Branding in the Sharing Economy

LEGAL IMPLICATIONS FOR INTELLECTUAL PROPERTY & CONSUMER OUTREACH

COLLEN IP
INTELLECTUAL PROPERTY LAW

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INTRODUCTION

The terms "collaborative economy" or "sharing economy" describes an economic system where consumers prefer to share, rather than purchase, goods and services. It seeks to empower consumers and free them from the burdens of ownership. Thus, "[a]n entire economy is emerging around the exchange of goods and services between individuals instead of from business to consumer."[1]

The past several years have witnessed the emergence of hundreds of startup businesses that have leveraged social media technology to meet this new demand. Instead of purchasing a car outright, someone who needs a car only occasionally can share a car through www.zipcar.com. A consumer from New York City who wants to visit Paris for a week's vacation no longer needs to book a hotel room; she can use www.airbnb.com or similar services to find a week-long apartment rental. Other startup businesses help consumers share bicycles, textbooks, fine art and fashion apparel.[2]

Major brand owners are now venturing into this space.[3] Patagonia's and eBay's "Common Threads" venture enables consumers to recycle PATAGONIA brand outdoor clothing from one user to another,[4] and Toyota has started leasing cars for short term periods.[5] Other significant companies, all wanting to follow their customers, either now or will soon feel pressure to follow suit.

Intellectual property – copyrights, trademarks and patents – are the lifeblood of many businesses. Will the collaborative or sharing economy render them obsolete? Will the venues for advertising and marketing become so diverse and diffuse that companies will no longer be able to afford to develop a brand identity? Will the lack of control over promotion of a brand and delivery of a product or service obviate the purpose of having intellectual property?

Trademarks may become more critical than ever in a sharing economy. Trademarks protect the consumer against confusion and ensure reliable quality from a specific source of goods or services. If the brand owner is no longer the source from which the consumer obtains its goods, how can a brand control or assure quality? The sharing economy could have the effect of making trademarks more critical than ever, a tall task considering the value that brand names already hold over the economy. In an economy of sharing, after facing disappointment with quality, consumers may look to trademarks as some indication of origin, quality or authenticity.[6] Whether the goods or services are new or recycled, a brand name waves the flag of quality and assures consumers that the product or service can be trusted to deliver a predictable, reliable level of quality, durability or performance. Indeed, some collaborative services may develop better reputations for quality and their own trademarks may soar in value. Consequently, brands will need to be vigilant in protecting their trademarks and monitoring the marketplace for infringement.

On the other hand, collaboration fundamentally disrupts traditional ideas of copyright and patents. The United States Constitution acknowledges the rights of authors and inventors to own and control their creations. Indeed, our Founding Fathers thought a monopoly incentive would jumpstart the advancement of science and the arts, and this notion gave birth to modern copyright and patent law. These government granted monopolies provide incentives for both artists and industrialists by promising exclusivity and control over the marketplace in exchange for use of their talents to grow and advance knowledge and culture. The sharing economy, however, changes the dialog by talking less about duplicating original works and inventions than about sharing them. This economy relies on reusing goods and services rather than selling them. This paradigm creates challenges for copyright and patent owners.

While evaluating the systems for developing and disseminating intellectual property, brands will also have to contend with a maze of regulation around the sharing economy. Historically, advertising and marketing initiatives have always been limited by the need to avoid deceptive and unfair speech. As the collaborative market matures, undoubtedly, certain elements will look to manipulate the conversation to their advantage, resulting in campaigns that dupe the consumer. In a sharing economy and, ultimately, a making economy, because of 3-D printing, consumers may be at increased risk for subterfuge. Regulators on the federal, state, and local level monitor the marketplace and will assert themselves if they feel consumers are at risk. Commercial speech in the form of advertising and marketing will continue to feel the squeeze of regulation until or unless various industries ban together to create ethical practices. Individual brands, therefore, must remember to vet their campaigns for legal issues or expose themselves to risk of financial and even potentially criminal penalties.

As the sharing economy matures, what can brand owners do to maintain and protect their valuable intellectual property assets? What steps can brand owners take to protect and enforce these important assets? How can they promote their goods and services without violating the law?

We have prepared this white paper to address these and related questions. In separate sections below, we summarize issues that companies participating in the sharing economy will face in five key areas of intellectual property law: trademarks, copyright, advertising and marketing, counterfeits and grey market goods, and patents. Each section concludes with a list of suggested best practices.

- In our first section we will examine the role of trademarks in the sharing economy. We explore their relevance and how brands can protect these assets. We also look at how certain developments such as fluid trademarks and 3-D printing will impact brands in the sharing economy.
- Copyright law developed from the government granting a limited monopoly to spur innovation. The digital economy has already exposed some of the weaknesses of the existing law. In time, we may see a new version of copyright law. Until then, how can copyright owners protect their rights in the sharing economy?
- Advertising and marketing are traditional concepts for extending a brand's reach. As the sharing economy takes power away from the brands and puts it into the hands of consumers, how will brands be able to advertise and market lawfully? What steps will brands have to take to reach consumers without exposing themselves to undue risk?
- We next turn to the problem of counterfeit and grey market goods. Will the sharing economy encourage surges of cheap quality knockoffs? How will consumers know who to trust

in the sharing economy? How can brands manage interlopers who threaten their reputations and sales?

- Finally, we look at patents. At first, patents seem completely at odds with a collaborative mindset. We explore several ways licensing concepts may allow patent owners to thrive in a sharing economy.

The sharing economy will undoubtedly change the way companies do business, the way consumers interact with brands, and the expectations consumers have for their lives. It is our hope that this paper will spark dialog on the practical and legal consequences of operating in the sharing economy and preserving the relevance of brands. While some of our intellectual property and consumer protection laws will evolve over time, companies need to stay ahead of the regulatory curve if they want to thrive in this new world. By proactively joining the sharing economy and using their intellectual property to build trust in products, services and commercial speech, brands have an opportunity to shape the legal landscape and how people function and trade within the sharing mindset. We aim to provide some best practices here that can help brands adjust to the new reality.

TRADEMARKS

In a changing marketplace, brands and trademarks remain a constant. A trademark is an asset to the brand owner and a sign of known quality to the consumer. Consumers reshape the market through social media, and the traits, trust and quality associated with a known brand continue to engage customers. After all, brand identity gives consumers something to "yelp" about and drives "favorite-ing" on Facebook.

What will the sharing economy do to trademarks? The social media-induced conversation has diminished the owner's control of marketplace perceptions. The brand owner no longer has total dominion over the presentation of its goods and services. In a sharing economy, the shift from outright sale to collective sharing will make it even more difficult to develop and manage a trademark portfolio and brand identity.

The sharing economy will require increased diligence by brand owners. Owning a trademark has always carried the burden of policing the marketplace. Now more than ever, trademark owners need to demand consistent and proper use of their brand's indicia and maintain control over the quality of goods and services associated with the brand to secure their trademark rights.

Management Guidelines for Trademarks

On some level, the sharing economy is not new; consumers have been re-selling used goods forever. A stroll through any garage sale, perusal of the weekly classified ads, or a turn through Craigslist reveals individuals advertising and selling products bearing brands they do not own on a daily basis. No one would think about obtaining permission to advertise used Toyota vehicles or collections of vintage Coca-Cola bottles. Despite having no affiliation or authorization from Toyota or Coca-Cola, these advertisements and sales are both perfectly lawful under the trademark laws. A consumer is entitled to re-sell any genuine product it purchases. It is also permitted to advertise its sale of such product and reference the brand by name, provided it does not falsely suggest endorsement or sponsorship by the brand owner.

In the sharing economy, brand owners will see an increase in unregulated "private" use of trademarks that will undoubtedly test the bounds of brand owner's permissible use guidelines. As such, trademark owners will have to develop strategies to maintain the value and strength of their brands against a more expansive field of usage. To do so, they must continue to police their marks in the sharing economy, with a focus on two guiding principles. First, they must protect against their trademarks becoming generic. Second, they need to be sure the brands are not used in a way that would suggest endorsement or affiliation with the brand owner where no such relationship exists.

