ULTRA-MODERN ADVERTISING: THE FUTURE OF NFTs IN ADVERTISING AND WHY COLLABORATION IS ESSENTIAL TO AVOID INFRINGEMENT

Annabelle Hentz*

I. Introduction

International supermodel and human rights advocate Bella Hadid announced in June 2022 that she would be partnering with REB453 (“rebase”) to create 11,111 exclusive Non-Fungible Tokens (“NFTs”) to the digital world, with each piece being a unique 3D scan of the model herself.1 Hadid was 3D scanned to create the art for the CY-B3LLA NFT, and each NFT will have unique aesthetics based upon the region of its release.2 The CY-B3LLA NFT collectors receive access to global in-person meet and greets, invites to events, as well as

*J.D. Candidate, Suffolk University Law School, 2024; B.B.A. in Marketing, Isenberg School of Management at the University of Massachusetts, Amherst, 2021. Annabelle can be reached at annabellehentz7@gmail.com.

1 See ABOUT THE NFT, REB453 x BELLA HADID CY-B3LL (Oct. 24, 2022) [hereinafter ABOUT THE NFT], archived at https://perma.cc/J2BQ-L5TZ (detailing an introduction about the collection of CY-B3LLA NFTS); Ian Dean, Bella Hadid’s first NFT is a shocker (because it’s actually good), CREATIVE BLOQ (July 29, 2022), archived at https://perma.cc/P2TK-WKKM (explaining the general details regarding Hadid’s first NFT release).

2 See ABOUT THE NFT, supra note 1(describing how CY-B3LLA will be spread across 10 real-world regions, creating artwork with “geo-based attributes” with unique aesthetics to that place, created by local artists to that region).
access to the metaverse Bella mansion and global treasure hunts. Although Hadid’s NFTs are among the first created for the Metaverse involving 3D scans of herself with inspiration from local artists across the globe, she is not the first celebrity to create an NFT and will certainly not be the last.

In an increasingly digital world, artists, celebrities, and investors alike are channeling their creativity and resources into an ever-evolving Metaverse. Unlike the current web, which is based primarily on text, images, and video, the Metaverse is expected to be based on 3D virtual spaces linked together to create a virtual universe. The evolution of virtual reality products such as headsets, glasses, and phone applications, allow their users to interact and enjoy a variety of fully immersive internet environments through the use of avatars and other developing digital technologies. The relationship between the Metaverse and NFTs is that NFTs provide a way for digital assets in the Metaverse to have value and ownership, creating a digital economy. NFTs can be used as currency within the Metaverse, and exchanged for assets such as virtual real estate, in-game items, and virtual characters and avatars. The Metaverse came to be in tandem

---

3 See Dean, supra note 1 (listing the additional perks that come with the purchase of CY-B3LLA).
4 See ABOUT THE NFT, supra note 1 (describing the goal of CY-B3LLA as creating access to a unique NFT with artistic input from international artists per geo-based location). See also Nicolette Salmi, 13 Celebrities Who Have Joined the NFT Crypto Art Craze, L’OFFICIEL (July 29, 2022), archived at https://perma.cc/C2CF-C43B (providing 13 celebrities including Bella Hadid who have embraced the NFT marketplace through various forms of NFTs such as electronic songs, digital art, and virtual accessories).
5 See Zachary Small, Forget Making Art in the Studio. Artists Are Now Developing Their Latest Works in the Metaverse, ARTNET NEWS (Jan. 4, 2022), archived at https://perma.cc/XJE6-448B (describing the shift in artists’ desire to explore the dynamics of online personas, virtual worlds, as well as wealthy collectors and institutions becoming increasingly more interested in digital avant-garde pieces).
6 See Tom May, What is the metaverse?, CREATIVE BLOQ (Sept. 23, 2021), archived at https://perma.cc/JAN6-4PHL (giving a brief description of what the metaverse is and how it is different from traditional internet by revolving around 3D virtual spaces).
7 See id. (listing the various ways to interact with the metaverse, such as with gaming within Virtual Reality and the expansion of virtual worlds, socialization, and concerts, and the increased interest of social medias such as Facebook entering the Virtual Reality space).
8 See Oğuzhan Öztürk, An Introduction to Metaverse NFTs, BUILT IN, (Feb. 21, 2023), archived at https://perma.cc/L4AB-8CLZ (explaining the relationship between the Metaverse and NFTs).
9 See id. (explaining how digital currencies may be used in the Metaverse).
with blockchain technology, which allows for the creation of multiple digital currencies, known as cryptocurrencies. These cryptocurrencies can then be exchanged for NFTs, such as the CY-B3LLA 3D scans of Bella Hadid.

This Note will examine the emerging law pertaining to the buying and selling of NFTs and the accompanying intellectual property issues, particularly with regards to advertising, as these artworks become more commonplace in society. While the law favors creativity and creative expression, NFTs require heightened regulation to prevent the exploitation of the artwork across the Metaverse.

In cases where the subject of the artwork contains their own rights to privacy and

---

10 See Jake Frankenfield, Cryptocurrency Explained With Pros and Cons for Investment, INVESTOPEDIA (May 28, 2022), archived at https://perma.cc/6UXX-9EBH (defining blockchain and cryptocurrency). Blockchain is “a set of connected blocks of information on an online ledger. [Where] [e]ach block contains a set of transactions that have been independently verified by each validator on a network.” Id. Cryptocurrency is defined as “a digital or virtual currency secured by cryptography . . . [that] enable secure online payments without the use of third-party intermediaries.” Id. “Most cryptocurrencies exist on decentralized networks using blockchain technology—a distributed ledger enforced by a disparate network of computers.” Id. See also Juegoadmin, Metaverse vs NFT: The Key Differences, JUEGO STUDIOS (Nov. 30, 2022), archived at https://perma.cc/F8YQ-3RS2 (providing an overview of the creation of the Metaverse and how it relates to NFTs). Further, the article states “NFTs have become popular due to their ability to represent tangible items within the virtual world of the metaverse.” Id. “The metaverse is an interconnected network of virtual worlds and realms created by individuals or companies with distinct qualities.” Id. The Metaverse is built on blockchain technology and is composed of various digital assets, and NFTs are a type of this digital asset. Id.

11 See Ian Dean, What are NFTs, exactly? Non-fungible tokens explained, CREATIVE BLOQ (Aug. 31, 2022), archived at https://perma.cc/LAZ4-RC77 (explaining that, “NFTs, or non-fungible tokens, are blockchain-held tokens that represent a unique asset—whether physical or digital. . . . This means they are tied to the ebb and flow of cryptocurrency values, which can be both a positive and a negative.”).

12 See Lauren Degen, Deceptive advertising practices may be tied to celebrity NFTs, BELMONT ENT. L. J. (Oct. 14, 2022), archived at https://perma.cc/U5M5-GJMN (explaining the importance of heightened FTC regulation regarding celebrities and NFTs as it pertains to advertising). See also Douglass v. Hustler Mag., Inc., 769 F.2d 1128, 1140 (7th Cir. 1985) (highlighting the court’s reasoning behind the Plaintiff’s right to recovery under false light invasion of privacy).

13 See Melissa Landau Steinman & William Lawrence, Branding the Future: Advertising Law, the Metaverse, and NFTs – Part 2, JD SUPRA (Aug. 31, 2022), archived at https://perma.cc/XF63-X724 (detailing the need for adequate disclosures of material consequences with endorsers and influencers within the Metaverse). The article also mentions the proposed FTC act, “Guides Concerning the Use of Endorsement and Testimonial in Advertising” intended to expand its definition of “endorser” to include computer-generated advertisers. Id.
contracts within their profession, this heightened regulation is particularly essential because there is a human behind the piece which may illicit consumer confusion. This Note will explore the history of intellectual property law and how it applies to advertising, current confusion among intellectual property as it applies to the Metaverse, as well as the parallels between physical and digital artwork in terms of regulation. Finally, this Note will discuss the future of NFTs within brands and agencies and the need for increased regulation to avoid consumer confusion, privacy infringement, as well as contract issues pertaining to the subject of these digital artworks.

