

BRANDS AND DESIGNS FOR WEB3

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The speed at which artificial intelligence, the metaverse and digital wallets are evolving is making brands, designs and copyright integral to realizing the value in digital innovation, says Olivia Petter at HGF in a book about IP and the next wave of growth

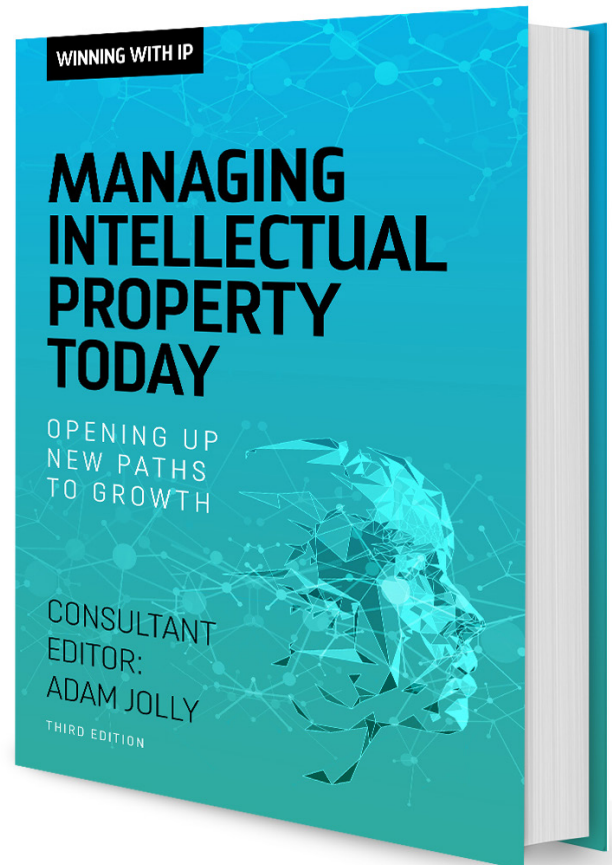
As digital technologies like blockchain, NFTs (non-fungible tokens), 5G, artificial intelligence and virtual reality move towards mass consumption, the question arises whether traditional assumptions about intellectual assets still apply in capturing their full value. Almost all innovation now relies heavily on these rapidly developing digital technologies. However, it takes time to register patents: from the day of the invention to the grant of a registered IP right, it may take several years. While new technologies have the potential to rapidly change the way we live, shop and feel, it is vital for their creators, as well as their users, to implement a clever mix of IP rights to keep pace with the speed of the developments.

The metaverse

This is especially true for the creation of the metaverse, which deploys several of these new technologies. Like many of them, there is no precise definition of the metaverse. However, it is inspired by science fiction and describes a new form of infrastructure or space on the internet.

Although a lot of these new technologies are based on existing computer science, so that their protection through IP rights poses no new problems, the creation of the metaverse is challenging well-established companies, as well as academics at the moment.

It is argued that the metaverse is the next level of the internet, a virtual three-dimensional world designed on the basis of Web3. Using blockchain technology, Web3 includes concepts such as decentralization and a token-based



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Drawing on the knowledge and experience of 24 top-level IP performers, including the academy of the European Patent Office, this book discusses how IP is opening up new paths to growth, highlighting the impact of transformative technologies, such as artificial intelligence, the metaverse, Industry 4.0, net zero and personalized medicine. It gives a series of lessons and insights into how today's winners are managing their IP to create a powerful and flexible system for breaking into new markets, trading at a premium and building up future value.

Further details: www.novaropublishing.com/managing-intellectual-property-today/

economy. Platforms to trade and buy NFTs are spreading and new business concepts are mushrooming. Indeed, the creation of a new universe on the basis of a whole set of disruptive technologies is exciting enough to inspire a company like Facebook to change its name.

