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NFTs and the metaverse

A new era in the digital age – and in the exploitation of IP-rights

Lately, terms and concepts such as "NFT" and "metaverse" have entered the global and digital consciousness. These concepts are likely to become a (virtual) game changer – also for IP rightholders for whom the importance of considering NFTs and metaverses as part of their general IP protection strategy is steadily increasing.

In December 2021, the American company NIKE, Inc. bought the brand RTFKT as part of a strategy of which the main goal is to strengthen NIKE's position on the market for the sale, display, and re-sale of unique, virtual products. Those products have one thing in common: They exclusively exist online and can therefore only be used in a virtual metaverse as brands, commodities, objects for investment, personal statements, and as unique works of art.

Besides emphasising the fact that NFTs are seemingly not going to be a digital "one-day-wonder", NIKE's acquisition of the brand RTFKT highlights another important point: IP rightholders should incorporate NFTs in their IP strategies.

What is an NFT?

An NFT (a "Non-fungible token") is a unique digital asset based on blockchain technology. It is stored in a virtual network with data that prove its origin and ownership history. An NFT can be shaped as everything from symbols and pictures to signs and drawings and can look like figures, pieces of clothing, works of art, etc. The possibilities are endless. NFTs have become collector's items and typically represent a digital work of art and/or an identity. NFTs can also be linked to a physical asset, thereby providing the owner of the NFT with ownership of both the unique digital asset and a similar physical asset such as a print a painting or a 3D mould of the asset.

As the NFT is unique, it can only have one owner at a time. When purchasing an NFT, the purchaser is granted the ownership of the digital asset (as well as the physical asset if such an asset exists). However, the purchase of an NFT does not necessarily provide the owner with the IP rights related to the asset.

What is a metaverse?

A metaverse is a virtual 3D-shaped world that incorporates features from SoMe, augmented and virtual reality (AR and VR) and online gaming. In the metaverse, the users – in the appearance of avatars – can socialise and interact. A great part of the assets that NFTs represent consist of clothes and accessories which can be worn by the owner of the NFTs' avatar in the metaverse to reflect the owner's style and status.

Several companies including Meta (formerly known as Facebook Inc.) have initiated the development of individual versions of a metaverse that will make it possible for users to live a digital life in parallel with their real life. In addition, multiple platforms such as Roblox and Fortnite where users can gain access to interactive and social metaverse-like features already exist.

A lucrative market

The increased digitalisation is one of the main causes of the extensive popularity of NFTs. Any IP rightholder who wants to be a frontrunner when it comes to online branding must therefore pay particular attention to the NFT market.

With an estimated market cap of 40 billion USD in 2021, the NFT trading market is undoubtedly lucrative. As the creator of a specific NFT receives a share of the sales sum after each sale of the NFT, it is quite attractive for a rightholder to gain access to the market for re-sale in digital products linked to NFTs.





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Furthermore, NFTs have provided new possibilities when it comes to trade in physical products. As an NFT contains data that states its origin and ownership, an NFT is well suited for proving the authenticity of the physical product that the NFT is linked to. This is an efficient tool in the battle against counterfeit products. Due to the increased attention towards the market for NFTs, it is possible for sellers of products to affect buyers' interest in physical products if the ownership of an NFT comes with the product – especially if the NFT looks like the physical product and it can be used in a metaverse.

The increased trade with and virtual use of NFTs have, however, entailed a lot of unanswered questions regarding IP rights and the protection of such rights which rightholders must be aware of when laying out their IP strategy.

The registration of trademarks related to a digital product

In connection to the registration of trademarks related to NFTs, much indicates that rightholders must carry out a much more extensive registration than what has previously been necessary. For example, trademarks related to trade in shoes are normally registered under class 25 that includes "footwear". However, the question is whether this registration is sufficient if the digital product – even though it is shaped as a pair of shoes – only exists in the metaverse as a "symbol" and therefore rather can be categorised as class 9 (software including virtual products that can be used online), class 35 (online retail of virtual clothing) or class 41 (entertainment services related to virtual clothing).

It is of course essential that a rightholder is aware of this problem before launching a digital product and, furthermore, that the rightholder considers which trademark classes are relevant when registering the trademark.

Art or infringement?