II. History

A. United States Copyright Law and Current Advertising Regulations

Under the Constitution, copyright law was created to “promote the Progress of Science and useful Arts.” Under current economic theory, copyright law seeks to achieve a balance between maximizing production of works of expression and their accessibility to consumers. Today, U.S. copyright law protects “original works of

14 See Press Release, Fed. Trade Comm’n, FTC Proposes to Strengthen Advertising Guidelines Against Fake and Manipulated Reviews (May 19, 2022) (on file with author) archived at https://perma.cc/BND9-PSU3 (detailing the changes the FTC is considering to tighten its guidelines for advertisers).
15 See Samuel Scott, The truth behind NFTs – and what marketers really need to know about the craze, THE DRUM (Feb. 24, 2022), archived at https://perma.cc/M28T-KBCA (describing the history behind NFTs and why they are rising in popularity amongst marketers). See also NFT Risks and Opportunities in the IP, Advertising, and Brand Management Spaces, CROWELL (Apr. 16, 2021), archived at https://perma.cc/E8JQ-8QSX (detailing the risks involved with NFTs as ownership of an NFT does not automatically hand over copyright ownership).
16 See Arun Sundararajan, How Your Brand Should Use NFTs, HARV. BUS. REV. (Feb. 28, 2022), archived at https://perma.cc/L8T6-MRGS (depicting how NFTs are the basis for a multifaceted digital consumer connection and the importance of their regulation).
17 See U.S. CONST. art. I § 8, cl. 8 (authorizing Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries.”).
18 See Rebecca Carroll, The Latest Technology Challenging Copyright Law’s Relevance Within a Decentralized System, 32 FORDHAM INT’L. PROP. MEDIA & ENT. L.J. 979, 991 (2022) (emphasizing the history of copyright law pertaining to the wide dissemination to consumer); See also William M. Landes & Richard A.
Copyright law recognizes eight categories of protected subject matters: (1) literary works, such as a novel; (2) musical works, such as sheet music; (3) dramatic works, such as a play; (4) pantomimes (story and gesture expressed through movement) and choreographic works (particular dance style); (5) pictorial, graphic and sculptural works (two-dimensional and three-dimensional works of art; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. The copyright owner contains the exclusive right to reproduce, distribute, publicly display and perform the work, and create derivative works.

Registration of copyright, despite not Posner, An Economic Analysis of Copyright Law, 18 LEGAL STUDS. 325, 326 (1989) (summarizing the tradeoff as “[f]or copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”); But see Amy Adler, Why Art Does Not Need Copyright, 86 GEO. WASH. L. REV. 313, 313 (2018) (arguing copyright law is “superfluous” regarding visual arts).

See 17 U.S.C. § 102(a) (stating that, “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”). See also Sarah Sue Landau, Copyright Office Review Board Reaffirms that Human Authorship is a Prerequisite for Copyright Protection, COWAN LIEBOWITZ LATMAN (Mar. 22, 2022), archived at https://perma.cc/9YKJ-7JFW (explaining that authorship requires a human quality as a prerequisite for copyright protection). See also Ruby Helyer, What Are the Copyright Rules Around AI Art?, MAKEUSEOF (Oct. 3, 2023), archived at https://perma.cc/YTV2-SRL (detailing the copyright rules surrounding art generated by artificial intelligence). See also Ruby Helyer, Why Getty Images Is Suing an AI Art Generator, MAKEUSOF (Jan. 20, 2023), archived at https://perma.cc/8UGT-N5V2 (explaining the lawsuit between Getty Images and an AI generator). See also Matt Novak, AI-Created Images Aren’t Protected By Copyright Law According To U.S. Copyright Office, FORBES (Feb. 22, 2023), archived at https://perma.cc/S8BX-PMLR (explaining the Copyright Office’s decision not to consider AI as an “author” for purposes of AI generated works seeking copyright protection). See also Blake Brittain, Getty Images lawsuit says Stability AI misused photos to train AI, REUTERS (Feb. 6, 2023), archived at https://perma.cc/S2DQ-235X (detailing the Getty Images lawsuit over the copyright infringement they experienced regarding 12 million of their images by Stability AI).

See § 102(a), supra note 19 (listing the works of authorship included in 102(a)).
necessary for a creator to gain copyright protection, gives the copyright holder options regarding compensation if and when a lawsuit if ever brought.\textsuperscript{22} A certificate of registration received before or within five years after the original work was published, constitutes prima facie evidence for the validity of a copyright.\textsuperscript{23}

Although copyright law is intended to prevent copying and incentivize creativity, there are legal limitations.\textsuperscript{24} Exceptions such as “fair use” permit the unauthorized use of a copyrighted work in certain circumstances such as “criticism, comment, new reporting, teaching...scholarship, or research.”\textsuperscript{25} Fair use may pertain to educational and non-educational purposes alike, from students and teachers making use of video clips for presentations, to parody purposes such as Saturday Night Live.\textsuperscript{26} If an affirmative fair use

in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

\textit{Id.}

\textsuperscript{22} See Jane C. Ginsburg, \textit{The U.S. Experience with Copyright Formalities: A Love/Hate Relationship}, 33 COLUM. J. L. & ARTS 311, 315 (2010) (detailing the formalities of copyright and the “coming-into-being” of rights upon creation).

\textsuperscript{23} See 17 U.S.C. § 410(c) (stating that “[i]n any judicial proceedings the certificate of registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.”).

\textsuperscript{24} See 17 U.S.C. § 107 (listing the exclusions of copyright law and defining “fair use”). The code states, “…fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” \textit{Id.}

\textsuperscript{25} See § 107, \textit{supra} note 24 (listing the uses recognized as “fair use”).

\textsuperscript{26} See \textit{Common Examples of Fair Use}, PRESSBOOKS (Nov. 17, 2022), archived at https://perma.cc/XZZ9-6M8C (detailing several educational and non-educational examples of the fair use example within copyright). Other examples might include student presentations, course reserves, and digitization projects. \textit{Id.}
defense does not apply, a person is liable for copyright infringement if they infringe a copyright owner’s exclusive rights without authorization.\textsuperscript{27}

1. Advertising

Advertising regulations in the United States are primarily governed by three acts: the Federal Trade Commission Act ("FTC Act"), the Lanham Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act.\textsuperscript{28} The main goal of the FTC Act is to "prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce."\textsuperscript{29} The Lanham Act, while largely governing trademark law, works in tandem with the other acts to regulate false advertising and unfair competition.\textsuperscript{30} Lastly, the Dodd-Frank Wall Street Reform and Consumer Protection Act focuses to promote "enforce[ment] against unfair, deceptive, abusive, or

\textsuperscript{27} See 17 U.S.C. § 501(a) (defining an infringer of copyright as "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a) . . . is an infringer of the copyright or right of the author, as the case may be.").

\textsuperscript{28} See Frankfurt Kurnit Klein & Selz PC, Advertising & Marketing in the USA, LEXOLOGY (Apr. 11, 2019), archived at https://perma.cc/RJ3H-2WD3 (stating the principal statutes that regulate advertising as "the FTC Act, which prohibits ‘unfair or deceptive acts or practices’; the Lanham Act, which is the federal false advertising statute; and the Dodd-Frank Wall Street Reform and Consumer Protection Act.”).


\textsuperscript{30} See 15 U.S.C. § 1125(a) (defining the elements of false designations of origin; false deception or representation). As defined in the statute, (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which— (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities . . . .

\textit{Id.}
otherwise prohibited practices relating to most consumer financial products or services.\footnote{See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (describing the general goal of the Dodd-Frank Act).}

Together, these acts play a unique role in ensuring that consumers are making fully informed purchases and decisions.\footnote{See Matthew Daynard, The Role of the Federal Trade Commission in advertising health products and services, NAT’L LIBR. OF MED. (2004), archived at https://perma.cc/RCJ2-AEZD (emphasizing the importance of the FTC as applied to advertising).} The advertisements available to consumers must contain substantiated, factual explanations regarding the advertised product.\footnote{See Enforcement, FED. TRADE COMM’N, archived at https://perma.cc/8V34-3F7A (describing the goals of the FTC as enforcing federal consumer protecting laws that prevent fraud, deception, and unfair business practices).} When successfully imposed, the FTC creates a climate for preventing misleading advertising for the benefit of the consumer.\footnote{See id. (stating the importance of protecting consumers and promoting competition).}

2. Brief History of Misappropriation of Likeness

While misappropriation of likeness—the unauthorized use of a person’s name or likeness—is not a new legal claim, it continually evolves amid technological advances.\footnote{See White v. Samsung Elecs. America, Inc., 971 F.2d 1395, 1399, 1401 (9th Cir. 1992) (holding the female robot within Samsung’s advertisement allowed for White’s common law of publicity claim and also had a claim under the Lanham Act).} When deciding whether a person’s images and likeness has been misappropriated, courts consider a range of constitutional, statutory, and common law claims including First Amendment claims, Right of Publicity Claims, The Lanham Act, and defamation claims, due in part to no federal right to publicity.\footnote{See Longoria v. Kodiak Concepts LLC, 527 F.Supp.3d 1085, 1095 (App. Div. 2021) (considering the case under Violation of Common Law Right of Publicity, Misappropriation of Likeness, and False Light Invasion of Privacy). In this case, Defendant strip club used the five Plaintiffs’ images and likeness in advertisements appearing on the Club’s social media accounts. \textit{Id.} at 1093. The court granted summary judgment in favor of Plaintiffs’ claims of liability under right of publicity, granted summary judgment in favor of Defendant on Plaintiff’s claim of false advertising, and false light invasion of privacy as to only two of the Plaintiffs. \textit{Id.} at 1112. See also Hart v. Elec. Arts, Inc., 717 F.3d 141, 166 (3rd Cir. 2013) (detailing a balancing test between the interests underlying the First Amendment against those
from appropriation of commercial value of a person’s identity without consent of plaintiff for image/likeness release, injury to the plaintiff, plaintiff being placed in a “false light,” or misrepresentation to which causes confusion of association of such person with another person.\footnote{See Downing v. Abercrombie & Fitch, 265 F.3d 994, 1008 (9th Cir. 2001) (restating the eight factors to be considered regarding likelihood of confusion in celebrity cases). The factors include:

1. the level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended; 2. the relatedness of the fame or success of the plaintiff to the defendant's product; 3. the similarity of the likeness used by the defendant to the actual plaintiff; 4. evidence of actual confusion; 5. marketing channels used; 6. likely degree of purchaser care; 7. defendant's intent on selecting the plaintiff; and 8. likelihood of expansion of the product lines.}

underpinning the right of publicity). The court ultimately decided on using the “Transformative Use Test” and defined the central purpose. \textit{Id.}

[Whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” . . . [W]orks containing “significant transformative elements” are less likely to interfere with the economic interests implicated by the right of publicity.]

