

NFT Sales Tactics That Protect Brands As Metaverse Evolves

By **Stefan Naumann** (October 13, 2022)

The flood of commentary and hype around nonfungible tokens, or NFTs, conjures up a vast landscape of opportunity for brands to leverage digital versions of their luxury goods and sportswear across the metaverse, with users traveling seamlessly across platforms, their virtual products in tow.



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The problem is that — for now, at least — this integrated digital realm does not exist. What the media, consultants, advertising agencies and others often describe as the metaverse is at present really a series of separate, competing and self-contained metaverses that are being built by various operators.

While the metaverse is evolving quickly, at this stage the value of virtual branded products — or even digital artwork — sold with an NFT depends on whether consumers can use them in one, several or all virtual environments.

Right now, the buyer of a virtual designer dress or sneakers cannot freely transfer these digital products from World of Warcraft to The Sims, from League of Legends to Fortnite or other open multiplayer video games.

They also can't move their digital branded products between these games and the various platforms often referred to as open universes, such as The Sandbox or Decentraland, currently two of the largest metaverse platforms.

In fact, users' avatars cannot travel from platform to platform. If they could, it's unclear whether their branded virtual products would be able to travel with them, and whether the ability to transfer them from one metaverse to another might diminish the value of the brand owners' intellectual property.

How well would those virtual branded products integrate with the various metaverse platforms? Could they be used in contexts that may tarnish the brand's image?

Think of avatars in the video game Grand Theft Auto committing digital mayhem wearing branded virtual clothing and accessories, and videos of that mayhem going viral.

If you are a brand looking to market your products in the metaverse by selling NFTs, you need to pay attention to these important constraints in the virtual realm to avoid potentially damaging consumer backlash, potential public relations headaches or an erosion of your brand.

Keeping the Promises of the Metaverse and NFTs

It is critical for brand owners to make clear where and how their customers can use the virtual products they purchased in the contracts associated with their NFTs.

To make sure that branded virtual products maintain their value, trademark and copyright owners must identify as precisely as possible the content and scope of the ownership rights and intellectual property rights that buyers receive when they purchase an NFT.

Allowing an avatar to wear or use a branded virtual product across these competing virtual worlds needs to be both technically feasible as well as contractually permissible, so that the virtual product's code can be imported into the various metaverses.

For example, virtual products from major luxury brands can currently only be used in virtual worlds for which the luxury brands have made agreements with game publishers, such as Balenciaga and Fortnite, or Gucci Group NV and Animal Crossing.

As for virtual sneakers, the digital realms where avatars can wear them are at best a work in progress, Nike Inc.'s acquisition of RTFKT, a startup that develops digital sneakers and other collectibles for video game enthusiasts notwithstanding.

Nuts and Bolts for the Virtual World

Brand owners who wish to offer virtual products with NFTs guaranteeing their authenticity need to articulate the limits and limitations of the property rights conferred by the NFTs on branded virtual products.

These should be set out both in the smart contract attached to the NFT and be made clear to users and customers in all communications — including in social media posts, press releases and interactions with journalists.

NFTs and blockchain technology only offer buyers a strong guarantee of ownership or authenticity of a product or work to the extent that the contract associated with the NFT (1) relates to a virtual — or physical — product or work that the seller of the NFT in fact owns, and (2) adequately and durably organizes the buyers' access to and portability of the product or work.

Only then can NFTs fulfill their promise of authenticity when they are sold by the legitimate owners of trademarks and other intellectual property rights.

Even the permanency of the digital files linked to an NFT needs to be addressed and made clear to buyers. The existence and integrity of a digital file of a branded product is not the same thing as the NFT entered on a blockchain ledger.

Unless the brand owner makes this clear to the buyer, he or she may feel that the loss of the virtual branded product or the inability to transfer and use it across metaverses is akin to leaving a Nike store in a pair of new sneakers only to have them fall apart when crossing into the next block.

In principle, trademark law, copyright law and civil procedure offer brand owners and other rights holders adequate legal tools to protect their rights and do business with their intellectual property rights in the metaverse.

For example, the use of blockchain and NFTs does not modify the rules and issues regarding ownership of virtual or physical products linked to the NFT or those related to ownership of the exploitation rights of the trademarks and copyrights in the products — except for certain issues regarding third-party resellers of authentic products.

However, the protection of trademarks in the metaverse does raise jurisdictional issues resulting from difficulties in identifying and locating actors in a decentralized Web 3.0.

These types of issues have however become common since the advent of internet, and

practitioners and courts are familiar with dealing and resolving them.

Other challenges can be resolved contractually, at least in part. For instance, smart contracts associated with NFTs cannot fully address many of the legal issues related to the use of intellectual property rights in the metaverses.

Since smart contracts are self-executing code, their clauses are limited to an if/then structure that cannot reproduce many of the terms and conditions ordinarily found in contracts that relate to intellectual property.

As a result, it may be necessary and is advisable to spell out full contractual terms in an additional electronic, but nonsmart, contract associated with the NFT.

Unlike the smart contract, this electronic contract would not be self-executing, but it would be binding on the buyers of NFTs and their successors and allow brand owners to address many of the issues discussed above.

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