COLLEN IP:

THE SHARING ECONOMY:

RADICAL REPRODUCTION

OF "OWNING" OR REBRANDING OF RENTING?

PART I. INTRODUCTION

"…the direct exchange of services between individuals, instead of from business to consumer, has been built on social media."

The "collaborative economy," or sharing economy, has taken root in the global market. In some circles, it is the "gig" economy, for it connotes ad hoc jobs measured one assignment at a time. Whatever it's called, the direct exchange of services between individuals, instead of from business to consumer, has been built on social media. This sharing economy has changed brand interaction, altering customer expectations and the way companies conduct their businesses. No matter what the type of commerce, trademark rights play a central role. The sharing economy should be changing the rules for trademark use and protection.

But is it? Is the sharing economy really such a radical departure from the way business has always been conducted, responding to demand by supplying the good or service? Or is it just an enlarging and rebranding of the renting market? If the sharing economy is an evolution, not a revolution, does it really substantially change how trademark law applies? While there is very little relevant case law, we will analyze parallel situations to assess how the sharing economy will ultimately impact trademark use and management.

I. THE COLLABORATIVE REBRANDING OF A FAMILIAR CONCEPT

A distinct market is forming as individuals directly exchange goods and services rather than purchase them from traditional business sources. This trend, coined as the "collaborative economy" or "sharing economy," allows empowered consumers to share goods and services rather than purchase them outright, freeing them from the burden and responsibility of ownership.

The concept of a collaborative marketplace is not entirely new. As the new millennium dawned, digital file sharing over peer-to-peer networks exploded. The tech-savvy consumer has been sharing digital files—as computer programs, images, and video over transferrable media such as diskettes or hard drives—for years. The emergence of basic downloadable programs that featured an easy interface for direct file sharing between users revolutionized how media, particularly music and video, were obtained and accessed. With platforms like Napster, which may have been a bit of "over sharing," and similar peer-to-peer networks, users could obtain and share files in minutes. Music consumers quickly transitioned into music collectors through sharing networks, and retail sales of music albums plummeted.[1] As consumers cast off the burdens of ownership, the impact was sharply felt by the music industry, causing even traditional music retail giants such as Tower Records to ultimately close.[2]

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[1] David Goldman, *Music's Lost Decade: Sales Cut in Half*, **CNN MONEY** (Feb. 3, 2010, 9:52 AM), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/ [https://perma.cc/9XXG-JDEZ].

[2] Dan Glaister, *Tower Crumbles in the Download Era*, **GUARDIAN** (Oct. 9 2006, 7:35 AM), https://www.theguardian.com/business/2006/oct/09/retail.usnews [https://perma.cc/WRW3-7DLG].

> ***"Infringement suits against individual users of peer-to-peer sharing networks . . . 'made examples' of ordinary file-sharing program users, at times resulting in damages awards of hundreds of thousands of dollars against them."***

Regulation and litigation, however, eventually caught up with the peer-to-peer networks of the early 2000s. A court order was issued, shutting down Napster, and assorted other suits brought by the recording industry eventually shuttered sites such as LimeWire and Grokster.[3] MegaUpload, a file-hosting site, was shut down and criminal charges were filed against its owners by the United States Department of Justice.[4] Further, the Recording Industry Association of America pursued copyright infringement suits against individual users of peer-to-peer sharing networks, demanding statutory damages on a hundreds of dollars per-file (essentially, per song) basis.[5] These suits "made

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[3] *See, e.g.*, MGM Studios v. Grokster, 545 U.S. 913 (2005); A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001); Arista Records LLC v. Lime Group LLC, 715 F. Supp. 2d 481 (S.D.N.Y. 2010).

[4] *See generally* Indictment, United States v. Kim Dotcom, No. 1-12CR3 (2012).

[5] Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, **WALL STREET J.** (Dec. 19, 2008, 12:01 AM), http://www.wsj.com/articles/SB122966038836021137

examples" of ordinary file-sharing program users, at times resulting in damages awards of hundreds of thousands of dollars against them.[6] The industry has since evolved, and individual track purchases or streaming is now standard. Artists now license their recordings to iTunes and subscription-based or streaming sites such as Spotify or Pandora.[7]

As time, innovation, and technology evolved, the mindset of file-sharing has shifted into goods-sharing and service-sharing, changing the way companies do business, the way consumers interact with brands, and the expectations of consumers. Hundreds of startup businesses have emerged to meet this new demand of share-based transactions, while major brand owners are

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[https://perma.cc/6FSX-9HPJ]; Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 **BERKELEY TECH. L.J.** 571, 581 (2005).

[6] *See, e.g.*, Sony BMG Music Entm't v. Tenenbaum, 719 F.3d 67, 72 (1st Cir. 2013).

[7] John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or Its Foe?*, **NEW YORKER** (Nov. 4, 2014), http://www.newyorker.com/magazine/2014/11/24/revenue-streams [https://perma.cc/HJV5-CFBF].

also venturing into the space. For example, ZipCar users share its fleet of vehicles, catering to those who only need a car on occasion." Or, vacationers use Airbnb or services such as HomeAway or VRBO to find an apartment or house rental rather than book a hotel.[8] Other startup businesses help consumers share bicycles, textbooks, fine art, and fashion apparel.

