



Exploring some trademark issues in metaverse from EU law perspective

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Abstract. This article addresses some issues of trademark protection in virtual worlds. The increasing presence of trademarks in the metaverse, as evidenced by the growing number of trademark applications for virtual goods and services, is likely to intensify legal conflicts related to trademarks and, consequently, to lead to litigation. The development of virtual reality thus brings challenges for the interpretation and application of traditional concepts and terms used in the trademark system. This article analyzes issues that require consideration in the context of trademark protection in metaverse. It discusses the issues of registering trademarks for virtual goods, assessing the similarities between real world goods and services and their virtual world counterparts, and the enforcement of the rights to trademarks, which were used without the owner's consent in metaverse. The analysis presented in the article leads to the conclusion that further development of the metaverse will certainly force a redefinition of traditionally applied enforcement principles, including those related to jurisdiction, as well as certain concepts known and interpreted for the application of the trademark system in the real world, such as trademark use.

Keywords: Metaverse, trademarks, NFT, infringement.

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1. THE IMPORTANCE OF TRADEMARK PROTECTION IN THE METAVERSE

The concept of the metaverse¹ and technological ideas associated with the metaverse originate from novels² describing a digital space in which users interact and establish social relationships using avatars (INTA, 2023, p. 13; Nwaeze, 2022, p. 2). With the emergence and development of interactive digital environments, including games like Fortnite, Roblox and Minecraft, the metaverse has gained a digital reality in which users interact by playing, collaborating, making purchases, and exploring. Mark Zuckerberg described the metaverse as ‘an embodied Internet, where you are, not just looking at’ (Chayka, 2021). However, currently, the metaverse does not identify a single shared virtual space, but is decentralized across different platforms.

The metaverse are thus virtual, but increasingly parallel worlds in which consumers can virtually experience life, including, for example, buying virtual products, attending concerts and sports events, purchasing expensive and unique works of art, driving virtual cars or yachts, traveling, and dining (INTA, 2023, p. 13; Nwaeze, 2022, p. 2; Bradley & Kolev, 2023, p. 3-4). The metaverse cannot be ignored, not only because technology and entertainment giants such as Facebook (Meta) and Disney are investing significant amounts in this concept and competing to create their own metaverses (Foerg, 2022, p. 1), but also because the metaverse is becoming another version of e-commerce, used by businesses to promote their goods and brands, which translates into increased sales in both the virtual³ and real worlds (EUIPO, 2023b, point 23). The metaverse is increasingly resembling the physical world also in terms of marketing activities and economic operations⁴. We are therefore reaching a critical point where it is necessary to consider the possibility of applying the laws that govern economic relationships in the real world life to economic relations in the virtual worlds. Considering that the metaverse is largely a digital version of reality, it will likely impact every type of legal or criminal activity of humans in the future. Thus, practically all issues existing in everyday life like will also be relevant in the metaverse (Foerg, 2022, p. 1; Murray, 2022, p. 2). This raises also a number of legal concerns regarding privacy, data collection, freedom of speech and expression and defamation, as well as intellectual property protection. While issues related to intellectual property rights in the metaverse mainly sparked discussions on copyrights and patents, they have recently generated controversies regarding trademark rights as well (Nwaeze, 2022, p. 2; Murray, 2022, p. 3; Okafor, 2022, p. 8).

This article addresses some issues of trademark protection in the metaverse, which are becoming increasingly important for trademark owners, for whom the metaverse requires to develop an appropriate legal strategy for the metaverse (Park, 2022). While it is still an early stage, it can already be said that the metaverse is a new business model utilized by entrepreneurs and further reinforced with the development of the metaverse to increase consumer engagement. Users already identify with their avatars in virtual worlds and make purchases of virtual items, the prices of which exceed those of products in the real world. For example, a virtual Gucci handbag was sold in Roblox for around \$800 more than a handbag sold in a real store (Nwaeze, 2022, p. 4). The presence of a trademark in digital worlds also helps to build the brand awareness predominantly among younger audiences. Some trademarks are used exclusively for the metaverse or are created in the metaverse and then move into the physical world (INTA, 2023, p. 16). Statistics presented by the United States Patent and Trademark Office and the European Union Intellectual Property Office clearly indicate that business development in the virtual world is becoming increasingly important for trademark owners (Carvalho & Krishna, 2024).

¹ The word “metaverse” is a combination of the words “meta” and “universe”, meaning “beyond reality”.

² See for example Stephenson, N. (1994), *Snow Crash*; Gibson, W. (1984), *Neuromancer*.

