

Can Hermes and Nike stop 'unauthorised' NFTs?

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Virtual items can create real legal problems.

As digital objects in the form of NFTs have exploded in popularity and value over the past year, so too have the legal headaches and complications.

Nike became the latest company to file a lawsuit over the issue on Thursday—suing shopping platform StockX for creating and marketing NFTs with its logo and branding.

It follows a lawsuit last month by French luxury brand Hermes against artist Mason Rothschild, who has auctioned 100 "MetaBirkins"—a digital "homage" to the label's famous Birkin bag—some fetching tens of thousands of dollars.

Can these cases succeed?

The Hermes case could go either way, said lawyer Annabelle Gauberti, whose firm Crefovi specialises in creative industries.

Rothschild has argued that he is protected by the First Amendment as an artist, which often has validity in US courts.

In Europe, too: Gauberti recalled the example of a case from a decade ago in which Louis Vuitton lost in its attempts to prevent a Dutch artist placing one of its bags in a picture of a Darfur refugee.

"The 'fair use' defence works well, particularly in UK and US law, in which an artist can use a trademarked word or product to make a point or as a parody," Gauberti said.

But she said Rothschild may struggle to convince a judge that his work had artistic merit.

"It's hard to see on the face of it what message he is trying to convey other than that he wants to make a lot of money, so it's going to be a lot of work for his legal team," she said.

The Nike case is a more directly commercial affair, since StockX has

never claimed its NFTs are a form of art.

But it remains to be seen how trademark law holds up in the digital realm.

"The extent of these protections in the digital world as well as what remedies can be granted are yet to be explored," wrote lawyer Danielle Garo in a briefing note for Lexology.

Should NFTs be treated differently to physical art?

In his response to Hermes, published on Twitter, Rothschild compared his MetaBirkins to Andy Warhol's famous Campbell soup paintings.

"The fact that I sell the art using NFTs doesn't change the fact that it's art," he wrote in a response published on Twitter.

However, Edward Lee of Chicago-Kent College of Law told Bloomberg Law that the Warhol comparison was not perfect since the Campbell Soup Co. was never likely to get into the business of selling paintings, whereas Hermes could well choose to create its own NFTs.

The technology can also confuse matters, since an NFT is actually just a receipt of ownership, rather than the thing itself.

"Many people assume that, when you talk about an NFT, the content of the NFT is inside the token, which it is not, and because it is not, there is no unauthorised reproduction," Primavera De Filippi, co-author of "Blockchain and the Law", told Business of Fashion magazine.

What can companies do to protect themselves?

Hermes has demanded that Rothschild remove and destroy his MetaBirkins, and at least one NFT platform, OpenSea, has already agreed to remove them from sale.

But Gauberti said enforcing the law online is very tricky.

"Even if lawsuits are successful, how do you go after the guy who has already bought the item or stop them being sold on secondary auctions? It's the wild west in terms of enforcement online," she said.

The best option, she said, is for brands to get ahead of the copycats and dominate the space with "official" NFTs.

Nike has done exactly that, acquiring RTFKT, a company that specialises in designing digital sneakers, in December.

"A strong offence is the best defence," said Gauberti.

"At the moment, a lot of these brands are on the fence (about creating their own NFTs) because their core products are physical, and they're still watching the space to see if the metaverse will really take off."

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