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## The Challenges of Enforcing IPR Protection of Avatars in the metaverse: A Critical Analysis

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### **ABSTRACT:**

In the immersive world of the Metaverse, where reality is augmented and virtual, the digital likeness of an individual known as an 'avatar' is doing the rounds. An individual can lead an imagined life through the medium of avatars or trade in digital goods if they please. Though the importance of the same cannot be denied as it gives commercial viability and 'lived experiences' and it cannot be denied that the IPR concerns arising from the same are worth considering. It is important to note who owns the intellectual property of these products and who owns the rights to original content that is made for the digital augmentation of these products. For instance, the patent protection for these avatars flows from the idea that how are these technologies, namely virtual reality, and artificial intelligence patented – the major tests for patentability ensure that there must be a novelty, consisting of inventive steps and have industrial application. The material test is employed to consider whether a particular product is a distinguishing characteristic between novelty and alteration of the same. An abstract notion need not be patented as such. In a comparable way, the copyright protection to the avatars is attached to the original works that are attached to a tangible medium. Many aspects of the avatars can be copyrighted like programs, videos, images, and audio records but the major challenge lies in protecting the same where the usage is small similarly if trademark protection is concerned, it is very necessary to ensure the same that characters, marks, and names protecting the brand values in the avatars and hence give it a commercial advantage of conducting the business in the digital world.

### **INTRODUCTION:**

The metaverse as we know it today deals with the immersive background of an environment where users connect, play, and even work together. Technological advances have led to the intermingling of our virtual and actual lives; and in order to conduct our virtual life, by and large. This is done by a wide variety of services per se, like virtual reality ('VR') gears, smart glasses, and sometimes even cryptocurrencies for that matter. The most major IPR concern in

this prospect is the protection of these resources in the metaverse as it is expanding with time – the patenting, copyrighting, and trademarking of these goods remain the most important issue to be considered for the advancement of IPR in the digital universe as it can be the major tool of advancement in the future. To protect the knowledge, and interests of sellers, buyers, and all those involved in the transactions of these digital goods, it is very important to accord IP protection to all these resources. Now, the question as to why avatars are important in the metaverse, flows from the idea that the world in the digital sphere depends on user interaction the most in the metaverse – this depends on the user’s online presence, it can also be used in various digital worlds<sup>1</sup> for that matter, for instance Decentraland<sup>2</sup>.

### **What is an Avatar in the Metaverse?**

The users of the metaverse gain an exciting opportunity for the purposes of customizing their digital likeness in the virtual environment as largely, the metaverse is in the virtual space. The online collection in the virtual space runs on the interlinking of various technologies, be it blockchain, VR, AR, etc. and that is how access is granted to the users in this world<sup>3</sup>. This three-dimensional world needs to be accessible to its users so that they can have their immersive role in the same, and that is done through avatars. If we consider the meaning of the word ‘avatar’ in the etymological sense, it finds its roots in the Sanskrit word for ‘descent’; in the world of computing, it refers to the digital simulation of users and gamers on the internet.

The developers have opined that the immersion levels in these technologies for increasing realism and interactiveness are necessary for the depiction of them on their screens<sup>4</sup>. This principle also applies to social media these days where the users can employ their visualization and represent them in the virtual world – it is inclusive of customization in relation to clothing, facial features, and body sizes of an individual on the internet. The physical representation of people in the metaverse depends upon the avatars and it is basically what a user experiences when they access the metaverse. They are available in both 2-D and 3-D formats which include

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<sup>1</sup> METAVERSE AVATAR: DEFINITION & HOW TO CREATE IT, <https://www.plugin.com/augmented-reality/how-to-create-metaverse-avatar/#:~:text=each%20application%20provides,-,Why%20are%20Metaverse%20Avatars%20important%20in%20Metaverse%3F,various%20virtual%20worlds%2C%20including%20Decentraland> (last visited Jun. 28, 2023).

<sup>2</sup> Decentraland is an Ethereum-based-3-dimensional virtual platform where one can buy or sell land or plots.

