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## THE LEAVES JUST PICKED OF HERMES NFT CASE AND THE SPOUTING OF METAVERSE: JUST A PEEK IF SCATTERING WATERS ARE THERE IN INDIA

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*The thaumaturgy of virtual fingers are making our economy an invisible  
story telling filed with invisible bosom buddies...*

### ABSTRACT:

Trademarks are source-identifying marks that show consumers where a product or service comes from. Trademark law aims to prevent consumer confusion and promote fair competition. In the marketplace, it is essential that consumers know where goods and services come from, so that they know what they are getting when they buy, and brands are an incentive to build a reputation for providing quality goods. While the owner of a trademark has the right to use it in commerce and exclude others from doing so, there are "fair use" defenses to infringement that prioritize fair competition and other rights over the interests of the trademark owner. Another fair expressive use of trademarks is in works of art. Whether such use is permitted is governed by the "Rogers test". The use of trademarks in the metaverse is a relatively new matter, but analogies can be found with earlier cases involving video games. Because the Rogers test is so biased towards free speech. Our globe is an enchanting one; the thaumaturgic fingers of the genius humanness are moulding it to more sorcerous and spectral with automated technologies.

**Keywords:** Metaverse, Non-Fungible Tokens, Fair Use, Trademark, Brands

## INTRODUCTION

Online sellers use well-known brands and objects within the metaverse as virtual goods Non Fungible Tokens (hereinafter referred as NFTs)<sup>1</sup>, sometimes without permission. In many cases, parties buy and sell these digital goods online, creating virtual marketplaces that represent physical goods. This new market raises new questions about how real-world intellectual property rights can be applied to Metaverse products. Southern New York In 2022, the *Hermès International v. Rothschild* lawsuit brought to its circuit digitally its artist Mason Rothschild created an online NFT depicting his famous Hermès handbag, the Birkin, and sold it. Rothschild named his collection of virtual handbags "MetaBirkins", and in response, Hermès sued Rothschild as the owner of the trademark for trademark infringement and dilution. Applying to such claims, the Rothschilds invoked protection under another test known as the Rogers test. One of the main defenses to trademark infringement claims is that the use of the trademark is merely creative expression. Creative expression is not commercial use and cannot constitute trademark infringement. "Commercial" means that the trademark is used for commercial purposes. This means that the mark is used in connection with products or services sold across national borders. "Trademark" means a company name, product name, slogan, logo or other identifier indicating the origin of a product or service. For example, the famous cursive Coca-Cola font on a soda can indicates its source is the Coca-Cola Bottling Company of Atlanta, Georgia. This italic is a design mark (logo) registered as a trademark of the Coca-Cola Bottling Company. The registered trademark symbol ® on the can next to this letter indicates that it is. The italic Coca-Cola font is used in the context of soft drink sales (or sodas if you're in New York or elsewhere on the East Coast) and may be trademarked. In other words, it can be registered as a trademark for commercial use.

Alternatively, if the text is painted on canvas, framed, and instead hung in an art gallery, it serves no commercial purpose. It would be art. Trademarks used for non-commercial, creative purposes cannot be registered as trademarks. It is also a defense against claims of trademark

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<sup>1</sup> NFT stands for non-fungible tokens (NFT), which are generally created using the same type of programming used for crypto currencies. Simply put, these crypto assets are based on block chain technology. They cannot be exchanged or traded equivalently like other cryptographic assets. Like bitcoin or ethereum. The term NFT clearly means that it cannot be replaced or interchanged because of its unique characteristics. Physical currency and crypto currency are fungible, meaning they can be traded or exchanged for each other. NFT stands for non-fungible token, which means it cannot be replaced or swapped because of its unique properties. An NFT is a digital asset that represents Internet collectibles such as art, music, and games with a certificate of authenticity created by the block chain technology that underpins crypto currency. It cannot be forged or otherwise manipulated. NFT exchanges take place with crypto currencies such as Bitcoin on specialized sites. Crypto punks is a notable example of an NFT. It enables you to buy, sell and store 10,000 collectibles with proof-of-ownership.

infringement. Creative expression does not force consumers to buy counterfeit goods, so it is a defense against claims of infringement. A picture of it written in cursive Coca-Cola hanging on the wall of an art gallery cannot convince consumers that an art gallery sells pop. In short, creative expression remains a viable defense to trademark infringement claims.

