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NFTS, DIGITAL WORLDS AND BRAND PROTECTION IN FASHION: A UK/ EUROPEAN INTELLECTUAL PROPERTY PERSPECTIVE

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ABSTRACT

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Two years into the metaverse utopia and with the promising launches of metaverse Fashion Weeks for two years in a row, the creative industries have not yet lost their enthusiasm for experimenting with digital worlds. In practice, brand owners 'mint' non-fungible tokens, or NFTs, associated with their real-world or purely digital assets that most commonly enjoy intellectual property (IP) protections, such as fashion designs. Those can be sold at dedicated NFT marketplaces, but are often interoperable, or capable of being used across a number of different digital worlds. This article endeavours to shed light into the following key question: to what extent intellectual property rights vested into real-world creations can be transposed into the digital and by extension, whether the legal protection offered can be given its full effect in a digital unregulated space, where users' identities are anonymous or pseudonymous. By weighing the expected benefits and losses from a UK & EU intellectual property perspective, the author questions: Are NFTs and the metaverse more than a gimmick? And hence, is the metaverse a market worth investing for fashion brands? The article first explores the metaverse for fashion, as well as designers' and brands' activity in this novel market space, followed by an in-depth discussion on the intellectual property question posed.

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1. INTRODUCTION TO FASHION NFTS AND THE METAVERSE

Following last year's success, in March 2023 the second metaverse Fashion Week took place across 3 different virtual interconnected worlds: Decentraland, Spatial and Over (MVFW, 2023). Global fashion brands of the likes of Diesel, Tommy Hilfiger, DKNY, Balenciaga and Dolce & Gabbana were among the 60 designers and artists who showcased their collections in the virtual runways, expanding their collections to blockchain-based digital twins. Other than long-established fashion giants, Web3 native brands that exclusively sell digital fashion, such as the Institute of Digital Fashion and The Fabricant, were also present. Digital fashion is the by-product of tokenization of real-world or purely digital assets, or else fashion designs, that most commonly enjoy a range of intellectual property protections. In 2021, digital fashion amounted to approximately \$498 million and 'is predicted to grow into a \$4.8 billion market by 2031' (Linares, Vogue Business, 2023; Allied Market Research, 2023). Brand owners showcase or market their creations in the form of non-fungible tokens or NFTs, permanently stored and verified in a blockchain network, i.e. commonly in the Ethereum blockchain [1]. The blockchain token essentially is a digital certificate of authenticity of its associated IP protected asset, i.e. a digital fashion design, rather than an embodiment of the asset. The latter is typically stored outside of the blockchain – often in a secure server or other cloud storage solution, while the NFT's metadata typically contain a URL link that points to this location. A fashion NFT can be accompanied by a digital wearable item for users' virtual avatars, that can be used in a multitude of virtual worlds, including gaming and metaverse platforms.

The metaverse is a virtual reality environment that blends the digital with the physical world, where users of networked computers can interact in real time (Oxford English Dictionary, 2023; [4]; Guadamuz, 2023). While one could perceive it as the future of gaming, it also is the latest market space for fashion [3]. Gonzalo Brujó, from Interbrand Group explains:

"At its most ambitious, the metaverse is imagined as a single, digital universe that people can inhabit, bodily, through the use of virtual reality (VR) – a space that will be used to exist: to shop, to play, to go to school or to work" (Seares, 2022).

Users are equipped with digital avatars, similar to those used in video games, that they can dress up with the latest fashion. They can immerse themselves in countless experiences, from unlocking physical fashion week experiences, to attending musical shows and after-parties, or sitting at the 'virtual' front row



of the most well-known fashion shows, contributing to the strengthening of brands' relationship with consumers. And all, or at least most, of those experiences can be accessed for free, opening the floodgates to a global audience of online users, curious enough to test the waters of this new digital territory. More recently, the Council of Fashion Designers in America launched a 60-year-anniversary exhibition on metaverse platform The Sandbox, featuring looks from among others, Carolina Herrera and Diane von Furstenberg, with accompanying NFTs for purchase that also unlocked experiences (Schultz, Vogue, 2023). For instance, purchasers of Diane von Furstenberg's NFT fashion will enjoy exhibition access and pre-collection viewings, a physical dress, as well as an exclusive meeting with the designer herself.