<sup>3</sup> Mayank Pandey, *IPR Challenges in the Metaverse*, 2 J.L.RES. & JURD. SCIEN. 303, 304-305 (2022).

<sup>4</sup> THE ROLE OF THE AVATAR IN THE METAVERSE, <https://www.xrtoday.com/virtual-reality/the-role-of-the-avatar-in-the-metaverse/> (last visited Jun. 30, 2023).



real-time movements that are enhanced by sensors, along with VR avatars that do not involve mobility<sup>5</sup> and food body avatars that replicate the movements of an individual and their relation with digital assets like NFTs and cryptocurrencies.

### **Avatars of Metaverse and their IPR Implications**

The metaverse revolves around its principles: presence, coherence, and uniformity and this actually relates to a sense of appearance that has the metaverse as its base for having a presence in the metaverse, it is very much necessary to have a digital incarnation in the virtual space which can only be possible by avatars. The system and portability of service that is linked to the metaverse also create utmost coherence and a uniform system of access as it can be used on multiple devices at the same time and operate various services at multiple verticals on the same platform. The technological innovations of the metaverse that are usable with the help of avatars as simulations of a person in the platform and the ownership of these resources is necessary for a cogent right-duty perspective in the IP domain and the consumer branding will be of utmost importance as many brands are coming close to being the mediums of interaction with the consumers. Various instances like Roblox's Gucci<sup>6</sup> store for simulated shopping complexes, Nikeland, a medium for Nike enthusiasts to buy their products, and IKEA's virtual reality showroom are among a few brands that are following suit in this domain.

### **Ownership Issues in the IP Domain**

A plethora of issues relating to the metaverse are existing just because the kinds of products that are being projected in the environment are major privacy driven – large sets of data involving sensitive personal information within the scheme of IT Rules<sup>7</sup> will be collected thereof, the interaction will be of paramount importance to see how the IP landscape transpires on that occasion. Another consideration is that when in a virtual setting, where there are no state borders, how would the IP issues transpire to shape the IP landscape and would it be able to provide comprehensive support to the IP in the metaverse? One more prospect in this linkage is the reality that the host platform might take up the ownership of digital assets like avatars,

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<sup>5</sup> As seen in Meta's Horizon Worlds, Microsoft's AltspaceVR, Spatial and other platforms.

<sup>6</sup> GUCCI ROBLOX METAVERSE-GUCCITOWN, <https://www.inverse.com/input/style/gucci-roblox-metaverse-world-gucci-town> (last visited Jul. 1, 2023).

<sup>7</sup> The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

and hence, the terms of ownership of that work should be clearly laid down to avoid ownership issues in the metaverse.

The virtual representations in the metaverse are usually the subject matter of the metaverse and they can be employed by persons who do not own them thus it is very important for the rightful holders of IP in these intangible elements of designers, inventors, and owners of the various distinctive signs and symbols – hence it has to be protected and prosecuted against but the determination of a subject matter of metaverse would again become a herculean task as the use of objects that are used in real-world have the capacity to infringe the rights of users in the real world. Hence, there should be an unambiguous legal regime that is sufficiently able to protect the rights of IP owners and the freedom of users to interact with each other through virtual objects in the metaverse<sup>8</sup>.

### **According to the Legal Protection to the Avatars through Legislative Scheme**

If we talk about the creative works in the domain of metaverse, we can come across the various methods and ways to tackle the problems in effectively enforcing the IPRs in avatars which can be protected either by copyright regime along with buildings and landscapes (‘real estate in metaverse’) and trademark law appears to be sufficient for the logos-containing letters or symbols and other branding material necessary for the protection and patent laws finally to safeguard the technological framework behind the development of avatars and other digital products in the metaverse.