## **THE TERMINOLOGY METAVERSE LANDSCAPE**

Metaverse combines elements of social media, online gaming, virtual reality, augmented reality, and blockchain to allow users to interact with each other using avatars. It is expected to expand and provide users with different environments for playing, working and socializing. Its use is not only for people but also for brands to help them engage customers and sell their products and services.<sup>2</sup> These virtual worlds also allow users to buy and sell branded digital goods.

With the impact that Metaverse can have on products and services, businesses must strive to protect their intellectual property (IP) in the Metaverse domain, particularly the use of trademarks. Trademarking a virtual product name in Metaverse gives the owner exclusive rights to use it and prohibits others from using the same or similar name. As a result, the use of trademarks in Metaverse raises new legal issues, such as how to protect a company's trademarks in Metaverse.

The word "Metaverse" was coined 30 years ago by the American science fiction writer Neal Town Stephenson in his 1992 novel "Snow Crash". It was part science fiction - part speculation. Fast forward 30 years later, this concept of an open virtual environment for everyone has become a reality. Currently, many companies are trying to create Metaverse or different types of mixed reality environments that combine multiple technologies such as AI, blockchain, VR and AR. At a time when we are aware of the futuristic idea of Metaverse and its fundamental technological innovations, the development of this virtual world is led by one industry - the gaming industry. Metaverse is evolving after two decades of gaming and will be built on the game's infrastructure. Since the beginning of the Metaverse discussion, game developers have been at the forefront, leading discussions on everything from virtual worlds to digital tokens. Such is the influence of the gaming industry in the world of the Metaverse that one of the leading gaming companies, Epic Games, has received its largest fundraising round to date

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<sup>2</sup> For example, brands can advertise in Metaverse or even let customers browse and buy products.

with a \$2 billion investment. This collection put Epic Games' market capitalization at \$31.5 billion.

### ***The Growth Stage***

Companies developing the Metaverse are focused on building new innovations and features to enable users to interact with each other efficiently and effectively digitally. The Metaverse companies are at the forefront of transforming the digital world with immersive experiences in the future. The top ten companies developing this digital space are:

Meta (Previously Facebook), NVIDIA, Epic Games, Microsoft, Apple, Decentraland, Roblox, Corporation, Unity Software, Snapchat, Amazon. Many businesses want to know more about what the Metaverse can accomplish or what their brands can do in this virtual space. The following section will explain the same.

### **BRANDS VIS-A-VIS METAVERSE**

Metaverse is a new area where businesses can reach a wider audience, expand their digital footprint and increase revenue. Realizing the huge potential, several big brands have already started creating new marketing campaigns covering this new digital world. Like contemporary social platforms, Metaverse requires digital brands to carry a voice appropriate for the platform and behave in a certain way depending on the type of environment. This requires an authentic brand image that extends into the experiences marketers create within the Metaverse. From the perspective of brands, Metaverse is nothing but a platform for digital business growth, just like in the real world. And trademarks are expected to help companies prevent abuse by competitors. Registering a trademark for their use in the Metaverse is not just an idea, but a reality. As one purchases digital collectibles to store in digital wallets on a blockchain, they are building their digital ontologies. Companies like Singapore-based Mighty Jaxx are now launching physical collectibles with NFC chips which, when scanned, automatically provide a certificate of authentication. The owner will also receive a “digital twin” of that collectible to use in games on the Mighty Jaxx app. This gives even more meaning and utility to their collectibles, extending the experience far beyond merely a physical shelf where one can show their guests one at a time.

Nike, one of the biggest and most recognizable brands in the world filed for several trademarks

late last year, signalling its intention to create and sell virtual sneakers and apparel. It's the clothing company's first step into the Metaverse. The trademark registrations clearly indicate Nike's strong interest in exploiting the potential of the virtual space. This isn't the first time Nike has explored virtual reality. In May 2019, Nike teamed up with "Fortnite" where characters wore Nike sneakers. The clothing company also teamed up with Roblox to create a digital world called "Nikeland" where users can dress up their avatars in Nike clothing. In addition, Nike purchased NFT studio RTFKT, which creates virtual sneakers and other collectibles. In December 2019, Nike secured a patent for "CryptoKicks" to link digital assets such as NFTs to physical products such as sneakers.

