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Author:	Nikita Chauhan Harshima Vijaivergia

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ilj.spilmumbai@gmail.com.

INTELLECTUAL PROPERTY RIGHTS IN THE METAVERSE-

COMBATING REAL ISSUES IN THE VIRTUAL WORLD

- Nikita Chauhan & Harshima Vijaivergia¹

ABSTRACT

The Metaverse can simply be defined as a 3D universe that exists in the virtual space. While it is still in the developing phase, some games and virtual platforms provide their users with a Metaverse-like experience. The thought that the Metaverse could be the next version of the Internet is a fascinating one, but it also invites certain legal complexities that need to be acknowledged. When we consider intellectual property rights, it is safe to assume that they will play a vital role within the Metaverse, since user-generated content will be an essential part of it. Companies filing for trademarks of virtual goods and services already show how significant the development of the Metaverse will be. And here come some nagging questions- What legal mechanisms will be put to use to safeguard the IP rights inside the Metaverse? Will the existing framework suffice? How will the law be implemented in a platform that has no geographical bounds? This research paper deals extensively with these questions and provides the existing international framework that deals with IPRs, the potential challenges in the future, and ways to combat those challenges.

INTRODUCTION

The term ‘Metaverse’ is a new tech lingo that has been gaining more and more popularity over time. In very simple words, Metaverse can be defined as a reality beyond physical qualms, or in other words the ‘virtual reality’. It is like cyberspace except that it uses AR and VR to allow people to experience Metaverse in the form of an Avatar by using VR goggles. The curiosity related to Metaverse has accelerated even more around the world since Facebook rebranded itself as ‘Meta’. While big tech giants like Microsoft and Meta already have plans to develop various Metaverse platforms, other industries and companies are also gaining enthusiasm for becoming compatible with these futuristic goals.

¹ Students at University of Petroleum and Energy Studies, Uttarakhand (India).

The worldwide pandemic revealed that people, after getting adapted to cyberspace, can do a majority of their work online, and it is no secret that ‘Work from Home’ is the new normal. Everything from education to working shifted to ‘online mode’ in the wake of the pandemic. And since we have already climbed a few steps on the ladder, the dependence on online platforms is likely to increase in the future. Throw in a VR goggle, and a better and more immersive online experience and you enter the Metaverse.

However, as exciting as it may seem, it comes with its own complexities. As more and more people start using the Metaverse, it will become crucial for them to know and understand their rights in the Metaverse. One such legal domain that needs to be particularly focused upon is Intellectual Property Rights. The Metaverse has proposed both, opportunities as well as challenges with respect to the IP regime.

I. SCOPE FOR INTELLECTUAL PROPERTY RIGHTS IN VIRTUAL WORLD

More interest in the Metaverse will mean advancement in patentable technology related to virtual and augmented reality, formation of new brands, companies and industries, will attract trademarks and also the creation of content by users in the Metaverse, will necessitate the use of copyrights respectively. It, therefore, becomes essential to acknowledge the significance of Intellectual Property Rights in the Metaverse.

Intellectual Property Rights in general deal with the rights the creator has over something created by the virtue of her/his human intellect. Intellectual property can be referred to as an intangible asset and can range from inventions, symbols, names, and marks to artistic creations, designs, trade secrets etc. The major aim of providing intellectual property rights is to recognize the efforts and intellect that the creator has invested into the goods/services, and also encourage people at large to continue inventing and creating a world largely driven by human intellect. Since IP forms a very essential part of our realities, it is more than expected that they will also be imperative in regulating and resolving disputes surrounding IPR in the Metaverse.

Although there is both excitement and doubts about the *not-so-common* concept of Cryptocurrencies and NFTs, influential people or company giants are attempting to enter the

virtual world to market their own virtual products. The same is evident from the rapid increase in the number of trademark and patent applications, along with the registration of other IP tools. These applications are filed by the owners of a variety of industries specifically for claiming their rights over their virtual creations, though they hold these rights even for their real-world products. This implies the companies are already realizing the growing importance of such virtual rights. One of the most favourite brands, McDonald's, recently filed multiple trademark applications for “MCDONALDS” along with the operation of its virtual restaurant consisting of its physical as well as virtual goods.² Furthermore, it seeks to register “McCafe” for its entertainment services like physical and virtual concerts.

Following the same, various other individuals and companies have also started registering their virtual assets:

- Walmart filed applications to trademark ‘WALMART’ for covering the creation and sale of its virtual goods such as electronics, toys, decorations, sporting goods, and personal care products;
- Hip-Hop legend Jay-Z filed a trademark application for ‘JAY-Z’ hinting his intentions to cover music, clothing, and jewellery goods for use in online virtual worlds; similarly, NBA Legend Kobe Bryant had previously trademarked iconic “KOBE BRYANT”, “*Mambacita*”, and “Mamba Forever” for goods and collectables in the virtual world.³
- The Coachella Music Festival filed a trademark application for ‘COACHELLA’, for the downloadable audios, videos and featuring live musical performances with NFTs authentication.⁴

There exists a very bright future for Intellectual Property in the Metaverse, where its application will be expanded and reshaped considering the legal requirements for the new virtual environment. This will accompany applications of new non-traditional trademarks, the patentable Virtual Reality and Augmented Reality technology.

