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NFTs and Metaverse: Exploring the Challenges and Prospects for IP Lawyers in the Digitalized World

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Abstract

This unprecedented technological advancement comes with promise and peril for content creators and consumers. In these digital worlds, various digital goods are bought and sold. These goods, though not physical, represent the same goods that are found in the normal marketplace. Consequently, companies are apprehensive about the intellectual property of goods to be sold in the metaverse. Protecting these assets invites a flurry of new legal challenges, and this is where the IP lawyers find their prospects. The field of IP covers inventions, artworks, symbols and trademarks which are legally protected by patents, copyrights and trademarks laws. This paper explores the implications of NFTs in metaverse for companies and consumers, and the place of IP laws in that regard.

Keywords: Metaverse, Intellectual Property, Blockchain, Cryptocurrency, Avatar

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1. Introduction

The metaverse and Non-Fungible Tokens (NFTs) have become buzzwords. The former is attributed to Neal Stephenson in his 1992 sci-fi, 'Snow Cash'. Metaverse is a portmanteau of meta and universe, which means 'beyond reality'. It is an immersive digital world where users can interact using digital avatars. It has been argued that the metaverse is to the different virtual worlds, what the internet is to the websites. Metaverse is the replication of the real world where people can create, interact and trade using their avatars from the comfort of their homes. On the other hand, an NFT is a digital asset which represents real-world objects like art, music, and videos. They are bought and sold online with cryptocurrency. NFTs are data stored on a blockchain (a digital ledger such as bitcoin) to authenticate and keep track of that digital property. Forbes ADVISOR records that the market for NFTs was worth \$41 bn in 2021 alone, an amount that is approaching the total value of the entire global fine art market. They are non-fungible, meaning that they are unique and cannot be replaced by something else.

2. The Implementation of NFT and Metaverse

2.1. Video Games

The metaverse technology has been developed into video games incorporating many aspects of social media into three-dimensional virtual world. The user is represented as an avatar. *Second Life* – the 2003 virtual world

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platform is reputed to be the first metaverse. *Roblox* is another online game platform which allows users to program and play games through a virtual currency called *Robux*. "With nearly 55 million daily active users, *Roblox* is increasingly an integral part of people's lives," said David Baszucki, CEO of *Roblox*. "As we look ahead to 2022, we will continue to develop our technology to enable deeper forms of communication, immersion and expression on our platform." When the active users stood at 45.5 million, *Roblox* says this led to revenue of \$1.9 bn.¹

2.2. Virtual Reality (VR)

Virtual reality is a computer-generated environment with scenes and objects that appear to be real, making the users feel they are immersed in their surroundings. In 2021, the social network company, Facebook was renamed 'Meta' and Mark Zuckerberg declared their commitment to developing a metaverse.² Similarly, Microsoft acquired *Altspace VR*, a virtual reality company in 2017, and has since implemented metaverse features such as avatars meetings held in virtual reality into Microsoft Teams.³ Earlier this year, HTC announced its launch of a cross-platform metaverse called *Viverse*.⁴ Recent iterations have taken the concept of virtual reality to a different level. In 2020, *Fortnite*, an online game, virtually hosted a concert that was attended by millions.⁵ The proposed applications for virtual reality technology include improving work productivity, commerce, real estate, fashion and interactive learning environment.

3. Challenges

3.1. Data Protection/Privacy

The privacy of information poses a serious concern as companies involved in these alternative worlds will collect users' data through interactions with these devices and biometrics information. It has been argued that the amount of information that the metaverse would collect is nothing compared to the ones on the World Wide Web. The use of avatar captures the gestures, facial expressions, and behaviors of the users. Similarly, the devices used to experience virtual reality could track the users' most private home. These users will be anxious as to how these data are used, by whom and for what. Therefore, the current data protection laws will require amendments to meet these developing risks of cybersecurity, liability and duty.

3.2. Brand/ Trade Mark Protection

As users continue to identify with their avatars and spending money on virtual accessories and items, there is a growing concern in the legal community about protecting these products in metaverse. A virtual Gucci handbag, for instance, was reportedly sold 350,000 *Roblox*, which is approximately \$4,500, and this is \$800 more than the bag sells for in the real world.⁶ In the US, Hermes has filed an infringement claim against a third party, Mason Rothschild offering digital assets branded as METABIRKINS which has a digital representation of the famous Birkin bag. Other brand owners like Nike, Abercrombie & Fitch as well as Urban Outfitters have applied for trademark registrations in respect of virtual goods.⁷

3.3. Patent

The metaverse is primarily software-based, but the technical aspects are also required for its function. The patent will be crucial for the economic success of the metaverse. It will ensure that interfaces are standardized and that an exchange can take place between the various digital worlds. Disney is reported to have obtained

¹ Stanton, R. (2022). *If Roblox Daily Users Were a Country, It would Be Bigger than Canada*, February. <<https://www.pcgamer.com/if-roblox-daily-users-were-a-country-it-would-be-bigger-than-canada/>> accessed May 27, 2022.