³ During the Metaverse Fashion Week, which took place in March 2022 in Decentraland and gathered over seventy brands and artists, including major Tommy Hilfiger, Dolce & Gabbana, and Etro, it was possible to buy virtual clothes for avatars. The function allowed also to be redirected to a website to purchase a real version of the outfit bought for the digital avatar.

⁴ The metaverse is often also linked to the physical world. For example, McDonald’s plans to run virtual cafes that offer the possibility to order physical food with delivery to the customer. Virtual and physical services can be the same. For example, training services can be provided both in the physical world and in the virtual one.

2. CHALLENGES FOR TRADEMARK PROTECTION IN THE METAVERSE

Due to the development of the metaverse and the similarity of user actions in virtual worlds and the real world, it is not surprising that the metaverse has also become an area for legal challenges related to trademark rights. Just as in the real world, trademark infringements occur in the metaverse, mainly due to the problematic issue of whether trademark protection for a product also extends to its counterpart in the virtual world. Entities acting in bad faith attempt to register trademarks for goods operating in the metaverse when the rightful owner of that trademark has not previously made such an application. For example, trademarks Prada and Gucci have been applied in the United States for products in the metaverse by the applicants not related to the holders of these trademarks in the real world. However, some owners of trademarks protected in the real world are not at all interested in using their trademarks in the metaverse due to their business strategy and reputation⁵.

Alleging infringement of a trademark that has not been registered for goods or services in the metaverse also entails the need to recognize the use of such a trademark in the course of trade. This raises questions, that have so far remained unanswered by the case law as to whether the use of a mark in the metaverse constitutes trademark use in the course of trade and, if so, in which territory the infringement takes place, and which law is therefore applicable to assess the occurrence of the infringement. Additionally, it raises the query of whether demonstrating the use of a trademark protected for goods in the real world and the virtual realm requires evidence of the trademark's use for goods from the real and virtual world separately. Answering these questions needs, first, an assessment of the similarity of the activities constituting the use of the trademarks in both worlds and, second, an assessment of the similarity of the goods or services, which are the same products but operating in different realms. What may challenge arguments for the similarity of goods and services from the real and virtual worlds is the European Union Intellectual Property Office approach regarding the trademark applications for goods from the virtual world and for NFTs as reflected in the 12th edition of the Nice Classification⁶. Although the diversity of goods classes does not necessarily indicate an absence of similarity between goods or services, and the identity of classes does not determine similarity, the EUIPO's position in this regard calls for broader analysis.

2.1. Registering trademarks for goods and services in the metaverse

One of the main questions facing trademark applicants is whether registering a trademark for traditional goods or services encompasses their virtual world counterparts, in other words, this question rises doubts on how to register trademarks for the metaverse. This uncertainty was partially clarified, but at the same time the way it has been resolved has caused other problems. In a communication from the EUIPO dated on June 23, 2022, the Office unequivocally pointed out that digital and virtual goods, which refer to non-physical items intended for use in an online or virtual environment, belong to Class 9. The communication also resulted in the enlarging Class 9 in the 12th edition of the Nice Classification from 1 January 2023 to include a separate category of goods relating to NFTs, namely 'digital downloads authenticated by non-exchangeable tokens [NFTs]' and also downloadable virtual goods. Thus, regardless of whether the virtual good relates to a vehicle, sports shoes or anti-wrinkle cream it will be classified in Class 9. In contrast, the situation is different for services that are related to virtual or downloadable goods, as well as services provided online or in a virtual environment. Such services are classified according to established classification rules based on the nature of the service and its impact in the real world. A service that involves transferring an avatar from one place to another in a virtual game may resemble a transport service, but is not

⁵ Hermès, for instance, associates its trademark with handcrafted leather, silk, and other goods highly valued by its customers. Offering virtual Hermès products is seen by the company as inconsistent with the nature of Hermès goods – Park (2022).

⁶ NFTs are a new class of digital assets, cryptographic data units with unique metadata, functioning as unique, indivisible, and immutable digital identifiers, attesting to the authenticity and ownership of these digital assets. Non-fungible tokens can therefore be best described as digital assets that are unique and cannot be exchanged for others – Carvalho & Krishna (2024, p. 2).

intended to provide a transport service; instead, it serves an entertainment purpose and would be classified under Class 41 (see EUIPO, 2023a, p. 322). Health training and fitness workouts, regardless of whether they take place in the real world or virtual world, are classified under Class 41. Determining the impact of the service in the real world however may not always be straightforward. The classification of virtual goods and services established by the EUIPO is not universally approved. At least two other proposals for such classification can be found. The first proposal involves creating a new Class 46 in the Nice Classification specifically dedicated for virtual goods and services. The second proposal suggests the registration of virtual goods and services in the same class as their physical counterparts. The first solution would alleviate some of the overcrowding of Class 9 with various goods currently contained in that class. However, similar to the current approach, the dedicated class would still encompass completely different, unrelated, and dissimilar goods, making it challenging to search for prior trademarks (INTA, 2023, p. 22) and determine potential similarities between goods from the real and virtual worlds.

