

# Lawyer Insights

## What Kinds of Issues Are Being Litigated Related to the Metaverse and NFTs?

As the metaverse merges the virtual world and the real world, it will raise many new IP issues, with metaverse-related litigation spanning a wide range of practices.

By Torsten Kracht and Daniel Schultz  
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Metaverse-related litigation spans a wide range of practices, including IP, insurance recovery, and securities fraud. For example, trademark disputes resulting from the unauthorized use of names, logos, and other identifiers of merchants in the metaverse are becoming common.

Recently, a jury in the Southern District of New York reached a verdict finding Mason Rothschild liable for trademark infringement of the Hermes BIRKIN mark when Rothschild advertised and sold a series of “MetaBirkin” non-fungible tokens (NFT or NFTs). *Hermes International SA v. Rothschild*, S.D.N.Y., No. 1:22-cv-00384, verdict 2/8/23. The verdict required Mr. Rothschild pay \$110,000 for trademark infringement and dilution, as well as \$23,000 for cybersquatting on the MetaBirkins domain name.

This case demonstrates how brand owners may pursue infringing uses of their IP in the Metaverse or for activities tied to blockchain. The days when blockchain was associated with anonymity may be long gone—at least when it comes to IP infringement. If a use of a mark is commercial and creates confusion, there can be a cause of action for trademark infringement and related claims. This verdict may also embolden brand owners to monitor the digital marketplace with more scrutiny and then target NFT creators.

As another example, in *AM General v. Activision Blizzard*, No. 17-cv-8644 (S.D.N.Y. 2020), a truck manufacturer sued a software company, alleging trademark infringement for including a branded truck in a video game. The court again found artistic relevance and use protected by the First Amendment, stating that featuring real military operations vehicles evokes a sense of realism and lifelikeness in video games.

Similarly, copyright infringement claims have risen due to the prolific misuse of NFTs and popular characters in AR/VR worlds. Patent infringement litigation among metaverse technologies—including AR/VR headsets, haptic feedback, and immersive tech—will increase as parties create and sell metaverse products.

For example, implementation of the metaverse will also require improvements in camera and materials technologies. Camera size reduction, to comfortably fit one or more cameras within a headset, and development of time of flight cameras for hand tracking, would advance metaverse applications. Development of microfluidics for tactile-sensing technologies, such as gloves and bodysuits, for an immersive metaverse experience, is also expected. As the metaverse drives demand for high density

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displays, including microLEDs and nanoLEDs, we expect an increase in patent activity for this technology and other display technology, e.g., quantum dot color conversion, combiner optics, and new glass configurations, as well as native eye movement recording software and applications.

In addition, with cryptocurrency theft and fraud resulting in over \$1 billion lost since 2021, insurance litigation has also been frequent. Recovering losses can be confusing and intimidating, and many asset owners do not even know if their holdings are insured. Insurance policies vary among exchanges: Coinbase provides a recovery policy for platform-wide breaches, but offers no coverage for unauthorized access to personal accounts. Some exchanges have different policies depending on how a consumer chooses to store their cryptocurrency, for example cold storage vs. hot storage.

Further, there are pending class actions against crypto providers and token creators. Securities fraud litigation is common, often addressing fraudulent cryptocurrency companies or fraudulent conversion of a plaintiff's assets into cryptocurrency. Some cryptocurrency funds have declared bankruptcy and, rather than return any liquidated funds to the investors, the funds have retained control over the funds through legally binding terms and conditions agreements.

For example, SDNY recently ruled that holders of cryptocurrency investments with the now-bankrupt cryptocurrency lending company Celsius Network LLC are not the true owners of these assets. The court further found that the Terms of Use lawfully transferred ownership of the Earn Accounts assets from account holders to Celsius. *In re Celsius Networks LLC*, No. 22-10964 (MG) Bankr. S.D.N.Y. (Jan. 4, 2023) at 5. The account holders disputed the validity of the Terms of Use, arguing that the use of "loan" and "lending," when referring to the Earn Accounts, should be interpreted as one party retaining ownership and merely lending the property to a second party as a loan, as the term "loan" is colloquially understood. The account holders also asserted that statements made by Celsius' CEO in videos, social media, and on the company's website constituted oral modifications of the Terms of Use. Nonetheless, the Court held that the Terms of Use were unambiguous and legally transferred ownership of the Earn Accounts assets from account holders to Celsius, finding the Terms of Use constituted a valid agreement because New York law overwhelmingly accepts "clickwrap" agreements as sufficient to constitute mutual assent.

Less common, but growing, is privacy litigation, with personal information, including facial geometry and other biometric information, being integrated into AR and VR experiences, often without user consent. Finally, a small but interesting subset of metaverse litigation includes nuisance claims against blockchain miners: mining technology requires a lot of energy, which in turn requires a lot of noisy machines that bother neighbors.

As the metaverse merges the virtual world and the real world, it will raise many new IP issues. Anyone with a stake in the metaverse space should regularly review their approach to IP, including copyrights, trademarks and patents, and continue to monitor the metaverse for new opportunities to use, expand and enforce their IP.

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