 168 F.3d at 259-60.

184. See id. at 260 (stating that “[i]t is unreasonable to think that the insurers would have enumerated all of the other covered offenses, such as copyright, which are listed in the definition of ‘advertising injury,’ but chosen not to list the commonly recognized offense of trademark infringement”).

185. 168 F.3d 256 (6th Cir. 1999).
advertising ideas or style of doing business” and “infringement of copyright, title, or slogan” are not ambiguous and do not cover trademark violations. The court in *ShoLodge* applied ordinary meaning to the words “copyright, title, or slogan” to determine that no coverage existed. The court concluded that the general language of Advertising Injury provisions did not cover trademark infringement. The court reasoned that if the insurer planned to cover the insured for trademark violations, it would have expressly included such language in the policy, as it included copyright violations.

2. The Ninth Circuit’s Look Beyond the Language Approach

The second approach, employed by the Ninth Circuit, looks beyond the language of the policy to determine whether coverage for trademark law violations exists. The Ninth Circuit in *Federated Mutual Insurance Co. v. Power Lift*, Nos. 97-55242, 97-55254, 1998 U.S. App. LEXIS 13602, at *2 (9th Cir. June 22, 1998) (holding that trademark infringement is covered under a CGL insurance policy even though the language of the policy did not specifically include trademark infringement).
Co. v. Power Lift\(^{191}\) held that the phrase "misappropriation of advertising ideas or style of doing business" in Advertising Injury provisions included coverage for trademark violations.\(^{192}\)

Contrary to the Sixth Circuit's decision in ShoLodge, the Ninth Circuit advocated an approach that looks beyond the policy language and unequivocally holds that under California Law, the phrase "misappropriation of advertising ideas or style of doing business" does cover trademark violations.\(^{193}\) Even though many CGL policies do not cover intentional acts, Power Lift held that coverage for trademark infringement exists even when the complaint alleges only intentional or willful trademark infringement.\(^{194}\) Thus, under California law, even defendants such as AsiaFocus, who use another's trademark in its meta tags in an obvious attempt to divert or confuse consumers, may be covered by Advertising Injury provisions.\(^{195}\)


\(^{192}\) See id. at *2 (reversing the district court's determination that plaintiff's Advertising Injury provision did not apply to trademark law violations).

\(^{193}\) See id. at *2-*3. The Ninth Circuit based this determination on Lebas Fashion Imports of USA v. ITT Hartford Ins. Group, 59 Cal. Rptr. 2d 36, 41-47 (Cal. Ct. App. 1996). In Lebas, the California Court of Appeal determined that trademark violations are covered by Advertising Injury provisions. See Lebas, 59 Cal. Rptr. 2d at 47. The Lebas court held this way despite the existence of Ninth Circuit precedent holding that trademarks are not protected by California's common law doctrine of misappropriation. See Toho Co., v. Sears, Roebuck & Co., 645 F.2d 788, 794 (9th Cir. 1981); see also supra note 19 and accompanying text (noting that meta tag cases often involve claims of trademark infringement).

\(^{194}\) See Power Lift, 1998 U.S. App. LEXIS 13602, at *4. The court reasoned that although a complaint may allege intentional wrongdoing, the claim may still be covered since the plaintiff may ultimately only prove negligence or unknowing infringement. See id. In theory, this holding is contrary to the general principle of insurance law that says that one looks to the complaint together with the insurance policy in determining coverage. See American Insurance Law, supra note 70, at 23; Maxtech Holding, Inc. v. Fed. Ins. Co., No. 98-56729, 1999 U.S. App. LEXIS 29978, at *4 (9th Cir. Nov. 12, 1999) (applying California law); Assurance Co. v. J.P. Structures, Inc., No. 95-2384; 96-1010/96-1027, 1997 U.S. App. LEXIS 34565, at *8 (6th Cir. Dec. 3, 1997) (applying Michigan law).

If a complaint alleges nothing but willful infringement, the court should rule that the policy's intentional acts exclusion precludes coverage since the plaintiff alleges only intentional acts. In practice, however, a plaintiff would be ill-advised to specifically allege only willful infringement since intentional wrongdoing is not necessary for a claim of trademark infringement and alleging only intentional wrongdoing runs the risk of bringing the claim outside of the defendant's insurance coverage.