I believe that registering virtual goods in the same class as their physical counterparts could provide a solution to many practical problems associated with the operation and interpretation of the trademark system. However, it would require a change in the EUIPO's approach to registering trademarks containing the word element 'METAVERSE', and it could even lead to the invalidation of several marks with this element registered for goods in the real world. It is already questionable whether trademarks such as METAVERSE ENERGY No. 018652720 and METAVERSE FOOD No. 18652695 have the distinctive character. Combining goods used in the real world and in the metaverse under one goods class would eliminate the possibility to register the trademark with such word that do not contain any additional distinctive element. It is therefore necessary not only to revise the current practice of the EUIPO in classifying goods for use in the virtual world, but also to establish international uniformity in this regard, so that applicants can, without hindrance or doubt, invoke the right of priority in their applications or extend registrations to international application (INTA, 2023, p. 23).

Applying for a trademark for goods in the metaverse also raises the question of where geographically and in which office to file the application (Saw & Chan, 2023, p. 5). The metaverse, like the Internet, is not restricted by geographical borders, whereas trademark rights are territorial. Certainly, except in cases of filing marks to block registration for goods in the metaverse, by filing a trademark for virtual goods, applicants are choosing to participate in international trade. For this reason, the strategy for registering a trademark should focus on territories crucial for the protection of trademarks, including certainly within the EU (INTA, 2023, p. 19).

2.2. Trademark infringement in the metaverse

The proprietor of a registered trade mark can oppose the use of identical or similar trademark to his own trademark only if such use occurs "in the course of trade for the purpose of distinguishing goods or services"⁷. According to the Court of Justice case law such use is interpreted through the prism of achieving economic benefit, therefore taking place outside the realm of private, educational, scientific, informational, artistic, criticism, and parody contexts (Case C-179/15, 2016, points 39-40; Case C-206/01, 2001, pont 40; Carvalho & Krishna, 2024, p. 11). While the issue of using a trademark in the metaverse both for digital goods or services and in connection with goods or services offered in the real world should not raise doubts that it takes place in the course of trade for the purposes of distinguishing the trademarks, the evaluation of infringement becomes more problematic in situations where the owner does not possess a registered trademark for digital goods. The problem mainly arises in the case of so-called ordinary marks lacking a renowned character. Indeed, the protection of trade marks with a reputation goes beyond the boundaries of identity and similarity of the goods, and involves an analysis of the impact of

⁷ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, point 18, OJ L 336, 23.12.2015, p. 1–26; See also Article 10 of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, p. 1–99.

unauthorized use of the trademark on the reputation and distinctiveness of the trademark with a reputation. Therefore, infringement of the rights to trademarks with reputation such as JUVE and JUVENTUS was recognized by a court in Italy (see more Carvalho & Krishna, 2024, p. 13), and Hermes Birkin by a court in the United States (Okafor, 2022, p. 3; Öztürk, 2023, p. 19-20; Carvalho & Krishna, 2024, p. 6-8). In both cases, the holders of the reputed trademarks did not have trademark protection for digital goods and the infringers used the marks for NFTs. Despite the different legal bases and traditions of the legal systems, both courts found infringement of rights to trademarks registered only for goods in real life and unregistered marks for digital goods. In the case involving infringement of the Hermes Birkin trademark by the use of the MetaBirkins mark for NFTs practically identical to the desired and recognizable Birkin bags created by Hermès, the court also did not accept the arguments of the defendant, i.e. artist Mason Rothschild, who claimed that MetaBirkins were commenting on or parodying Birkin handbags by depicting them as covered in fur, thus criticising “the cruelty to animals resulting from Hermes' production of its ultra-rare leather handbags”. The court found however that the evidence indicated, that the NFTs MetaBirkin were more a tribute to the famous Birkin handbags than a parody or criticism (Öztürk, 2023, p. 19-20).