²Benjamin D. Schwartz, *Trademarks in the Metaverse: Brand Protection for Virtual Goods & Services*, 12 THE NAT. LAW REV. 59 (2022), <https://www.natlawreview.com/article/trademarks-metaverse-brand-protection-virtual-goods-services>.

³Olivia Jones, *The Rise in NFT and Metaverse-Related Trademark Applications*, JDSUPRA (Feb. 23, 2022, 05:23 PM), <https://www.jdsupra.com/legalnews/the-rise-in-nft-and-metaverse-related-2940820/>.

⁴*Ibid.*

A. Trade secrets

Additional problems of maintaining confidentiality in Trade Secrets will also arise. Trade secrets constitute confidential information that can be either sold or licensed.⁵ It may include any technical know-how, commercial information or even a combination of elements. As such, it is known that maintaining secrecy is one of the ultimate requirements in the protection of trade secrets. Now the virtual space will establish much newer ways to preserve the very nature of trade secrets, rather than relying on the old ways of using a Non-disclosure Agreement or restricting access by Biometrics.⁶

B. Patent

With respect to another essential IPR tool in Metaverse, Patent, in the language of WIPO is:

“A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem.”

The scenario around Metaverse will be largely based on technologies and software. These cannot be avoided owing to the fact that these serve as a basic requirement for a patent protection regime.⁷ However, considering the growing number of computerized patents authorized by the authorities, this does not seem a far cry. On analysis of hundreds of Patent Applications by Meta, it is crystal clear as to how it plans to commercialize on Metaverse.⁸ In the review by Financial Times, it was found that users will be able to buy virtual products via virtual stores and even objects, corresponding to the actual third party sponsored things in the

⁵WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), <https://www.wipo.int/trademarks/en/> (last visited Feb. 21, 2022).

⁶Suebsiri Taweepon & Chariyaphon Vachanavuttivong, *Thailand: Immersing Intellectual Property Rights In The Metaverse*, MONDAQ (Feb. 24, 2022, 04:06 PM), <https://www.mondaq.com/trademark/1156298/immersing-intellectual-property-rights-in-the-metaverse?login=true&debug-domain=.mondaq.com>.

⁷Christian Tenkhoff et. al., *The Metaverse: legal challenges and opportunities*, LEXOLOGY (Feb. 24, 2022, 06:34 PM), <https://www.lexology.com/library/detail.aspx?g=c1872705-ccbe-49bb-98f4-77092e4f26ec>.

⁸Isabel Asher Hamilton, *Meta might let companies sponsor the appearance of objects in the metaverse, patent filing suggests*, BUSINESS INSIDER INDIA, (Jan 18, 2022, 08:34), <https://www.businessinsider.in/tech/news/meta-might-let-companies-sponsor-the-appearance-of-objects-in-the-metaverse-patent-filing-suggests/articleshow/88978897.cms>.

real world.⁹ Furthermore, upon the patent review, it was also revealed that Brands will be examined under a Bidding Process in order to sponsor the ‘object appearance’ in a virtual store. The traditional inventions would also have a part to play and this has already been considered under a plethora of applications. For instance, even Disney applied for a patent in the USA for the simulation of a *Virtual World*.¹⁰

Since the advent of the Internet, owners and users of intellectual content or protected content have been exposed to a variety of challenges, relating to authority, monetary benefits and enforcement. While many of these issues are covered by IP Rights and prevailing laws, the ‘Metaverse’ is capable of challenging the protection currently granted. The question that would arise is: ‘*Will the information landscape or virtual assets be covered for legal protection and ownership?*’¹¹

C. Copyright

WIPO defines Copyright as a:

“Legal term used in describing the rights that creators have over their original literary and artistic works. Copyright covers a wide ambit of work from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.”¹²

The Metaverse ensures first-mover benefits of Software that has already been copyrighted. However, policing the metaverse for infringing copyrighted creations is yet a challenge and in case usage of such is “*de minimis*”, there will be an issue in proving infringement. Hence, the law shall not concern itself with trifles.

Viewed from the perspective of copyright laws, non-fungible tokens (NFTs) have invited a lot of opinions and discussions. It has caught attention for multiple reasons and not only due to its

⁹Hannah Murphy, *Facebook patents reveal how it intends to cash in on metaverse*, FINANCIAL TIMES, (Jan. 8, 2022), <https://www.ft.com/content/76d40aac-034e-4e0b-95eb-c5d34146f647>.

¹⁰Kyle Johnson, *Disney Patents Virtual World Simulator: Augmented Reality Without Headsets*, WDW MAGAZINE, (Jan. 8, 2022), <https://www.wdw-magazine.com/disney-virtual-world-simulator-patent-augmented-reality-without-headsets/#:~:text=On%20Dec.,wearing%20a%20virtual%20reality%20headset>.