\(^{195}\) See Power Lift, 1998 U.S. App. LEXIS 13602, at *5 (holding that California law does not preclude insurance coverage for claims of intentional trademark violations).
III. BUSINESSES WITH HEAVY INTERNET ACTIVITIES MUST ENSURE POLICY COVERAGE

A. Clinching Fair Use: Disclaimers And Permission

The Brookfield court held that using another's trademark in a Web site's meta tags may constitute trademark law violations, while the Welles court concluded that such meta tag use may be acceptable when it constitutes a fair use. Therefore, businesses that advertise on the Internet and want to include others' trademarks in their meta tags must consider the good faith requirements of fair use enunciated by the Welles court.

Web sites that employ others' trademarks in describing the site may want to include a disclaimer similar to the one used by Welles. A disclaimer can provide evidence of good faith and also decrease the likelihood of confusion by the consumer. If a Web site contains a disclaimer that clearly states that the site is not affiliated with companies holding those trademarked terms, a court is less likely to find consumer confusion. Though a disclaimer may not cure the threat of initial interest confusion, the disclaimer, in bolstering a claim of good faith, will help support a fair use defense.

As an additional precaution, a business may ask permission before using a company's trademark, since a denial of permission will not weigh

196. Brookfield Communications, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036 (9th Cir. 1999).
198. Compare Brookfield, 174 F.3d at 1065 (concluding that the Lanham Act prohibits the use of another company's trademark in a way that is confusingly similar to the trademark owner's use), with Welles, 78 F. Supp. 2d at 1096 (holding that Playboy failed to raise a material issue of fact of the fair use issue).
199. See Welles, 78 F. Supp. 2d at 1080. The steps taken by Welles included adding a disclaimer clearly indicating Welles' Web site was not affiliated with Playboy, including a link from Welles' site to Playboy's Web site, and the substitution or removal of certain images or words to which Playboy had objected. See id.
200. See id.
201. See Consumers Union v. Gen. Signal Corp., 724 F.2d 1044, 1053 (2d Cir. 1983) (noting that disclaimers may be effective in eliminating consumer confusion).
202. See Welles, 78 F. Supp. 2d at 1093, noting that:

"[E]ven if a web user clicks on the website belonging to the defendant, he will see that the domain name of the website he has selected is the defendant's domain name.... Consequently, the Brookfield court concluded that in the context of metatags, it is "difficult to say that a consumer is likely to be confused about whose site he has reached or to think that somehow [the plaintiff] sponsors [the defendant's] web site."

Id.
against a defendant in any subsequent lawsuit. Moreover, courts do not construe a request for permission as an indication that a defendant believed permission was necessary to use the trademark. Since asking permission may bolster a defendant’s claim of good faith for the purposes of a fair use defense, while not hurting a defendant’s claim of fair use, under some circumstances it is advisable that a business using another’s trademark in its Web site meta tags first request permission.

B. Advertising Injury Provisions: Clearly Including Trademark Infringement

Although businesses advertising on the World Wide Web may guard against claims of trademark violation, the increase in Web advertising has led to an increase in inappropriate claims of trademark infringement in connection with that use. Thus, even though a business may increase its chances to defend such claims on the basis of fair use, the issue still remains as to whether those trademark infringement claims will implicate an insurer’s duty to defend its insured. Since the law is unsettled in this area, it is advisable that businesses vulnerable to such inappropriate claims ensure that the Advertising Injury provisions of their policies cover trademark infringement.

For example, the ShoLodge court held that had the insurer in that case intended to cover trademark infringement, it would have unambiguously included it in the policy provision, as it had copyright infringement. Thus, businesses vulnerable to claims of trademark infringement should request that their policies unambiguously include trademark infringement. In addition to including “infringement of copyright,” Advertising Injury provisions should also include “infringement of trademark.” Under this language, a court need not decide whether to interpret the policy as including trademark infringement under the duty to defend, because it will be expressly covered by it.

203. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 n. 18 (1994) (rejecting the argument that a defendant’s request for permission suggests the defendant believed their use was not a fair one).
204. See id.
205. See Oratz, supra note 11 (“In addition to the discovery of actual trademark infringers, the expansion of the internet is also leading to an expansion of inappropriate claims of trademark infringement.”).
206. See ShoLodge v. Travelers Indem. Co., 168 F.3d 256, 260 (6th Cir. 1999) (“The only reasonable assumption is that ‘if Travelers had intended to provide coverage for such liability, [they] would have referred to it by name in the policy.’”) (quoting Advance Watch Co. v. Kemper Nat’l Ins. Co., 99 F.3d 795, 803 (6th Cir. 1996)).
207. See id. at 259 (“Where there is no ambiguity, terms should be given their ordinary
C. Prior Acts Exclusion: Covering All Internet Advertising Time

Businesses must consider prior acts exclusions. Prior acts exclusions exclude coverage for any acts committed prior to the effective date of the policy. Therefore, a business vulnerable to suit must take into consideration the time at which it began advertising on the Web by using others' trademarks as meta tags in relation to when its commercial insurance policy became effective. If the advertising began prior to the effective date of the policy, the insurer may deny coverage based on a prior acts exclusion, leaving the insured to defend on its own.

Armed with this information, a business may request that its CGL policy include a clause that retroactively applies the Advertising Injury provision to ongoing advertising that commenced prior to the policy's effective date.

D. Web Insurance Policy: Accounting for the Meta Tag Issue

Finally, insurance companies are not unresponsive to the complex issues that arise when an entity conducts business on the Web. For example, the Chubb Group insurance company has created a “Multimedia Liability Insurance” policy. These policies often serve as a supplement to CGL policies. Multimedia policies are specifically

meaning, and neither party ought to be favored.”) (citing In re Estate of Clement, 220 Tenn. 114 (Tenn. 1967).
210. See id.
211. See Adam H. Fleischer, Internet Torts and Cyberspace Insurance: New Issues for the E-Conomy, 88 ILL. B.J. 268, 274 (2000) (“Over 40 new insurance products attempt to address the needs of Internet and technology companies either by packaging various types of coverage or including a broad range of coverage in one policy.”). The many available policies vary in nature, some cover only third party claims, while others are offensive in nature because they cover legal expenses incurred by a business for bringing a suit to stop trademark infringement committed by another. See id.
212. See Paar, supra note 2, at 1114 (noting that the policy covers publishing claims). Several other insurance companies provide similar policies, such as INSUREtrust (writing an “Errors and Omissions Policy” to protect against third-party claims) and Lloyd’s of London (providing a Website and Internet Security Program which may be expanded to include trademark infringement). See id. at 1113-14.
213. See id. However, businesses with supplemental policies must take caution. Multiple policies may require payment of unnecessary premiums. See id. Multiple policies may also incite litigation where more than one policy applies. See id. Further, when a business has separate policies to contend with, gaps in coverage may be created, especially where the policies derive from different carriers. See id.
tailored to those companies that do business on the Web.  

Advantages to coverage under such a policy are evident. Since it is specially tailored to the needs of Web advertisers, the policy may remedy many of the problems associated with applying existing law and policy to the new and untested realm of Internet law. The problems are lessened because rather than attempting to cover business risks on the Internet through insurance policies that were written without contemplating such risks, a multimedia policy specifically provides coverage for those risks in the Internet context. However, as with the purchase of any insurance policy, a business must study several potential policies before purchasing one because not all multimedia policies cover intellectual property claims such as trademark infringement.

IV. CONCLUSION

Case law indicates that both intent and likelihood of confusion, specifically in the form of initial interest confusion, are factors in disputes concerning the use of a third party's trademark in Web site meta tags. Because the potential for inappropriate claims of trademark infringement on the World Wide Web is increasing, it is important for Web advertisers to understand that the law is currently unsettled in determining whether the language of a CGL policy's Advertising Injury clause covers trademark infringement. To insulate themselves from responsibility for large defense fees and judgments, businesses should work with their insurance carriers to develop policy language that will ensure coverage for potential trademark infringement claims.

214. See id. at 1112-13 (noting that the specialized coverages are designed to insure Internet claims).
216. See supra notes 211-12.
217. See Fleischer, supra note 2, at 274 (noting some policies that are designed for Internet activities but do not cover trademark infringement claims); Paar, supra note 2, at 1113-14 (noting several specially tailored policies that do not list trademark infringement or intellectual property claims as covered).