Luxury brands Ralph Lauren, Dolce & Gabbana and Gucci were among the first to actively experiment in metaverse and Web3 spaces and appreciate the possibilities that exist within this technology. Since summer 2021, Ralph Lauren collaborated with one of the largest Asian social networking and NFT avatar platforms, Zepeto (Ralph Lauren, 2021). In late 2022, Gucci launched its own metaverse world and game called 'The Vault' in metaverse gaming platform, The Sandbox (Marr, Forbes, 2022). Two of the most successful brands in this new market frontier are luxury brand Dolce & Gabbana, generating a striking 5.7\$ million from its NFT couture apparel collection in 2021 (Thomas, The NY Times, 2021), as well as sportswear brand Adidas, with over 30,000 digital wearable items and a trading volume of \$138.6 million (Linares, Vogue Business, 2023). Adidas has collaborated with several digital native brands, including virtual avatar company Genies in 2021 and most recently, with the bespoke Bored Ape Yacht Club NFT collectibles, launching an exclusive collection of virtual hoodies that sold for \$35 up to approximately \$8,000 (OpenSea, 2023).

While initially viewed as a "trillion-dollar revenue opportunity" (Holmes, 2021) in late 2021, the metaverse has declined in popularity. Among other things, the incompatibility of its software with certain devices or programmes makes it difficult to access all of its available features and instances of technical issues, such as drop in performance of certain online games or game server lags, have further contributed to this phenomenon (Farrukh, 2023). However, this decline does not seem to particularly affect the fashion sector's activity in this virtual environment. To the contrary, despite the popularity of the metaverse declining by over 85% between October 2021 and January 2022 (Google Trends, 2023), the first metaverse Fashion Week was launched in March 2022 and the substantial attention it attracted led to its second edition in 2023 with more than 60 participating brands, both emerging and established fashion houses. In terms of participation, however, less than 50,000 users attended the virtual event, which is approximately



half of last year's numbers (Linares, Vogue Business, 2023). Nonetheless, retailers and fashion are still actively involved with the metaverse to this day, indicating that there is still potential for revolutionising the way fashion players make profit, in this new and uncharted territory that is the metaverse, potentially extending to a more diverse consumer base.

1.1. Fashion NFTs and their diverse consumer base

A large part of the popularity of fashion NFTs is owed to the fact that their buyer is the owner of a scarce version, much like a limited-edition, of the underlying fashion design associated with it. But a fashion NFT is not just a blockchain-based certificate that can be traded as a collectible, although in various instances the value of NFTs has tremendously grown in the resale market (Lapatoura, The IPKat, 2021; McDowell, 2021). When considering fashion NFTs' associated digital wearables, they could appeal to gamers and the long-established in-game purchases of outfits, such as the so-called Fortnite 'skins', for their videogame characters. The norm with in-game items is that they are pre-determined by the developers, with limited scope for customisation. Also, they are typically at the disposal of end-users by means of a license, that allows their use within a specific online gaming environment. NFTs could revolutionise things, as their code supports interoperability and are compliant with several metaverse or gaming platforms. This means that buyers of fashion NFTs could not only have additional choice as to how they want to express themselves through their virtual avatars' attire, but also have proof of ownership of their digital wearable items, carry them across different platforms or even resell them. A promising development in this sphere comes from gaming platform The Sandbox and its announcement that thousands of popular NFT collections, including Bored Ape Yacht Club, World of Women and Cool Cats, could be played as avatars (The Sandbox, 2023). Nevertheless, while it is technically feasible for a digital wearable to be transferred to and recognised by another online game, such transfer could impact on how those assets appear and incorporating user generated content that is not part of the game could slow down its performance (Glegg, 2022). In fact, one of the key reasons for the metaverse's recent decline in popularity is the unexpected experiencing of bugs and drop in metaverse games' performance by some users, impacting on their overall experience (Farrukh, 2023).