Dangers of Generic Status

While brand owners in the sharing economy will lose even more control over the transfer of their goods from one consumer to the next, they can, at least, require proper usage of their brands. This requires not only policing social media to stop unauthorized uses but also requires proactively sending the message that trademarks are property under the sole control of the brand. Brand owners can also engage consumers directly by taking advantage of the tools of the sharing economy, including conveying their own messages through the same social media sites that are driving this new marketplace. By putting out a consistent brand image and responding to consumer feedback on social media, brand owners can stay more in control of their trademarks.

WHAT IS A GENERIC TERM?

When a word no longer identifies the source of a particular good or service, but instead becomes the word used to refer to the product or service itself, the word no longer functions as a trademark. It becomes generic. Once generic, a mark is no longer entitled to trademark protection and falls into the public domain. Instances of marks that have become generic, in part through failure to police proper usage, include: ASPIRIN, THERMOS, ESCALATOR, ZIPPER. and DRY ICE.

False Impression of Affiliation

Brand owners must also police against a false impression that the brand endorses the person sharing goods or is somehow affiliated with the collaborator.

While the person offering to share her Toyota automobile can advertise that she has a Toyota vehicle available for use, she would be more hard-pressed to claim a right to use the corporate logo as part of her advertising:

TOYOTA

The selection and arrangement of wording is equally important for ensuring that the user does not suggest a false endorsement or affiliation with the trademark owner. While it is a fair use of the trademark to say: *"we have a Toyota Camry available for sharing,"* the Camry owner does not have the right to create an advertising message that reads: *"visit our Toyota facility to select your vehicle*."

FAIR USE OF TRADEMARKS

The fair use exception to trademark rights allows a consumer to use a brand to describe a good or service she offers for sale. At the same time, the law only allows use of so much of the mark as is necessary to describe fairly the product.

Brands as Domain Names

Brand owners must also monitor use of their trademarks in domain names, on websites and as business names. For example, a person sharing Toyota vehicles may be tempted to create a website www.sharingtoyota.com or operate a business called Toyota Sharing. (There are many derivations of this concept). Whether or not each use will be deemed "fair use" will be fact-specific. The general rule, however, holds that the mark should only be used to describe what the consumer is offering to share. Brand owners will need to monitor what happens in the marketplace to be sure that users never convey that the individual sharing the product has been doing so with the authorization of the brand owners.

Companies have adapted their protection philosophies as third parties started to incorporate the company's brand in their web address, became "fans" in social media, and started to share brand name goods. At one time, it was unthinkable to a major brand owner that others might have legal ownership of important real estate, such as a domain name, which included their famous trademarks. Most big companies now accept that hundreds or even thousands of those domains exist, generally opting to ignore them so long as they remain dormant.

Even though brand owners have accepted domain squatters as a fact of life, will they vow not to let the sharing economy let more people lay claim to using their marks? Legal tools are available, but there are practical limits to what the brand owner can stop. The cost of monitoring alone is high, but the cost of legal enforcement after is even higher. Nonetheless, because the relationship between product/service and source is the *sine qua non* of trademark protection, owners must find a benevolent way to police uses that will not alienate customers. Fearing negative social media backlash, many trademark owners chose not to approach consumers with a stern legal letter. In the sharing economy, a softer approach may be appropriate, using a letter to outline why the consumer's use harms the brand owner and perhaps how the brand and consumer could work together to make a branded initiative that evokes trust and quality.

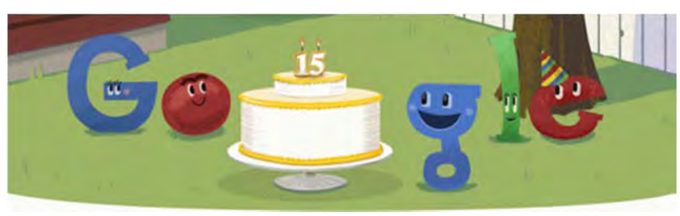
Fluid Trademarks

Brands never stay static. The consumer's "collaborative" consumption philosophy comes at a time when brands are already striving for interactivity and instant re-action from consumers, via social media. Companies such as Google understand the consumer mentality and try to keep their brand fresh and different in the minds of the consumer, every single day. Playful permutations of the brand create what are often called "fluid trademarks."

WHAT IS A FLUID TRADEMARK?

A fluid trademark is one that changes dynamically and intentionally, rather than the traditional trademark that is a static signature or source identifier. In recent years, some brands have experimented with trademarks that alter in appearance. By refreshing their trademarks constantly, the brands engage consumers with their creativity and energy. The most famous examples of fluid trademarks are Google and Absolut vodka. Google updates its artwork almost daily, and yet, consumers always see a "Google" essence even as the name bears constantly-changing artistic ornamentation. Absolut has adopted an ongoing ad campaign in which artists and designers play with its trade dress. The Absolut bottle has taken many forms, from a fried egg on a sidewalk to a snow sculpture, and yet, consumers still recognize that they are seeing an Absolut bottle.

Using this strategy, the trademark GOOGLE changes daily. It may be written in a different font, in different colors, or formed with special characters like teddy bears or donuts (if it is National Teddy Bear Day or National Donut Day).



Sep 27, 2013
Google's 15th Birthday

Sep 25, 2013
Maria Tănase's 100th Birthday

Sep 23, 2013
Saudi National Day 2013

What is Google's message? Check in every day, or you will miss something. Google's fluid trademark builds goodwill with the consumer and enhances the reputation of the brand. It even offers opportunities for collaboration as Google sponsors user contests to develop the artwork.

Fluid trademarks, however, bring up their own legal issues: what is the protectable mark? Is it in the outline, the colors or the teddy bear composition? Is each trendy expression of the mark a different trademark, such that the company is not really using the mark as registered? In a sharing economy, is it fair use for "sharers" to use or create a reworked or creative rendition of a famous brand? While this strategy permits personalization of a brand, creating a closer tie between consumer and brand owner, it endangers trademark rights unless the brand owner continues to set parameters for how consumers can use its trademark properly.

The variable nature of fluid marks combined with the new territory of the sharing economy makes policing a brand and preventing consumer's misuse of the brand more challenging. Brands will have to determine their own best practices for engaging in fluid trademarks and determining whether alternate uses of the mark make sense for their marketing goals in the sharing economy. That is, with the additional variable the sharing economy inputs into the idea of legal trademark protection, can a brand afford to have a more vaguely-defined mark such as a fluid trademark, or does practicality call for a traditional, fixed trademark so that enforcement and consumer-facing guidelines are more straightforward?

Clarifying the Brand Position

By its very philosophy, the sharing economy has massive potential to weaken the power of the brand and tarnish the goodwill associated with it. The brand signifies a source of a certain quality to a consumer and if control of the brand escapes the brand owner in the sharing economy, can the consumer still expect the trademark owner to be responsible when the product does not perform as expected?

In a sense, "sharing" directly contrasts to traditional trademark concepts. Accepting this new reality may mean brand owners will have to advertise to consumers to explain the difference between a new product bought through traditional outlets, versus goods obtained through a share-based sharing economy. At the same time, educating consumers to protect one's brand is not a new concept. Companies, perhaps most famously Xerox, have for many decades advertised to tell consumers that they do not make a "Xerox." They make a photocopy on a XEROX-branded copier. The sharing economy means that brands will have to renew their efforts to clarify the lines between products they sell or promote and those they do not.

3-D Printing

What will 3-D printing do to brands, where even the manufacturing process is taken out of the hands of the brand owner? The likelihood of consumer confusion in the sharing marketplace could be triple with 3-D. Obviously, if articles are produced through 3-D printing technology, the cloned good cannot use the brand name unless the blueprint came from the brand under license. The prospects for outright trademark infringement or counterfeiting explode when home users can manufacture goods and presumably place any mark they wish on the finished product. Consumers will place blame automatically on the brand owners for unsatisfied goods. Brands will find themselves in the undesirable position of having to address a problem they did not create or to tell the consumer he has purchased a fake. The message consumers may receive is that a brand name may not signify quality. In the sharing economy, brands will have to create clear ways to denote genuine goods.