### **THE THREE ACTORS: TRADEMARK, ARTISTIC EXPRESSION AND METAVERSE**

In *Rogers v. Grimaldi*,<sup>3</sup> Famous actress Ginger Rogers sued the producers of the movie "Ginger and Fred," which was named after Ginger Rogers and her frequent co-star Fred Astaire. The US Court of Appeals for the Second Circuit summarized the film: The film tells the story of two fictional Italian comedians, Pippa and Amelia, who impersonated Rogers and Astaire in their heyday and became known in Italy as "Ginger and Fred". The film focuses on the televised reunion of Pippa and Amelia, many years after their retirement. Appellees describe the film as a bittersweet story of these two fictional dancers and as a satire of contemporary television shows. Ginger Rogers sued for, among other things, false designation of origin under the Lanham Act.<sup>4</sup> The Second Circuit found for the defendants and established the Rogers test for use of trademarks in artistic expression. The test seeks to balance artistic expression protected under the First Amendment with the rights of the trademark holder. The Rogers test has two steps and clearly tips the scale in favor of the First Amendment:

- Does the use of the trademark have any "artistic relevance to the underlying work"?<sup>5</sup> This is a very low threshold to overcome, and some courts have said that any artistic relevance above zero obliterates.
- Step 1. However, if there is no artistic relevance, then the question of infringement

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<sup>3</sup> 875 F.2d 994 (2nd Cir. 1989)

<sup>4</sup> Id. at 996-97.

<sup>5</sup> Id at 999.

remains (and there is no need to proceed to Step 2).<sup>6</sup>

If the use of the trademark has some artistic relevance to the underlying work, then the next question is whether the use "expressly misrepresents the source or content of the work." Rogers,

- Will consumers actually mistake the use of a brand for sponsorship by its owner? If so, then the question of infringement remains.

The use of trademarks in the metaverse is a relatively new issue, but analogies can be drawn to earlier video game cases. Because the Rogers test is so biased toward free speech, these cases largely favor artists:

In *AM General v. Activision Blizzard*,<sup>7</sup> Activision's *Call of Duty* video game featured a drivable AM General Humvee to better simulate warfare. The court concluded that the video games were works of art that clarified Rogers Step 1 because the inclusion of the Humvee helped establish a theater of war. Step 2 examined likelihood of confusion using the Polaroid factors, and the court found Activision. In *SS Entertainment 2000 v. Rock Star Videos*,<sup>8</sup> Rock Star's *Grand Theft Auto: San Andreas* video game imitated the appearance of Los Angeles, including the strip club E.S.S. "Play Pen" by including the "Pig Pen" strip club. Noting that, according to Rogers, "the level of relevance merely has to be above zero," the court found that the video game's depiction of Los Angeles was artistic and that "Pig Pen" was relevant to the work. Proceeding to step 2, the court concluded that "a reasonable consumer would not think that a company that owns one strip club in East Los Angeles, which is not well known to the general public, also produces a technologically sophisticated video game like *San Andreas*." "Lastly in *Dillinger, LLC v. Electronic Arts Inc.*,<sup>9</sup> EA's video game *Godfather* featured a gun called "Dillinger" that mimicked the infamous criminal's "Tommy Gun." "Finding the case "similar to S.S." the court stated that "the man-bandit, commonly known for his public persona as 'a flamboyant gangster who dressed well, womanized, drove fast cars and sprayed Tommy Guns,'... has more than zero relevance to a game whose premise allows players to act like mobsters and spray Tommy Guns." As to step 2, the court found that the plaintiff could not

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<sup>6</sup> See *Parks v. LaFace Records*, 329 F. 3d 437 (6th Cir. 2003) (reversing finding that Outkast's use of the name of civil rights icon Rosa Parks had artistic significance for their song "Rosa Parks").

<sup>7</sup> 450 F.Supp.3d 467 (S.D.N.Y. 2020):

<sup>8</sup> 547 F.3d 1095 (9th Cir. 2008):

<sup>9</sup> No. 1:09-cv-1236 (S.D. Ind. June 16, 2011):

present evidence of consumer confusion.

### ***The Novel Stories***

Online sellers use famous brands and objects in the metaverse as virtual goods or NFTs, sometimes without authorization. Parties often buy and sell these digital goods online, creating a virtual marketplace to display real-world goods. With this new market comes new questions about how to apply real-world intellectual property rights to products in the metaverse.

In one case brought to the Southern District of New York in 2022, *Hermès International v. Rothschild*,<sup>10</sup> digital artist Mason Rothschild created and sold an NFT online depicting Hermès' famous Birkin handbag. Rothschild called his collection of virtual handbags "MetaBirkins", and in response, Hermès, as the owner of the trademark, sued Rothschild for trademark infringement and dilution. While courts generally apply the Lanham Act's "*likelihood of confusion*" test to such claims, Rothschild invoked protection under a different test, called the Rogers test.