¹¹Pranav Nayar & Vivek Kumar, *Exploring the Meta: Exploring the Legal Ramifications of Metaverse*, RGNUL STU. RES. REV. BLOG, (Feb 23. 2022, 08:45 PM), rsrr.in/2021/12/06/legal-ramifications-of-the-metaverse/.

¹²WORLD INTELLECTUAL PROPERTY ORGANIZATION(WIPO),<https://www.wipo.int/copyright/en/> (last visited Feb. 20, 2022).

application in “*Everydays: The First 5000 Days*” digital artwork, which was sold at a whopping 69.3 million dollars in 2021.¹³ NFTs can be defined as “*unique digital assets that can be easily and securely traded and are built on Blockchain Technology.*” While the seller may want to permit a non-exclusive license or may even limit the right to use, the buyer always seeks to obtain an exclusive license in NFTs based digital artwork.¹⁴ It can be drawn that NFTs will be considered essential in the Metaverse, where buyers and sellers can trade digital content, artwork and other goods through non-fungible tokens, and consequently make profits by further selling.

D. Data Protection

Data protection is an absolute necessity in the current scenario and the Metaverse also challenges this aspect of law. A user can live a real-life experience inside the Metaverse through VR Goggles even though actually being in virtual reality. Furthermore, the users can build their own virtual avatars that mimic the user’s facial expressions, mannerisms and even gestures. The fun part about this would be the VR and other technological equipment that will enable users to participate and enjoy the experience in virtual spaces without even stepping out of their comfort zones and prevent any unnecessary surveillance.

E. Trademark

WIPO defines a Trademark as an

“IP form that consists of a recognizable, design or expression that can distinguish goods of one brand from another brand.”

Though Virtual Reality and Augmented reality (VR & AR) facilitate owners of the brands to expand their influence in market and consumer reach, Trademark is yet another IP right that exists at the intersection of video games and virtual space. In the Gaming industry, third-party trademarks are applicable when the brand seeks to simulate the real world (for instance *ESS*

¹³Jacob Kastrenakes, *Beeple sold an NFT for \$69 million*, THE VERGE (Mar 11, 2021, 10:09 am), <https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million>.

¹⁴Christian Tenkhoff et. al., *The metaverse: Legal challenges and opportunities*, TAYLORWESSING, (Feb. 23, 2022, 12:56 PM), <https://www.taylorwessing.com/zh-hant/insights-and-events/insights/2022/01/the-metaverse-legal-challenges-and-opportunities>.

Entertainment). Some video games also provide their users with the ability to establish their market presence over a virtual platform and trade in the real world. These opportunities are packed with the likelihood of unauthorized usage of trademarks owned by third parties along with the probability of brand dilution. Ultimately, these risks of using brands call for the caution of trademark owners, especially in the virtual landscape, since the status and protection in law are unclear and still evolving. The brands must be cautious in securing their digital Intellectual property, in a manner Nike did when it claimed its digital trademark rights.¹⁵

F. Licensing

Apart from infringement, there will be various concerns over the breach in licencing, joint ownership, and safe harbours,¹⁶ along with the rise in organizations dealing in patent cross-licensing and exposure to opportunities in brand licensing. However, the licensing related to content as well as technology has to be carefully dealt with considering all the aspects of 'Metaverse'. Licensing can be simply defined as an agreement made between the owner of intellectual property (Licensor) and the person who seeks to use the intellectual property (Licensee). The licensor is then authorized to use the IP in exchange for a fixed monetary value. It is not difficult to restrict a licensee's rights depending on his/her territory, the rules are yet to be formulated for the virtual world wherein there are no borders or the borders haven't been identified yet. IP issues will also rise considerably with respect to publicity disputes when celebrities and sportspersons are subjected to commercial values through their virtual avatars.

G. Brands

In the markets, the brand of a company is one of the most valuable elements that has made huge waves in the interplay between Metaverse and Intellectual Property. The 'brand' of a company is its precious asset upon which consumer identification, as well as success in markets, is dependent. Moreover, a brand has a huge inter-relation with the goodwill of a company, since people know the latter because of the former. With people increasingly having

¹⁵Kim Bhasin, *Nike Files for 'Virtual Goods' Trademarks in Shoes, Apparel*, BLOOMBERG, (Nov. 2, 2021, 9:19 AM) <https://www.bloomberg.com/news/articles/2021-11-02/nike-files-for-virtual-goods-trademarks-in-footwear-apparel>.

¹⁶Jeffrey Neuburger & Jonathan Mollod, *In the Coming 'Metaverse', There May Be Excitement but There Certainly Will Be Legal Issues*, PROSKAEUR: NEW MEDIA AND TECHNOLOGY LAW BLOG (Feb. 23, 2022, 09:29 AM), <https://newmedialaw.proskauer.com/2021/12/03/in-the-coming-metaverse-there-may-be-excitement-but-there-certainly-will-be-legal-issues/>.