Conclusion

Brand owners can embrace the sharing economy and offer their products for "consumption" in a new way. This goal might be easier for companies in the service industry than for those who sell goods. For example, Marriott has begun a program certifying homes or rooms offered for vacations or short stays on Airbnb.com. Marriott has entered the sharing economy on the ground floor (or lobby) by also putting its reputation behind a listing to provide a consumer looking to 'share' a room with a recognized stamp of approval.

In a recent television commercial, Enterprise Rental Car "re-branded" itself as a "car sharing" company: the word "rent" was never mentioned. Similarly, Toyota has jumped on the collaborative bandwagon by offering some of its products for "sharing" rather than purchase in the San Francisco Bay area. These brands will want to use domain names like www.sharingtoyota.com or www.sharingenterprisecar.com to safeguard their own expansion into the sharing economy.

Ironically, the sharing economy thrives only with the trust brands develop through the work of the brand owner. Without investments in building brands and establishing instant consumer recognition of the quality of products or services, people could not identify effectively what they are "sharing" in a sharing economy. For the sharing economy to survive, the brand must still signify a consistent quality to the consumer. Accordingly, the brand owner can take comfort in knowing that brands will continue to remain relevant in the sharing economy. At the same time, trademark owners will need increased vigilance to police their intellectual property.

Turn page for Trademark Best Practices

TRADEMARK BEST PRACTICES

- ✓ *Police the brand. Remain vigilant in enforcing proper use of trademarks to avoid them becoming generic. Never let marks be used to describe the goods or services.*
- ✓ *As trademarks fall into the hands of consumers, these valuable assets are at risk. Protect the brand from false endorsements or affiliations.*
- ✓ *Direct proper use of the brand by disseminating internal use guidelines and engaging consumers through social media.*
- ✓ *Consider possible benefits of leveraging the power and trust of the brand to join the sharing community. Partner with collaborative companies to offer certification programs. Offer goods/services for sharing rather than purchase and publicize that they come from a trusted, branded source.*
- ✓ *Consider carefully how 3-D printing and an emerging making economy may threaten control of the brand and relevance of the brand. Strive for points of clear quality distinction to stay ahead of making technology.*

COPYRIGHTS

At first blush, copyrights, like many intellectual property rights, may seem diametrically opposed to the idea of a sharing economy. Copyright law grants a temporary monopoly to individuals and companies as an incentive to promote their creativity. The monopoly allows copyright owners to monetize their works and to control where and how they sell those works in the marketplace. The sharing economy, on the other hand, has its foundations in monetization, through sharing rather than ownership.

What is Copyright?

A temporary monopoly granted by the government to encourage creativity and artistic invention

- *Bundle of rights to prevent unauthorized use of protected works*
- *Author/creator has exclusive right to:*
  - *Copy*
  - *Distribute by renting, selling or leasing*
  - *Make derivative works*
  - *Display*
  - *Perform in public*
- *Duration: life of the author plus 70 years or for a corporate creator, 95 years from date of publication*

It can be difficult to conceptualize the role of copyright in a sharing economy. Trading promotional copies or free digital downloads of a song has become a standard way for artists to gain recognition. So in this sense, collaborative content serves as a marketing tool to build word of mouth, elicit positive feedback, or promote previewing. Nonetheless the ultimate goal has always been to give away content in order to garner outright sales.

Sometimes offering content at no charge for collaborative uses does not lead to greater sales, as the print news media discovered. That industry jumped headlong into the free content camp, and ever since, it has been trying to claw its way back to profitability.

Learning from this example, the sharing economy leads us to three essential questions about copyright:

1) Is the current copyright law relevant and useful?
2) In a collaborative environment, how can copyright owners enforce their copyrights in a sharing economy?
3) Can copyright owners engineer 'sharing' in a sharing economy to foster and encourage creativity?

Historical Perspective

In the late 1990s, the music sharing website Napster emerged as a massive collaborative effort. Some thought that collaboration sampling (and even piracy) would boost sales,[7] but instead, record companies' profits and sales dropped. Sales went from $14.6 billion to $7.7 billion in a decade.[8] Responding to Napster, copyright owners constructed restrictive licensing terms to protect profits and limit sharing.

Other platforms emerged as the marketplace rebounded from Napster and the lawsuits that followed. Some sites, such as LimeWire, were mere replications of Napster. Others, however, provided more control to copyright owners. Today, platforms such as iTunes, Pandora, and Spotify distribute music under strict licensing arrangements and Digital Rights Management systems. These platforms evidence new ways of assessing the digital distribution problem, but they still fall short of collaboration.

How Copyright Law Might Adapt to Collaboration

Current copyright laws present serious obstacles to sharing. At the same time, the online market now allows new and unknown artists to publish and republish as never before. In so doing, they are testing the boundaries of current law and endeavoring to stretch the current defenses to copyright infringement.

First Sale Doctrine

Like most IP rights, the copyright law seeks a balance between the limited monopoly granted to creators, and the right of the public to access creative endeavors. Once the copyright owner has made its initial lawful sale, the First Sale Doctrine takes over. It permits the sale of used CDs, records, books and magazines on online websites, at yard sales, and in secondhand stores. Extending this Doctrine to also permit 'sharing' of the goods purchased by an original consumer seems logical. On the other hand, the First Sale Doctrine does not apply generally when the copyright owner is licensing goods like software and digital music for a limited purpose rather than selling those goods.

Google Books and Fair Use

A "sharer" in the sharing economy might seek to use an image of a lawfully obtained copyrighted work when offering it for "sharing," citing the Fair Use Doctrine. This type of use, however, does not usually fall under any of the acceptable purposes for fair use: research, teaching or criticism. Still, the Fair Use Doctrine faces possible expansion in the sharing economy.

Consider Google Books and how it is transforming the publishing monopolies. Google has scanned more than 20 million books since 2004. This library allows Google's users to perform a search and see snippets from the books. Google does not allow users to view books in their entireties. A U.S. district court in New York has said that Google's use is a transformative fair use that trumps an owner's exclusive rights to control the books.[9] The judge in the case said that Google's library is beneficial not only to Google itself, but also to the public at large and the authors who might theoretically benefit from an expanded market for their books.

At this time, the decision is on appeal. While the district court decision points the way toward possible expanded interpretations of "fair use doctrine" in the sharing economy, the Google Books case is perhaps a unique circumstance and does not help to set a clear agenda for collaboration or amending of copyright law. While the decision puts a massive amount of important content into a free and freely searchable public database of copyrighted material, the collaborative benefit recognized by the court is not new.

The Google Books case rests on an argument of transformation, a known defense to copyright infringement. While the case represents a solid precedent on fair use, one is left to wonder whether Google Books is an example of innovative collaboration or simply an electronic version of old-school fair use and 'conventional' application of copyright law.

New Interpretations of Copyright Law

Copyright law is quite flexible, but existing principles may not stretch far enough in a sharing economy. Perhaps, only a combination of the two Doctrines – Fair Use and First Sale – will allow a rightful purchaser of a copyrighted work to offer it for sharing. Any such effort will require the cooperation of legislators or the courts.

There are efforts underway to overhaul the Copyright Act in general.[10] Many of those efforts are meant to better define the rights available through copyright and to catch up with technology. The process for amending the Copyright Act, however, is not speedy. When the Act was last overhauled in 1976, it took more than a decade of hearings and debates. A revision of the existing copyright laws could provide the copyright owner with secure rights in the sharing economy by providing, for instance, additional royalties to authors for second party sharing and secondhand sales.

Enforcing Copyright Law in the Sharing Economy

Absent a revision to the copyright statute, copyright owners may need to expand their uses of copyright licenses in order to protect their work but still participate in the collaborative effort. The copyright license is a contractual restriction on the use of a work. Copyright owners can support the sharing economy by using the least restrictive types of licenses.