In *Hermès*, Rothschild argued that "MetaBirkins" are creative, artistic representations eligible for enhanced First Amendment protection under the Rogers test, rendering the "likelihood of confusion test" inapplicable. The *Hermès* case recently survived a motion to dismiss because, while the Rogers test applied, Rothschild's statements were sufficient to show that its use could be expressly misleading as to the source of the work and thus in violation of trademark laws. For example, Rothschild stated that his MetaBirkins were intended to be "an homage to Hermès' most famous handbag, the Birkin," and that he "wanted to see as an experiment if he could create the same kind of illusion that the Birkin has in real life as a digital commodity."

Most recently, the Central District of California in *Yuga Labs, Inc. v. Ripps, et al*<sup>11</sup>, which established the Rogers test, may not apply to NFT infringers where their primary purpose is commercial. Here, defendant Ryder Ripps created NFT using Yuga Labs' NFT Bored Ape Yacht Club ("BAYC") collection trademarks. The court denied Ripps' motion to dismiss, finding that the Rogers test did not apply because Ripps' NFTs failed to "express an idea or opinion." Rather, Ripps' NFTs pointed to BAYC's marks and used them to support Ripps' own

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<sup>10</sup> 22-CV-384 (JSR)

<sup>11</sup> 2022 WL 18024480 (C.D. Cal. Dec. 16, 2022)

"commercial activities to sell infringing products."

The court also held, "even if Rogers were applicable, Ripps' use of the BAYC marks was expressly misleading because those marks were used in the same marketplaces to identify and sell NFTs bearing the exact same images on which the [protected] BAYC NFTs are based without being any expressive content added." These decisions can set the tone for identifying the boundaries of trademark use for NFTs. While the Rogers decision was initially limited to film titles, courts have variously expanded its application to books, songs, video games, and even commercial items such as dog toys, with a particular extension in the 9th US Circuit Court. The extent of its scope is now the subject of a dispute before the US Supreme Court. While virtual goods present different issues than physical goods, how courts determine the limits and boundaries of the Rogers test will determine how NFTs are analyzed.

The US Supreme Court in *Jack Daniel's Properties, Inc. v. VIP Products LLC*<sup>12</sup> (Pending case) reviewed the applicability of the Rogers test to trademark law and consider when to grant enhanced First Amendment protection to potential infringement. At Jack Daniel's VIP, he sold a dog chew toy in the shape of the famous Jack Daniel's bottle. Its label featured a wide-eyed spaniel above the words "Bad Spaniels, the Old No. 2, on your Tennessee Carpet". The bottom of the Bad Spaniels toy read: "43% POO BY VOL." and "100% FRAGRANT," with the toy specifically stating, "not affiliated with Jack Daniel Distillery" Jack Daniel's demanded VIP stop selling the Bad Spaniels chew toy. VIP responded by filing suit in the District Court of Arizona seeking a declaratory judgment that the Bad Spaniels name does not infringe or dilute any trademark rights under the Rogers test. The case is appealed up and down, but most recently the 9th Circuit has held:

(1) the Rogers test applies (ie, the product contains expressive speech in the form of a humorous parody) and

(2) there is no trademark dilution because the protected speech falls under the trademark dilution exception as non commercial speech that purports to "do more than suggest a commercial transaction."

Some of the amicus curiae briefs in the Supreme Court case argue that the Bad Spaniels chew toy should not qualify as a "parody." At its core, a parody must use someone else's work to

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<sup>12</sup> November 21 and December 1 and 9, 2022 (Part I).

convey the essence of the original composition. However, if the accused work has no critical effect on the substance or style of the original composition, the defendant's claim to fairness in borrowing from another's work is diminished or extinguished altogether. In short, without parody, the commercial nature of the use looms large. Regarding the VIP chew toy, some friends say that while the toy may contain a "funny" message about the dog being "100% CHEWABLE" or putting an "old number 2" on your Tennessee rug, it does not make any comment on the original product Jack Daniel's. Without the required comment, the Supreme Court may find that Bad Spaniels lacks parody. In the metaverse, similar issues will arise with respect to whether new works are artistic or parodic, and the breadth of the Rogers test is critical to resolving these issues.

