NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

U.K. ABBA PRODUCTS, INC., Plaintiff and Appellant, v. EMPLOYERS INSURANCE OF WAUSAU, Defendant and Respondent.	G028347 (Super. Ct. No. 818029) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Eleanor M. Palk, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

John A. Belcher for Plaintiff and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, Patrick M. Kelly, Otis D. Wright II, and Meridith L. Casat for Defendant and Respondent.

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INTRODUCTION

U.K. Abba Products manufactures shampoos, conditioners and other products used by hair stylists and barbers. It was sued by its distributors for, among other things irrelevant to this insurance coverage case, showing up at a hair stylists' trade show and selling directly to customers there, and for confiscating its distributors' customer lists. Abba requested a defense of the underlying suits, and was turned down by, among other insurers, Employers of Wausau, which had issued Abba a commercial umbrella policy for the year 1994.

Abba settled the underlying cases, then initiated this coverage litigation against Wausau. This appeal comes to us after Wausau's successful summary judgment motion. We affirm because: (a) Whatever else Abba may have allegedly "misappropriated" from its distributors, an advertising *idea* or a *style of doing business* wasn't one of them; and (b) while Abba may have allegedly misappropriated a *contractual right* to sell to customers in competition with its distributors or for grabbing its distributors' customer lists, it wasn't sued for *infringing* a trademark.

II. BACKGROUND

A. *The Underlying Cases*

U.K. Abba is a hair care products manufacturer. The distributorship contract it used in the 1990's precluded its distributors from selling to anyone but licensed hairdressers and barbers.

Which is not to say that Abba itself wanted to play by the same rules as it required of its distributors. Abba's distributor contracts were clear that Abba could sell directly to customers for its own account in certain contexts, regardless of a distributor's territory. Specifically, the distributorship contract was plain that Abba had the right to sell its product at the annual Long Beach Hair Show "to all customers in the Southern California area for the week of the show." Also, the distributor contracts had a provision allowing Abba to audit its distributors' books: They required a distributor to "permit the inspection of its books and records on reasonable advanced demand by ABBA, including inspection of any invoices, receipts, orders, or other documentation concerning the sale, shipment, or delivery of ABBA products."

Apparently, the distribution agreement, combined with competition from the company itself, made it a bit hard for Abba's distributors to make any money, and so they sued the company and several of its executives in a series of actions in 1998.[1] The essence of the complaints was that the Abba distribution contracts amounted to *franchises* under the California Franchise Investment Law (Corp. Code, § 31000 et seq.), and, as *franchises*, Abba was guilty of a number of abuses in connection with the "sale" of those franchises. Specifically, Abba had not registered its distribution agreement as a franchise, failed to provide "an offering circular with a copy of all proposed agreements relating to the sale of the franchise" 10 days before the contract, and had failed to disclose a number of its practices which would operate to the detriment of the distributors.

Two of these nondisclosures, alluded to above, formed the basis of Abba's liability insurance claims: Abba hadn't told its prospective franchises that it would compete with them by selling directly to customers at the Long Beach Hair Show and that it would use its power to examine their books and records as a pretext to purloin their customer lists. (The idea behind the later was that Abba wanted to obtain its distributors' customer lists so it could terminate their distributorship agreements and give them to new distributors.)

B. *The Terms of the Insurance Policy*

The relevant terms of the policy are:

First, the basic coverage provided in the insuring agreement: "This insurance applies to . . . 'advertising injury' only if caused by an 'offense' committed in the policy period. . . . The 'advertising injury' must be caused by an 'offense' committed in the course of advertising your goods, products or services."

Second, the relevant definitions: "'Advertising injury' means injury arising out of one more of the following offenses committed in the course of 'your

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[1] To be precise, three actions were filed in superior court against executives of Abba, but not Abba itself, in an obvious attempt to circumvent an arbitration clause in the distributorship contracts. Abba itself was the object of an arbitration action initiated with the Judicial Arbitration and Mediation Service (JAMS).

advertising activities:' [¶] . . . . c. Misappropriation of advertising ideas or style of doing business; or [¶] d. Infringement of copyright, title, trademark, patent or slogan." "'Offense' means any of the offenses included in the definition of 'advertising injury' or 'personal injury."