Various licenses have already been established in a type of sharing economy: movie rentals, video game rentals, and library books. With movies and video games, restrictive licenses maintain the value of the work, preventing reproduction or public performances while still generating a profit. Potential customers can give a work a “try” (for a price), and usually, for a set increment of time.

Perhaps the most pervasive use of copyright licensing occurs with software. Almost every computer owner is a licensee. Companies such as Microsoft and Apple have restrictive licensing agreements on software. Restriction may limit the context in which the software is being used (student license, business license, etc.) and how (if at all) the software can be transferred or copied. In order to maximize profitability, Microsoft must use its copyright monopoly to distribute to as many users as possible, and attempt to eliminate sharing.

At the other end of the spectrum, open source software is generally accessible to the public, both for downloading, and for modification. The creators designed these products from the outset for collaboration rather than private profit. Collaborative sites such as Linux and SourceForge allow free and open sharing of source code. For open source sites, “sharing” means more than just use; it also includes the enhancement or modification of source code. The open source world therefore develops a world with little to no copyright restriction.

Indeed, open source software seems to be the best example of the sharing economy at work. People find ways to share yet still turn a profit. The question remains, however, whether the model is sustainable economically on a broader scale.

In a far less complicated example, copyright licenses for written works can protect the copyright owner in the sharing economy. Consider the restrictive licenses on e-books, such as those purchased for e-readers like the Amazon Kindle. E-books cut down on raw material costs associated with a printed book and halve the cost to consumers. At the same time, neither Amazon nor the book publisher intend for users to enjoy unlimited sharing of the book.

Similarly, with Creative Commons, authors are licensors who can apply restrictions to the use of their works. Some authors are seeking attribution for their work in exchange for use. Others offer their work for collaboration, allowing contributing authors to share the additions and improvements.

These examples all show that the marketplace still treats copyrights in a binary sense in the collaborative world. Either there is ownership with traditional controls “on,” or there is free collaboration through licensing with ownership “off.” Licenses have become the customary method for sharing content among multiple users. Companies like Scoopshot are exploring crowd-sourcing libraries of content, but still operate pursuant to licenses granted by the copyright owners.[11] In short, while we may see new models for licensing in the collaborative world, copyright owners will still assert some ownership to the work while permitting others to share content.

How Copyright Owners Can Engineer the Sharing Economy for Their Benefit

Copyright owners have been under attack for some time through constant piracy, political movements that favor crowd-sourcing, and legislative efforts with unknown consequences. Copyright owners need to engineer solutions that will allow them to remain relevant and prosper.

Websites like Scoopshot demonstrate how copyright owners can still profit in a collaborative marketplace. Want a photo at a particular place in the world of a particular scene? Ask someone, thought scoopshot.com, to take the picture for you, to your specifications. This avoids the need to find the right stock photo. The model is wholly collaborative to produce on-demand stock photos. At the end of the day, however, the license or use fee still follows all conventional copyright laws, licensing certain bundles of rights that are normally reserved to the copyright owner. In this case, existing copyright law works fine. The innovation lies in the website concept and its overall functioning, not in some new legal interpretation.

The recent phenomenon of “Fan Lit” may also provide some clues about collaborative marketplaces. “Fan Lit” is a cottage industry where fans, enamored of the heroes they have learned to love through lawful purchase of copyrighted material, take their tribute to another level by writing stories and cartoons incorporating the authors’ characters. The author is a victim of her own success: her characters have become such a beloved part of pop culture that new artists want to add on to the collection of the authors’ works. In many instances to date, sharing seems only to be of an original authors’ characters: that is, the fan/authors do not always want to ‘share’ their own newly created content; they often seek a copyright monopoly on their new creations or derivative works. This model has not yet arisen in any substantial way. If authors agree to build a body of freely authored and shared literature, “Fan Lit” could develop communal concepts of rights ownership.

Cloud-based storage systems, such as the one run by Amazon, are also in the forefront of a sharing economy. These platforms merely provide a different (ephemeral) media outlet for a private collection or data to be stored. By improving on the cloud-based systems, copyright owners may find ways to please the public while safeguarding their revenue streams. Electronic sharing is far faster, cheaper, and easier, allowing words to be shared in a true collaborative sense, subject to the copyright owner’s restrictions. For e-reader sites and distributors of works which follow this model, the content owner must decide where to draw the line between satisfying the consumers need to share, and the point where sharing becomes so unrestricted as to make controls meaningless.

Low price apps, widely written for smartphones, are another success story in licensing. High value and performance apps can often be downloaded for free under license or at a very modest cost ($1.99 versus $50.00) for content and software. Collaboration in part keeps the costs down, though volume and access to data and advertising are also largely responsible for the low cost of apps.

The best way for a copyright owner to engineer sharing in the sharing economy is through a two-step process. First, copyright owners need to decide which technologies to use to share their copyrighted materials. Then, they can employ creative and flexible licenses to enforce their rights, learning from the experience of Kindle and others.

Conclusion

The very purpose of copyright – to foster and reward creativity – is related to questions of sharing. From copyright’s inception, legislators considered how to reward the creator while encouraging sharing. Today, this dilemma illustrates the thick tension between the existing law and generational values that favor collaboration. Indeed, human nature often wants to say "what's yours should be shared; what's mine is mine." In reality, the goal of ownership will likely not become irrelevant in the sharing economy. Copyright law may adapt to collaboration either through court interpretations or legislative efforts. In the meantime, copyright owners and the marketplace can drive the collaborative movement with innovative licenses.

COPYRIGHT BEST PRACTICES

- ✓ *Join forces with other industry members to lobby for legislative changes.*
- ✓ *Leverage emerging technologies that will allow for creative licensing.*
- ✓ *Employ flexible licensing for sharing copyrighted material. Innovate new licensing structures that permit use but secure ownership.*
- ✓ *Consider licenses that have limited durations to provide opportunities for evolving relationships.*
- ✓ *Move to the cloud to help restrict rampant infringement, unauthorized copying and use. Examine closely the extent of sharing that is permitted.*

ADVERTISING AND MARKETING

Advertising and marketing are the driving forces in the sharing economy. Publicity may come from brands seeking to leverage this new economy, but the bulk of the commercial speech will come from the crowd. Social media and mobile marketing will spread information about available opportunities, and more players will buy into the collaborative model as they witness its power, ease of access, and savings potential.

At the same time, the sharing or collaborative economy can only flourish if consumers trust it more than they trust the traditional brand experience. As consumers leverage the collaborative economy to access luxury markets[12], they will rely on each other and their testimonials for confirmation that the experience or goods available are legitimate and of high quality. The crowd's advertising and marketing efforts will fuel the sharing economy as much as, if not more than, brands' promotion of commercial opportunity. As the line between brand and consumer erodes and consumers create their own marketing opportunities, the sharing economy faces legal challenges.

Blurred Line Between Commercial and Non-Commercial Speech

As always, before the FTC or any other regulator can limit speech, it must be clear that the speech is commercial in nature. In recent years, it has become harder to detect whether speech is advertising. The sharing economy brings an uptick of native advertising, namely advertising that blends with news and content. In addition, brands will experiment in the sharing economy with experiential or gamified content and argue for broader protection under the First Amendment as noncommercial speech. Certainly, the FTC is paying attention, having held its first workshop on native advertising in December, 2013 to explore the "blurred lines" between editorial and advertising and entertainment content.