their own virtual avatars, it is highly likely that they will also be willing to spend on virtual fashion accessories. For instance, *Gucci*, one of the high-end brands, had its virtual handbag sold out on Roblox, for approximately \$4.100, which is much more than the price at which its bags are sold in the physical world.¹⁷ It also raises questions about whether their registered trademarks, *intended for physical world purposes*, are protected against usage when it comes to virtual commodities by a third party. There are several other high-end brands that have acknowledged the potential of virtual spaces and have taken positive steps forward in claiming their rightful position by signing necessary legal contracts like Louis Vuitton with “*League of Legends*”¹⁸, Valentino and Marc Jacobs with “*Animal Crossing*”¹⁹ as well as Balenciaga with *Fortnite*.²⁰

II. INTELLECTUAL PROPERTY INFRINGEMENT IN METAVERSE

An emerging and ever-increasing development in cyberspace, VR or AR, brings forth a plethora of questions about the legal facets pertaining to the Intellectual property of both technologies as well as possible unlawful acts within cyberspace. The faces behind Virtual reality may be subjected to lawsuits:

- while exercising their right to publicity, wherein they may use the reputation of a famous person/celebrity to their own advantage and without any permission;
- Due to defamation;
- Invading right to privacy by false portrayal or misrepresented information;
- Deliberately or negligently portraying emotional/physical distress in cases of cyberbullying²¹;
- Violation of copyright of respective owners.

¹⁷Tenkhoff, et. al, *Supra* note 13.

¹⁸ Laura Hawkins, *Choose your fighter: the fashion brands outfitting video gamers*, WALLPAPER (Feb. 8, 2022), <https://www.wallpaper.com/fashion/video-games-luxury-brands>

¹⁹*Ibid.*

²⁰Simona Tolcheva, *Digital Fashion and the Metaverse: How Does It All Work?*, MAKEUSOF (Feb. 21, 2022, 05:21 PM) <https://www.makeuseof.com/digital-fashion-metaverse-explained/>.

²¹Margaret Mantel, *Trademark Infringement in Virtual Reality Spaces: When Your Virtual World Gets Too Real*, MICHIGAN L. REV. BLOG, (Feb. 22, 2022, 01:51 PM), <http://mttlr.org/2019/11/trademark-infringement-in-virtual-reality-spaces-when-your-virtual-world-gets-too-real/>.

It has been indicated that the activities taking place within the confinement of virtual spaces may also provoke criminal activities. Intellectual property rights are exposed to ambiguity and vagary in the real world, due to the emerging concept of virtual spaces like Metaverse itself. It shall only result in much complexity for owners of brands, who are now forced to regularly monitor the brands and ensure their rights are infringed neither in the cyberspaces nor in the real spaces. Needless to say, law enforcement is already taking cognizance of these matters.

In the light of the territorial principle of intellectual property rights, where it has now become possible to pile up evidence about infringement, it is quite difficult for websites to determine and control the point at which such infringement has occurred. Precisely, it is procedurally complicated.

Suppose, a famous influencer on social media does not promote a particular famous brand of apparel but his virtual avatar “does” and appears on the *New York fashion runway* virtually through Metaverse. The brand will undoubtedly receive attention and increase its consumer base, making it necessary to preserve its territorial scope, but it will also make the trademark effective.

Recently, Hermès International and Hermès of Paris, Inc.²² (referred to as “Hermès”) filed a complaint against Mason Rothschild.²³ The action was taken due to alleged trademark infringement, brand dilution and unfair competition against the defendant.²⁴ In the case, it was asserted that Mason Rothschild is a digital speculator and he sought to misappropriate the brand name METABIRKINS with the view to get rich. It was alleged that Rothschild used the above-mentioned brand to create, market, sell and facilitate the exchange of NFTs. Furthermore, adding “meta” (a generic term) is insufficient in distinguishing his bootlegged version of Hermès' original trademarked name. The cases of IP infringement require the owners of brands to be ready with appropriate actions to enforce their rights in virtual space with as much diligence as in the real world.

²²Jodi Ann Talliman, *Intellectual Property Rights in the Metaverse: Hèrmes v. Rothschild and the MetaBirkins Saga*, JDSUPRA (Feb. 22, 2022, 07:13 PM) <https://www.jdsupra.com/legalnews/intellectual-property-rights-in-the-3168911/>.

²³*Hermès International v. Rothschild*, Case No. 22-cv-00384.

²⁴ Supra note. 21

Some other cases display how common IP infringement is and reveals an urgent need to address the need for strict implementation of IP laws in virtual spaces:

1. Richard Minsky built an art gallery on a Virtual gaming platform, naming it “SLART”. He trademarked the SLART mark in real life from the U.S patent Office. After a while, it was realized that a virtual avatar on this gaming platform used the “SLART GARDEN” mark in a virtual exhibit.²⁵
2. Taser International, Inc., manufacturer and seller of guns, took action against the entities and individuals involved in the virtual infringement of TASER (the company’s registered trademark). It was alleged that the defendants were selling and advertising virtual weapons of TASER on a Virtual Gaming Platform. The case raised questions on the usage of the trademark as well as trade dress over *The Second- Life*, a virtual gaming platform.²⁶