According to the Indian legal regime of IPR, the Patent Act<sup>9</sup> warrants the presence of various characteristics of a valid patent to exist like novelty, inventive step, and industrial application. But, with the technological advancements in the background, it will be difficult to ascertain whether the present criteria would be sufficient to grant patent protection to avatars in the metaverse, and kinds of violation would also determine the same. In the *Alice Corp.*<sup>10</sup> case, it was identified that a software application is not capable of being patented as it was only implementing an ‘abstract idea’ – it is thus necessary to clarify the sense of novelty to determine

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<sup>8</sup> Gayathri Prajit, Founding Partner, Chelton Lega, Protecting intellectual property in the metaverse: Challenges, opportunities, and recent case laws”, timesofindia.indiatimes, (July. 07, 2023, 9:29 PM), <https://timesofindia.indiatimes.com/blogs/voices/protecting-intellectual-property-in-the-metaverse-challenges-opportunities-and-recent-case-laws/>

<sup>9</sup> Patents Act, 1970, No. 39, Acts of Parliament, 1970 (India).

<sup>10</sup> *Alice Corporation v. CLS Bank International*, 573 U.S. 208 (2014).

between inventive step and mere modification of existing technology. The technologies in the metaverse are basically centered upon hardware and software considerations, various components in the metaverse are being granted the patent protections like AR, VR, and software applications, etc. the persisting patented technological advances are also being used in the virtual form-this also involved the patents created by avatars in the metaverse like awarding of a patent for 'Digital Vaccine' that was used in a metaverse game<sup>11</sup>. Along with this, a clear-cut indication in the NICE Classification is also necessary for the overall protection of patents in avatars and other digital assets of the metaverse.

Various international agreements like the Berne Convention<sup>12</sup>, which lays down the minimum standards for copyright protection, similarly the Art. 1(4) of the WIPO Copyright Treaty<sup>13</sup> which clearly implies that the storage of a protected work in the digital medium would amount to a reproduction and that pertains a prior information to the copyright holder. There should also be ensured that there is such an environment that there can be showcasing of one's copyrighted virtual asset without taking away third-party's rights upon them and there must be a proper safeguard of these entities. For example, the U.S. Copyright Act<sup>14</sup> provides a kind of safe environment for entities that use user-owned works that violate copyrights, various authorized procedures can also be set up for the safeguarding of same. In this Act, the copyright protection also extends to the tangible mediums that are attached to it-a medium of licensing just like the Stock pictures<sup>15</sup> may also be employed to give a licensing safeguard to artistic works like avatars in the metaverse. The same was also affirmed in the case of *Solid Oak Sketches*<sup>16</sup> wherein the copyright holder of certain tattoos of basketball players as a part of their avatars was shown in the game NBA 2K, it was held that it was well within the domain of fair use. Along with this, copyright considerations arose in NFTs of breedable animals in the *Second Life*<sup>17</sup> metaverse case wherein the defendant was said to replicate the digital likeness of

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<sup>11</sup> RUPALI MUKHERJEE, INDIAN GETS WORLD'S FIRST DIGITAL VACCINE PATENT, THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/business/startups/trend-tracking/indian-gets-worlds-first-digital-vaccine-patent/articleshow/92073578.cms>. (last visited Sept. 6, 2022).

<sup>12</sup> Berne Convention for the Protection of Literary and Artistic Works, 1886.

<sup>13</sup> WIPO Copyright Treaty, 1996, art. 1(4)., Andy Ramos, Partner at Pérez-Llorca, Madrid, Spain, wipo.int, July 07, 2023, 9:29 PM), [https://www.wipo.int/wipo\\_magazine/en/2022/02/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2022/02/article_0002.html).

<sup>14</sup> Digital Millennium Copyright Act, 1998, No. 115, Acts of Parliament, 1998 (U.S.).

<sup>15</sup> IPR CHALLENGES IN THE METAVERSE, <https://suranaandsurana.com/2022/06/30/ipr-challenges-in-the-metaverse/> (last visited Jul. 4, 2023).

<sup>16</sup> *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16CV724-LTS.

<sup>17</sup> *Amarreto Ranch Breedables, LLC v. Ozimals, Inc.*, N.D. Cal. Dec. 21, 2010.



a virtual horse. The Nodwin Games<sup>18</sup> case in the Delhi High Court had cautioned against the practice of copying company logos and branding and thus violating the vested copyright in it which was also seen as being of paramount importance when it comes to rights of digital assets on webspace.