REGULATORY INFLUENCES ON THE SHARING ECONOMY

- *FTC concerns*
- *Deceptive speech concerns (Section 5 FTC Act)*
- *Endorsement and Testimonial Guidelines*
- *DotCom Disclosure Guidelines*
- *Green Guides*
- *Industry specific guidelines*
- *Federal laws on text messaging/mobile marketing*
- *State laws relating to specific industries*
- *State sweepstakes and gambling laws*
- *Insurance concerns*

Endorsements and Testimonials

The FTC's Endorsement and Testimonial Guidelines[13], last revised in 2009, provide that advertisers must disclose "material connections" between themselves and endorsers. In addition, endorsers, themselves, may bear legal liability for their statements. In 2011, the FTC's enforcement action against Legacy Learning Systems, Inc. set the tone with penalties for false endorsements and undisclosed connections to the brand to the tune of $250,000. Recently, in September, 2013, the New York Attorney General applied these concepts to collect almost $350,000 in penalties against nineteen companies who solicited fake consumer online reviews. The Endorsement and Testimonial Guidelines will be a linchpin in FTC and state enforcement practices in the collaborative economy. Best practices, then, require those offering goods and services in the new economy to develop policies regarding how to promote products or services, how to disclose relationships with product promoters and employees, and how to monitor online activity of the crowd.

DotCom Disclosure Guides

The Legacy Learning case not only explored the requirement for disclosure but how disclosures should be made. In 2013, the FTC announced its long awaited revised ".Com Disclosures: How to Make Effective Disclosures in Digital Advertising."[14] Asserting that advertisers need to make their disclosures clearly so that consumers understand their offers, the FTC decries hyperlinks, hashtags, and pop-ups. Regardless of the space-constraints of mobile space, banner ads, and tweets, advertisers must make clear and conspicuous disclosures to avoid complaints of deceptive advertising. The guides go to great lengths to describe what the standard "clear and conspicuous" means, using numerous examples that advertisers in the sharing economy should heed. In addition, advertisers are responsible for monitoring the marketplace to ensure that its affiliated third parties are disseminating the disclosures properly and that consumers understand them. This will be particularly challenging for actors in the sharing economy, given the influence of the crowd on marketing within the system. These guides will be a crucial tool for regulators who wish to ensure that the collaborative system presents goods and services clearly to consumers. Collaborative sharing sites should build disclosure into their designs, and brands should tighten up their disclosure practices.

Green Advertising and Marketing

One of the major premises of the collaborative economy is that, as a society, we can be less wasteful and have a more sustainable footprint as users of products and services.[15] Those advertising and marketing in the sharing economy are likely to want to appeal to the crowd with products and services that build a healthier world. In so doing, they need to heed the FTC's regulation of "green" advertising. While the FTC did not tackle the words natural or sustainable and deferred to the USDA for regulation of the use of the word organic, the updated Green Guides regulates terms such as recyclable, biodegradable, compostable, ozone safe, non-toxic, carbon offsets, renewable, and "free-of." The FTC also requires that marketers avoid unqualified general claims regarding environmental benefits, using specific, prominent, and substantiated language. The Guides also targets marketers' use of eco-seals and other kinds of seals of approval. Companies marketing "green" products, services or attitudes should be aware that these strengthened Green Guides give the FTC more authority to challenge advertisers' environmental marketing under general advertising law principles.

Made in the USA

Because trust is a crucial part of the sharing economy, consumers will want to know more about the origins of the goods they are sharing. With recent press about poor manufacturing safety standards in Bangladesh and elsewhere and poor quality control in the Far East, consumers may turn more to the capabilities of 3-D printing and start to "make" their own goods. While 3-D printing is far from mature as of the date of this writing, its potential to disrupt the manufacturing process has been heralded by commentators and politicians. No doubt, it will become a crucial leg of the sharing economy.

Those who take advantage of the "making economy"[16] may want to herald their products as "Made in the USA." In so doing, they will need to comply with the FTC's Enforcement Policy Statement on U.S. Origin Claims which applies to advertising and packaging for goods.[17] These guides are complex, but their overriding concern is to prevent consumer confusion and require substantiation for U.S. origin claims based on an "all or virtually all" standard. The sharing economy will provide many opportunities for the FTC to enforce its guidelines in this area. If consumers cannot rely on claims that products are "Made in USA" (or similar claims), then trust in the sharing economy will break down.

Gamification

Undoubtedly, the sharing economy will take advantage of the trend toward "gamification." Those who want to share will utilize games to generate creative incentives and attract attention in a field that is crowded and noisy. This could be a real opportunity for brands to assert themselves and to reclaim their importance. The most progressive brands are already pursuing gamification as a way to excite and delight their customers. If they can make the sharing experience more fun and trustworthy at the same time, then brands will undoubtedly thrive in this space with their marketing efforts.

As brands embrace gamification in an effort to stay in the forefront of consumers' minds, regulators will have renewed interest in enforcing related sweepstakes and contest laws to prevent these games from injuring consumers. For example, because speed is often a function of gamification in an age of social media, consumers can lose a lot of money very quickly on illegitimate offers. As such, regulators will be watching for frauds that use robotic technology to create fake bids and entries, driving up the prices that honest consumers are willing to spend. Honest brands have a real marketing opportunity to distinguish themselves as creative and dependable as they offer spaces for consumers to share.

Text Message and Mobile Marketing

On October 15, 2013, changes to the Telephone Consumer Protection Act (TCPA) became effective, increasing the onus on marketers to obtain consent before approaching consumers via phone. The updates to the law will have a significant effect on marketing in the sharing economy. As brands attempt to moderate the consumer sharing experience, it will be natural to rely on mobile technology and interpersonal communications. In order to share, people need to communicate directly.

At the same time, enforcement for violations of the TCPA is alive and well. In particular, the class-action bar has been active, pursuing brands for fraudulent mobile marketing.[18] Any brand contemplating mobile marketing or telephonic marketing needs to ensure at the concept stage whether it has proper consent from consumers in the sharing economy.

Navigating Regulatory Responses

There have already been specific regulatory responses to the sharing economy. Reacting to the room sharing platform and Airbnb's burgeoning popularity in New York City, the hospitality industry lobbied and persuaded the City to pass a regulation preventing short term apartment rentals. The regulation has already resulted in litigation. After an apartment owner paid a fine under the new regulation, he appealed his punishment. The courts overturned the fine because the apartment owner did not rent the entire apartment, only one room, and he was present during the time of the rental. In this example, we can see the struggle between lobbying groups, in this case the hotel industry, who may seek to combat the sharing economy, and the free market adapting to new opportunities. It may be up to the courts to create some sense of reason and fairness in the system.

Other industries have also tested the sharing economy. The simple concept of sharing your car is fraught with difficulty due to unclear liability for accidents, inspection issues and taxation responsibilities. Some of the same issues plague the food sharing industry and groups like “Shareyourmeal” and “Eat with Me.” How can consumers be assured that the food they eat is safe and that the advertising and marketing claims associated with the services are legitimate? Who pays the taxes on the services offered and the compensation received?

The sharing economy is pushing regulatory boundaries, and at the same time, redefining notions of ownership and whose responsibility it is to make sure that consumers are safe. Collaborative operators need to take constant stock of the ever changing regulatory landscape and ensure that their business model remain sustainable.

Conclusion

Social media has already eroded traditional branding initiatives. The crowd will quickly abandon brands that do not include them in their marketing efforts. Indeed, even luxury marketers who thrive on an air of unattainability understand the importance of speaking with and not to their customers. The sharing economy drives crowd involvement to the next level and threatens to cut brands out of the conversation completely. Still, brands can and will survive if they offer consumers something they cannot create on their own, whether that be goods and services that are vetted for quality control or experiences that are too difficult for consumers to create on their own.

As brands transition into the sharing economy, they should not seek to disguise themselves as just "one of the crowd." With the proliferation of "native advertising" (i.e. advertising disguised as editorial content), regulators are watching carefully. As brands use both old and new technologies to disseminate a message that they are still relevant, their commercial speech will continue to be subject to regulation. It is more essential than ever that brands are truthful and non-deceptive if they are to thrive in the sharing economy.