Another essential problem regarding NFTs is caused by the fact that many products related to well-known trademarks are being developed and sold as NFTs without the consent of the rightholder. Recently, there have been several cases regarding the creation of and trade with NFTs that look like the real products and trademarks but are categorised as an impression of the original product or sometimes even as a work of art which therefore does not constitute an IPR infringement.

In a recent case, an American artist sold 100 digital NFT versions of the French fashion brand Hermès' famous Birkin bag on the NFT trade platform OpenSea which attracted extensive global attention. Hermès responded fast and demanded an immediate cessation of the trade with the NFT bags. In an open letter, the artist defended his actions claiming that the NFT bags were works of art. However, Hermès recently filed a suit against the American artist accusing the artist of infringing its trademark rights related to the Birkin bag.

The Birkin case emphasises the fact that the creation of and trade with NFTs may operate at a fine line between legal and illegal use of trademarks. If Hermès' lawsuit against the American artist ends up before the courts, it is expected that it will cause more legal clarity regarding the use of IP rights related to NFTs.

Accura recommends

We recommend that IP rightholders consider the world of NFTs and metaverses in their IP strategies on the surveillance of their own rights and product designs. Rightholders that enter the market of NFTs themselves should also consider their own presence in that market and ensure that their IP rights are sufficiently protected.

Changes to the rules on advertising for medicinal products for human beings and animals

Until the beginning of 2022, the Danish rules for advertising for medicinal products were in addition to the Danish Medicines Act set out in one executive order and one underlying guidance covering advertising for medicinal products both for human beings and for animals.

This has now changed with the new EU Regulation on Veterinary Medicinal Products taking effect on 28 January 2022, as it has prompted certain changes to the Danish Medicines Act and further given rise to separating the previous Danish Executive Order on Advertising for Medicinal Products into two new executive orders, one covering advertising for medicinal products for human beings and one covering advertising for medicinal products for animals.

As a further change, the Danish Medicines Agency has proposed to replace the current guidance on advertising for medicinal products with two new sets of guidance, one covering medicinal products for human beings and one covering medicinal products for animals. The consultation period for the two proposed sets of guidance is set for 1 March 2022 and can be retrieved [here](#) and [here](#) (only available in Danish).

So what's new?

The changes to the Medicines Act do not as such bring about material changes to the regulation of medicinal products for human beings, as the changes essentially clarify that the regulation of medicinal products for animals (primarily) follows the EU Regulation on Veterinary Medicinal Products. This also goes for the new executive order on advertising for medicinal products for human beings, which has been amended to primarily omit sections on and mentioning of veterinary medicines.

On the other hand, the EU Regulation on Veterinary Medicinal Products have brought about changes to the regulation of medicinal products for animals, which in an advertising context are laid out in more detail in the new executive order for advertising for veterinary medicines and the proposed guidance. Most notably, the changes address what is understood by a medicinal product for animals and, thus, what constitutes advertising for such products. For further information on these changes and updates, please see the box below.

Changes and updates worth noticing with respect to advertising for veterinary medicines:

- The advertising rules shall apply to veterinary medicines understood as veterinary medicinal products prepared industrially or by a method involving an industrial process and intended to be placed on the market
- Advertising of the following veterinary medicines is generally prohibited: Inactivated immunological veterinary medicinal products that are manufactured from pathogens and antigens obtained from animals in an epidemiological unit and used for the treatment of those animals in the same epidemiological unit or in a unit having a confirmed epidemiological link.
- The advertising rules shall, however, not apply to the following:
 1. veterinary medicinal products containing autologous or allogeneic cells or tissues that have not been subjected to an industrial process,
 2. veterinary medicinal products based on radioactive isotopes,
 3. feed additives,
 4. veterinary medicinal products intended for research and development, and
 5. medicated feed and intermediate products.



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As for the proposed sets of guidance, the one for human beings includes a number of updated sections to reflect the Danish Medicines Agency's current practice, including first and foremost on the definition of advertising, the exemption for press releases, advertising on the Internet including social media, vaccination campaigns, advertising at international conferences and dispensing of product samples. With respect to the proposed guidance on advertising for veterinary medicines, the rules set out in the EU Regulation and executive order as described above are expanded further in the guidance.