\textit{Id.} at 159 (emphasis added).

\textit{See also} Godbehere v. Phoenix Newspapers, Inc., 162 Ariz. 335, 342 n.2 (1989) (upholding Plaintiff’s recovery for false light invasion of privacy). The court stated,

[T]he plaintiff posed nude, consenting to the publication of her photographs in Playboy magazine. Her photographer subsequently left the employ of Playboy for Hustler magazine, a publication of much lower standing in the journalistic community. He sold her photographs to Hustler, which published them. The plaintiff sued for the nonconsensual use of the photographs. Plaintiff had no cause of action for defamation, because essentially, there was nothing untrue about the photographs. She posed for them and, as published, they did not misrepresent her. She also had no claim for outrage. She voluntarily posed for the photographs and consented to their publication in Playboy. Publication was not “outrageous,” as it may have been if she were photographed without her knowledge and the photos published without her initial consent. However, the court upheld her recovery for false light invasion of privacy. The jury may have focused on the differences between Playboy and Hustler and concluded that to be published in Hustler, as if she had posed for that publication, falsely placed her in a different light than the Playboy publication.

\textit{Id.} at 1007-08.
Courts are often split on their decisions regarding misappropriation of likeness, due in part to the preemption of a variety of claims by aforementioned Copyright Law.38

a. NFTs...What Are They?

On February 25, 2021, Christie’s Auction House became the first major auctioneer to offer a purely digital artwork with absolutely no physical component—Michael Joseph Winklemann’s (Beeple’s) “EVERYDAYS: THE FIRST 5000 DAYS” which sold for approximately $69 million.39 This groundbreaking sale catapulted NFTs into the mainstream, creating interest in collecting NFTs as either an investment opportunity, or by way of quenching the desire for a new and disruptive art form.40 Unlike previously acknowledged art forms, an NFT is a one-of-a-kind certificate of authenticity for a given digital artwork.41 A key feature of an NFT is that the file itself

---

38 See Landes & Posner, supra note 18 (explaining the balance between copyright protection and benefits of creating additional works). See also L. v. Sony Music Ent., Inc., 448 F.3d 1134, 1143 (9th Cir. 2006) (holding that plaintiff’s relief would be found in a breach of contract claim regarding the contracted copyright holder, not the copyright holder’s agent). The court also recognized the lower court’s reasoning. Id. at 1145.

[W]e recognize that not every right of publicity claim is preempted by the Copyright Act. Our holding does not extinguish common law or statutory rights of privacy, publicity, and trade secrets, as well as the general law of defamation and fraud (or any other similar causes of action), so long as those causes of action do not concern the subject matter of copyright and contain qualitatively different elements than those contained in a copyright infringement suit.

Id.

39 See Valentina Di Liscia, NFT Art Goes Viral and Heads to Auction – But What Is It?, HYPERALLERGIC (Feb. 24, 2021), archived at https://perma.cc/S9C6-2YRE (detailing the monumental first major auction house sale of an NFT which catapulted NFTs into the mainstream). The NFT consisted of 5,000 individual images created every day by graphic artist Mike Winkelmann [aka Beeple] “between 2007 and 2021 and posted on the artist’s Instagram.” Id.

40 See id. (interviewing Christie’s specialist Noah Davis who led the Beeple sale as to why NFTs are making a market-driven art world more speculative regarding their non-tangible investment opportunities).

doesn’t contain the digital art piece—the file cannot be replaced nor interchanged due to its unique properties, and represents digital assets such as internet collectibles in the form of art, music, and games.\textsuperscript{42} While the image of an NFT may be downloaded, copied, and viewed online by the masses, there can only be one authenticated owner of the blockchain which cannot be copied.\textsuperscript{43}

A key factor in the increased interest of NFTs is the benefits to the artist, such as resale royalties, and dismissing any middlemen between the artist and buyer, which were often not traditionally

\textit{changes in ownership verified by a worldwide network and logged in public. . . . [T]he chain of custody is marked in the file itself permanently, and it’s practically impossible to swap in a fake.}

\textit{Id.}


Digital Asset - NFT is a digital asset that represents Internet collectibles like art, music, and games with an authentic certificate created by blockchain technology that underlies Cryptocurrency. Unique - It cannot be forged or otherwise manipulated. Exchange - NFT exchanges take place with cryptocurrencies such as Bitcoin on specialist sites. . . . The majority of NFTs reside on the Ethereum cryptocurrency's blockchain, a distributed public ledger that records transactions. NFTs are individual tokens with valuable information stored in them. Because they hold a value primarily set by the market and demand, they can be bought and sold just like other physical types of art. NFTs' unique data makes it easy to verify and validate their ownership and the transfer of tokens between owners.

\textit{Id.}

\textit{43 See Mitchell Clark, NFTs, explained, THE VERGE (June 6, 2022), archived at https://perma.cc/Q4BQ-PV2W (comparing the owning of an NFT to that of owning a physical Monet; anyone can own a Monet print, but only one person can own the original). Further, the benefits of NFTs depend on whether you are the artist or collector. \textit{Id. As the artist, you are given a platform to sell work that there otherwise might not be a market for. \textit{Id. Some NFT marketplaces also have a feature where artists can get a percentage every time their NFT is sold or changes hands. \textit{Id. As a collector, you maintain the authenticated ownership of the NFT, being able to post the image online, as well as investment opportunities if the value of the NFT rises over time. \textit{Id. See also Luci Goodman, Can NFTs Be Copied?, NFT CLUB (Nov. 14, 2022), archived at https://perma.cc/SHZ8-RE4H (explaining that while one can duplicate the image of an NFT and share it across the internet, the code cannot be copied).}
applicable regarding physical works of art. In addition, there are also utility NFTs—tokens that are focused on creating a community and granting its collectors access to these communities. By offering digital assets that can be collected, traded, and sold, NFTs create space for brands to better incentivize their audience through exclusive content and community building.

b. Current NFT Regulations

Given the unprecedented nature of NFTs and their newfound presence within the legal system, it is no surprise that courts are attempting to fit NFTs into traditional intellectual property frameworks. To date, NFT regulations are based largely on legal precedent, which gives space for different interpretations of how NFTs must be considered in the legal realm. However, recent

---

44 See Andrey Drobitko, Can Artists Still Benefit From NFTs?, FORBES (June 29, 2022), archived at https://perma.cc/P6QA-7ZWH (describing the fundamental benefit of an NFT as, allowing creatives to “prove the authenticity of their digital works, thus making it possible to trade them.”). “NFTs help artists get resale royalties . . . because the blockchain enables them to follow all the resales of their work.” Id. “The NFT art market dismisses any middlemen between an artist and buyers . . . .” Id. Lastly, “NFTs make it possible for aspiring creatives to profit from their art and get recognition.” Id.

45 See Drobitko, supra note 44 (explaining the difference between NFTs and utility NFTs). Utility NFTs “provide artists with new opportunities for monetization within their fan base and a tool to attract more collectors and convince them to purchase [NFTs].” Id. Further, utility NFTs allows for artists to strengthen their connections with their potential buyers. Id. These NFTs allow artists to “provide their collectors with access to exclusive events and content, private sales of new pieces and collections, and other activities that bring additional value . . . .” Id.

46 See Martina Bretous, How Brands Use NFTs for Marketing: Are They Really Worth The Hype?, HUBSPOT (May 9, 2022), archived at https://perma.cc/A7UU-6PUY (giving current examples of NFTs in advertising initiatives). In March 2022, Anheuser-Busch hosted an #NFTBeerFest event at its flagship brewery reserved for holders of specific NFTs from Budweiser. Id. Purchasers of the NFT enjoyed free beer, tours, giveaways, and performances at the event. Id. Norwegian Cruise Line similarly created six NFT art pieces of vessels to celebrate their launch of Norwegian Prima class, starting at $2,500 per NFT. Id.