Generally, innovations require and deserve protection. However, in that context IP rights should not only be seen as a tool of defence, but as a tool to create an asset for the company, a way to describe its real nature. Thus, a holistic approach has to be taken when it comes to the protection of new technology. A mixture of IP rights, which includes not only patents and copyrights, but also trade marks and designs will address every aspect of the innovation.

A good example of that holistic approach is a smart stethoscope, one of the finalists of the DesignEuropa Awards 2021, which is protected not only by copyrights, but also by trade marks and a registered design. The stethoscope is a small handy device, which can be used to examine the respiratory system of a person. It sends the data to a mobile app. Using AI, the software guides the user through the examination and data may also be sent to a doctor for consultation.

The device's outer appearance is protected by a registered design. Its indication of origin, ie, its trade mark, is protected, and the technology involved, namely clever software using AI, enjoys protection through copyright. IP rights are capable of protecting new creations in their technological (patent), visual (design), creative (copyright), and origin- indicating (trade mark) aspects.

Design

Referring to the metaverse as an example again, virtual items and services are intangible by their nature. That is why design rights may become more and more important. Although trade marks filed lately tend to cover 'virtual goods/ services', it is unclear at the moment whether software relating to downloadable virtual goods is really seen to be similar to real goods in terms of likelihood of confusion under trade mark law.

For example, the Nike shirt in the metaverse is simply a piece of code and thus software, whereas it is a piece of

cloth in the analogue world. As digital goods, although marked with the same trade mark, they may not be held to be similar under trade mark law, as their nature, their distribution channels and their use are completely different.

By contrast, designs protect the outward appearance of the whole or a part of a product resulting from the features of the lines, contours, colours, shape, texture, materials and its ornamentation. Not only product packaging may be protected by a design, but also logos, parts of products, web designs, typefaces or get-ups.

In Europe, designs come in two types: unregistered designs which are protected for three years from the date the design was first made available to the public within the territory of the European Union; and registered designs which enjoy protection for an initial period of five years from the date of filing which may be extended to a maximum of 25 years.

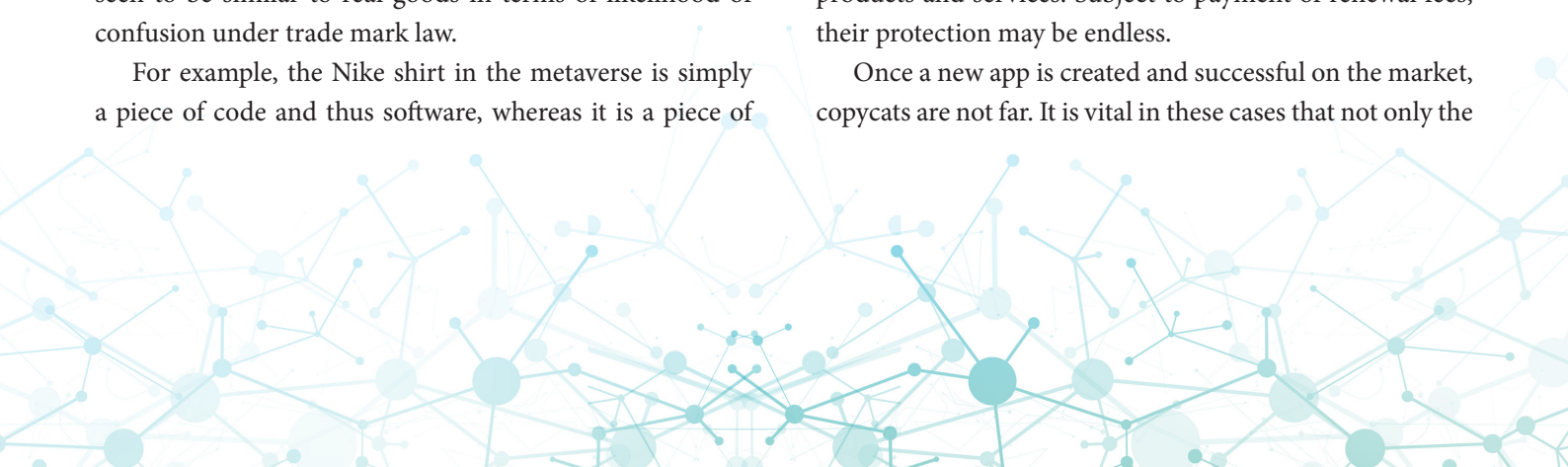
When it comes to digital items, it may be that the look and feel of a real product is depicted, whereas the trade mark of the analogue product is not. While the trade mark is protected in relation to specific goods and services, design protection exists independently from the intended use of the design. Thus, a design may be infringed in the same way in the analogue as in the virtual world.