Equally, fashion-conscious consumers, technology enthusiasts and 'Gen Z' individuals – alongside the increasing tendency of the latter to engage in virtual communications [5] – could be attracted to purchasing fashion NFTs to showcase their virtual fashion collections to others. Given their digital nature, NFT fashion items can be modified and customised using 3D modelling software without the costs of



designing and producing physical items. This provides both designers and consumers with a unique opportunity to express their creativity and unique identities with less time-related and financial restrictions. With minimal production costs, no packaging or shipping fees, the price tag of fashion NFTs could arguably be substantially lower than their real-world counterparts, making fashion more accessible. Although it is not surprising that there are exceptions when it comes to more 'exclusive' luxury brands, where the metaverse has enabled brands to profit more than in the real world, with fashion NFTs selling for more than their 'real' value. For instance, in 2021 a tokenised Gucci handbag sold for approximately \$4,500 in Roblox, while the identical physical counterpart sells for \$800 less (The Fashion Law, 2021). At last, it is important to note that the popularity of digital fashion could also have a significant impact on reducing carbon emissions and waste, the by-products of producing physical fashion goods, meaning that it could also appeal to the environmental-conscious segment of fashion consumers.

2. FASHION NFTS AND UK/EU INTELLECTUAL PROPERTY LAW CHALLENGES IN THE METAVERSE

The second part of this article endeavours to shed light into the following key question: to what extent intellectual property rights vested into real-world creations can be transposed into the digital and by extension, whether the legal protection offered can be given its full effect in a digital unregulated space, where users' identities are anonymous or pseudonymous (Section 2.1.). Through the exploration of potential infringement instances in the metaverse and beyond, there comes the issue of effective legal enforcement (Section 2.2.).

2.1. Copyright and Trademark protection in the metaverse

Under the EU intellectual property regime, real-world fashion items can be protected as trademarks, designs or copyright, while it is possible to receive cumulative protection from more than one of the above-mentioned rights. In theory, brand owners and designers arguably maintain the exclusive right to exploit their works in the digital domain. Therefore, use of a tokenized digital wearable, even in the metaverse, must abide by the intellectual property rules that apply to those digital assets [4]. Nevertheless, very commonly the buyer of a fashion NFT will be granted certain limited usage rights in relation to the work associated with the NFT, by way of licensing. This does not automatically entail an assignment of any intellectual property rights vested in the said asset to the buyer, though it may be possible. Smart contracts embedded with the NFT code dictate the rights and interests that will be passed



on upon purchase and those are pre-determined by the right holders themselves. This section will particularly focus on the UK and EU copyright and trademark regimes and the available protections to fashion NFTs.

Copyright may subsist in a fashion design the moment it becomes created and for 70 years after the designer's death, provided that the sole criterion of *originality* is satisfied (Directive 93/98/EEC, Art. 1). In other words, the fashion design would need to be the original expression of their *author's own intellectual creation*, or else, a reflection of their personality that stems from their *free and creative choices* (Infopaq, 2009; Painer, 2012). While some EU national laws (such as Portugal and Italy) stipulated those industrial designs, including fashion, needed to meet a higher threshold of originality, the CJEU has recently departed from this requirement, making it easier for fashion designs to satisfy the EU originality threshold (Derclaye, Kluwer Copyright Blog, 2019). The 2019 *Cofemel* CJEU judgment established that copyright protectable subject-matter may not necessarily possess an artistic value or aesthetic appeal, while in *Brompton Bicycles* the Court accepted the copyrightability of functional shapes, thereby opening the floodgates of protection for different types of fashion items, including clothing or accessories (Cofemel, 2019; Brompton Bicycle, 2020).

