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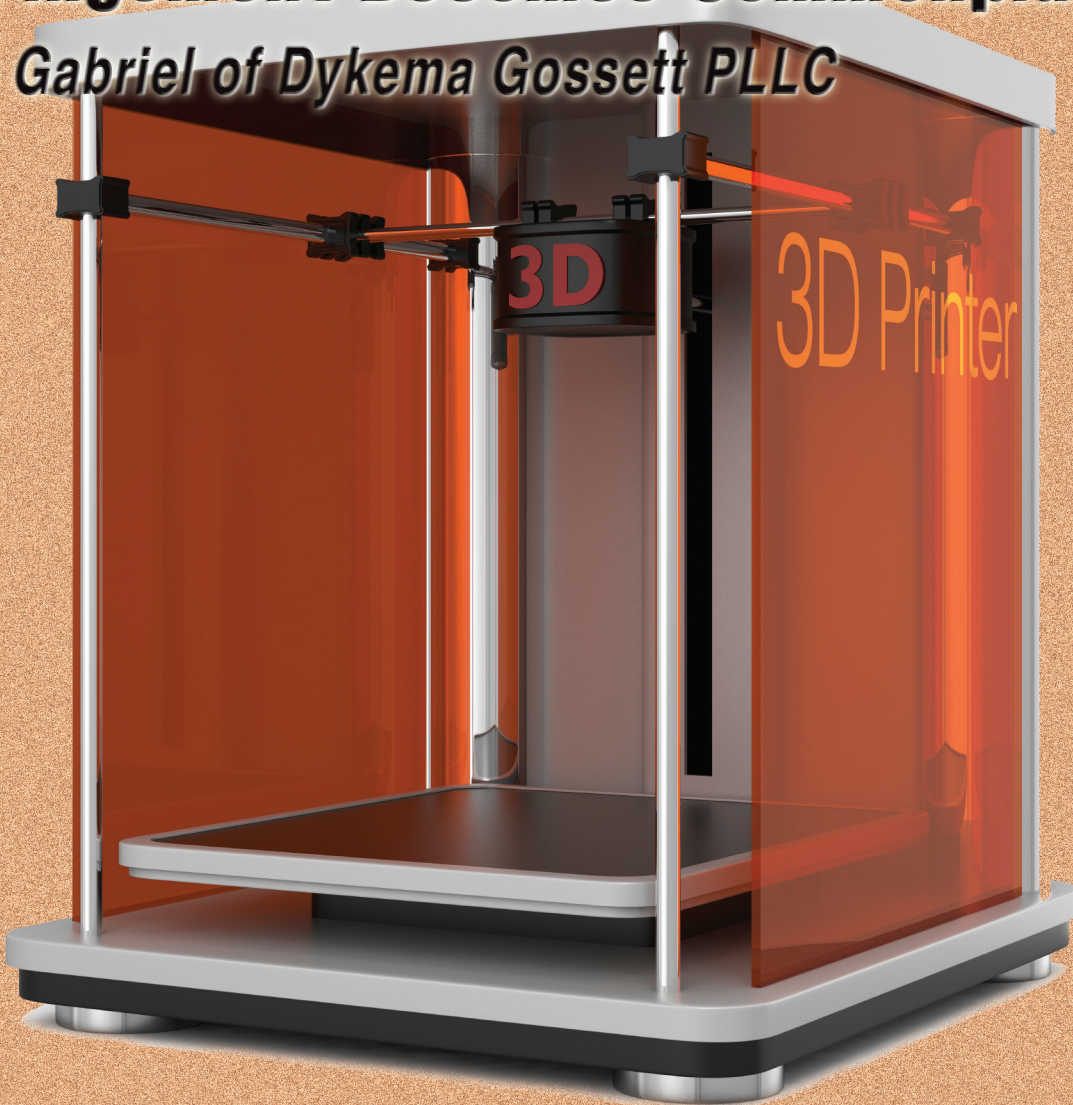
November, 2014