Protection of IP rights has become imperative in the current scenario where major companies in the market are attempting to chip in and compete for their lucrative prospects in the Metaverse by entering into the gaming sector, commerce and social networking. These strategies would help them in gaining a significant consumer base and shape their purchasing decisions. Enforcement of IP rights is important for brand owners in marketing, promoting and advertising goods and services through Metaverse. As mentioned above, Nike claimed its rights for its worldwide famous symbols *Nike* and *Swoosh* sign, the slogan ‘*Just do it*’, the ‘*Jumpman*’ logo and *Air Jordan* of Jordan. Also, Ralph Lauren applied for trademark protection for virtual clothing and accessories.²⁷

A. Trademark and Copyright infringement

Trademark infringement is the consequence of using a mark, identical or somewhat identical to an already registered trademark within the one or related category of products and services and hence causing confusion in consumers' minds.²⁸ There are likely to be certain legal consequences in case a virtual Avatar is wearing Virtual goods having a registered trademark

²⁵*Minsky v. Linden Research, Inc.*, No. 1:08 cv 819 (N.D.N.Y. 2009).

²⁶*Taser International, Inc. v. Linden Research, Inc.*, No. 2:09 cv 00811 (D. Ariz. 2009).

²⁷Laura Kusserow & Samantha Collins, *The Metaverse and the implications for Intellectual Property rights for fashion brands*, MARKS & CLERK (Feb. 23, 2022, 02:38 PM), <https://www.marks-clerk.com/insights/the-metaverse-and-the-implications-for-intellectual-property-rights-for-fashion-brands/>.

²⁸ UNITED STATES PATENT AND TRADEMARK OFFICE, <https://www.uspto.gov/page/about-trademark-infringement> (last visited Feb. 24, 2022).

of its owner in the ‘real world’ for instance. This is because this may mislead the consumers into believing that the virtual clothing has been offered or licensed by the real trademark owners.²⁹ Under the present laws, it is quite unclear as to whether the usage of a trademark in virtual goods can be constituted in the real-world product registered by a trademark.

Copyright Protection along with trademark registration can be granted to a brand when it satisfies two elements i.e., originality and innovation.³⁰ Furthermore, unauthorized reproduction of a trademark in the form of virtual goods used for the virtual avatars may also be liable for breach of copyright laws.³¹

B. NFTs (Non-Fungible tokens)

With the rise in Metaverse and NFTs, one essential feature is that anyone can create an NFT in their own comfort zone, and sell it thereafter. However, the downside of this feature is piracy i.e., well-known brand designs can be easily copied with very little effort and cost, very much like the counterfeited commodities.³²

C. Content uploading

Another major concern relates to infringement by users by uploading content that is not authentic. This includes movies, pictures, music, virtual fashion and characters. IP holders desire cooperation with the platform providers to monitor as well as remove the content. However, it becomes difficult to track IP infringing content with an ever-expanding, complex virtual landscape.

D. Patent infringement

Patent infringement can be a result of the illegal and unauthorized use, marketing, or selling of an invention without the prior consent of such use from the patentee. Last year, Apple filed a

²⁹Amanda Liu, *Trademark Protection in the Metaverse*, LEXOLOGY, (Feb. 23, 2022, 08:23 AM), <https://www.lexology.com/library/detail.aspx?g=1be3918e-e0d1-48f0-99da-0b2d113987a2>.

³⁰USLEGAL. COM, <https://copyright.uslegal.com/enumerated-categories-of-copyrightable-works/creativity-requirement/> (last visited Feb.24, 2022).

³¹Liu, *supra* note at 25.

³²Kusserow & Collins, *supra* note 23.

patent seeking to remove certain subjects from Metaverse. Cupertino proposed that protection included a route for future “Meta-users” to delete subjects violating the interaction rules formed by the “Meta-users”.³³ If the user’s virtual avatar harms/violates/attacks the virtual avatar of another user, the former user can ‘Stop’ him.

Though it is common knowledge that patent applications are required to be authorized by the respective offices but there are already some technical solutions, specifically designed to deal with disputes arising from Metaverse. Facebook's Meta had also previously filed a number of Patent applications for Metaverse, which also included a method of changing the virtual experience of the user.

For example, a VR app enables a person to take a virtual tour to any place possible and he enjoys the element of realism in what he witnesses and hears. The developer does not seek any permission from the owner of the copyright before his app launches. The question of infringement arises as observed in the above example but it is unlike real-world copyright infringement. Not only the use of music will be construed as an infringement as it required prior permission from the holder of copyright but also the VR tour will be a copyright infringement i.e., the architecture, paintings and everything visible through the tour. However, France as an exception requires the app developer to check whether the use of images would need prior permission from the copyright owners for each painting, building or any work covered under copyright and the failure to do the required would attract heavy penalization for infringement.

E. Passing off in Metaverse

Passing off comes to question when:³⁴

- Some goodwill is attached to the owner's goods;
- the misrepresentation by the person who is not an owner forces the public to believe that the goods actually belong to the person who is not the owner

³³COINYUPPIE, (last visited Feb. 24, 2022). <https://coinyuppie.com/a-headache-for-both-nike-and-apple-how-to-provide-copyright-protection-for-metaverse-2/>

³⁴NIBUSINESSINFO.CO.UK, (Last visited Feb.25, 2022). <https://www.nibusinessinfo.co.uk/content/passing-definition-remedies-and-defences#:~:text=Passing%20off%20happens%20when%20someone,causing%20financial%20or%20reputation al%20damage>

- the misrepresentation has caused damage or potential damage to the goodwill, finances or reputation of the owner

Assuming there exists goodwill in the chocolate bar brand, it is likely that the misrepresentation can be proved when it is included in a game. It indicates that there does exist licensing agreement between the two parties i.e., the company selling the chocolate bar and the developer of the game.