But what about subsistence of copyright in digital NFT fashion? In theory, the fashion design itself is protected, irrespective of the products, or 'vessels', it is applied to. Moreover, *Levola* has established that a copyright work "must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form" (Levola, 2018). Therefore, fixation of the fashion design in any medium in a precise and objective way would suffice, including in digital form. The same cannot be said for UK law, which necessitates fixation of the work in a tangible medium. As such, while real-world physical tokenised fashion and its digital twin metaverse wearable could both enjoy copyright law protection under both regimes, digital-born fashion would fall outside the scope of copyright protection in the UK.

On the other hand, if we strictly focus on the copyrightability of the fashion NFT itself, rather than its associated digital design (or its copy), which is stored off-chain, things may differ. The NFT is comprised of computer code and under such circumstances, it cannot be regarded as an embodiment of the protected asset itself, unless the actual copy of the protected fashion design is stored within the same blockchain block that stores the NFT and its metadata. This is rarely the case, as popular NFT platforms, like OpenSea, operate in the Ethereum blockchain, where the larger the size of the NFT's metadata to be



minted, the higher the chances that the minting timeframe and payable gas fees by the minter are going to increase. Incorporating a copy of the protected fashion design within the NFT would, therefore, be a costlier and more time-consuming exercise and hence, the NFT would likely only be comprised of computer code and a link pointing to the off-chain location of the asset, rather than contain the actual IP asset.

In terms of UK and EU trademark law, any signs, including words, letters, designs, prints or shapes, that are capable of distinguishing one's brand from their competitors' may be protected (Regulation 2017/1001, Art. 4; Directive 2015/2436, Art. 3; Trade Marks Act 1994 (TMA), s.1(1)). They can either be registered and protected for renewable 10-year periods, provided that they can satisfy a series of absolute and relative grounds for refusal (TMR 2017/1001, Art. 7-8(1)(a)-(b); Directive 2015/2436, Art. 4-5(1)(a)-(b), 11, 40; Directive 2008/95 Art. 4(4)(b)-(c); TMA, ss. 3, 6, 42, 43), or remain unregistered, with varying levels of protection. In terms of registrable fashion items, they need to possess distinctiveness or acquire it through successful and continuous use in the EU market. For instance, the Louboutin red sole is now protected as a position mark in the EU (Louboutin, 2018). Nevertheless, trademark protection is territorial in nature, so how can fashion designers protect their creations in the metaverse? Its borders have not been yet defined, in the sense that it is not expressed in any fixed territory other than being an online environment. And its notable popularity since the end of 2021 has resulted in countless NFT mintings, though the initial hype has gradually settled.

The landmark *Hermès v Rothschild* case from the US – involving digital 'MetaBirkin' handbags that closely imitated Hermès' 'Birkin' word mark as well as the shape mark of their iconic Birkin bags range – illustrates the complexity in brand protection in the borderless metaverse territory (*Hermès v Rothschild* (2023)). Despite the artist's counterclaims for fair use, some important factors that led the US Court to find trademark infringement, were the enormous popularity of the digital 'MetaBirkin' NFT wearables and the fact that they were selling at premium prices, between \$450 – \$46,000 each. In one instance, a 'Baby Birkin' NFT was auctioned for \$23,500, exceeding the average \$9,500 price of original Hermès 'baby' Birkins sold by the luxury fashion house [3]. Given that Hermès' had no involvement with NFTs or the metaverse at the time, the importance of the decision is substantial in this sphere, making it clear that copyists are not immune from trademark infringement liability in the metaverse. Moving forward, as in the case of Hermès, brands may be able to rely on their established reputation and argue for extended protection, beyond the Classes of goods or services for which they have secured trademark



registrations. But would this precedent be followed in relation to all types of brands? Arguably, small emerging fashion designers and fashion SMEs would be in a flawed position nonetheless, as they could not rely to their established reputation, and especially a global reputation that Hermès enjoys for many years.