Along similar lines, if the use of trademarks is concerned, they serve as the best tool for protecting the brand value of an entity being distinguished from others, it would be a great technique to preserve the financial considerations of an entity. In the case of *E.S.S. Entertainment*<sup>19</sup> the court had rightfully observed that the representation of the augmented club trademark logo in the GTA game will not amount to trademark infringement as it is within the creative liberty-this was the underpinning of earliest metaverses too<sup>20</sup>. If the trademarks are used in avatars for the extraction of commercial gains-that should be the major test for determination of a violation of the same. Another case that touched upon this interlinkage was *AM General LLC*<sup>21</sup> case that considered a digital recreation of the Humvee vehicle in the game, Call of Duty which bore the trademarked logo of the vehicle in the game itself, the court had otherwise noticed that the intention of the game was not to extract commercial gains but to practice artistic freedom. In another case of *MetaBirkin*<sup>22</sup>, it was also seen that the trademark infringement was also held relevant in the case where the artist Mason Rothschild released a MetaBirkin NFT that resembled the iconic Hermes Birkin handbag<sup>23</sup>. The NFTs issue again found itself in the middle of things when the consideration of *StockX*<sup>24</sup> wherein the said marketplace was using the digital likeness of Nike shoes to instill a lot of products as NFTs within the metaverse, although, StockX succeeded in maintaining their case.

<sup>18</sup> Patents Act, *Supra* note 9, at

<sup>19</sup> *E.S.S. Entertainment 2000, Inc. v. Rockstar Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008).

<sup>20</sup> INTELLECTUAL PROPERTY RIGHTS IN THE METAVERSE, <https://ijclp.com/intellectual-property-rights-in-the-metaverse/> (last visited Jul. 4, 2023).

<sup>21</sup> WIPO MAGAZINE, THE METAVERSE, NFTS AND IP RIGHTS: TO REGULATE OR NOT TO REGULATE?, [https://www.wipo.int/wipo\\_magazine/en/2022/02/article\\_0002.html](https://www.wipo.int/wipo_magazine/en/2022/02/article_0002.html) (last visited Jul. 5, 2023).

<sup>22</sup> *Hermes International v. Mason Rothschild*, 1:22-cv-00384.

<sup>23</sup> SAFEGUARDING INTELLECTUAL PROPERTY RIGHTS IN THE METAVERSE, <https://www.lexology.com/library/detail.aspx?g=d07a9d7a-8bba-4f7a-8b1b-e7c31ec8916f> (last visited Jul. 5, 2023).

<sup>24</sup> *Nike v. StockX*, 1:22-cv-00983-VEC.

### Suggestions and Recommendations

Based on the study, there are various suggestions and recommendations that need to be considered before developing an overall protective regime of avatars in the metaverse:

- The criteria for protection of the digital assets in the metaverse is ever expanding and it must be seen that they are incorporated in due time to deal with these considerations.
- The effect of digital assets in the virtual world should be realized to see what the response in the economic sphere is.
- The imperatives in the metaverse should be giving comprehensive protection to the digital identification objects in consonance with the trademark laws and finetuning NICE classification.
- The fair dealing considerations in the metaverse should be protected in the sense to protect IPRs in the digital space along with the copyright regime that pertains to legal protection.
- With technological advancements, an effective criterion needs to be set to decide the future of the protectability of the metaverse.

### CONCLUSION:

Despite various challenges in the incorporation of protection of the digital assets in the metaverse, and the players that enable them, there exist significant opportunities that await the concerns as it has within its ambit, a wide variety of goods and services in the market and the owners of IP can eventually monetize on this opportunity and make commercial gains; the licensing of the goods is of utmost importance and hence that also should be considered in the backdrop. The metaverse provides a platform for all the users that are there on the platform to create and showcase their products backed by innovation and work on the brand value they inhabit. The prospects in the metaverse have a wide variety of concerns like various opportunities and threats – also, a willingness to adapt and protect the IP in the virtual world would be very helpful in the prevalence of desirable protective schemes of the IP in the metaverse. More various suggestions like drawing up terms and conditions that promote protectability, licensing of the IP on fairgrounds, and feasible tracking of violations would lead to an all-inclusive IPR protection for these assets.