Third, the possibly relevant exclusion: "This insurance does not apply to: [¶] . . . . "n. 'Advertising injury' arising out of: [¶] (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract . . . ."

III. DISCUSSION

A. *The Breach of Contract Exclusion Doesn't Apply Because Abba Wasn't Sued for Breaching Its Contract*

In a reversal of the usual order, we will take the exclusion first.[2] Advertising injury "arising out of" breach of contract is excluded, even if there is a potential for a successful "advertising injury" claim. On this preliminary point, Abba must prevail -- the breach of contract exclusion doesn't help Wausau here.

1. Potential Liability for the Trade Show

As to the underlying claims made against the executives based on exhibiting at the trade show and selling directly to customers who showed up there, it would be safe to say that one thing the underlying plaintiffs were not asserting was liability for *breach* of their distributorship contracts. Abba's *contract* clearly gave it the right to show its product at the Long Beach Hair Show and sell directly to customers there. Any liability for its trade show conduct was

[2] Generally, it is preferable to analyze insurance coverage issues by first ascertaining whether the insuring clause might cover a claim, then looking to see if the coverage that *otherwise* would be afforded is removed by an exclusion. (Cf. *American Star Ins. Co. v. Insurance Co. of the West* (1991) 232 Cal.App.3d 1320, 1325 ("If the claim does not fall within the insuring clause, there is no need to analyze further.").) Here, however, the insuring clause for advertising injury issue is less easily resolved than the breach of contract exclusion. If the exclusion were applicable, it would obviate any need to deal with the relatively more complex advertising injury issues.

necessarily premised on terms *implied into* its contract as a matter of law, or, alternatively, premised on a violation of rules imposed by law regarding the sales of franchises.

We need not attempt the academically interesting task of trying to distinguish between liability based on terms which the law implies into a contract and liability which is not based on "contract" at all, but on rules otherwise implied into a relationship by law. Either way, the contract exclusion -- which expressly exempts coverage for liability arising out of implied contracts and has nothing to do with liability that is independent of breach of contract -- would not apply.

With regard to the suit against Abba itself, which included an *express* breach of contract claim based on the distributorship contracts for Abba's conduct at the trade show, another level of analysis is needed. We need not rehash, for the seemingly billionth time, the dynamics of the potentiality rule for liability insurance policies generally acknowledged to have originated with *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 275. It is enough to note that if there were the potential for liability for advertising injury based on breach of an implied contract, the breach of contract exclusion could not operate to relieve Wausau of any duty to defend that it otherwise might have.

As *Gray* itself noted, it's not the legal theory that triggers the duty to defend, but the potential of alleged facts to lead to covered liability. (See *Gray v. Zurich Ins. Co., supra,* 65 Cal.2d. at pp. 272-275 [while underlying complaint alleged battery, which would not be covered, the facts established the potential for negligent use of unnecessary force, which would be].) The facts alleged against even Abba itself here could lead to liability arising out of a breach of an implied contract (or liability independent of any contract at all) based on the possibility that the trade show exhibit and sales violated rules imposed by the Franchise Investment Law. Indeed, given the plain terms of Abba's contract, any liability would most likely arise out of the Franchise Investment Law -- the contracts themselves didn't hold much hope for the distributors.

2. Potential Liability for the
Thefts of Customer Lists

The same analysis obtains with regard to any liability for the alleged thefts of the customer lists. In terms of breach of contract, any liability could only "arise out of" either (a) a term implied into Abba's distributorship agreement that its right to audit the books of its distributors did not include the right to take any customer lists or (b) a duty, otherwise imposed by law independent of the distributorship contract, that Abba not take its distributors' customer lists. Again, either way, there is the clear potential for liability not arising out of breach of Abba's distributorship contracts.

B. *However, Abba Was Never Accused of Misappropriating Any Advertising Ideas*

1. Preliminarily, Though, "Misappropriation" Was Indeed Alleged

Now to the insuring clause for misappropriation of advertising ideas or misappropriation of a style of doing business. Again, the preliminary round must go to Abba.