Turn page for Advertising and Marketing Best Practices

ADVERTISING AND MARKETING BEST PRACTICES

- ✓ *Remember that sharing may seem natural, but not all speech about sharing will enjoy vast First Amendment protection. Sharing is a commercial venture in the sharing economy and is subject to all the rules for commercial speech.*
- ✓ *The experiences of friends and other consumers are key marketing components for the sharing economy. Advertising that includes references to these experiences is still subject to regulation by the FTC and the various state rules to prevent deceptive advertising.*
- ✓ *Disclosure practices have already come under regulatory scrutiny in e-commerce. Undoubtedly, in the sharing economy, it will be more important to make all disclaimers clear and conspicuous and unavoidable for the consumer.*
- ✓ *If marketing a specific advantage for goods and services in the collaborative space (e.g. good for the environment, Made in the USA), remember that existing regulations apply.*
- ✓ *Focus on the increasing challenges to safeguarding consumers' sensitive, personal data to avoid legal risk. Take advantage of traditional and new media marketing techniques when communicating with consumers.*

COUNTERFEIT AND GREY MARKET GOODS

Counterfeit and grey market goods have always been a problem for brand owners. Now, facilitated by the low cost of entry offered by the Internet, counterfeit and grey market products flood the marketplace. Consumers sometimes encounter counterfeit or grey market goods in commercial settings – a cardboard table on a street corner, for example – where the goods are easily identifiable for what they are. More often, however, website operators hawk these goods over the Internet, where consumers are unable to touch or examine the goods in order to differentiate counterfeits from genuine products. The red flags for brand owners wave furiously over the Internet where counterfeit and grey market goods proliferate. "The only way to stop it is to take aggressive action against the counterfeiters and make them pay, civilly," says Michael Kowalski, chairman and CEO of Tiffany. "Trademark counterfeiting severely damages brand owners and consumers alike."[19]

In a sharing economy, consumers share the product, removed from the original point of sale, and therefore lack access to information concerning the product's source. How can the collaborative crowd distinguish counterfeit or grey market product from the "real McCoy"? Are goods manufactured by third parties automatically considered "counterfeit"? How will the advent of 3-D printing affect the marketplace? The sharing economy poses challenges for brand owners who wish to control the flow of counterfeit and grey market goods in the marketplace to protect their brand image and their revenues. If the brand owner does not participate in the sharing transaction, it has a weakened ability to manage counterfeit and grey market goods in the marketplace.

Counterfeit Goods in the Sharing Economy

The sharing economy presents an increased risk for trafficking in counterfeit goods. In the traditional economy, consumers generally know whether or not a product is real or fake. Purchasing conditions frequently provide important signals to consumers. For example, the purchase of a ROLEX watch on a street corner for $45 is a clear sign to many people that the product is counterfeit. Even on the Internet, a purchaser may detect clues that the goods offered for sale on a given website are counterfeit – for example, where the website is unsecured, has a misspelled domain name, or offers an unrealistic "bargain basement" price. The participants in a collaborative marketplace, however, are not exposed to the initial purchasing conditions. Instead, they must rely on faith and a presumption that products being shared are, in fact, genuine goods.

What is a Counterfeit Good?

- *A counterfeit product is a fake.*
- *It is not manufactured or authorized by the brand owner.*
- *The sale or importation of counterfeit goods is illegal in the United States.*
- *Statutory remedies and damages for the importation and sale of counterfeits are available through the Lanham Trademark Act.*

For some consumers who crave a certain look or experience, the fact that the product is counterfeit may be insignificant. For others, however, counterfeit products, of all types, carry potential to cause real injury. Counterfeit jewelry advertised as “100% silver” may contain other metals including some which are toxic or contain allergens. Counterfeit electronic products may have batteries or other components that have not undergone testing and can cause fires and burns. Counterfeit children’s toys may contain lead paint, or use flammable materials.

The consumer is not the only one at risk from counterfeit goods. Brands suffer not only lost sales to counterfeit goods, but also experience tarnished reputations, especially if the fakes cause injury or harm to consumers, and at a minimum, loss of prestige which is often the hallmark of a successful brand. Indeed, court decisions applying trademark law frequently recognize that counterfeits cause irreparable injury to a brand.

The new level of anonymity provided by the sharing economy makes identifying counterfeit products more difficult for brand owners. The challenges are already seen with online marketplace websites such as eBay. These websites provide a storefront where counterfeit and non-counterfeit products are sold side-by-side. Because these sites offer some legitimate products, it is difficult for brand owners to identify sites that offer counterfeit product as opposed to sites that offer genuine product. Examination of the goods is also difficult, other than by actually purchasing one by which time it may be too late. Then, too, even if a brand owner identifies the distribution channels of counterfeit products, tracking the source of those products could be problematic in an economy that does not revolve around manufacturing. From a legal perspective, this means that it will be even more difficult to trace the origin of these goods and protect the consumer from deception.

Even after identifying counterfeit products, brands have limited enforcement options in the sharing economy. Courts, until now, have been reluctant to enjoin the website where at least some of the products on the website are legitimate. In *Tiffany v. eBay*[20]*,* for instance*,* the court held it was the trademark owner’s duty to police for and identify counterfeit goods, not the platform provider.

The sharing economy will likely raise new legal issues about take-down remedies as market conditions influence fact-finders. This type of legal precedent implies that courts will expect brand owners to do all of their own monitoring and legal enforcement of collaborative uses which hurt their brand(s). If the brand owner receives no benefit from the sharing of products by a third party, perhaps courts could decide to shift the burden of protecting the consumer to the platform provider. Such a shift depends upon whether, ultimately, the sharing economy results in fewer transactions for the brand owner or more.

Grey Market Goods in the Sharing Economy

Gone are the days of independent brick-and-mortar stores which only have access to a limited geographical area. An international marketplace of sharing products stands to impact the existing grey market. Through the Internet and international couriers, consumers can directly arrange for sharing of products in regions where manufacturers set often substantially different prices. A student in Kentucky can join a sharing website and can rent products from Argentina at better rates than through a sharing website offering only United States based products.

At the same time, under trademark law, brand owners have the right to ensure their products reach consumers without material alterations, including damaged boxes and missing, or limited, warranties. Once a product enters a shared marketplace, brand owners will have lost all control over how their products are presented to the consumer. While a consumer may be willing to overlook scratches on a watch, or be blind to a new pair of boots arriving in a damaged box, these problems impact the brand's reputation. This is particularly important for luxury goods manufacturers who not only sell themselves on the quality of the products, but who also obsess over the overall purchasing and ownership experience of the brand.

Cross-border sharing may present new challenges for United States Customs. Under existing trademark law, owners of federal trademark registrations in the United States can record their marks with the U.S. Customs Service to police the importation of counterfeit products. An economy where goods can easily be shared across international borders will certainly make the job of distinguishing a counterfeit product from a grey market or used product more difficult. Law enforcement, perpetually spread thin in resources when it comes to crimes such as counterfeiting luxury goods, will not be eager to delve into a new arena.

What is a Grey Market Good?

- *Grey market goods are genuine goods that have been manufactured or authorized by the brand owner.*
- *Third parties sell grey market goods through channels of distribution that have NOT been authorized by the brand owner.*
  EXAMPLE: Assume Rolex sells a ROLEX watch to a distributor in Guatemala and restricts resale to Latin America. Assume, as well, that – despite this contractual restriction – the distributor sells the watch in the United States. The ROLEX watch is not "counterfeit" because it was manufactured by Rolex. Yet as a watch not intended by Rolex for sale in the United States, it is considered a "grey market" good.
- *Under certain circumstances, brand owners may prevent the importation and sale of grey market goods – most commonly where the goods have been "materially altered" in some way.*
  EXAMPLES: A product may be considered "materially altered" where: the packaging has been changed, the warranty for the goods may be different, appearances or formulations differ, serial numbers have been altered, warranty coverage is different or missing, differences in physical appearances, or the instruction are in different languages.

Conclusion

With all the enhanced difficulties of identifying counterfeit goods and locating grey market goods, collaborative commerce might well be perceived as one more "threat" that a brand owner must manage than a "benefit" to exploit. Indeed, brand owners likely will never escape the presence of grey marketers and outright counterfeiters trying for a share of the market. Then, too, the sharing economy will necessitate trademark owners' developing heightened vigilance in an increasingly splintered marketplace.