47 See Ferrill et al., Demystifying NFTs and Intellectual Property: What You Need to Know, FINNEGAN (May 10, 2022), archived at https://perma.cc/62R5-3PW3 (detailing how NFTs may be subject to copyright, design patent, and trademark rights).

48 See Hermès Int’l v. Rothschild, 654 F.Supp.3d 268, 277 (S.D.N.Y. 2022) (holding there were sufficient factual allegations supporting denial of Defendant Rothschild’s motion to dismiss). In this case, Defendant Rothschild created a collection of NFTs
understandings of NFTs challenge the preconceived notion of what an NFT is, and if they should be considered as personal property as well as digital assets. 49

If viewed within traditional frameworks, under the Lanham Act, NFT purchasers might have a claim against counterfeit creators for false advertising if they can show: (1) the seller made false or misleading statements as to the NFT products; (2) actual deception or a tendency to deceive a substantial portion of the intended audience; (3) the deception is material; (4) the advertised NFT goods traveled in interstate commerce; and (5) a likelihood of injury to the plaintiff. 50

titled “MetaBirkins” each of which depicted an image of a blurry faux-fur covered Birkin handbag. Id. These NFTs sold for prices comparable to real-world Hermès Birkin handbags. Id. Plaintiff Hermès claimed trademark infringement of their Birkin and Hermès trademark. Id. See also Rogers v. Grimaldi 875 F.2d 994 (2d Cir. 1989) (using a test which suggests application of the Lanham Act only where “public interest in avoiding consumer confusion outweighs the public interest in free expression.”). Further, the test “will normally not support application of the [Lanham] Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.” Id. at 999. Given sufficient facts supporting the use of the trademark as not artistically relevant and misleading, causing confusion, defendant’s motion to dismiss was denied. Id. See also Hermès Int’l, 654 F.Supp.3d 268 (detailing the February 2, 2023 decision of this case). Following the recent February 2, 2023 decision in this case, the court held that the Rogers test must be applied. Id. The court ruled in favor of Hermès because Rothschild’s “Metabirkin” explicitly mislead consumers, and there was evidence of Rothschild purposely intending to exploit the fashion house. Id. Purposeful exploitation counters Rothschild’s claim of artistic relevance, allowing the court to rule in favor of Hermès. Id. See also Matthew Loh, An NFT artist who sold virtual ‘MetaBirkin’ handbags for up to $45,100 a piece violated Hermes trademark rights, New York jury rules, BUS. INSIDER (Feb. 8, 2023), archived at https://perma.cc/MCQ3-FPJR (listing the prices of the virtual Metabirkin bags). See also Why Are Birkin Bags So Expensive? And Worth the Price, MADISON AVE COUTURE (Mar. 7, 2022), archived at https://perma.cc/LDX7-AR3W (listing the prices of Birkins).

49 See Tyler Bridegan, Spencer Brooks & Duane Pozza, Property Rights in NFTs Are in the Spotlight, JDSUPRA (Aug. 23, 2022), archived at https://perma.cc/JPB4-BRUU (explaining the weight of a Singapore court recognizing NFTs as “protectable digital assets and a form of legal property.”). In the case, the claimant and defendant entered into a loan agreement, and the claimant used NFT Bored Ape Yacht Club [BAYC] No. 2162 as collateral for the loan. Id. Upon untimely repayment of the loan, defendant took ownership of BAYC No. 2162. Id. “The court granted plaintiff relief and ordered the defendant to return the NFT. In doing so, the court recognized NFTs as protectable digital assets and a form of legal property.” Id. Given that Singapore is a common law jurisdiction much like the United States, this decision will likely be persuasive in further decisions in our country. Id.

50 See 15 U.S.C. § 1125(a), supra note 30 (defining the elements of false advertising).
However, the Lanham Act largely regulates trademarking, which is foundationally different from copyright.\textsuperscript{51} If viewed under Copyright Law, NFTs are subject not only to the rights of the copyright holder, but also claims supporting fair use.\textsuperscript{52} Fair use applies to any copyrighted intellectual property, as well as NFTs.\textsuperscript{53} However, fair use’s applicability to NFTs depends on the facts of the case, and whether the NFT is for personal or commercial use.\textsuperscript{54} While current

\textsuperscript{51} See 15 U.S.C § 1051 (defining the application for registration and verification of trademarks under the Lanham Act).
\textsuperscript{52} See 17 U.S.C § 106, supra note 21 (defining the rights of a copyright holder). See also 17 U.S.C. § 107 (explaining the fair use exclusions).
\textsuperscript{53} See Fair Use & Non-Fungible Tokens, TRAVERSELEGAL (Oct. 21, 2022), archived at https://perma.cc/87Y3-P554 (explaining how fair use applies to NFTs). Further, the article acknowledges the uniqueness of NFT case law decisions and how fair use regarding NFTs must be looked at on a case-by-case basis. Id.
\textsuperscript{54} See Daniel M. Levine, NFTS AND THEIR INTELLECTUAL PROPERTY IMPLICATIONS: PART IV—‘Fair Use’ and Copyright Infringement, RM PARTNERS L. (May 19, 2021), archived at https://perma.cc/8W8E-8H29 (detailing the implications between NFTs and fair use and the factors that must be considered). The article states,

As applied to physical art, courts have been more likely to find in favor of “fair use” for this factor if the new use adds or changes the original work instead of just making a copy. This type of use is sometimes called “transformative”. [sic] As applied to art, music, and similar abstract mediums, the courts have remained split, and somewhat inconsistent, on when a use is transformative. Art made into an NFT may fall to the same fate. The facts of an NFT’s creation, history of the artist, the type of work, and other details could determine whether an NFT will be transformative use, which makes a finding of “fair use” more likely. NFTs may be treated differently from other art because of the “character” of its use. Courts distinguish between commercial and non-[ ]commercial uses. Finding a use is of a “commercial nature” weighs against a finding of “fair use” but is not dispositive. If commercial uses could not be considered “fair use”, [sic] college textbooks and newspapers would be forbidden from using any copyrighted materials. Even though NFTs of digital art could, theoretically, be used for “non-commercial” purposes, they are currently being used as commercial vehicles. There are two main reasons for this conclusion. First, digital images can easily be reproduced, shared, and distributed with commonly available tools. Second, NFT[s] have inherent costs associated with their creation and transfer. Since each part of the blockchain must be recorded for either creation or transfer, computing power must be expended, which incur[s] costs that must be paid. While technology may reduce these costs in the future, any added costs
legal decisions stand as precedent regarding NFTs, they are likely to continue evolving with every new technological advancement presented in our legal system.\(^55\)

Fortunately, recent progress was made regarding trademarks and NFTs.\(^56\) Hermès Int’l v. Rothschild revolves around a dispute between luxury goods brand, Hermès, and NFT creator Mason Rothschild for the creation of his MetaBirkin NFTs.\(^57\) On February 8, 2023, the jury returned a verdict finding that Rothschild’s MetaBirkin NFTs, modeled after the iconic Hermès Birkin Bag, constituted trademark infringement, trademark dilution, and cybersquatting of Hermès’ intellectual property rights.\(^58\) Further, the jury also found that Rothschilds’ creations and sale of the MetaBirkin NFTs were not protected by the First Amendment.\(^59\) This decision is an important milestone in the legal development of the application of trademark law to NFTs because it outlines the factors used to determine infringement, including the similarity between the Birkin bag and MetaBirkin, as well as the consideration of bad faith consumer confusion by the

will still make using NFTs cumbersome and unlikely to be used in wholly “non-commercial” ways.


Further, University of Kentucky Law professor Brian Frye claims these developments “require brands and trademark practitioners, alike, to wrap their heads around what is taking place, and understand the nature of the claims they want to make and why they want to make them.” Id. Due to the nuisances of NFTs, the NFT “cannot be destroyed without dismantling the blockchain.” Id. Rather, “the best outcome for a brand may be to have the NFTs sent to a burn address . . . .” Id. However, even this process does not prevent copycats from recreating the images.

\(^{56}\) See Moish E. Peltz, Hermès v. Rothschild: A Landmark Decision for Trademarks and NFTs, FALCON RAPPAPORT & BERKMAN LLP (Feb. 10, 2023), archived at https://perma.cc/2ZQY-FL3N (describing the lawsuit between Hermès International and Mason Rothschild).

\(^{57}\) See id. (detailing the background for each of the parties).

\(^{58}\) See id. (explaining the result of the 2023 verdict in favor of Hermès). See also Bloomberg, Hermes Sales Surged Despite China Shopping Disruptions, BUS. OF FASHION (Feb. 17, 2023), archived at https://perma.cc/CD6B-9QZ6 (highlighting the 23% increase in sales by Hermes International in the fourth quarter of 2022).