Wausau argues that the word "misappropriation" in this context signifies common law misappropriation of intellectual property. Common law tortious misappropriation requires three elements -- investment of substantial time and energy by the plaintiff, appropriation at little or no cost by the defendant, and actual injury sustained by the plaintiff. (See, e.g., *New Hampshire Ins. Co. v. R. L. Chaides Const. Co.* (N.D. Cal. 1994) 847 F.Supp. 1452, 1455.) Because it is clear that the distributors did not base their claims on common law misappropriation (*they* certainly had not invested substantial time and energy developing Abba's brand identity), Wausau reasons there was no claim for misappropriation of advertising ideas.

Wausau's argument that the word "misappropriation" in this context is synonymous with common law misappropriation has already been well demolished by Justice Croskey in *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group* (1996) 50 Cal.App.4th 548. Misappropriation is a word that has not been specifically defined in the policy, and thus is not confined to, say, a term of art such as common law misappropriation. (See *id.* at pp. 559-566.) In fact, most of the *Lebas Fashion Imports* opinion amounts to a judicial meditation on the word "misappropriation" in the context of advertising injury coverage. Misappropriation must be read as a layperson would read it (*id*. at p. 559), and so read, it means, "'to take wrongfully.'" (*Id*. at p. 562.) "[W]hile the misappropriation of an 'advertising idea' certainly would include the theft of an advertising plan from its creator without payment, it is also reasonable to apply it to wrongful taking of the *manner or means* by which another advertises its goods or services." (*Ibid.*, original emphasis; accord, *Dogloo, Inc. v. Northern Ins. Co. of New York* (C.D. Ca. 1995) 907 F.Supp. 1383, 1388-1389 [rejecting proposition the "misappropriation" clause is confined only to common law misappropriation].) *Lebas Fashion Imports* used the phrase, "manner or means" to include trademarks, which at the very least convey the idea that a product has a certain manufacturer.

This is just another instance where insurers use ISO forms which do not specifically define words that insurers *think* are obvious shorthand for legal terms of art, but which would lead a layperson, armed only with the ordinary meaning of words, to conclude otherwise.[3] As *Lebas Fashion Imports* shows, the average person -- a hypothetical creature who is not burdened with a law degree -- would think that "misappropriation" means *any kind* of wrongful taking.

[3] We deal with language common to the post-1986 CGL. Surely by the end of the 20th Century enough coverage opinions had been written so that the relevant committees at ISO would know that if they didn't specifically define a word or phrase as a legal term of art, it was going to be construed, if otherwise reasonable, to include other things.

2. It May Have Been Advertising, But Did It Involve Any "Ideas"? No

a. *The Trade Show Allegations*

However, the insurers prevail on the question of whether what was allegedly misappropriated constituted an "advertising idea."

Of course, there can be no doubt that trade shows certainly *involve* "advertising." What goes on *inside* a trade show booth -- whether it be merely handing out literature, giving demonstrations, passing out various freebies, or having some form of interaction with the personnel -- surely falls under the rubric of advertising. Indeed, *most* of what goes on inside a trade show booth is probably the manifestation of somebody's advertising idea.

The problem is, Abba wasn't sued for the nature of its presentation at its booth in Long Beach. There were no claims even close to charging that Abba copied something. Abba's distributors didn't care about the *content* of Abba's exhibit at the Long Beach Hair Show. Rather, Abba's sin was merely in the fact of showing up in the first place and making sales for its own account.[4]

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

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[4] Actually, to be precise, according to the complaints Abba's sin was in *not telling* prospective franchisees that it would compete with them by showing up at the trade show and making direct sales to customers within the distributors' territories -- activity which is one step even from that. However, as the complaints might easily have been amended to allege that the trade show exhibition and sales themselves violated the distributors' rights under the Franchise Investment Law, we operate on that assumption, as it is the most favorable to extending coverage.

If, for example Abba's trade show booth had an ancient Greek motif -- fake Doric columns on the sides of the booth, staffed by Abba employees dressed in togas and sandals, featuring a demonstration of a model with "medusa" hair (say a fake snake hair wig on a model in the booth) -- now that would have involved the potential for misappropriation of an "advertising idea."

There is, however, nothing conceptual about merely going to a trade show and doing some selling. Those activities are not a "manner or means" of advertising in the sense that the *Lebas Fashion Imports* court spoke of those words -- to extend "manner or means" to include *idea-less* practices would clearly extend coverage beyond what a reasonable policyholder would expect, given the presence of the word "idea" in the coverage clause. (See *ACL Technologies Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1788-1789 [whatever else a term used in an insurance policy means, it doesn't mean its opposite].)