Also under EU law, a similar conclusion could be expected when assessing infringement of a reputable trademark not expressly registered for digital and virtual goods or services. The protection of such marks is specific and goes beyond the limit set by the similarity of the goods. In cases such as the Hermes case, the value of the virtual good is derived from its value in the physical world, so that profiting from the use of the trademark in the virtual world by an unauthorised person is ascertainable (INTA, 2023, p. 18).

In contrast, entities whose marks are not reputable are in a different situation. In order to demonstrate infringement, they must prove the similarity of the goods and the existence of a risk of confusion on the part of the public. The assessment of the similarity of goods or services according to well-established case law of the ECJ is based on all relevant factors relating to the goods or services, such as, *inter alia*, their nature, the end users, the manner in which they are used, and whether the goods are in competition with or complementary to each other (Case C- 39/97, 1988, point 23). Therefore, it is worth considering whether virtual goods and services are similar to physical goods at all, and if so, to what extent (INTA, 2023, p. 10).

Virtual goods only exist in a digital environment and do not provide physical accessibility, whereas most goods in the real world have a tangible form. Consequently, the user's interaction with such goods is also different. While with virtual goods it is limited only to digital experiences involving the sense of sight and hearing, physical goods can engage all of the user's senses, including touch, smell or taste. The function of most virtual goods is still mainly related to entertainment, simulations or digital interactions, whereas physical goods are used in everyday life from fulfilling specific needs ranging from the basic to the luxurious. Virtual goods also do not undergo physical wear and tear, unlike physical goods. The purchase of virtual goods only takes place online and the virtual good is immediately available to the consumer in the digital space, while the purchase of physical goods, although it can take place via the internet, generally requires physical distribution. Despite these differences, it must be acknowledged that virtual and physical goods can satisfy similar human needs, including entertainment. Virtual goods for avatars in the metaverse can serve similar social purposes as goods in the real world. This was also noted by the EUIPO, which, in assessing the distinctiveness of a trademark for virtual goods, pointed out that ‘consumer perceptions of real world goods can be applied to equivalent virtual goods as a key aspect of virtual goods is the imitation of the basic concepts of real world goods’⁸. Therefore, one could infer that a similar criterion of the equivalence of goods in the real and virtual worlds should be applied when evaluating the similarity of goods. Thus, if a good in the virtual world is equivalent to a good in the real world, then such goods can be considered similar.

⁸ See Refusal of application for a European Union trade mark 018647205, of 8 February 2023. A similar conclusion was reached by the American court in Hermes case. It held that if MetaBirkins were virtual clothing for wearing - which was not the case in this instance - they could be treated more as ordinary commercial products. See further Michaels (2022, p. 3).

The assertion of equivalence between goods in the real and virtual worlds, however, challenges the logic of classifying virtual counterparts of real world goods into different goods classes in the trademark system. It appears that even a low degree of similarity between goods, combined with the use of an identical or very similar trademark registered for goods in the real world according to ECJ jurisprudence that suggests that “a lower degree of similarity between goods or services may be offset by a greater degree of similarity between trademarks and vice versa” (Carvalho & Krishna, 2024, p. 11-12; Case C-39/97, point 17) would constitute infringement of the trademark right. This conclusion should also apply in reverse situations, where trademarks that are registered and used solely in the metaverse for virtual goods are transferred to the real world by an unauthorized entity (INTA, 2023, p. 18).

However, concerns about how the similarity between virtual and real goods will be assessed in light of existing case law are, in my view, justified. Therefore, a worth considering solution would be to assume that the registration of a trademark for a tangible good or service also covers its digital version available in the metaverse. Otherwise, for the time being, adequate protection of a trademark against its unauthorized use in the metaverse by third parties can only be ensured by registering a trade mark application in Class 9 of the Nice Classification for digital and virtual goods. However, this registration strategy raises a question stemming from the obligation to use the mark and the possibility of revocation of the trademark if it is not used. In other words, the question arises whether the use of the trademark for goods in the real world, results in recognition of use of the mark for goods in the virtual world. While there are arguments for extending the use of marks for physical goods to virtual goods, such a conclusion should not be automatic considering the differences in use, experience and nature of these goods.

Another important issue related to enforcing trademark infringement involves determining the territory where the infringement occurred or may have occurred and consequently, the law applicable to assess the infringement. The traditional concept of “territory” does not apply in the metaverse due to the borderless nature of virtual reality (Saw & Chan, 2023, p. 12). In determining the place of infringement in the metaverse in accordance with Regulation 1215/2012⁹ and Regulation 2017/1001 (Case C 523/10, 2012, point 19), the case law concerning trademark infringements on the Internet may be helpful. The ECJ has ruled that the applicable jurisdiction in such cases is the place where the event causing the harm occurred or is likely to occur, which could be where the harm materialized or where the event causing the harm occurred. Therefore, the defendant can be sued at the choice of the plaintiff before a court located in one of these places. The infringement may be deemed to have taken place in the “Member State within which the consumers or traders to whom that advertising and those offers for sale are directed are located, notwithstanding that that third party took decisions and steps in another Member State to bring about that electronic display” (Case C-172/18, 2019, point 65).

