

IP: COPYRIGHT

3D PRINTING COMPLICATES COPYRIGHT



Additive manufacturing, or 3D printing, is quickly becoming a mainstream technology—and as that happens, it is creating challenges for IP owners.

The concept of 3D printing has been around for decades, but it had been a small-scale, isolated phenomenon, rather than a widespread business technology. However, it has been evolving rapidly, making it possible to print a growing range of 3D items—everything from prototype parts for manufacturers to prosthetic devices, jewelry, and food.

With 3D printing, companies can distribute products quickly and easily. For example, a company could license 3D design software to industrial customers to allow them to make replacement parts on site and on demand—or do the same to let consumers print children’s toys at home. The technology also makes it possible to use 3D scanners to create digital designs of objects that can then be printed.

But those capabilities can be easily abused. “How do you keep track of who is printing out your products without a license?” asks [Valerie Goo](#), a partner in Crowell & Moring’s [Litigation Group](#). Traditionally, selling counterfeit products meant setting up a plant overseas, producing enough volume to make it cost-effective, and bringing the fake goods into the country through U.S. Customs. Now, she says, “people potentially can just download software from the internet, or even use a 3D scanner to copy a design, and then use their 3D printer to make, for example, knockoff designer sunglasses—complete with the designer name and logo—just about anywhere.”

In general, says Goo, “this is an area where the technology is out in front of the law.” She notes that there are parallels between the emerging 3D printing legal landscape and that of the Napster and other music downloading cases a decade and a half ago, where IP owners found themselves going after music-sharing platforms and even individual users. Similarly,

with 3D printing “we have enablers—people who are making the software or the programming available and indirectly infringing. And then there are the people who are actually printing the product—the direct infringers,” she says. This is likely to raise questions that will be settled in court.

Identifying and stopping that sort of infringement will be challenging. While the recent Supreme Court ruling in *Star Athletica* clarified the test for severability, allowing companies to claim copyrights in design elements that are part of a functional product, thus strengthening copyright protection in 3D products, it will be difficult to enforce these rights when it comes to 3D printing. It is not easy to trace the source of infringing products made with 3D printers or to prohibit file-sharing of infringing 3D printer design files. In addition, IP owners’ efforts are likely to be frustrated by the Supreme Court’s *eBay* decision and the Ninth Circuit’s *Herb Reed* decision—rulings that make it harder to get injunctions in copyright and trademark cases.

IP owners may also be stymied by the Digital Millennium Copyright Act. While the DMCA affords IP owners additional protection against circumvention of technological measures employed to protect digital works, it also insulates internet service providers from liability stemming from file-hosting activities that allow users to share content—unless the ISP has knowledge of the infringement. And the strength of the DMCA’s “repeat infringer” rule, which requires ISPs to terminate users who are repeat infringers, remains uncertain.

Companies can look to technology, as well as to the courts, for solutions. For example, encryption and tracking can make it harder for unauthorized parties to use or alter 3D design files. Software with built-in limits might restrict the number of items to be printed. Goo adds that some companies are exploring the use of hard-to-scan material in their copyrighted products. IP laws will need to catch up with the technology, she says, “but that is going to take some time.”



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