Rather, trade show selling is most ordinarily understood to be a *generic form* or *category* of advertising, like "newspaper advertising" or "cable television advertising." And that is, after all, the way that judges -- who, even though they are burdened with law degrees, still usually use the English language according to its ordinary meaning -- talk about trade shows. (E.g., *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.* (S.D.N.Y 2002.) 201 F.Supp.2d 264, fn. 14 [trade show seminar booths among journal ads and telemarketing and direct mailing as forms of advertising]; *Super Natural Distributors, Inc. v. Muscletech Research and Development* (E.D. Wis. 2002) 196 F.Supp.2d 761, 776-777 [noting that money spent on trade show booth was among promotional expenses]; *Sunquest Information Systems, Inc. v. Park City Solutions, Inc.* (W.D. Pa. 2000) 130 F.Supp.2d 680, 684 [noting that company had used its logo in various advertising contexts, including on pamphlets, golf shirts, and trade show booths]; *Indiana Plumbing Supply, Inc. v. Standard of Lynn, Inc.* (C.D. Cal. 1995) 880 F.Supp. 743, 746-747 [noting that a company had solicited business by buying advertising in national journals, maintaining a toll-free number, and buying a trade show booth]; *Ortho Pharmaceutical Corporation v. Cosprophar, Inc.* (S.D. N.Y. 1993) 828 F.Supp. 1114, 1127 ["At various hair care industry trade shows, Riahom promoted its product with booth displays, brochures, videotapes and the like . . . ."].)

The case before us is more like this hypothetical: Imagine a college fraternity, Beta Upsilon Delta, who, as a prank and show of loyalty to their favorite brand of beer, literally go out in the middle of the night and physically steal a billboard with an advertisement on it for Coors beer from its place near the highway and bring it back to their frat house as a souvenir. The billboard itself might have all sorts of advertising ideas in it, associating certain images with the product: a scene from the Rockies, a group of people whooping it up in a bar, or even a pepperoni pizza. But one could not say that these misbehaving frat boys had "misappropriated an advertising idea?" Only in the plonkingly literal sense of stealing the *physical embodiment* of an idea.

And that, to use another hypothetical, is rather like saying that a shoplifter who pockets a paperback at Barnes and Noble should be sued for plagiarism. (Or, apropos *Lebas Fashion Imports*, it is like saying that a shoplifter who tries to sneak out of a store wearing a Calvin Klein shirt has stolen the Calvin Klein trademark.) It's a usage that slips the bounds of reason because it has no meaningful relationship with the ordinary understanding of a theft of an "idea."

b. *The Theft of Customer Lists*

The underlying complaints charged that Abba had targeted the distributorships of the plaintiffs for termination. Abba was alleged to have grabbed the distributors' customer lists in preparation for giving the lists to successor distributors. Did these facts carry the potential for misappropriation of an "advertising idea"?

As the parties well know, this is an area where this court has gone before. A recent case out of this court, *Hameid v. National Fire Ins. of Hartford*

(G026525), review granted April 10, 2002, concluded that the misappropriation of confidential customer lists *was* the misappropriation of an advertising idea. The theory was that because (a) customer lists could be used to identify and solicit clients, (b) related to advertising, and (c) did not involve the performance of services or manufacturing of a product, their thefts fell into the category of misappropriation of advertising ideas.

A granted petition for review is not wholly unlike one's imminent hanging: If it is not an occasion, as Samuel Johnson said, to concentrate the mind, it is at least an occasion to do some rethinking. The Supreme Court will do what it will do in *Hameid*, but for the moment we must decide the case before us.

So let's begin with a point not quite directly considered in *Hameid*: Where's the idea?

Now, again clearly a customer list is a marketing tool, and even the format of such a list may contain some demographic information that would facilitate marketing to particular customers (e.g., does the shop cater to younger or older customers, does it also stock Paul Mitchell products?). But the underlying claims here were not about any wrongful thefts of an idea, but of the physical lists themselves. What was allegedly stolen does not even remotely resemble the misappropriation of intellectual property, except maybe in the strained sense that our hypothetical stolen billboard is a theft of intellectual property.