Nonetheless, the collaborative economy also presents opportunities for brand expansion. The brand owner can partner with sharing providers to offer some consistency in the consumer experience.[21] If brands partner with collaborative providers to ensure high quality and trusted goods and services, they may find an opportunity to increase sales and further develop their intellectual property's good will and value.

COUNTERFEIT AND GREY MARKET GOODS BEST PRACTICES

Brand owners can diminish the threat of counterfeit and grey market goods:

- ✓ *Monitor the marketplace by acquiring goods and inspecting for authenticity.*
- ✓ *Record marks with the U.S. Customs Service for help in policing for importation of counterfeit goods.*
- ✓ *Develop marketing to identify consumer sectors that value genuine and unaltered goods.*
- ✓ *Certify certain collaborative distribution channels.*
- ✓ *Partner with collaborative providers to share the burden of quality control.*

PATENTS

The sharing economy presents interesting new questions for patent holders and patent driven businesses. While the sharing economy encourages sharing goods and breaking down the barriers that limit the exchange of information and technologies, patents, like most intellectual property, create temporary monopolies. Patents grant inventors the ability to exercise almost absolute control over their inventions for a limited period of time on the theory that an inventor will be able to monetize his invention and be compensated for his work. Will patent owners be able to reap the benefits of their patents while participating in a sharing economy that seeks to eliminate the exclusivity that their patents create?

Use of Licenses to Control the Distribution of Patented Goods

After the first sale of goods covered by a patent, patent law cannot be used to prevent the purchaser from subsequently selling or sharing the patented goods with others. As consumers increasingly share hard goods such as cars, lawnmowers and appliances, instead of individually purchasing them, the cumulative sales of such goods decrease, and the value of underlying patents diminishes. For example, it has been reported that every car-sharing vehicle reduces car ownership by 9-13 vehicles, a revenue loss of at least $270,000 to an average auto manufacturer.[22] Accordingly, sharing economy principles threaten the benefits of patent ownership.

One way a patent owner can control the post-sale distribution and sharing of patented goods is to offer them to consumers under a license as opposed to an outright sale of goods. By structuring the transaction as a license rather than a sale, the patent owner can contractually retain certain rights that would otherwise be extinguished by the first sale, and can also place additional restrictions on the "purchaser's" use of the item. Under a license, a patent owner can restrict re-sale of the item and potentially limit the number of users, thus preserving the exclusivity afforded by its patent.

Humanitarian Licenses

One such licensing approach is demonstrated by the application of humanitarian licenses. Humanitarian licenses offer patent owners a way to make vital, often life-saving, technology such as pharmaceuticals or water purification systems available in areas where the local population would not be able to generally afford such goods. While there are many different ways such a license could be structured, a sample humanitarian license has been created and made available by Natural Innovation, a group founded in 2003 to support the development of clean technologies.[23]

The crux of Natural Innovation's model agreement is that the licensor grants the licensee the right to produce, use, sell, and/or market the technology in the "humanitarian domain." Natural Innovation defines the humanitarian domain as "geographic locations and populations in which it is possible to alleviate suffering through the use of Intellectual Property, Technology, and Products related to [the licensed technology], and where the population is typically too poor to afford such technologies."[24] The purpose of the license is to "reduce the overhead of a for-profit Western company or University licensing a technology to a social venture."[25] The hope is that such an agreement will be for patents what the Creative Commons license is for copyright, allowing for noncommercial use of patented technology without sacrificing ownership or exclusivity benefits.[26]

Through the use of a humanitarian license, a patent owner can promote the distribution of the technology to those who need, but cannot afford it, while preserving the right to market competitively and sell the technology in more developed and wealthy areas.

Patent Commons

Patent owners can also participate in the sharing of ideas and technology through patent commons. Patent commons are repositories of patents which allow use of patented technologies and provide a common location for specific patents of interest. Such patent commons include the Eco-Patent Commons and the Patent Commons Project.[27]

The World Business Council for Sustainable Development in conjunction with IBM, Nokia, Pitney Bowes and Sony launched the Eco-Patent Commons in 2008.[28] The goal is to provide an avenue for the sharing of innovation and to accelerate the implementation of technology to protect the environment. Furthermore, the Commons promotes and encourages cooperation and collaboration between businesses that pledge their patents.[29] This centralized database provides free access to patents that can be leveraged by others to improve and innovate environmental technologies, thereby contributing to global environmental health.[30]

Similarly, the Linux Foundation organized the Patent Commons Project to allow for collective innovation and the development of technologies for widespread benefit. Under this program, patents are made available along with the patent owner's "pledge" or "commitment" whereby patent owners grant others certain rights related to the use of their patents in a covenant not to sue.[31]

The development of these commons underscores the idea of using licenses to allow patent owners to share, yet maintain control over, their patents. Licenses provide patent owners with the ability to share their ideas and inventions, and thereby participate in the sharing economy, without completely foregoing their patent rights.

Patent Pools

Knowledge-sharing organizations, such as patent pools, are another potential solution to the challenges of integrating patent law into the sharing economy. This idea has already shown acceptance among information and communication technologies sectors, accounting for the majority of patent pools over the last two decades.[32] Although patent pools would allow the members to work collectively, perhaps sharing costs and combining their individual strengths, there are some legitimate concerns to this collaborative approach. The most obvious concern is that such pools could encourage anti-competitive behavior. The fear is that the pools would be used as collusive agreements amongst competitors excluding certain market players to the advantage of others within the pool. One suggested way to lessen the likelihood of this exclusionary collaboration would be to require that patent pools allow independent licensing, whereby any pool member may license its patent outside of the pool.[33] This would allow for the desired collaboration within the pool and maintain a patent owner's competitive exclusivity outside of the pool, striking a balance between monopolization and cooperation.

Patent Enforcement Issues

The emergence of the sharing economy also has potential repercussions on the enforcement of patents. One example is through the sharing of open source designs, whereby CAD files and the equivalent are used in conjunction with 3-D printers to produce objects that infringe upon design and utility patents. Services which use open source designs and 3-D printing include Shapeways[34], Thingiverse[35], and Sculpteo[36]. On a more extreme level, a group called Open Source Ecology seeks to develop a "Global Village Construction Set" which "is an open technological platform that allows for the easy fabrication of the 50 different *industrial machines* that it takes to build a small civilization with modern comforts."[37] The first two machines on this list are a 3-D scanner and a 3-D printer, machines that can be used to replicate and produce needed goods and tools.[38] This manufacturing could enable open infringement of patented designs without regard to their legally exclusive status.

Under the current patent laws, it may be difficult for a patentee to enforce its rights when infringement occurs as a result of 3-D printing. For example, services such as Thingiverse allow for the easy sharing of potentially infringing designs. Given this, it may be difficult to track the unauthorized dissemination of a patented design or identify those who have printed the design and infringed the patent holder's rights.

The next question is one of liability. Which, if any, parties involved with 3-D printing, are indirectly liable or may be seen to have contributed to infringement? While Shapeways and Sculpteo may actually make the potentially patented items, other services that enable sharing of designs but do not physically print them may initially avoid such culpability. Despite the lack of actual replication and therefore "direct" infringement, however, sharing sites may still be subject to contributory liability for "indirect" infringement relating to their assistance or participation in infringement of patented designs. Yet, some refinement to patent laws and their interpretation may be required to properly address these concepts as the technology and its uses develop.

Furthermore, as 3-D printing becomes more accessible, service providers may not be necessary for the process, and people could potentially print infringing items in their own homes. In that case, discovery of infringement by costly legal action may be difficult to support in enforcing patents against multiple small-scale infringers. Considering the seismic change to the copyright enforcement landscape upon technological advances that allowed for easy copying and downloading of music, videos, photos, and text; a similar pattern may emerge as at-home 3-D printing enables individual replication of patented designs.

Conclusion

While the concept of monopoly is under direct fire in the sharing economy, patent owners have several strategies available for maximizing their impact on the marketplace. Consider the importance of 3-D printers in the sharing economy. The takeaway for inventors is to focus on filling a niche with products that facilitate collaboration and making. In addition, patent holders need to align themselves philosophically with the new economy and consider innovative forms of licenses.