However, even if the work is not a parody, the question remains whether the chew toy conveys a non-commercial, expressive message. While Rogers himself cautioned that his test does not cover "common commercial products," the 9th Circuit's decision in Jack Daniel's appears to have discounted that warning and expanded the scope of the Rogers doctrine to include works of art (e.g., movies, books) to cover a chew toy, presumably common commercial product.

In many cases, products in the metaverse pose the same problem: Does the product make a statement about the original brand, or is it being used to leverage the brand's goodwill for its own mainstream commercial product?

A similar factual pattern to Jack Daniel's occurred in the 2nd circuit with the exact opposite result. In the matter of Harley Davidson, Inc. v. Grottanelli<sup>13</sup>, the defendant owned a motorcycle repair shop called "The Hog Farm" that serviced Harley-Davidson motorcycles. The repair shop used the Harley-Davidson logo, except that the logo (1) included a drawing of a pig wearing sunglasses and (2) replaced the words "Harley-Davidson" with the words "American Made" and a statement that the defendant was an "unauthorized dealer."

As with the Bad Spaniels chew toy, which looked like a Jack Daniel's bottle but contained different contents the defendant in Harley-Davidson also attempted to use parts of the trademark owner's brand to convey its own humorous message. There, however, the 2nd Circuit rejected the argument that the allegedly humorous mark was eligible for enhanced protection, instead holding that the mark was not a parody because it did not comment on a Harley-

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<sup>13</sup> 164 F.3d 806 (2nd Cir.1999)

Davidson product, but rather used it to promote the defendant's own services. In the Jack Daniel's case, the key questions will be whether Bad Spaniels qualifies as a parody under Rogers and whether the non commercial exception to trademark law applies. The same questions will similarly be key to determining whether marks used in the metaverse infringe or dilute the mark holder's reputation.

### **THE PROTECTION SCENARIO: TRADEMARK PERSPECTIVE**

Trademarks protect the identity of a company and the reputation of its brands, including in the Metaverse, by keeping imitators at bay. The trademark registration protects the owner and legally recognizes the company, thereby safeguarding the company's interests. As a result, the registered trademark's owner will have exclusive rights to use the trademark and access essential legal tools to prevent it from being used illegally by other entities. Some of the perks of using a trademark in the Metaverse are as follows:

- Makes it convenient and cost-effective for customers to find products
- Reduces marketing expenses
- Helps build brand identity

In Metaverse's immersive reality, brand identification and differentiation will be crucial. Trademark registration is a must for any company that seeks to enjoy exclusive rights over a mark in a jurisdiction. The law not only protects the trademark in the real world but safeguards it against any infringement in the Metaverse as well. Therefore, just like trademark owners can initiate legal action against the sale of counterfeit products on online stores, they can litigate against infringement in virtual environments. However, it is critical to note that the trademark owner should register the mark for digital goods and services since a trademark for clothing does not extend to virtual clothes. Moreover, legal protection available after trademark registration is not limited to the class of products and services of trademark registration. A trademark owner can also prevent the unauthorized use of the trademark for unrelated products and services in case the third party is taking undue advantage of or harming the distinctive character or reputation of the mark.

### **INDIAN PANORAMA**

With reference to the trademark infringement in metaverse, India has not explicitly adopted

any test similar to Rogers test, but Section 30 of the Trademark Act, 1999( Hereinafter referred as 'TM Act') protects fair use in trademark infringement. Since there have been no trademark infringement claims in the metaverse in India until now, the jurisprudence regarding the application of Section 30 is also not certain. Section 29 of the TM Act provides for infringement of trademarks due to similarity and identical uses of a registered trademark. Section 30, on the other hand, provides an affirmative defense against a trademark infringement claim. In order to get this defense, the use must be a *bona fide* one; Section 30(1)(a), and not detrimental to the distinctiveness of an earlier trademark. There are two types of fair use available for defense, i.e., nominative fair use and descriptive fair use. Descriptive fair use under Section 30(2)a of the TM Act provides a defense when the alleged unauthorized use is for indicating the quality, purpose and origin of the product in the process of rendering services or goods. Section 30(2)d talks about nominative fair use which relates to use of marks when it is 'reasonably necessary' to indicate that the goods are compatible with the trademarked goods, or to criticize, comment or create a parody of the registered trademark.