The applicable law should be the law of the real world jurisdiction where the infringement occurred or where consumers have been affected by the use of the mark and where, of course, the mark is registered (Saw & Chan, 2023, p. 16). Existing criteria for determining the relationship between infringement and the applicable jurisdiction in cases involving trademarks in the metaverse are worth reviewing (INTA, 2023, p. 11, 41, 59). Cheng Lim Saw and Chan Zheng Wen Samuel pointed out that the choice of jurisdiction may be determined by the language used by the user when performing infringing acts in the metaverse. While the increasing use of English language as the universal language in the online world may suggest that this factor becomes less relevant, the use of other languages specific to countries, regions or communities around the world may indicate a potential locations of infringement. Other circumstances to consider in assessing territorial jurisdiction include factors such as the availability of goods and services bearing trademarks in the virtual world for consumers in the real world, the indication by the seller in

⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32, Article 7(2) A person domiciled in a Member State may be sued in another Member State: in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur; see also art. 125 of Regulation (EU) 2017/1001.

the metaverse of the means of contact in the real world, the type of currency used to pay for products or services (Saw & Chan, 2023, p. 19-20). For the time being, as with many disputes involving international issues, mediation and arbitration seem to be the most suitable for resolving trademark infringement cases (Foerg, 2022, p. 2).

3. TRADEMARKS IN VIRTUAL WORLDS – NAVIGATING THE PRESENT

The development of the metaverse has brought new challenges to trademark protection. As economic activity in the virtual space grows, there is an increasing need for legal clarity regarding the registration, use, and assessment of trademark infringement. Due to the continuous development of this environment, it is difficult to identify and solve all the potential challenges related to the protection of trademarks in the metaverse (INTA, 2023, p. 12). The observed increase in trademarks presence in the metaverse, as also evidenced by the increasing number of trademark applications for virtual goods and services, will surely intensify the tendency for legal conflicts related to trademarks and, consequently, to legal disputes (INTA, 2023, p. 20). Just as it was the case in the 1990s and early 2000s, the judiciary, but also legislators and intellectual property doctrine, will have to decide how the evolving new reality may affect the rights of trademark owners and how to meet the challenges it will bring (INTA, 2023, p. 10).

Regarding the legal situation of entrepreneurs planning to engage in the virtual world, it would certainly be appropriate to suggest that they should adopt offensive-defensive actions (Okafor, 2022, p. 24; Nwaeze, 2022, p. 6). This strategy could also be recommended for entrepreneurs who do not intend to operate in the metaverse, but wish to prevent others from registering the same or a similar mark for activities in the virtual environment. Therefore, on one hand, entrepreneurs should ensure the registration of trademarks for virtual goods, irrespective of the registration for real world goods. In the light of current lack of jurisprudence, registered rights will certainly be easier to enforce (Foerg, 2022, p. 6), although I hope that offices and courts will demonstrate a rational approach in determining whether trademark owners for physical goods can enforce their rights in the metaverse without additional registration or use of the mark in this environment (INTA, 2023, p. 18). On the other hand, it is essential to respond promptly and combat unauthorized use of the trademark in order to protect it. If the holder of the Hermès trademark did not exercise its rights and allowed the MetaBirkins NFT project to proceed, it could be argued that upon entering the metaverse space, M. Rothschild might claim Hermès is infringing his mark in the metaverse (Murray, 2022, p. 17-18). Enforcement of trade mark rights infringed in the metaverse space may face fundamental problems relating to identifying the infringer, determining the location of the infringement and the decentralized nature of the metaverse (INTA, 2023, p. 27). Therefore, the further development of the metaverse will undoubtedly require the redefinition of traditionally applied enforcement rules, including those concerning jurisdiction, as well as certain concepts known and interpreted for the needs of applying the trademark system in the real world, such as the use of a trademark. Courts will undoubtedly play a primary role in this process. The judicial rulings may fill legal gaps, or clarify legal doubts until, if at all, legislation is adopted in this area. Court decisions can also have a deterrent effect on potential infringers who take advantage of the current lack of regulations (Okafor, 2022, p. 23).

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