The same is true for copyrights, which not only protect code and software, but also content which may be distributed through virtual reality devices with innovative fields of application. For example, the dentist who is providing a special treatment to patients with virtual reality glasses may become a distributor of copyrighted content. It is further proof of how invaluable an holistic approach to IP rights for innovative products and services can be.

Trade marks

Trade marks are a powerful tool to fight third parties riding on the coat-tails of the reputation and success of a product or service and to indicate the quality and value of one's own products and services. Subject to payment of renewal fees, their protection may be endless.

Once a new app is created and successful on the market, copycats are not far. It is vital in these cases that not only the



name and logo of the app are protected by trade marks, at least in key countries of availability, but also that the trade mark rights are enforced as soon as copies are discovered.

As soon as a similar app with a similar name is established on the market and similar trade marks are registered, it is difficult and expensive to get rid of it.

Cancellation actions have to be initiated in different jurisdictions, notice-and-takedown proceedings have to be undertaken on the platforms where the apps are distributed. In the worst case, a co-existence of the similar trademarks has been tolerated for too long with the effect that the trade marks may no longer be cancelled from the registers and may be legally used.

The capabilities of a trade mark to transmit the quality and reputation of a product or service become even more crucial in relation to digital products and services which are intangible for the consumer. Their physical composition cannot be felt as they were before when purchased on the high street. This does not only apply to the online purchase of, for example, a Louis Vuitton bag, but even more so to the utilization of a banking-as-a-service provider or the establishment of your e-wallet. The guarantee of quality which is transmitted by a trade mark really counts when it comes to a service that requires the trust of the consumers and happens in a virtual environment employing new technologies.

The e-wallet issued by an established bank whose trade mark enjoys a trusted reputation will most likely be relied on by more customers than a service offered under a new name without a similar guarantor. A trade mark that guarantees the commercial origin of an e-wallet may also guarantee security and trust at the same time, serving as a valuable asset of the company offering these services.

Although other factors, such as the decline in cash payments due to the pandemic, accelerated the popularity of e-wallets and digital payments, advancements in digital technology and security has made possible the steep rise in use of digital payments in Europe during the last year.

Following the European Commission's proposal for

a European Digital Identity in June 2021, digital wallets will become more widespread. They will supersede mobile payment, giving users the option to prove their identity and share electronic documents. Companies will be able to offer a variety of new services with the help of this new secure, transparent and borderless European means of digital identity.

As so many innovations are based on digital technologies, it comes as no surprise that the most popular class of goods in 2021 for trade mark filings was class 9, covering a vast array of computer and software-related goods again, followed by retail and advertising services in class 35.

Copyright

Copyright, from the moment of creation, protects works such as books, articles and other written works, paintings, music and computer programs, to name a few. Copyrights also offer protection to software and non-creative collection of data in case it is subject to significant investments.

Thus, in view of fast-developing digital technologies, copyrights offer a suitable means of protection as they come into existence quickly and may be enforced without delay. However, technologies also take their toll on copyrights, leading to new questions about whether human creation is necessary to copyright a work and whether AI-generated works also enjoy copyright protection.

While the common understanding at the moment seems to be that only original works reflecting the intellectual creation of a human being may be protected under copyright law, it may also be necessary to take into account the consequences of this approach.