Proof of damage is not required for the owner of the brand to raise and enforce his claims, which is strictly required in case of an infringement claim. In his claim against passing off, the owner must prove that the misrepresentation by the defendant caused damage to his goodwill or that damage could be reasonably foreseen.³⁵

III. INTERNATIONAL INTELLECTUAL PROPERTY LAWS

International laws applicable to Intellectual property Rights are a patchwork of multiple treaties, being unilateral, bilateral and multilateral. The nature of intellectual property calls for laws in both national as well as international dimensions.

While patents, trademarks and copyrights are the most widely known and used intellectual property rights over which issues arise, domain names, software, databases etc. are also attracting a lot of attention due to frequent infringements as well as litigation to curb them. The World Intellectual Property Organization (WIPO) is the leading international organization that addresses and regulates international issues with respect to IPRs³⁶. While all countries have different laws that prevent the rights of creators and also promote innovation, the international legal framework provides the basic outlining of the rights with regard to intellectual property. It also ensures that the rights of the creators are not only preserved in their home country but also all around the globe irrespective of territorial borders. An example of this is the National Treatment Principle, which mandates equivalent treatment to a foreign product that is given to

³⁵ Andy Lucas & Robyn Chatwood, *Intellectual Property in Virtual World*, LEXOLOGY (Feb. 24, 2022, 6:54 PM), <https://www.lexology.com/library/detail.aspx?g=30d7168d-4886-46e1-8ef6-ff7245948a91>.

³⁶ WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), <https://www.wipo.int/portal/en/index.html> (last visited Feb. 21, 2022).

the domestic product in a country³⁷. The principle is not only applicable to goods and services in general, but under the scope of international law, it is also applicable to copyrights, trademarks, and patented goods of foreign countries at large. The principle is recognized by the various bilateral treaties, the World Trade Organization (WTO), the General Agreement on Tariff and Trade (GATT)³⁸, and Trade-Related Aspects of Intellectual Property Rights (TRIPS)³⁹.

IV. INTERNATIONAL INSTRUMENTS THAT GOVERN IPRs: THE HISTORY

Global trade is a very significant part of the development of countries, and as it keeps on increasing, one of the subjects that comes into focus is intellectual property. There are various instruments that have been curated to safeguard the rights of IP owners at a global level.

5.1 The Paris Convention on Protection of Industrial Property- Adopted in 1883, the Paris Convention has very wide applicability, and it applies to industrial properties like patents, industrial designs, trademarks, geographical indications, trade secrets etc.⁴⁰

5.2 The Berne Convention for the Protection of Literary and Artistic Works- adopted in 1886, protects artistic works at large and enumerates the rights of the poets, musicians, painters, authors and all creators at large⁴¹.

5.3 The Madrid Agreement Concerning the International Registration of Marks- also called the Madrid System, is governed by the Madrid Agreement, and the Protocol for governing and protecting different marks and allowing international registrations of the same⁴².

³⁷Will Kenton, *National Treatment*, INVESTOPEDIA (Feb. 23, 2022, 3:30 PM), <https://www.investopedia.com/terms/n/nationaltreatment.asp#:~:text=Key%20Takeaways,National%20treatment%20is%20the%20principle%20of%20giving%20others%20the%20same,trademarks%2C%20copyrights%2C%20and%20patents>.

³⁸WORLD TRADE ORGANISATION (WTO), https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited on Feb. 27, 2022).

³⁹WORLD TRADE ORGANISATION (WTO), https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm (last visited on Feb. 27, 2022).

⁴⁰WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), <https://www.wipo.int/treaties/en/ip/paris/> (last visited Feb. 22, 2022).

⁴¹WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), <https://www.wipo.int/treaties/en/ip/berne/> (last visited Feb. 22, 2022).

⁴²WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), <https://www.wipo.int/treaties/en/registration/madrid/> (last visited Feb. 22, 2022).

5.4 United International Bureaux for Protection for the Protection of Intellectual Property- set up in 1893, the BIRPI was made to administer the Paris Convention and the Berne Convention respectively. It was later succeeded by the World Intellectual Property Organization (WIPO)⁴³.