\(^{59}\) See Peltz, supra note 56 (highlighting the jury’s rejection of Rothschild’s First Amendment defense).
infringing party Rothschild. While this verdict is the first of its kind, the implications of the novelty of this suit prove there is still much to be discovered regarding First Amendment defenses to trademark infringement claims, and how future courts will address expressive adaptions of brand names.

III. Premise

A. Two Sides to Every Lawsuit

In January of 2022, StockX launched its Vault NFT collection comprised of nine NFTs; each NFT in the vault is tied to a physical item that StockX sells. Eight of the nine Vault NFTs prominently display Nike’s marks and are associated with Nike products. According to the Vault NFT terms, after a consumer purchases a Vault NFT, the consumer “gains title to both the purchased Vault NFT and the Stored Item to which the NFT corresponds, and the consumer automatically makes use of StockX’s Vault Services (i.e. storage of the physical goods in StockX’s facility).” This represents a

---

60 See Peltz, supra note 56 (discussing the seven-part balancing test the jury was provided with when determining their verdict).
Regarding trademark infringement, the jury was provided with a 7-part balancing test that included factors such as: the similarity between Hermès Birkin bags and a MetaBirkin NFT, whether the products competed for the same consumers, whether Rothschild acted in bad faith, and the likelihood that Hermès would sell their own NFTs using the Birkin mark. Although no one factor is determinative, the jury necessarily evaluated these factors in its finding of infringement. Additionally, a requisite to finding trademark dilution is the jury finding that Hermès’ BIRKIN mark is famous, which the jury must have necessarily found.

Id. Further, the court did not discuss copyright in this case at all. Id.


63 See Nike, Inc. v. Stockxx LLC, No. 1:22-CV-00983, slip op. at 1 (S.D. N.Y. Jan. 9, 2023) (detailing the background of the offenses of StockX to Nike).

64 See Benjamin C. Stasa, Nike v. StockX Case Highlights Many Unanswered Questions About IP and NFTs, BROOKS (Aug. 25, 2022), archived at
newfound example of how NFTs may be utilized in advertising as the NFT is linked to the sale of a physical product.\textsuperscript{65} The purchaser of Vault NFT has the option to redeem the NFT for the actual sneaker, or the right to resell the NFT.\textsuperscript{66} However, the terms further state that StockX “retains the right to unilaterally redeem a Vault NFT for so-called ‘Experiential Component,’ and can cancel or take away the NFT,” meaning the Vault Owner never receives the physical version of the shoes, loses their exclusive access which comes with the NFT, and can lose ownership of the NFT itself.\textsuperscript{67} Yet this provision directly conflicts with the listed benefits of the NFT beyond ownership of the physical shoe, such as “exclusive access to StockX releases, promotions, events, as a result of ownership.”\textsuperscript{68} The effects of this conflict can only hurt the consumer by providing misleading

\textsuperscript{65} See Mike Calia, Online marketplace StockX hits back at Nike over claims of counterfeit shoe sales, CNBC (Jun. 6, 2022), archived at https://perma.cc/BS7L-JASM (highlighting the confusion regarding NFTs and infringement). The articles quotes StockX CEO Scott Cutler’s perspective on the lawsuit, “Nike’s recent allegations lack merit, demonstrate a lack of understanding of the modern marketplace, and display anticompetitive behavior that will stifle the secondary market and hurt consumers . . . .” \textit{Id.}

\textsuperscript{66} See Stasa, \textit{supra} note 64 (detailing the benefits that come with the StockX Vault NFT).

\textsuperscript{67} See Wynne Davis, What is StockX and why is Nike suing them?, NPR (May 12, 2022) archived at https://perma.cc/ZY5M-WPN8 (detailing the terms within the StockX Vault NFTs). \textit{See also} Nike, Inc., v. StockX LLC, 2023 WL 144718 at *1 (describing the experiential component within the NFT).

\textsuperscript{68} See Complaint at 2, Nike, Inc., v. StockX LLC, 2022 WL 340664 (S.D. N.Y. 2023) (No. 1:22-CV-00983) (describing Nike, Inc.’s claims asserted against StockX). The complaint states: [W]ithout Nike’s authorization or approval, StockX is “minting” NFTs that prominently use Nike’s trademarks, marketing those NFTs using Nike’s goodwill, and selling those NFTs at heavily inflated prices to unsuspecting consumers who believe or are likely to believe that those “investible digital assets” (as StockX calls them) are, in fact, authorized by Nike when they are not. Unlike its e-commerce business which caters to buyers and sellers of goods originating from various companies, nearly all the NFTs minted by StockX to date are Nike-branded NFTs, yet none of those NFTs originate from Nike.

\textit{Id.}
promotion and unclear purchasing terms which creates customer confusion, as well as damage to the Nike brand.\(^{69}\)

Upon notice of the StockX Vault NFT collection, Nike filed a lawsuit, stating StockX is minting NFTs that use Nike’s trademark, profiting off Nike’s goodwill and consequently, misleading consumers as to the heavily inflated prices of the NFTs.\(^{70}\) StockX argues however, that each Vault NFT is tied to a specific product, such as a pair of Nike sneakers it bought second-hand from its rightful owner, which is being sold on their marketplace.\(^{71}\) Further, StockX invokes the first sale doctrine, arguing that its use of the Nike branding and images as part of its display and sale of Vault NFTs are proper as an entity “can resell goods bearing a trademark, such as a logo or brand name, after the trademark owner has.” \(^{72}\) However, the pricing of the StockX NFTs supports the NFTs being a digital asset separate from the resale of the sneaker.\(^{73}\)

\(^{69}\) See Landon Wilneff, Nike v. StockX: “Running” to NFTs, IP BYTES (Nov. 19, 2022), archived at https://perma.cc/QG5W-JN3K (emphasizing the confusion StockX NFTs created amongst consumers, and how this is infringement to Nike).

\(^{70}\) See Complaint at 2, Nike, Inc., v. StockX LLC, 2022 WL 340664 (S.D. N.Y. 2023) (No. 1:22-CV-00983) (describing Nike, Inc.’s claims asserted against StockX). The complaint states:

[W]ithout Nike’s authorization or approval, StockX is “minting” NFTs that prominently use Nike’s trademarks, marketing those NFTs using Nike’s goodwill, and selling those NFTs at heavily inflated prices to unsuspecting consumers who believe or are likely to believe that those “investible digital assets” (as StockX calls them) are, in fact, authorized by Nike when they are not. Unlike its e-commerce business which caters to buyers and sellers of goods originating from various companies, nearly all the NFTs minted by StockX to date are Nike-branded NFTs, yet none of those NFTs originate from Nike.

Id.

\(^{71}\) See Rossow, supra note 62 (describing StockX’s response to Nike, Inc.’s claims).

\(^{72}\) See Stasa, supra note 64 (detailing StockX’s defense to Nike, Inc.’s infringement claims).

\(^{73}\) See id. (arguing the price disparity as a key factor in determining the outcome of the lawsuit). Stasa explains,

For example, Nike alleges that the 2022 version of its Nike Dunk Low sneaker will retail for $100 on the Nike website and the average resale price of the 2021 physical version on StockX’s website was $282 as of February 2, 2022. However, the average price of the Vault NFT linked to the 2021 Dunk Low shoes as of the same date was $809, with the highest trade being $3,500. In other words, there is a major disconnect (nearly 1000 percent) between the price of the physical shoe and the price of the digital
Although there have been other notable lawsuits over trademark infringement among major corporations, this StockX case is particularly important because it involves two brands who have previously benefitted from a working relationship, but where new technologies have allowed space for potential infringement. While there is not yet a decision regarding this case, StockX and Nike’s arguments are very telling of where the foundational issues of NFTs within brand partnerships and advertising may lie. More importantly, the ruling of this case will show where the future of regulating such partnerships and advertising within the Metaverse is headed.

B. How Brands Are Using NFTs

As the decision from cases like Nike, Inc. v. StockX LLC unfold, brands are increasingly utilizing NFTs in promotions and

Id. 74 See What Do Brands Stand to Gain in Fights Over Trademarks in the Metaverse?, supra note 55 (opining that brands may not benefit from acting in instances where infringement may have occurred). The article states, While the rise of NFTs and unauthorized trademark uses within the metaverse do not create “any kind of existential problems for trademark law,” [University of Kentucky Law professor Brian] Frye says that they do “require brands and trademark practitioners, alike, to wrap their heads around what is taking place, and understand the nature of the claims they want to make and why they want to make them.” This includes thinking about “whether these are the types of uses that we are actually entitled to stop [under trademark law] in the first place,” particularly as “the way that people are doing art and speaking about the world is changing.”