Coverage turns on context and objective reasonability, even when there is ambiguity in the abstract. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.) We must therefore conclude that, given the context of the policy -- which pegs coverage to ideas, not physical objects which may literally contain or embody ideas, much less physical objects that one day might be used to come up with an idea -- the customer list thefts did not implicate the coverage for misappropriation of advertising ideas.

3. What About "Style of Doing Business?"
No. There Were No Allegations of the Misappropriation
of Anything "Comprehensive"

"Style of doing business" is exactly the sort of opaque phrase used in ISO forms that often leads to decisions in favor of coverage, even though insurers are sure that they never intended coverage. If considered literally and in a vacuum, it might mean almost anything. "Style of doing business" -- what's that? Not letting your employees have Christmas off? Habitually using bait and switch advertising? Having your salespeople say they have no authority to conclude a deal and forcing the customer to then bargain with the sales manager?

Fortunately, even though the phrase is opaque in a contextless vacuum, it does have, as used in an insurance policy, a virtually universal definition in the case law: It means a *company's comprehensive manner of operating its business.* (E.g., *Novell, Inc. v. Federal Ins. Co.* (10th Cir. 1998) 141 F.3d 983, 987 (and authorities cited therein); *American States Ins. Co. v. Vortherms* (Mo. App. 1999) 5 S.W.3d 538, 542; *Sentex Systems, Inc. v. Hartford Acc. & Indem. Co.* (C.D. Ca. 1995) 882 F.Supp. 930, 942, fn. 5; *St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Systemsl* (E.D. Va. 1993) 824 F.Supp. 583, 585.)

The nice thing is that this judicial definition has, in the specific context of an insurance policy which is clearly intended to provide coverage for at least some kinds of intellectual property, the virtue of making sense in terms of how the ordinary layperson would understand the phrase. The words "doing business" suggests a wholeness or comprehensiveness to an enterprise, not just an isolated part. *Style* of doing business suggests some sort of encapsulation of that wholeness.[5]

[5] While there is almost universal agreement on the basic definition, there is some tension among the courts as to whether "style of doing business" is merely a synonym for "trade dress," or whether it can include allegations beyond trade dress. (See *Novell, supra*, 141 F.3d 983 at p. 987.) (No court, as far as we are

For a claim to be covered, there must be some potential implication of the "comprehensive" part of the definition. *Novell* is illustrative: There, a software company had a program to encourage third parties to write additional add-on software for its basic program. A third party software writer sued the company, alleging that it capitalized on his research, development and marketing efforts in regard to a program he had written that would allow documents to be printed with either a "copy" or "original" stamp already on them (obviously law firms were part of the target market). In the ensuing coverage dispute the court held that the third party software writer had not alleged a theft of his "comprehensive manner of operating his business," it was merely an isolated aspect of his business. (*Novell, supra*, 141 F.3d at p.987.)

For the same reason a federal court in Virginia said that a patent infringement claim did not approach "pervasive similarity in the overall manner of doing business." (*St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Systems, supra,* 824 F.Supp. at p. 585.) Patents, after all, usually comprise only one small part of a process within a machine used in a business.

Restaurateurs appear to have a particular need for protection from being sued for misappropriating a style of doing business. Restaurants often claim that a rival's general ambiance was stolen from them. (See, e.g., *Two Pesos, Inc. v. Taco Cabana, Inc.* (1992) 505 U.S. 763 [fast food Mexican]; *Prufrock, Ltd. Inc. v. Lasater* (8th Cir. 1986) 781 F.2d 129 [down home country]; *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.* (9th Cir. 1987) 826 F.2d. 837 [upscale burger with cooking area visible].)[6]

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aware, has said that the phrase misappropriation of style of doing business does not include *at least* trade dress.)