5.5 World Intellectual Property Organization- WIPO is the current international organization that works toward the protection of IPRs and the regulation of laws related to them.⁴⁴

V. INTERNATIONAL IP LAW AND THE METAVERSE

With the Metaverse unfurling slowly, but steadily, it is imperative to recognize the effect that international IPR laws will have on the intellectual property present in the Metaverse. The Metaverse can be said to be geographically boundless unless we consider the servers which root the information that exists in the virtual world to some corner of the globe. The process, however, to locate the roots can be extremely time-taking as well as complex, which is why the need for having laws that specifically govern the IP rights in the Metaverse is escalating. The prime intention of international IP laws is to provide certain basic rights to IP creators. Additionally, they form a foundation for making national/domestic IP laws. As people are investing a lot of time into the Metaverse, the scope for new technologies for accessing the Metaverse, the foundation of new companies, and the creation of vast amounts of content in the virtual world are seamless. And to match this development as well as the probability of disputes that might arise in the Metaverse, it is important to analyze the applicability of International Laws to the intellectual property that exists in the Metaverse.

However, there are various challenging factors that come along the way while attempting to apply the existing international IP framework to the Metaverse.

⁴³WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), <https://www.wipo.int/about-wipo/en/history.html> (last visited Feb. 22, 2022).

⁴⁴*Supra* note at 32.

VI. CHALLENGES PERTAINING TO IMPLEMENTATION OF LAWS IN THE METAVERSE

Various IP related issues including protection, piracy, ownership, and distribution of content will have to be revisited through the eyes of an avatar in the Metaverse in order to get an idea of the potential challenges that follow.

A. An Avalanche of Virtual Lawsuits

Using a Metaverse requires a person to have an avatar and enter the virtual reality by way of that avatar. Now, when the subject matter of any lawsuit related to IP infringement will be the Metaverse, it is difficult and the most potent challenge to outline where, how and by whom lawsuits will be filed. The world at large is still learning about Metaverse and having a concrete idea about the lawsuits that are subject to the Metaverse is quite difficult. Moreover, as people are also investing in real estate inside the Metaverse, for instance, Snoop Dogg recreating his California Mansion as a virtual property in 'The Sandbox', the 'What if?' of the lawsuits are not exhaustive. There might even be a possibility that in the near future lawsuits are filed as well as fought within the Metaverse by lawyer avatars. And what would the implications be? What would the process be? Will the option of filing a lawsuit or settling the dispute within the Metaverse by the parties be a valid and enforceable one?

To answer all these questions, it is important to come up with some concrete laws that enumerate the dos and don'ts within the Metaverse.

B. Jurisdictional Aspects

Our world has territorial boundaries, which provide territorial jurisdiction to countries. But in a world where geographical boundaries have no meaning, new thinking and laws will be required. Moreover, interaction in the Metaverse is not constricted based on geographical borders. Hence, the parties to an IP infringement may well belong to different countries, further complicating the situation. Jurisdiction is imperative to decide whether a court/ tribunal/ judge or any other legal body is competent to adjudicate a matter at hand, based on various aspects like territory, subject matter, and the pecuniary limit of the dispute at hand etc.

Considering international law, numerous factors are analyzed to establish the territorial jurisdiction, including-

- The sovereign right of the State over the party
- The geographical location of immovable property
- Internal waters
- Territorial waters
- Nation aircraft/ships etc.

History is proof that various international issues have arisen in the past, and have been settled on an international platform when States are the subject matter of the dispute. And this is not limited to civil disputes only.

There have also been instances wherein criminal matters became subject to international law because of the different nationalities of the parties. For instance, in the case of France v. Turkey, popularly known as the SS Lotus case⁴⁵, a French officer in command of the ship that collided with a Turkish vessel on the high seas and led to casualties, was tried by the Turkish authorities. Authority was given to Turkish authorities to try the officer under the Treaty of Lausanne⁴⁶, and it was stated that it is the duty of the State to keep the sovereign rights under limitation.

Hence, the international stance is quite dynamic in matters related to territorial jurisdiction under international law. Since the Metaverse is geographically fluid, it is imperative to acknowledge the implications, challenges, and solutions to potential problems related to Metaverse. And talking about IP rights in specific, as people from all across the world will get an opportunity to interact virtually, but still at a much deeper level than the interaction on social media, intellectual property of creators will also be available on this international virtual forum. Hence, figuring out the jurisdictional aspects of the disputes that might arise in the Metaverse is one of the first aspects of the checklist.

⁴⁵ ICGJ 248 (PCIJ 1927).

⁴⁶ BRITANNICA, (last visited Feb. 21, 2022) <https://www.britannica.com/event/Treaty-of-Lausanne-1923>.

C. Intellectual Property Created by Artificial Intelligence

Artificial Intelligence and Machine Learning are two integral concepts used in cyberspace. While machine learning allows the software to self-improve, and thereby improve its accuracy, by learning from the historical data and older algorithms.⁴⁷

Intellectual Property Rights have been designed to incentivize creators by providing them recognition as well as economic benefits. The scope of artificial intelligence creating intellectual property is already a subject of discussion around the globe, as that would require an evolution of the existing laws.

And as humans continue to make AI-related improvements, the probability of artificial intelligence being self-aware, learning from past experiences, and creating intellectual property in the Metaverse on its own, isn't a very distant reality either. While the thought can seem scary, it is important to be prepared for the same, by acknowledging the kind of rights that may/may not be given to the AI, whether the original creator of the artificial intelligence, that further invented something patentable will be credited or not, etc.