Id. 75 See Davis, supra note 67 (explaining the viewpoints of both Nike, Inc. and StockX). Further, Nike, Inc. stated that, “StockX's use of Nike's marks is, upon information and belief, intentionally deceiving consumers into believing that Nike sponsors or approves of the Vault NFTs,’ Nike said, adding that it is not a collaboration between the two companies and Nike did not authorize the NFTs being sold.” Id. See also Rossow, supra note 62 (quoting parts of StockX’s answer to the complaint). StockX maintains this is, “no different than major e-commerce retailers and marketplaces who use images and descriptions of products to sell physical sneakers and other goods, which consumers see (and are not confused by) every single day.” Id.

76 See Stasa, supra note 64 (opining the disconnect and confusion between consumers and emerging assets such as NFTs).
Brands are capitalizing on opportunities for monetization amongst their consumers by strengthening their connections with their potential buyers through the selling of NFTs. Further, companies are experimenting with advertising among the

---

77 See Arif Kazi, How brands are using NFTs for marketing – are they worth it, FIN. EXPRESS (Oct. 2, 2022), archived at https://perma.cc/UNB9-T4TX (listing examples of brands that are utilizing NFTs in marketing and advertising initiatives). Brands include McDonald’s, who minted a limited number of MCNFTs to promote the re-release of the McRib. Id. The 10 MCNFTs were made available to those who reshared the brand’s invitation tweet—it saw 90k+ retweets by the start of 2022. Id. A different example regarding merchandise involves metaverse platform Decentraland, who “hosted an immersive Fashion Week wherein luxury fashion brands like Dolce & Gabbana, Tommy Hilfiger, and Forever 21, among others participated. Apart from driving the brands’ engagement with the visitors, the platform also allowed visitors to buy NFT merchandise that was exclusively a part of the show.” Id. Lastly, an interactive example includes Anheuser-Busch, who hosted a #NFTBeerFest at its flagship brewery where holders of the Budweiser Heritage Can NFT or Royalty Collection NFT were provided with free beers, performances, and other freebies at the festival. Id. See also Maghan McDowell, Metaverse Fashion Week: The hits and misses, VOGUE BUS. (Mar. 29, 2022), archived at https://perma.cc/8AGM-FT83 (giving an in-depth summarization of Decentraland’s Metaverse Fashion Week). Further, CEO of Tokens.com Andrew Kiguel noted of the event, “[i]t is amazing to see so many brands validating the metaverse as a new venue for advertising and reaching consumers.” Id. See also Hermès Int’l, 603 F.Supp.3d at 100–101 (outlining newfound issues regarding NFTs and trademark infringement). In this case, Defendant Rothschild created a collection of NFTs titled “MetaBirkins” each of which depicted an image of a blurry faux-fur covered Birkin handbag. Id. at 100. These NFTs sold for prices comparable to real-world Hermès Birkin handbags. Id. at 101. Plaintiff Hermès claimed trademark infringement upon their Birkin and Hermès trademark. Id. at 100. The court used a test applied in Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989) which suggests application of the Lanham Act only where “public interest in avoiding consumer confusion outweighs the public interest in free expression.” Id. at 103. Further, the test “will normally not support the application of the [Lanham] Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.” Id. See Hermès Int’l v. Rothschild, 654 F.Supp.3d 268, 104 (S.D.N.Y. 2022) (emphasizing the factors of artistic relevance and potential confusion to consumers with the use of trademarks). Given sufficient facts supporting the use of the trademark as not artistically relevant and misleading causing confusion, defendant’s motion to dismiss was denied. Id.

78 See Kazi, supra note 77 (listing several brands who utilize NFTs for marketing and advertising). Brands also use NFTs to promote philanthropic endeavors to create a sense of community amongst consumers, such as Ray-Ban who partnered with German 3D designer Oliver Latta to mint an Aviator Sunglasses NFT to be auctioned off for the Italian Art Trust, or Gucci who created an NFT based off its Winter and Fall 2021 Collection and auctioned it through Christie’s where proceeds were donated to UNICEF USA. Id.
Metaverse through virtual reality headsets. Virtual reality games are increasingly utilizing in-game advertisements, allowing its user to interact with a 3D virtual product placed by an advertiser in an unprecedented way. Conversely, ‘utility’ NFTs, such as StockX’s Vault NFTs, allows brands to grant their consumer base access to exclusive events and content in the physical world, private sales of new pieces and collections, and other activities that bring additional value.

While these exclusive concepts are not new to the physical space, the incorporation of NFTs into advertising create a new market for virtual personalities and notable persons to be used within the Metaverse – such as Bella Hadid’s meta-nation of herself. Given the futuristic nature of the virtual realm, issues will arise pertaining to the subject rights of the NFT for which the NFT is based. Consider a circumstance where an individual purchases an NFT of Hadid, and uses it to market their own services or products without her consent within a virtual reality. Not only can this mislead consumers and create consumer confusion, but it can also damage Hadid’s personal brand as well as her prior contracting obligations with corporations. Corporations must educate themselves on the Metaverse and

---

80 See id. (explaining the product placement advertisements among VR).
81 See Kazi, supra note 77 (articulating how brands may create NFTs to further branding initiatives, allow exclusive access to purchasers, or donate NFT proceeds to charitable causes).
82 See Dean, supra note 1 (describing the perks and exclusive content access that comes with the CY-B3LLA NFT).
83 See Betül Çolak, Legal Issues of Deepfakes, INST. INTERNET & JUST SOC’Y (Jan. 21, 2021), archived at https://perma.cc/TDVG-23VY (detailing the questions addressed regarding the copyright of an artificial simulation which harms the person to which the simulation is based). See also See What’s the Law on Deepfake Celebs in Ads and Entertainment, LITTLE BLACK BOOK (Jan. 24, 2023), archived at https://perma.cc/MK7M-Z6SR (highlighting the concerns among deepfakes and public perception).
84 See Steinman & Lawrence, supra note 13 (detailing the legal implications of advertising in the Metaverse).
85 See Gregory J. Chinlund & Kelley S. Gordon, What are the copyright implications of NFTs?, REUTERS (Oct. 29, 2021), archived at https://perma.cc/B3YW-9X9V (detailing how NFTs impact copyright owners). The article notes that the “sale of an NFT does not necessarily transfer the underlying copyright in the work . . . .” Id.
proactively monitor for infringement, but also leverage artistic partnerships to advertise their brands.\textsuperscript{86}

C. Celebrity Deepfakes

Celebrity deepfakes – digital simulations of celebrities through the use of image melding technology – have begun growing in popularity and appearing in advertisements with or without the celebrities’ permission.\textsuperscript{87} These appearances, while new to the marketing industry, raise complex legal and ethical questions regarding the unauthorized use of a celebrity’s image under right of publicity laws.\textsuperscript{88} The digital simulations allow for computer generated renditions of Hollywood celebrities and business notables alike to appear to say and do things they never did.\textsuperscript{89} This creates immense space for widespread consumer confusion as the people who view these simulations do not know whether the person actually said, did, or supports the following

\textsuperscript{86} See Tariq Akbar, \textit{The Legal Factors Companies Must Consider When Exploring NFTs}, FORBES (Feb. 24, 2022), archived at https://perma.cc/NLT5-T9XC (highlighting practices companies should utilize to successfully incorporate NFTs into their marketing and advertising).

\textsuperscript{87} See Patrick Coffee, \textit{‘Deepfakes’ of Celebrities Have Begun Appearing in Ads, With or Without Their Permission}, WALL ST. J. (Oct. 25, 2022), archived at https://perma.cc/ZRR8-C5S2 (describing the ethical and legal issues with real life-like celebrity digital simulations in advertising). \textit{See also} Vejay Lalla, Adine Mitrani & Zach Harned, \textit{Artificial intelligence: deepfakes in the entertainment industry}, WORLD INTELL. PROP. ORG. (June 2022), archived at https://perma.cc/PV9A-MWZH (outlining the ways deepfakes may help or hurt the entertainment industry).

Benefits may include scalability of allowing an actor to appear in commercials or websites all over the world, or repurposed use of talent within authorized horizontally or vertically integrated companies. \textit{Id.} However, negatives may include unauthorized use of talent furthering misappropriation of likeness, or exploitation of current actors while disregarding up and coming actors. \textit{Id.}

\textsuperscript{88} See Coffee, supra note 87 (emphasizing the unauthorized use of celebrity digital simulations can manipulate a celebrity’s brand and reputation). \textit{See also} Cass R. Sunstein, \textit{Can the Government Regulate Deepfakes?}, WALL ST. J. (Jan. 7, 2021), archived at https://perma.cc/U2JM-9CLW (discussing whether the government can regulate deepfakes considering First Amendment, free speech, and right to publicity applications).

\textsuperscript{89} See Sunstein, supra note 88 (giving an example of a 2021 “alternative Christmas address” depicting Queen Elizabeth II cracking jokes and performing a dance popular on TikTok). The video was created as a warning regarding deepfakes, given artificial intelligence and machine learning may produce an exact replica of notable persons doing and saying things they never did, or never would do. \textit{Id.}
ideas or products. Where social media marketing is the front liner for product promotion, the deepfake environment is extremely dangerous not only for the consumer, but also for the person to which the deepfake is based upon.