[6] *Prufrock* is a good example of getting yourself sued for misappropriation of a style of doing business, which at the very least means infringement of "trade dress." There, the defendant restaurant was sued because, among other things, its church pew seating, antique light fixtures and small print wallpaper resembled a competitor's. (*Prufrock, supra*, 781 F.2d at p. 133.) However, the plaintiff ultimately lost on the merits, because such items, while distinctive, were held to be functional, and one of the main theories in trade dress litigation is that you can't "own" trade dress that is functional. (*Ibid.*)

Outside the restaurant business and directly in the context of insurance coverage, *Hoosier Ins. Co. v. Audiology Foundation of America* (Ind. App. 2001) 745 N.E.2d 300 is illustrative. In *Hoosier Ins.*, an audiology credentialing service offered a credential known as "Doctor of Audiology." It wasn't exactly one of those mail-order doctorates, but it was close enough that a rival credentialing service sued because it conveyed the false message that the credential was an academic degree. (*Id*. at p. 306.) In separate coverage litigation, the appellate court held that the suit potentially posed liability for misappropriation of a style of doing business because the claim was based in the similarity of the two associations. (*Id*. at p. 308.)

Neither showing up at a trade show or grabbing a list come close to resembling the misappropriation of a comprehensive manner of doing business. Indeed, the distributors' business was not the trade show market -- Abba had tried to reserve that dance for itself -- but in making direct sales to small hair salons.

4. Wrongful Use of a Trademark? Yes
"Infringement," No.

There is, of course, no question that the Wausau policy covered claims potentially implicating liability for trademark infringement. It is plainly in the policy. ("'Advertising injury' means injury arising out of one more of the following offenses committed in the course of 'your advertising activities:' [¶] . . . . d. Infringement of . . . trademark . . . .")

The tricky part here is threading through the unique fact that in this case it is the policyholder who indisputably owns its trademarks, and has been sued for selling products with *its* trademark on it.

Wausau's argument that Abba's distributorship contracts made it clear that Abba had the absolute right to sell its products at the trade show misses the mark. Under the potentiality rule, Abba's right to sell merely demonstrates that Abba might have won the underlying cases on the merits. But it does not show that there was no potential for any liability for selling its products.

Just because an insured has a surefire defense does not mean there is no insurance coverage on the theory that there is no potential covered liability. The point is perhaps best illustrated by *Garriott Crop Dusting Co. v. Superior Court* (1990) 221 Cal.App.3d 783, 796-797, where any liability was clearly barred by applicable statutes of limitations. Even so, there was a duty to defend. After all, courts have been known to misinterpret the statutes of limitations and the possibility of liability still remained. Arguments that go to the merits of a dispute do not demonstrate the absence of potential recovery under the policy.

However, even though Abba may have faced liability under the California Franchise Investment Law, it did not face any potential liability for "infringement of trademark."

If you want a lucid quick lesson on trademark law, read the Ninth Circuit's recent decision in *Mattel, Inc. v. MCA Records, Inc.* (No. 98-56577, 9th Cir. July 24, 2002) ___ F.3d ___ [song lampooning Barbie doll fit not violate trademark because it fit within noncommercial use exception, even though it was dilutive of trademark].) The "core purpose" of trademark law is to avoid "confusion in the marketplace." (*Ibid.*) The name of the game is to prevent buyers from being fooled into buying something they didn't intend to buy. (See *id*. at p. ___ ["'Whatever first amendment rights you may have in calling the brew you make in your bathtub "Pepsi" are easily outweighed by the buyer's interest in not being fooled into buying it.'"].)

However else Abba might have gotten in trouble for selling its own products, it was not sued for any product confusion. There is a difference between the selling of a *specific* product in a given context (which, according to the underlying complaints, Abba didn't have the right under the Franchise Investment Law to do) and the wrongful selling of a product because it might be perceived as another's (which is violative of the trademark laws). Abba was sued for the former, not the latter: The only trademark in this case was its own. (See *Bayshore Group Ltd. v. Bay Shore Seafood Brokers, Inc.* (D. Mass. 1991) 762 F.Supp. 404, 410 [trademark infringement requires plaintiff have exclusive right to the trademark].) Thus, while Abba may indeed have wrongfully usurped the "right" of its distributors to sell products with its trademark at the Long Beach Hair Show, that usurpation cannot reasonably be described as the "infringement" of trademark. No reasonable insured, considering the language of the policy in context, would take a chance on that proposition.

IV. CONCLUSION

Because the insuring clause afforded no potential coverage, the trial court properly granted Wausau's summary judgment motion. The judgment is therefore affirmed. Because this is a close and complicated case, the interests of justice require that each side will bear its own costs on appeal.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.