VII. IP LICENSING IN THE METAVERSE

Any user can glide quite seamlessly in the Metaverse. Hence brands extending their existence to the Metaverse, along with all creators at large need to be clear about the licensing of their intellectual property inside the Metaverse. For example, if a brand is collaborating with some creator in the Metaverse, and say licensing its IP for usage in a particular game, it is imperative to figure out the details like the term of the license, royalty, way it can be used etc.

The scope of IP licensing in the Metaverse goes beyond the real world. This is because the usage and the repercussions are not limited to unfair use of a trademark, patent or a copyright,

⁴⁷TECHTARGET, (last visited Feb. 21, 2022).
<https://www.techtarget.com/searchenterpriseai/definition/machine-learning>
ML#:~:text=Machine%20learning%20(ML)%20is%20a,to%20predict%20new%20output%20values

like in the real world. Reputational damage is one such potential challenge that every IP owner can face in case the IP licensing is not done properly⁴⁸.

For example- A clothing brand extended their IP for costumes in a certain game. But the game creator now wants to use the same IP in another game that has a lot of graphic content. Now to mitigate the damage that this use might cause to the goodwill of the brand, it is important for both the parties to discuss the limitations of the use of the licensed IP, terms and conditions of usage, and steps in case of IP infringement by third party etc.

VIII. DIRECT/INDIRECT INFRINGEMENT VIA USER-CREATED CONTENT

Applications like Instagram and TikTok depend essentially on the content created by their users for both, their development as well as their popularity. Metaverse is no different, and user-created content forms an essential part of it. However, there have already been instances wherein the user-generated content indirectly infringes brand rights within the Metaverse. For instance, in the game ‘animal crossing’, the players started creating their own costumes for their avatars, and many of these costumes mimicked the designs as well as logos of brands from real life, (like Louis Vuitton). Now, is permitted such user-generated content good for the brand, as it will help in advertising? And if allowed, and later used in a damaging way, what will be the rights of the brand? What is the scope of third-party infringement in such scenarios? All these questions need to be answered with concrete laws so that parties can anticipate such concerns and act with respect to their IP rights accordingly.

SOLUTIONS AND THE ROAD AHEAD

Considering the nature and the potential challenges that the use and creation of Intellectual Property inside the Metaverse may lead to, the solution is to have a pre-determined legal framework that will be compatible in order to provide effective remedies. Even though the use and engagement with the Metaverse are increasing, the world has still not passed the threshold where the majority of people are dependent on the Metaverse for not only playing games and

⁴⁸Anthony Lloyd et. al., *An unreal issue: managing IP in the metaverse*, DLA PIPER (Feb. 25, 2022, 9:44 PM), <https://www.technologysleage.com/2021/11/an-unreal-issue-managing-ip-in-the-metaverse/>.

entertainment purposes but also for other significant day to day activities. And while it hasn't happened, it is a distant possibility, which is why it is imperative to mould the existing laws and create new ones to combat the IP infringement issues that will arise as a result of virtual interaction among people in the Metaverse.

- Focusing upon the impact the international intellectual property laws have had on the rights of IP creators around the world, it is significant to establish a framework that will address and hopefully establish the following for better clarity.
- Establishing a concrete legal framework that irons out the basic wrinkles like jurisdictional aspects, competency of national courts with regard to IP infringement in the Metaverse, limitations of national jurisdiction etc. This will help in establishing a strong foundation in order to make seeking remedies a smoother process in the future.
- Special forums for creators to understand their IP rights in order to protect the same within the Metaverse. Since the Metaverse is an intersection between intellectual property rights and tech law, knowing both will be essential, and having international as well as national forums that are available for spreading awareness and helping creators will promote clarity about both their rights, and the limitations to those rights.
- Specific acknowledgement of intellectual property created by artificial intelligence, and an outline of the rights related to credit, limitation, ownership of such intellectual property, rights of the creator of the AI etc. along with the limitations of those rights. This is important because in case certain rights are provided to an AI, they cannot be the same as the existing IP rights provided to creators at large. The prime reason for the same is that giving ownership, rights to use, economic benefits arising out of IP licensing, or monetary remedies in case of IP infringement to artificial intelligence might not be the most ideal choice. These rights act as an incentive for the creator, and when an AI is considered to be subject to the same laws, it completely changes the perspective, which is why the creation of new laws is imperative.
- Specialized tribunals at international as well as national levels in order to deal specifically with Metaverse related legal matters, in order to provide speedy trial and expedient remedies to aggrieved parties. The rise in cases of IP infringement will be directly proportional to the

increase in the number of users of the Metaverse. Hence, establishing an effective system beforehand will mitigate the excessive workload that will be put on the judicial system all around the world as the popularity of the Metaverse grows.

The world is an ever-evolving place, and to match the constant changes, the law has also been modified with respect to the requirements of people. The usage of the Metaverse is metamorphosing, and it is going beyond the sole purpose of entertainment, making it important to acknowledge the challenges and potential problems and find solutions to them. While all the problems and disputes that will arise with respect to intellectual property in the Metaverse cannot be predicted beforehand, having a concrete system will not only help the creators but also the judiciary, and international IP organizations at large.