The celebrity deepfake simulation, when viewed for purposes of advertising, is much like a NFT that embodies a real person. Both recreations may contain references to celebrities, influencers, and notable people, and may cause consumer confusion given when used to promote a product or service which is not authorized by the inspired subject of the simulation. The unauthorized use of deepfakes has the power to manipulate celebrities’ brand and reputation, and create difficulties regarding the correlating unauthorized digital reproductions of themselves. While some simulations may constitute broad parodies, an exception to Copyright Law, others may not as easily fool a viewer.

A key factor in determining whether deepfakes have approached misappropriation of likeness and other similar claims must be based

---

90 See Coffee, supra note 87 (explaining the negative impacts celebrity deepfakes have on celebrities).
91 See Genevieve Perez & Jason Mueller, “Deepfake” Technology: Very Real marketing Value...and Risks, NAT’L L. REV. (May 1, 2020), archived at https://perma.cc/TXM2-2Z3M (describing the potential for abuse within celebrity deepfakes and advertising). The article states a deepfake ad as “a mixture of wonder at the technology’s capabilities, and concerns about misuse and fraud.” Id.
92 See id. (highlighting how digital simulations in general may be harmful for celebrities).
93 See id. (articulating the space for consumer confusion regarding celebrity simulations).
94 See Coffee, supra note 87 (explaining how unauthorized deepfakes may hurt the celebrity). See also Perez & Mueller, supra note 91 (highlighting the difficulty viewers have between “distinguishing between ads with actual people and those that have been digitally altered . . . .”). Further, the article states that “advertisers should of course always obtain consent from those appearing in their ‘deepfake’-powered ads.” Id. See also The Impact of Deepfake Technology on Digital Marketing and Advertising, RESPEECHER (Mar. 30, 2021), archived at https://perma.cc/8BZD-QUKY (describing deepfakes as “the most harmful form of artificial intelligence-based criminality . . . .”). The articles states, “[a]ccording to various estimates, up to 96% of deepfake videos circulating on the internet are either pornography or videos with political topics . . . . This is largely due to the fact that the negative examples of deepfake gain more traction than do the positive ones.” Id.
95 See Lalla et al., supra note 87 (detailing how the belief of whether the subject of the simulation is real determines whether the simulation would likely be considered a parody). See also 17 U.S.C. § 107, supra note 52 (defining the fair use exception under copyright law).
on the celebrity in question’s authorization of such use. Authorized use of deepfakes could completely alter the scope of advertising, as huge stars would not be required to be present on set or appear before cameras. However, unauthorized use opens the door to a world of infringement, especially with the expansion of social media and the ease at which false information is spreading. Celebrities will likely be subject to proliferation of unauthorized digital reproductions of themselves and the manipulation of their brand and reputation.

Given the radical nature of these nuances, law makers have begun to address the deepfake phenomenon but have yet to determine how to regulate deepfakes within commercial advertising. Even in cases

96 See Coffee, supra note 87 (explaining the difference between authorized use of a deepfake and unauthorized use). Further, there is a large gray area regarding deepfakes as many current celebrity contracts do not account for this phenomenon yet. Id.

97 See Lalla et al., supra note 87 (opining the financial savings that deepfakes would have on the advertising industry as production would not need the subject to be present during each re-taping of an advertisement).

98 See Coffee, supra note 98 (stating the ease at which deepfakes may be created allows for heightened probably that small businesses and individual creators may create ads with unauthorized celebrity deepfakes). Further, the language of celebrity contracts written before the creation of this technology may allow for marketers to use existing footage to create deepfake videos. Id. A clause protecting new use of likeliness will become necessary to protect against contract vagueness. Id.

99 See Çolak, supra note 83 (listing the legal issues with deepfakes). Deepfakes have the potential to violate human rights, right of privacy, personal data protection, as well as copyright infringements. Id.

100 See Adi Robertson, Virginia’s ‘revenge porn’ laws now officially cover deepfake, THE VERGE (July 1, 2019), archived at https://perma.cc/6DAX-5RKB (describing the Virginia law banning the spreading of nude images or video “‘with the intent to coerce, harass, or intimidate’ another person.”). The amendment defines deepfakes as “‘a falsely created videographic or still image’ – which could refer to ‘deepfakes’ video but also Photoshopped images or otherwise faked footage.” Id. See also Tex. S.B. 751, 86th Leg., R.S. (2019). (outlining the proposed deepfake regulation bill of Texas). The proposed bill states:

AN ACT relating to the creation of a criminal offense for fabricating a deceptive video with intent to influence the outcome of an election. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: SECTION 1. Section 255.004, Election Code, is amended by adding Subsections (d) and (e) to read as follows: (d) A person commits an offense if the person, with intent to injure a candidate or influence the result of an election: (1) creates a deep fake video and (2) causes the deep fake video to be published or distributed within 30 days of an election. (e) In this section, "deep fake video" means a video created with artificial
where a deepfake’s use may not be authorized, such as the unauthorized use of Woody Allen in an American Apparel billboard, if there is not harm created sufficient to constitute a claim for libel, then plaintiffs of this claim will likely not be able to recover damages—regardless of their likeness being used without their permission. Deepfakes have the potential to aggravate the spread of misinformation across internet platforms, as well as infringe upon the rights of the subjects of the digital simulations.

IV. Analysis

A. Critical Implications

Undoubtedly, the issues that lay at the crux of NFTs and advertising, such as consumer confusion and unauthorized use of likeness, may appear to be farfetched. However, they must be addressed to avoid a future of misappropriation, infringement, and unauthorized use of likeness. Consider a situation where the intelligence that, with the intent to deceive, appears to depict a real person performing an action that did not occur in reality.

SECTION 2. This Act takes effect September 1, 2019.

---

101 See Nicholas Casey, American Apparel, Woody Allen Settle Lawsuit, WALL ST. J. (May 19, 2009), archived at https://perma.cc/B3S9-42W2 (detailing the $5 million settlement between American Apparel and filmmaker Woody Allen). “Mr. Allen took issue with American Apparel’s billboards in New York and Los Angeles that showed him dressed as a Hasidic Jew, a scene from ‘Annie Hall.’” Id. Allen claimed that photo on the billboard was used without his permission, and American Apparel calculatingly took his name, likeness, and image and used them to promote their business. Id. See also Sunstein, supra note 88 (discussing a 2012 Supreme Court decision where “the First Amendment prohibits the government from regulating speech simply because it is a lie.”). Under current law, deepfakes may be subject to libel if there are damaging to the subject’s reputation, however most deepfakes have not been used in negative contexts, furthering the difficulty in determining the rights of the deepfake subject. Id.

102 See Çolak, supra note 83 (detailing the dangers of deepfakes within politics and the spread of misinformation, dangers to women in the form of revenge porn, manipulation of the public, and personal data violations).

103 See Dean, supra note 11 (acknowledging the need to regulate within the “digital realm” which encompasses NFTs and cryptocurrencies as NFTs within advertising becomes more popular).

104 See Douglass, 769 F.2d at 1137 (highlighting the court’s reasoning behind the Plaintiff’s right to recovery under false light invasion of privacy). The court indicated that while the Plaintiff did not have a claim for defamation, the Defendant’s
The aforementioned NFT of Bella Hadid is purchased by a brand, and then is used within their own campaign to promote their products, such as couture outfits or accessories. Metaverse fashion shows are already taking place, such as the Decentraland Metaverse Fashion Week which took place in March 2022. While the fashion show exhibited cats as models wearing high couture outfits, it will not be long before these brands want to contract with real life models to walk in their shows. Given Hadid’s career as a supermodel, a competing brand’s imaging of her would likely cause conflict with any brands she is already contracted with. More importantly, this imaging would be completely out of her control. The use of a digital rendition of a person’s likeness, which initially might be authorized given the authenticated purchase of the NFT, will cause issues once the rendition nonconsensual use of the photographs placed her in a false light to which she did not authorized. This case can be applied to visual representations of persons concerning unauthorized copied use of likeness. See also Downing, 265 F.3d at 1007–08 (9th Cir. 2001) (restating the eight factors to be considered regarding likelihood of confusion in celebrity cases).

1. the level of recognition that the plaintiff has among the segment of the society for whom the defendant's product is intended; 2. the relatedness of the fame or success of the plaintiff to the defendant's product; 3. the similarity of the likeness used by the defendant to the actual plaintiff; 4. evidence of actual confusion; 5. marketing channels used; 6. likely degree of purchaser care; 7. defendant's intent on selecting the plaintiff; and 8. likelihood of expansion of the product lines.