It is important for established or traditional brand owners to have an awareness of this new sector, although they may not completely embrace its concepts. The failure to evolve has caused the demise of many mega-brands, including Blockbuster Video and the aforementioned Tower Records.[9] Some

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[8] *See* **COLLEN *IP***, *supra* note 1, at 2; *see also* *Vacation Rentals, Homes, Experiences & Places*, **AIRBNB**, https://www.airbnb.com [https://perma.cc/64BT-DU6T]; *Vacation Rentals, Beach Houses, Cabins & More*, **HOMEAWAY**, https://www.homeaway.com [https://perma.cc/A8JB-V2VK]; *The Most Popular Vacation Rental Site in the US*, **VRBO**, https://www.vrbo.com [https://perma.cc/67D9-K7RC].

[9] Greg Satell, *A Look Back at Why Blockbuster Really Failed And Why it Didn't Have To*, **FORBES** (Sept. 5, 2014, 11:38 PM), http://www.forbes.com/sites/gregsatell/2014/09/05/a-look-back-at-why-blockbuster-really-failed-and-why-it-didnt-have-to/ [https://perma.cc/F8GZ-YEJ6].

major brands have already joined the sharing economy, including outdoor clothing brand Patagonia, who allows its customers to recycle and reuse clothing between users through its "Common Threads" project. Toyota now offers short-term leases, and others have made investments into sharing economy startups, including BMW in JustPark and Avis in Zipcar.[10] Most notably, traditional travel website Expedia purchased HomeAway in a $3.9 billion acquisition in November 2015, with CEO Dara Khosrowshahi noting in a conference with investors and analysts that "[a]ll of us have witnessed not just the incredible growth of the sharing economy but also the substantial growth of alternative lodging in particular[.]"[11] By participating in the sharing economy,

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[10] *See* Kia Kokalitcheva, *BMW Really Wants to Help You Park Your (BMW) Car*, **FORTUNE** (Sept. 4, 2015), http://fortune.com/2015/09/04/bmw-parking-investment/ [https://perma.cc/N8ZD-RXXE]; Tim Worstall, *Explaining the Avis Takeover of Zipcar*, **FORBES** (Jan. 2, 2013, 9:18 AM), https://www.forbes.com/sites/timworstall/2013/01/02/explaining-the-avis-takeover-of-zipcar/#6fc1c227986b.

[11] Sean McCracken, *Expedia Buys HomeAway in Sharing Economy Move*, **HOTEL NEWS NOW** (Nov. 5, 2015, 9:56 AM), http://www.hotelnewsnow.com/Articles/28389/Expedia-

brands can now shape both its legal landscape and the mindset of how their consumers function and use this space.

"In enabling protection of 'a consumer's expectations about the origin' and the associated goods or services, trademark law imposes the 'duty to control the quality of the good or service' on the brand owner."

But brand owners may, in fact, find that upholding their valuable intellectual property rights will not change significantly, despite this shift into a new commercial mindset. Regardless of whether the goods or services offered are new or shared, brand names and trademarks must still deliver the message to consumers that they can reliably expect a trusted level of quality.[12] In enabling protection of "a consumer's expectations about the origin" and the associated goods or services,

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buys-HomeAway-in-sharing-economy-move [https://perma.cc/Q25W-EVCK].

[12] *Id.* at 2; Giana M. Eckhardt & Fleura Bardhi, *The Sharing Economy Isn't About Sharing at All*, **HARV. BUS. REV.** (Jan. 28, 2015), https://hbr.org/2015/01/the-sharing-economy-isnt-about-sharing-at-all# [https://perma.cc/DS79-FBZB].

trademark law imposes the "duty to control the quality of the good or service" on the brand owner.[13]

"Diffusing ownership inherently dilutes a brand owner's authority over the delivery of their products or services."

As, over time and with sizeable advertising budgets, trademarks have developed their secondary meaning as a unique commercial source, they now provide a basis for this sharing economy. But, as always, trademarks are considered abandoned and rights of protection lost if their owners do not maintain proper control.[14] Accordingly, through its very principal of decentralized sources or providers, the sharing economy can weaken brands and tarnish their associated goodwill. Thus, the issue of control is perhaps the most crucial in considering intellectual

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[13] Yana Welinder & Stephen LaPorte, *Hacking Trademark Law for Collaborative Communities*, 25 **Fordham Intell. Prop. Media & Ent. L.J.** 407, 414 (2015).

[14] *Fact Sheets: Assignments, Licenses and Valuation*, **Int'l Trademark Ass'n**, http://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkLicensing.aspx; 3 **J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition** § 18:48 (4th ed. 2016) (citing Barcamerica Int'l USA Trust v. Tyfield Importers, 289 F.3d 589, 596 (9th Cir. 2002)).

property in the sharing economy. Broadly, as brand owners distance from direct control over their marks and goods or services, they must maintain oversight over how their marks are used. Diffusing ownership inherently dilutes a brand owner's authority over the delivery of their products or services.[15] Beyond this, conversation about brands as facilitated by social media rather than by marketing departments has diminished the owner's control of marketplace perceptions. Therefore, in the sharing economy, the shift from outright sale to collective sharing may seem to make it more difficult to develop and manage a trademark portfolio and brand identity. This could present new challenges to the maintenance of intellectual property rights.

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[15] Mark Scott, *Luxury Brands and the Social Campaign*, **N.Y. TIMES** (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/fashion/luxury-brands-and-the-social-campaign.html [https://perma.cc/NMD8-AGGV].