Turn page for Patent Best Practices

PATENT BEST PRACTICES

- ✓ *To preserve exclusivity rights, consider using licenses as an alternative to sale. This is analogous to current software practices with end-user license agreements. To be effective, licenses would have to replace sales as a means of providing access to patented goods. While wholesale licensing is unlikely to become the standard, its application will help maintain exclusivity and control within a sharing economy.*
- ✓ *Be proactive in developing business models that will be competitive in the context of the sharing economy. For example, consider whether a business structure whereby consumers "rent" rather than "buy" is feasible for your business.*
- ✓ *Consider the pros and cons of participating in a patent pool or a patent commons. Evaluate whether you and your competitors would mutually benefit from the sharing of knowledge and resources.*

BIOGRAPHIES

- **Kyle-Beth Hilfer (kbhilfer@collenip.com)**

Kyle-Beth Hilfer, Of Counsel to Collen *IP*, has more than 25 years' experience specializing in advertising, marketing, promotions, intellectual property, and new media law. Kyle-Beth helps clients leverage traditional, digital, and emerging marketplaces, reviewing their advertising and marketing campaigns and helping to secure and license their intellectual property portfolios. Harnessing her unique understanding of social media and mobile, Kyle-Beth regularly advises clients on the multi-disciplinary legal issues associated with branding in these media. She works with clients from the concept stage through execution on specific marketing techniques, including sweepstakes and contests, premium offers, rebates, negative options and advance consent marketing, loyalty programs, and behavioral marketing. Kyle-Beth attended Yale College and Harvard Law School.

- **Jess Collen** (jcollen@collenip.com)

Jess Collen's expertise in the field of trademark law has long been recognized. He has been active in IP practice for 25 years and highly involved in the profession, having acted in many capacities, including as a member of the Executive Committee and Board of Directors of the International Trademark Association. He is also a featured Forbes.com contributor, whose blog, *What's Your Trademark?*, focuses on all aspects of intellectual property.

- **Jeffrey Lindenbaum** (jlindenbaum@collenip.com)

Jeffrey Lindenbaum is a partner of the firm and practices primarily in the firm's litigation department. He has broad intellectual property experience representing and counseling a wide range of domestic and international clients in patent, trademark, copyright, right of publicity, trade secret, and related intellectual property matters. His litigation experience includes obtaining and defending injunctions, Internet disputes, trademark misuse, and ex parte seizures of counterfeit products. Jeffrey has appeared and argued patent, trademark and copyright matters in federal district courts in New York, Michigan, Nevada, Missouri, Connecticut, New Jersey, California, North Carolina, Georgia, Arizona, Illinois, Texas, Virginia and Florida.

- **Thomas Gulick** (tgulick@collenip.com)

Thomas Gulick's work as a Senior Associate entails the prosecution of copyright and trademark applications. Tom has counseled both international and domestic clients in matters pertaining to copyright and trademark infringement, trade secrets, arbitration, mediation, domain name disputes and other intellectual property matters. In addition, Tom has overseen and coordinated many oppositions both in the United States and internationally and is experienced with U.S. Customs seizures. He has filed appeals with the Copyright Office Board of Review, petitions to cancel copyright registrations with the Copyright Office and is actively involved in trademark and copyright litigations including depositions and appeals in federal courts

- **Jane Collen** (jacollen@collenip.com)

Jane Collen is a founding member of Collen *IP* and is presently Of Counsel to the firm. Her practice spans a wide variety of intellectual property areas, including Trademark, Copyright, Unfair Competition and Internet law. She has also practiced in the areas of federal court litigation, actions before the United States Trademark Office, infringements, counterfeiting, licensing, false advertising and misrepresentation, and software and related matters. She has counseled clients for over twenty years on management of their trademark portfolios and offering guidance on adoption, selection, protection and enforcement of trademark rights. She routinely prosecutes trademark applications on behalf of domestic and international clients before the United States Patent and Trademark Office, and counsels clients regarding use and revision issues outside of the United States, and addresses issues such as procurement, use and enforcement programs regarding Internet domain names.

- **Kristen Mogavero** (kmogavero@collenip.com)

Kristen Mogavero, a registered Patent Attorney, is an Associate with the firm. Her work includes patent prosecution and litigation, trademark litigation and copyright disputes. Kristen joined the firm as a law clerk during her third year of law school. While in law school, Kristen also completed an internship with the Honorable George A. Yanthis of the United States District Court for the Southern District of New York, and was a member of the Pace Law Review and a Student Bar Association representative. Kristen was the 2012 recipient of the Justice Sondra Miller Scholarship, which is awarded to a female law student who demonstrates a dedication to community service. She was also a member of the first place team that won a national alternative dispute resolution moot competition.

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Joshua Paul, a partner in the firm, is an experienced litigator and trial lawyer. He represents clients before trial and appellate courts in disputes involving trademarks, copyrights, advertising, trade secrets, patents and general business matters. He also counsels clients in these areas.

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Lisa McAndrews is an Associate within the firm's litigation department. Lisa's practice areas and experience include both the litigation and prosecution of applications before the United States Patent and Trademark Office in both patent and trademark matters. Her practice work in these areas includes counseling and advice regarding the development of domestic and international intellectual property portfolios.

- **Govinda Davis** (gdavis@collenip.com)

Govinda Davis is an Associate with the firm's litigation department. She works on a broad range of matters with the firm's trademark and copyright litigation teams and Internet domain name disputes. Prior to joining Collen *IP*, Govinda worked at a New Jersey-based law firm that specialized in intellectual property litigation. While in law school, she held positions in intellectual property and entertainment law with several law firms, music publishers, record labels and at corporations such as Universal Music Group and NBC Universal. Govinda also completed an internship with a federal judge for the District of New Jersey. She was involved in the Entertainment and Sports Law Society and the Diversity Council, the American Bar Association and was the 2011 Black Law Students Association Writing Competition winner.

ABOUT COLLEN *IP*

Collen *IP is* a premier intellectual property law firm, boasting a broad client base in the United States and overseas, from multi-national luxury goods makers and entertainment industry leaders to start-up technology ventures and local businesses. Collen *IP* is widely recognized for our many successes in launching brands, advising on advertising and marketing strategies, and protecting valuable intellectual property rights.

For more information, please visit www.collenip.com.

ENDNOTES

1 Jeremiah Owyang et al., The Collaborative Economy (June 2013), available at http://www.altimetergroup.com/research/reports/collaborative-economy.

2 *Id.*

3 *See* Crowd Companies, http://crowdcompanies.com/ (last visited Jan. 24, 2014).

4 A recent full-page Patagonia ad in the *New York Times* featured a picture of a Patagonia underneath the headline "Don't Buy This Jacket." The ad copy announced "Because Patagonia wants to be in business a good long time – and leave a world inhabitable for our kids – we want to do the opposite of every other business today. We ask you to buy less and to reflect before you spend a dime on this jacket or anything else." *See* Annie Lescroart, *Inside the Partnership: Patagonia + eBay*, eBay (Nov. 27, 2011) http://green.ebay.com/greenteam/blog/Inside-the-Partnership-Patagonia-eBay/7797.

5 TOYOTA Rent a Car, www.toyota.com/rental (last visited Jan. 24, 2014).

6 *See Ombudsman*, Conde Nast, Nov. 2013, at 130 (discussing the difficulty in relying on apartment sharing services, especially overseas, and suggesting that consumers "rely on trustworthy sources—like some of the specialists in Condé Nast Traveler's villa rental guide, who can find affordable quality rentals in London, Paris, and beyond….").

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[34] *See* Shapeways, http://www.shapeways.com (last visited Jan. 24, 2014). Shapeways is a service which allows users to upload design files and select materials, and then Shapeways will print (manufacture) the item and send it to the user. Alternatively, the user can sell the item through the Shapeways website.
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