Accura comments

Although it has not been the intention to make any substantial changes, the split of the advertising rules for medicinal products for human beings and for animals will bring about clarity as well as better possibilities for making and highlighting differences between advertising for the two different types of medicines. This is stressed by the fact that the previous executive order on advertising for medicinal products (and the soon to be replaced guidance) focused greatly on advertising for medicinal products for human use and not animals.

Also worth noticing is that the new sets of guidance will contribute with new and more up-to-date information on how the Danish Medicines Agency interprets the advertising rules set out in the two new executive orders. Undoubtedly, this will offer guidance on material matters such as the understanding of the term *advertising* in the context of digital marketing and social media posts from pharmaceutical companies' employees.

Accura's dedicated team of Life Science experts continue to follow the completion of the 2 proposed sets of guidance. Feel free to reach out to us if you have questions regarding the changes to the rules on advertising for medicinal products.

Did you know?

EU SME Fund offers partial refunds of IP registration fees

In 2022, the EU SME Fund, administrated by the European Union Intellectual Property Office (EUIPO) is offering partial refunds of fees associated with trademark, design and patent registrations for micro, small and medium-sized enterprises (SMEs) located in EU. While the refunds are of limited economic value, the SME Fund can be a useful tool to get off to a good start on protecting your company's IP rights.

The SME Fund 'Ideas Powered for Business' is a newly established grant scheme to boost the protection and exploitation of intellectual property created by SMEs. Administrated by EUIPO and with a budget of EUR 15,000,000 (in 2022), the SME-fund issues vouchers for partial refunds of fees associated with the registration of new IP rights in SMEs.

Companies can apply for the refund vouchers in the months of March, May, July, September and October 2022. Vouchers are granted on a *first-come, first-served basis*.

Is my company eligible for a refund?

The SME Fund provides vouchers to micro, small and medium-sized enterprises (SMEs) established within the EU. The enterprise must:

1. Engage in economic activity
2. Have an annual work unit of less than 250
3. Have an annual turnover of no more than EUR 50 million or an annual balance sheet total of no more than EUR 43 million.

The EU Commission offers a SME self-assessment questionnaire for companies to determine whether they qualify as an SME. The questionnaire can be found [here](#).

What types of fees can be covered by the refund?

	IP activity	Coverage	Coverable fees	Possible refund
Voucher 1	Trademarks and designs	National, regional and EU rights	Filing fees, research fees, registration fees, publication fees	Max. 75% (max. EUR 1,500)
		Rights outside EU	Filing fees for applications through the Madrid or Hague System, including basic and designation fees outside EU	Max. 50% (max. EUR 1,500)
Voucher 2	Patents	National rights	Filing fees, research fees, examination fees, publication fees	Max. 50% (max. EUR 750)

The vouchers cover only basic fees (no costs related to legal assistance, renewal or costs related to existing rights). VAT is also excluded.

A partial refund of up to 90% (max. EUR 1,500) of national fees to IP pre-diagnostic audits (IP Scan Services) is also available. In Denmark, no IP Scan Services are covered by the scheme.





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EUIPO has announced that more services may be included in the grant scheme as of 2023, e.g. costs related to patent prior art search and patent filing applications, private IP advice charged by IP attorneys for patent registration, licensing agreements, IP Valuations, etc.

How does the application process work?

To obtain a partial refund for IP registration fees, there are essentially 4 steps to follow:

1. Submit an application at [EUIPO's SME Fund-site](#)

Mandatory supporting documents needed for application

- Bank statement and
- VAT or TIN certificate
- Declaration signed by the SME if an external representative is submitting the application

2. Receive grant decision (with voucher) from EUIPO
3. Initiate and pay for covered IP activities
 - It is important not to initiate and pay for the covered IP activities before the grant decision and voucher are received (step 2)
4. Submit a request for payment (including documentation of actual costs)

Read more on the SME-fund and how it works at [EUIPOS website](#).

If you have any questions on IP protection, please feel free to reach out to Accura's team of IP experts.

ACCURA



”Very good legal and industry knowledge. Focuses on the relevant items”

”Great team of engaging and hard-working lawyers.”

“Always pragmatic, commercial yet diligent and fun to work with.”

“Highly recommendable.”

Legal 500