\$12.00

Volume 21, No. 11

3-D Printing and Intellectual Property: New Technologies and Products to Protect as Infringement Becomes Commonplace

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3-D Printing and Intellectual Property: New Technologies and Products to Protect as Infringement Becomes Commonplace

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Allan Gabriel serves as the Director of Dykema's Intellectual Property Department. Mr. Gabriel's practice focuses on intellectual property litigation involving patent, trademark and copyright infringement, trade secrets, false advertising and right of publicity claims on trial court and appellate levels. He has substantial experience in handling antitrust, unfair competition, internet related and general business litigation matters for a variety of industries including software development, high tech components, manufacturing, consumer food products, newspaper publication, as well as investors and entrepreneurs.

New 3-D printed garments are hitting the runways in Paris and New York. Future engineers in grades K through 12 are challenged to design a space tool using digital 3-D modeling technologies. A Chinese company is printing 3-D homes, 10 per 24 hours, out of recycled materials. 3-D printing is emerging from its status as an esoteric hobby for those interested in making jewelry and trinkets into a consumer friendly method for non-scientists to use 3-D design programming to make copies or replicas of virtually anything. Some companies which own intellectual property, such as Hasbro, Inc., are riding along with and trying to capitalize on this trend. Hasbro has entered into a partnership program with the Shapeways, licensing its characters from My Little Pony, which allows Shapeways customers to design their own 3-D My Little Pony products through patterns created with developers on the Shapeways website. Other intellectual property owners are ramping up protections for use against these 3-D copies. While this technology is bursting at the seams and heading in multiple directions, its impact upon intellectual property is likewise the subject of ongoing extensive analysis, debate, guesswork and forecast.

3-D printing is the process of making three-dimensional solid objects of almost any shape from a digital model. The ability to create objects through the 3-D printing technology implicates intellectual rights at both ends of the spectrum of those rights. On the new intellectual property to create and protect side, there will be opportunities arising from new machines and equipment (printers and associated items) utilized in 3-D printing as there is a rush to invent devices and processes to service a growing market of not only industrial users, but also at-home consumers. There also will be original designs created for production through the 3-D printing process which themselves may be amenable to protection through various intellectual property laws. At the same time, arguable infringement could explode given the ubiquitous nature of 3-D printing, resembling in many ways that which arose from the ability of consumers of music to simply and easily download music, bypassing or avoiding the traditional protection of copyright laws. As consumers at home make 3-D copies or replicas of household products, clothing, useful utensils, etc., many of these copies will be exposed to claims of infringement under copyright, trademark, and even patent laws. A brief review of the implications of the flow of these rights, including the creation of new ones in new devices and methods, and the undermining of traditional rights, will be examined herein.

As the price of 3-D printers and the supporting materials rapidly decreases, such that systems reach below the \$1,000 dollar level, the number of consumer inventors and designers will increase exponentially. While the protection of designs related to 3-D printing in certain circumstances is unclear or yet to be fully defined, utility patent or design patent protection may be available for certain useful articles created through 3-D printing. Copyright laws could protect certain ornamental design elements under the rubric of sculpture or visual

art, although the useful article aspects of 3-D printing may not be protectable under the same copyright laws. Certain simple items may result in the invention, through 3-D design and printing, of new features to enhance or accompany them, which improvements could be subject to patent protection. For example, stationary objects used in medical or mechanical applications could become mobile or dramatically decreased in size through invention of parts through 3-D printing which allow them to move or be used for newer applications. A new miniature heart valve for use in infant surgery is achievable only through 3-D printing technology.

A much more apparent impact on intellectual property will be the enormous proliferation of infringing acts undertaken by an endless array of new consumer infringers. Gartner, Inc. a leading information technology research and advisory company, has predicted that 3-D printing will result in the loss of at least \$100 billion per year in intellectual property by 2018. This disruption could be enormous as individuals in their own homes will be able to construct products outside the traditional acquisition of them from the existing chain of major suppliers. Additionally, the ability to avoid traditional suppliers will soon have real monetary value to home users. One study has suggested that home users will be able to save as much as \$2,000 each year by making just two dozen simple things with a 3-D printer. A dramatic and negative impact upon the workforce could also be forthcoming given these anticipated scenarios.