So how can brands respond to metaverse-related threats to their IP? First, brands have soon realised that they may need to expand their trademark portfolio and register for other Classes of goods and services, that cover virtual goods, including digital fashion wearables and uses in virtual environments, to strengthen their position in a potential legal dispute over use of their signs in the metaverse. Among the first fashion industry players to do so was Nike, expanding their trademark to cover "downloadable virtual goods" (Class 9), "retail store services featuring virtual goods" (Class 35), and "entertainment services, providing on-line, non-downloadable virtual footwear, clothing, [...] and accessories for use in virtual environments" (Class 41) (USPTO, (2021)). The EU has followed suit, recognising that "virtual goods are proper to Class 9 because they are treated as digital content or images" (EUIPO, 2022). In fact, from January 1, 2023, the 12th Edition of the Nice Classification has recognised the term 'downloadable digital files authenticated by non-fungible tokens' in Class 9.

Speed is of the essence in ensuring that an extended trademark portfolio is in place, as another concern for securing trademark protection in a global, borderless metaverse environment is the increased likelihood that similar marks will be registered for virtual products and services beforehand, that could give rise to revocation claims. And the *Hermès* case illustrates that some will not lose the chance to register trademarks that resemble other's for use in the metaverse. Failing to expand a trademark portfolio in time, alongside the numerous freshly minted fashion NFTs daily, could put brands in a difficult position. Not only could they be exposed to IP legal disputes, but also find it more difficult to secure IP protection for their digital collections.

2.2. Copyright and Trademark infringement and enforcement in the metaverse

When it comes to NFT-related intellectual property infringement and enforcement, an anonymous, international, and decentralised environment is far from ideal. The ease of tokenising fashion designs and the straight-forward NFT minting process means that anyone can mint NFTs. Given the lack of any thorough user identity checks from the existing popular NFT platforms, a high volume of fraudulent minting or "copyfraud" has emerged [1]. Copyists have been presented with a window of opportunity to



not only profit from the sale of NFTs to a global and more diverse consumer base, but also 'incur substantially less costs than those required for producing physical counterfeit goods' [3]. This ultimately poses the risk of a new wave of digital 'counterfeit fashion'. According to popular NFT platform OpenSea, host of approximately 80 million NFT listings, "more than 80 percent of the items created with [its free NFT minting] tool were plagiarized works, fake collections, and spam" (OpenSea, 2022). Amongst them, protected fashion designs, such as tokenised versions of popular Cartier 'love bracelets', are being sold as NFTs on NFT platform Roblox (Roblox, 2023).

In practice, "copyfraud" refers to the instance where, other than the rightful IP owner of the token's underlying asset, a fashion NFT is created by a third party, with no interest in the work and no authorisation to use the work. The newly minted NFT may be tied to someone else's intellectual property [1] [3]. The imminent question is whether this act would qualify as IP infringement.

There are certain instances where the minting of someone's trademarked or copyright work in NFT form would be permitted. For instance, where the third party is the holder of a license or some other form of authorisation to use the work, or where the NFT falls within some of the exceptions from liability, i.e. if used for personal and non-commercial purposes. If this is not the case, the act of minting an NFT which is tied to someone else's protected trademark would likely be infringing, especially if brands have expanded their trademark portfolios to cover Classes of digital goods and uses of their marks in digital environments.

In terms of copyright infringement, it was previously discussed that the NFT is simply a digital receipt, or else a digital certificate of authenticity of the underlying asset, rather than an embodiment of the asset, as no actual copy of the work would typically be stored within the NFT's metadata. This would mean that the NFT would not violate the author's reproduction right. However, NFTs usually do contain a URL link, pointing to the off-chain location of the protected work (or its copy). In such a case, the NFT would be arguably violating the author's exclusive right of public communication, given that any online user would be able to access the blockchain and hence, access the copyright work by clicking on the URL link at any time (Bonadio and Mohnot, 2022).