Ideally, all video games can claim an exemption from infringement under Section 30(1)(a). (b) which provides that it will not amount to infringement if the use "is not such as to take unfair advantage of or damage the distinctive character or reputation of the mark". Section 30 uses factors such as nature of use, consumer confusion, intent of association, manner of use in determining whether any infringement claim falls within the descriptive/nominative fair use exception. Unlike the US, India's trademark law does not expressly protect freedom of speech and expression in cases of trademark infringement. The closest India has come to resolving the issue of fair use in AR/VR is the case of Tata sons v. Greenpeace international,<sup>14</sup> where the defendants used Tata's trademark in their Pacman video game. Here, the court applied a very similar test to the Rogers test, stating that the commercial or communicative intent of the use must be considered before deciding infringement. The court also focused on the relationship between freedom of expression and trademark law. Since the use of the TM in this game was to criticize Tata, it did not constitute infringement and no injunction was granted to the plaintiffs. Metaverse is slightly different from video games in the VR world because the elements made in it are not only for producing a life-like experience, but also for giving users the opportunity to have an alternative cyber life. From land to NFTs, people have invested heavily in the metaverse. Brands such as Nike and McDonalds have registered their trademarks

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<sup>14</sup> (2011) 45 PTC 275

for the metaverse to allow protection against infringement and dilution and to "open their shops" in the metaverse. There is a high probability of their 'commercial use'.

Therefore, the defense of the Rogers test, which has also been similarly applied in India for video games, cannot be sustained in the metaverse because the element of "commercial use" enters into it. purpose that should constitute infringement. The use of TM in the metaverse can no longer be protected through the protection of freedom of speech and expression, even in India where the Rogers test is used.

A company's presence in the metaverse can lead to two different conclusions under Section 30. Applying the Rogers test and the precedent set out in Tata Sons can still work for trademarks that are only used in physical goods and services and have no online presence. This is because it will be easier to prove no "commercial use" in such matters. However, it will be difficult to apply this exception to companies that have their marks registered in the metaverse itself. The growing presence of commerce in the metaverse therefore means that the virtual use of a registered mark without permission may no longer constitute "fair use" in the virtual world.

On the other hand, while the Rogers test may not help in some cases, other nominative exceptions to fair use may still apply to companies that have a metaverse presence. For example, using a trademark to denote its quality, purpose, or origin in the metaverse may still avail itself of the defense if the trademark also has a virtual commercial presence as well as the physical world. Similarly, the use that is "reasonably necessary" according to Section 30 paragraph 2 letter Therefore, fair use can be availed in some cases if the company has an online presence, while in other cases the test in Tata sons may be available if the company does not have such a presence.

## **THE BOTTOM LINE**

In short, this means that virtual products within the Metaverse may mimic real-world products. This creates both opportunities and risks for brand owners. The Metaverse allows users to interact with the virtual environment in the same way they would with the real world. This means that virtual products within the Metaverse may mimic real-world products. This creates both opportunities and risks for brand owners. As an example, imagine as a handbag manufacturer known worldwide for the distinctiveness, high-quality products. The brand is instantly recognizable and has diligently protected the brand for the goods which manufactured.

While in the Metaverse a virtual store opens for selling virtual handbags to users and discover this virtual store is selling the exact product albeit virtually. If the proprietor is not already in the Metaverse and have not filed trademark applications covering virtual products, the infringing party may argue that the proprietor's existing trademark protection does not extend to the Metaverse. Additionally, the infringing party may argue that because the proprietor don't offer a competing virtual product in the Metaverse consumer confusion is not likely. These arguments may prevail, especially in countries that require registration for trademark protection. Major companies like Ralph Lauren, Walmart, Nike, and Mcdonald's have filed trademark applications covering Metaverse products and services such as NFTs, downloadable virtual goods, products to be sold to virtual avatars, retail sales of virtual goods, virtual food items, and providing virtual restaurants.

Big companies like Puma, Adidas, Louis Vuitton have started to register their brands in the metaverse, and the US registry now records a number of applications daily. This will allow them to protect their brands in the metaverse. India still lags behind in such registrations. There are two likely scenarios for Indian companies or international companies with an Indian presence. First, their absence in the metaverse may allow intruders to use Roger's test as a defense. Second, their presence may allow users to assert a nominative fair use defense. In the current environment, companies should be proactive in not allowing the Roger test to be used as a defense against infringement in the metaverse. This is because it is a principle borrowed from another jurisdiction and has a subjective application in India. Such subjectivity may or may not fit well into the virtual world. The defense under Section 30, on the other hand, is still valid and does not infringe trademark rights. To ensure protection from defamation, unauthorized use, etc., Indian brands should proactively start registering their brands in the metaverse and use this opportunity to grow their brand equity.