A brief review of the intellectual property rights potentially exposed to infringement claims by this emerging technology reveals the broad and all-encompassing nature of this threat.

COPYRIGHTS

Apart from the protection that may be available for new 3-D printing machines and technology, as well as resulting new products, issues as to ownership of copyrights in 3-D printed works after their conceptualization and creation raise novel legal issues. Will ownership of copyright reside with the person who creates the designs, who creates the design file to make the 3-D item, or the operator the 3-D printer that manufactures it (like the individual who takes a picture with a camera) and will there be sole or joint copyright ownership? From an infringement standpoint, as

to existing items subject to 3-D printing, copyright laws may lead to a determination that someone who copies and distributes a 3-D printed copy of a copyrighted object may be liable for infringement. Even if 3-D printing of copyrighted objects at home may infringe, the value of a copyright may be significantly reduced because enforcement of rights will obviously become impractical or even in many instances impossible. This will be true notwithstanding the fact that a consumer who copies a protectable work by printing an already existing object could be liable for copyright infringement absent permission or license or the use of the printed object only for his or her own purposes. It is also possible that a private use Betamax scenario may be adopted legislatively or by the courts.

PATENTS

To the extent certain patented products or inventions can be replicated or copied by 3-D printers (e.g., hearing aids, other small medical devices), infringement of patent rights in those devices may be found if the infringing product is used or offered for sale to potential buyers. It is also possible that a single object could be protected by both patent and copyright law. For example, certain design elements protected by copyright could be incorporated into a product which elements could be copied along with the item itself with a 3-D printer. Patent protection values may be reduced as copying proliferates in a manner that cannot be practically deterred.

TRADEMARKS

Trademarks can protect against the use of a confusingly similar mark in conjunction with a product and also protect certain product configurations from confusingly similar copying under trade dress concepts. To the extent trademark word or logos and related design elements (the Nike swoosh, etc.) are incorporated into 3-D copies of objects, the producer and sellers of those objects could be liable for trademark infringement.

COMBINATION OF INTELLECTUAL PROPERTY RIGHTS

A range of intellectual property rights may be at risk in certain 3-D products. Toys or characters and artifact models may be covered by design patents, trademarks and copyrights. Model Boeing or airline 747 planes, Star Wars or Frozen figurines are examples. Further, 3-D printing can be used to repair goods as well as generate replacement parts. The reconstruction, repair and replacement of items protected by copyright, trademarks and patents is subject to a body of law which addresses distinctions between repairs and reconstruction as a fuzzy line between lawful conduct and actionable infringement. The question of when a repaired or reconditioned Rolex offered for resale becomes one that infringes certain intellectual property rights is one that will spill over into the 3-D printing area. In this new context, variations on this already unclear area of the law may become even more commonplace.

CONCLUSION

Issues that remain to be addressed are identification of desirable solutions to these problems from several directions. One example is focus on the potential loss of value in patent rights. Thus, there is a proposal for the extension to patents of the notice and takedown rules applicable to copyrighted material that inhibit the misuse of copyrights on You Tube and other video sharing web sites by making available to copyright holders a mechanism to have infringing files removed. On line sites that offer 3-D design and copying software could be subject to patent owners' requests for removal of 3-D mechanisms used solely for demonstrably infringing purposes. On the other hand, the threat to virtually every home user and consumer of exposure to potentially frivolous lawsuits is also of concern. Since there appear to be lawful uses of 3-D printers for personal purposes and related technologies and websites to facilitate and enhance those lawful uses, this concern must be addressed from both a legal and practical perspective to avoid what is now viewed as the mistake that the recording industry made when faced with the music copyright issue.

The interplay of all of these 3-D printing challenges in the creation and protection of intellectual property rights and the practical and legal solutions to them will be subject to extensive discussion and analysis in the both immediate and long term future. The risks and rewards are much too large to be ignored. 