In case of IP infringement, blockchain decentralisation effectively means that regulation falls on the individual NFT platform used for minting the infringing token in question. But, achieving effective IP enforcement is inherently difficult, as NFT minters maintain their anonymity and most key NFT platforms



do not verify their users' identities. Since the ability to take legal action against unauthenticated users who mint others' protected works cannot be guaranteed, this gives copyists leeway to infringe without being held accountable for their actions and at the same time, leaves IP holders with little choice to protect their brands and very few or no legal remedies available to them. Other than policing the NFT marketplaces against infringing digital uses, designers are faced with the option of filing a 'notice-and-takedown' request to the NFT platform's complaints team, for the allegedly infringing listing to be removed from the marketplace; to disable access to the illicit content; or to disable the infringers' platform accounts (Directive 2000/31/EC, Art. 13-14; InfoSoc Directive, Art. 8(3); Directive 2004/48/EC, Art. 11; Directive (EU) 2019/790, Preamble). In terms of the latter, while disabling the online accounts of the platform users may be effective, it is only a temporary measure, as infringers can easily re-appear with a new identity and counterfeit goods listings may be back again. A proactive measure from the platforms' side to request for users' identity verification, if universally applied, could play a critical role in disincentivising infringers from signing up to NFT platforms and engaging with counterfeit sales, in fear that their revealed real-world identities could result in being held accountable for their unauthorised uses of IP protected assets, within or outside the metaverse.

Another hurdle in effective enforcement in this context is lack of timeliness. Under EU law, once platforms are notified of infringement, they are under an obligation to take action in a timely manner. But, how promptly can NFT platforms respond to a takedown request? Especially when being the recipient of numerous requests, given the plethora of newly minted NFTs daily, some of them being potentially infringing. It is possible that the infringing NFT could have been bought before the NFT platform even gets the chance to review the incoming complaints. And what if the infringing NFT has a digital 'resale royalty' embedded within its metadata? [3]. It quite possibly means that the infringer continues to profit indefinitely, or for as long as the specific 'resale royalty's' terms are.

And even in the event that the infringing NFT is delisted in time and before being purchased, the effectiveness of such a measure is questionable. Because of blockchain's immutability, the information stored within the blockchain, namely the fashion NFT code alongside the link pinpointing to the off-chain location where the infringing copy of the garment is stored, are part of the blockchain ledger. This means that, in theory, users could access the link contained within the NFT's metadata and access the infringing copy of the protected work indefinitely, provided that the link still works. Recently the CJEU has ruled, however, that online platforms may be under an obligation to remove any other content that is equivalent



to the infringing content in question, meaning that the infringing copy located off-chain and any other related NFTs could be subject to a removal request (Glawischnig-Piesczek v Facebook, 2019).

3. CONCLUSION

The metaverse and its compilation of virtual interconnected worlds undeniably present an exciting opportunity for fashion designers to not only express their creativity in new ways and experiment with fashion in digital form, that was previously largely reserved to the gaming industry, but also attract a diverse and global consumer base, interact with their audience through virtual experiences and build their brand image. But where there is opportunity, there also lies risk. Risk for an investment that may sink, alongside the gradually decreasing popularity of the metaverse and the failure to keep its promise to users for a seamless interoperable experience, though several fashion brands are still actively engaged in this digital market space for the second year in a row. But most importantly, the serious threat posed by the metaverse's anonymity to the preservation of creators' rights and the risk of uncontrollable unauthorised minting of copyright or trademark protected fashion designs in NFT form, without the power to seek effective IP enforcement.

There is arguably a long way to go for ensuring that IP holders' rights are safeguarded. While there are certain steps that designers can take to maximise protection of their IP assets in the metaverse, their effectiveness is limited to instances where infringers identities are not hidden. Whether the metaverse is here to stay is yet to be seen. For the time being, if complete anonymity prevails, we could be witnessing an unprecedented wave of tokenised fashion fakes, that mirrors the longstanding counterfeiting phenomenon of physical 'real world' fashion.



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