² Christian, T., Jonathan Alexander Kropp, Ina Kamps, M.A. and Jan Philip Rektorschek. (2022). *The Metaverse: Legal Challenges and Opportunities*, January 31. <<https://www.taylorwessing.com/en/insights-and-events/insights/2022/01/the-metaverse-legal-challenges-and-opportunities>> accessed May 27, 2022.

³ Tom, W. (2021). *Microsoft Teams Enters the Metaverse Race with 3D Avatars and Immersive Meetings*, November 2. <<https://www.theverge.com/2021/11/2/22758974/microsoft-teams-metaverse-mesh-3d-avatars-meetings-features>> accessed May 27, 2022.

⁴ *Ibid.*

⁵ *Ibid.* (no. 2)

⁶ <<https://podcasts.apple.com/gb/podcast/the-virtual-gucci-handbag-that-sold-for-more-in/id1565851466?i=1000526660859>> accessed May 27, 2022

⁷ <<https://rpjlaw.com/the-wild-west-of-metaverse-trademarks/>> accessed May 27, 2022.

a patent in the US for a virtual world simulator. Facebook, (now meta), has also filed for a patent relating to various aspects of the virtual world. Apart from the technologies directly related to building and using the digital world, it will also spur challenges that concern patentees in the real world. It will be inevitable to build hardware in form of data centers and servers, and these devices will require patenting.

3.4. Copyright Protection

The development of virtual worlds introduces several issues relating to copyright ownership and infringement. These issues need to be carefully navigated and negotiated. They will challenge IP lawyers on the scope of the metaverse and the attendant legal rights. Therefore, unauthorized use of NFT can cause damage to the reputation of virtual assets. In the same vein, user-generated content virtual spaces would need to ensure the removal or censorship of infringing content. Jay-Z, for instance, has filed for protection of *Jay-Z* which covers NFTs such as music, jewellery, sports equipment, bags, toys and fragrances.⁸

4. Prospects

4.1. Registration Under the Nice Classification

The Nice Classification, established by the 1957 Nice Agreement, is an international system used to classify goods and services for registration of marks. In the Nigerian jurisdiction, trademarks are registered according to the class of such goods. Thus, the protection offered to the owner is limited to that of the class in which it has been registered. The Nice Classification has 45 classes of trade marks registration under its latest edition. Presently, there is no law with regards to the protection of brands in virtual reality, but may be registered under Class 9 of the Nice Classification as a 'recorded and downloadable media'. This is possible given that the metaverse involves an online 3D universe. Similarly, protection can be given to the assets of metaverse under Class 35, which covers the advertisement of services through the internet. Others are Class 36 which deals with the provision of financial services via the internet; and Class 38 which concerns telecommunication, chat room, portal and e-mail services, providing users access to the internet, radio and television broadcasting; as well as Class 42, where protection to virtual assets can be given as scientific and technological services and the creation, maintenance and hosting of websites.

4.2. Protection By Defensive Registration

A proprietor of a mark who does not intend to operate in the metaverse could opt for defensive registration. This is an exception to the requirement that a trademark must be used or proposed to be used in relation to the goods for which it is being registered. Here, the proprietor is allowed to register their mark in unrelated class to avoid others from registering same or similar mark in that class. However, it does not prejudice the owner from subsequent registration of a normal trademark. It can be used to protect brands from market dilution in the metaverse.

4.3. The Natural Zone of Expansion

This doctrine gives trademark owners additional rights beyond their originally established commercial and/or geographical origins. However, they must show that such expansion is in fact, natural. This means that they must establish that it is a prior user and had planned to expand its operation and use of the trademark into the new area before the opposing party arriving the same area. Thus, the courts consider the following factors to determine the natural zone of expansion:

- (1) Previous business activity;
- (2) Previous expansion or lack of it;
- (3) Dominance in the area of use;
- (4) Presently planned expansion; and
- (5) Possible market penetration by means of products brought to or from other areas.

This doctrine protects the first user, called 'senior user', of a mark in a given geographical area. The senior user has a superior right over a later junior user who is using a similar mark with the same or similar goods or services within the same geographical area. It does not, however, give protection to a senior user outside the natural zone of expansion against a junior user who has honestly adopted a confusingly similar mark in an

area, without knowledge of the senior user's mark. This doctrine is fit enough to offer protection to goods in the metaverse.

5. Conclusion

The metaverse and NFTs are new expansions in intellectual property, and though it can be argued that existing intellectual property rights for physical goods may cover those in the metaverse, there are currently no laws to that effect. NFTs serve as a key component in the metaverse ecosystem, allowing people to own virtual goods. However, they do not grant any intellectual property rights to the owner. Thus, there is a cutting edge in the issues of intellectual property arising from the application and use of virtual worlds, and the IP lawyer will be heavily bestowed with the duty of drawing the line between rights and responsibility.

⁸ *Ibid.* (no. 7)