A journalistic article, a piece of music or some art which has been created exclusively by AI may not enjoy copyright protection. Accordingly, it is necessary not only to address the output produced by the new technology, but also the input. Without input, AI cannot produce any output.

Thus, case law commonly examines works on a case-by-case basis as to the amount of decisive influence of a



human author to it. Of course, new questions concerning the application of IP rights arise, in the case of when new technologies and concepts are combined. For example, software code generated by AI may use open-source software and thus would have to be made available itself as open-source software again.

Territorial scope of IP

The territorial scope of IP rights causes additional problems. Websites, for example, are accessible anywhere in the world. Companies wishing to expand their business on either side of the Atlantic, for example, may also face problems when it comes to the use and protection of their IP rights.

IP rights registered nationally enjoy protection within the borders of that territory. Some IP rights may extend to a larger territory than that of a nation, for example, EU IP rights, as well as international treaties and agreements, such as the Paris, Berne and Hague Conventions, which mutually acknowledge the IP rights of other nations. In taking account of such territoriality within a holistic IP strategy, bear in mind that case law in different regions of the world offers different concepts and conditions on how to deal with the infringement of IP rights on the internet, which may have an effect in the relevant territory. In a recommendation adopted in 2001, the World Intellectual Property Organization determined that: ‘use of a sign on the internet shall constitute use in a member state for the purposes of these provisions, only if the use has a commercial effect in that member state’. Different factors are relevant to the examination of that ‘commercial effect’ of the use of a sign on the internet.

Considering these factors when examining the use of trade marks and designs in the metaverse or for NFTs, these platforms will most probably also have to install a notice-and-takedown mechanism ensuring that they comply with IP laws in countries where their services are accessible and have commercial effect.

There are also voices which explain that the territory of the website where the metaverse is hosted will most likely be the connection point to the relevant territory.

The territorial scope of IP rights thus may not only pose a problem for those entities offering digital services on the internet, but also for those who try to expand their market by distributing their goods through an online shop.

As soon as the goods and services protected under IP rights are offered across national borders, there is a risk that either assets are no longer protected or third party rights are infringed. Companies which were established on either side of the Atlantic first and later on wanted to expand their markets, often with the help of the web, to the other side of the Atlantic frequently face problems, because identical or similar trade marks are registered already.

In case further aspects come into play, such as the language in which the goods or services are offered, the relevant territorial market may be limited to the area in which the respective language is spoken. For example, printed matter, whether it is published on paper or online, may be relevant to a public which speaks a specific language only. Then IP rights protected in specific territories may be sufficient.

Therefore, it is crucial to think of a comprehensive strategy of protection which involves any expansion plans in the future and to consider the accessibility of products or services provided via online distribution.

Conclusion

For entrepreneurs, a good mixture of IP rights not only secures the success of the business and prevents copycats, but also serves as a significant asset in valuing the company. Not only patents may be subject to licensing, but also trade marks or designs can serve as a powerful lever in negotiations with investors and licensees.

Although it is not possible to protect the idea itself, IP rights protect almost every aspect of a new product or service. While a patent protects the technological side of the innovation, trade marks serve as an indicator of the commercial origin and quality, and designs protect the outward appearance of the product or the web design of the online shop where the product or service may be purchased.



Accordingly, the creation of a strategy in terms of IP rights should take into account the following factors:

- IP protection as a valuable asset and cornerstone of any business.
- A good mixture of all IP rights, including trade marks and designs.
- Consideration of ownership of rights and licensing strategies.
- Territorial aspects of the accessibility of the goods or services of the company, as well as potential expansion plans.

Taken together, these IP rights will give protection and value for Web3 innovations, when applied in a holistic manner.

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Winning with IP: Managing intellectual property today

Published October 2022, 182 pages, paperback,
229mm x 152mm, ISBN: 978-1-7398640-2-6

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