See NFT Risks and Opportunities in the IP, Advertising, and Brand Management Spaces, supra note 15 (detailing copyright ownership issues within NFTs). Further, there will likely be a rise in copyright infringement due to NFTs allowing infringers to commodify art by creating tokens without the permission of the original artist. See McDowell, supra note 77 (giving the background on Decentraland Metaverse Fashion Week).

See McDowell, supra note 77 (detailing the models of the show were cats, as well as other intricacies of the fashion week event).

See Carroll, supra note 18, at 995 (articulating issues of dissemination to consumers).

See Kazi, supra note 77 (describing how fashion shows have begun taking place within the metaverse). See also McDowell, supra note 77 (detailing how Decentraland, the metaverse fashion show, included a performance by artist Grimes as well as offered cat models walking in couture outfits). The article further describes how the fashion week included real life events that model real life fashion shows in the hopes of reaching consumers to purchase products, as well as advertise high fashion brands. See also McDowell, supra note 77.
is used for an unlicensed purpose.\textsuperscript{110} The FTC Act and the Lanham Act must be applied in tandem to police these unprecedented spaces in advertising with a focus on the metaverse – whereby the FTC Act must be strictly applied to reduce ‘unfair or deceptive acts or practices,’ and the Lanham Act applied to protect against false advertising.\textsuperscript{111}

\textbf{B. Application of Law}

There is an enormous gray area of uncertainty regarding the nature of celebrity deepfakes and their unauthorized use paralleled with their misappropriation of likeness.\textsuperscript{112} The law regarding both deepfakes and a digital presence within the metaverse should be considered and applied in conjunction with one another.\textsuperscript{113} Case law in Virginia has expanded the definition of deepfakes, and the

\textsuperscript{110} See McDowell, supra note 77 (describing how brands are trying to advertise through the metaverse). Alex Lambert, creative director of content production studio Happy Finish—who has worked with Balmain, D&G Group, and H&M Group—spoke of the metaverse fashion show. Id. He stated, “[i]t’s about moving towards a point where we can bring virtual elements into the real world. Once you’re able to buy a virtual Chanel jacket and then wear that item in the real world, that’s when things will really start to change.” Id.

\textsuperscript{111} See Frankfurt Kurnit Klein & Selz PC, supra note 28 (stating the principal statutes that regulate advertising as “the FTC Act, which prohibits ‘unfair or deceptive acts or practices’; the Lanham Act, which is the federal false advertising statute; and the Dodd-Frank Wall Street Reform and Consumer Protection Act.”). See also 15 U.S.C. §§ 41–58, supra note 29 (defining the elements of the Federal Trade Commission Act as the primary statute of the Competition Consumer Protection).

\textsuperscript{112} See What’s the Law on Deepfake Celebs in Ads and Entertainment, supra note 83 (outlining the growing concerns among deepfakes and public perception). The article quotes Ron Moscona, partner at international law firm Dorsey & Whitney – experts in intellectual property law and technology law. Id.

This kind of show definitely tests the limits. It would need to make it abundantly clear that the deepfake images are not real and also that the show is not sponsored or approved by the individuals being portrayed. He continues, [t]his is usually not a problem if the comedy clearly makes fun of celebrities by way of parody or pastiche. However, the deepfake technology – particularly if it is high quality – clearly increases the risk of people getting the wrong end of the stick.

\textsuperscript{113} See Robertson, supra note 100 (describing how revenge porn laws in Virginia will cover deepfakes, while expanding the definition of deepfakes and how they must be regulated). While revenge porn is foundationally different than a celebrity deepfake, there might be an overlap in the creation of a counterfeit image which hurts the subject of the photo. Id.
corresponding ways to regulate them.\textsuperscript{114} On a foundational level, the digital presence of an NFT whose subject is based on a living individual should be considered the same as another edited videographic or still image living online.\textsuperscript{115} Examined simultaneously, the law regarding these recreated digital images may be applied as it would traditionally regarding misappropriation of likeness, copyright infringement, and false light of privacy.\textsuperscript{116}

Further, there is a heightened importance regarding the protection of these works in the Metaverse due to companies’ use of marketing with NFTs.\textsuperscript{117} In order to successfully promote the creation

\begin{footnotesize}
\begin{enumerate}
\item See Robertson, \textit{supra} note 100 (describing the Virginia law banning the spreading of nude images or video “with the intent to coerce, harass, or intimidate another person.”). The amendment defines “deepfakes” as “a falsely created videographic or still image – which could refer to ‘deepfakes’ video but also Photoshopped images or otherwise faked footage.” \textit{Id.}
\item See Tex. S.B. 751, \textit{supra} note 100 (outlining the proposed deepfake regulation bill of Texas). The proposed bill states:

\textbf{BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: SECTION 1.} Section 255.004, Election Code, is amended by adding Subsections (d) and (e) to read as follows: (d) A person commits an offense if the person, with intent to injure a candidate or influence the result of an election: (1) creates a deep fake video; and (2) causes the deep fake video to be published or distributed within 30 days of an election. (e) In this section, ‘deep fake video’ means a video created with artificial intelligence that, with the intent to deceive, appears to depict a real person performing an action that did not occur in reality. SECTION 2. This Act takes effect September 1, 2019.

\textit{Id.} The bill not only expands the definition of a deepfake video, but also provides context in which a deepfake would be harmful to the public. \textit{Id.}
\item See \textit{Hermès Int’l}, 654 F.Supp.3d at 272 (outlining newfound issues regarding NFTs and trademark infringement). In this case, Defendant Rothschild created a collection of NFTs titled “MetaBirkins” each of which depicted an image of a blurry faux-fur covered Birkin handbag. \textit{Id.} These NFTs sold for prices comparable to real-world Hermès Birkin handbags. \textit{Id.} at 274. Plaintiff Hermès claimed trademark infringement upon their Birkin and Hermès trademarks. \textit{Id.} at 272. The court used a test applied in \textit{Rogers v. Grimaldi}, 857 F.2d 994 (2d Cir. 1989), which suggests application of the Lanham Act only where “public interest in avoiding consumer confusion outweighs the public interest in free expression.” \textit{Id.} at 275. Further, the test “will not support the application of the [Lanham] Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.” \textit{Id.} at 280.
\item See generally \textit{NFT Risks and Opportunities in the IP, Advertising, and Brand Management Spaces, supra} note 105 (describing the issues between NFTs, false advertising, and brand management). These issues may include consumer confusion
\end{enumerate}
\end{footnotesize}
of new works by consumers, copyright law must be applied to new NFTs to protect their artist from infringement.\textsuperscript{118} As previously mentioned, the NFT only gives the purchaser a certificate of authenticity, yet the work may still be copied and sold online.\textsuperscript{119} The application of current laws to NFTs, along with the regulation of the NFTs subject will promote fair advertising and allow for more creative opportunities within the metaverse for artists and corporations alike.\textsuperscript{120}

regarding the ownership of NFTs and that the purchase of one does not convey copyright for the associated digital image, and market changes regarding NFTs within asset portfolios. \textit{Id.} \textit{See also} \textit{What Do Brands Stand to Gain in Fights Over Trademarks in the Metaverse?}, \textit{supra} note 55 (emphasizing the uniqueness of NFT infringement and subsequent remedies).

\textsuperscript{118} \textit{See NFT Risks and Opportunities in the IP, Advertising, and Brand Management Spaces, supra} note 105 (detailing the importance of enforcing copyright law to protect artists).

\textsuperscript{119} \textit{See Clark, supra} note 43 (comparing the owning of an NFT to that of owning a physical Monet; anyone can own a Monet print, but only one person can own the original). Further, the benefits of NFTs depend on whether you are the artist or collector. \textit{Id.} As the artist, you are given a platform to sell work that there otherwise might not be a market for. \textit{Id.} Some NFT marketplaces also have a feature where artists can get a percentage every time their NFT is sold or changes hands. \textit{Id.} As a collector, you maintain the authenticated ownership of the NFT, being able to post the image online, as well as investment opportunities if the value of the NFT rises over time. \textit{Id.} \textit{See also What Do Brands Stand to Gain in Fights Over Trademarks in the Metaverse?}, \textit{supra} note 55 (stating how copies of NFTs can be produced and how that harms the artist).

\textsuperscript{120} \textit{See What Do Brands Stand to Gain in Fights Over Trademarks in the Metaverse?}, \textit{supra} note 55 (opining that brands may not benefit from acting in instances where infringement may have occurred). University of Kentucky Law professor Brian Frye states,

\begin{quote}
While the rise of NFTs and unauthorized trademark uses within the metaverse do not create “any kind of existential problems for trademark law,” Frye says that they do “require brands and trademark practitioners, alike, to wrap their heads around what is taking place, and understand the nature of the claims they want to make and why they want to make them.” This includes thinking about “whether these are the types of uses that we are actually entitled to stop [under trademark law] in the first place,” particularly as “the way that people are doing art and speaking about the world is changing.”
\end{quote}

\textit{Id.} \textit{See also Hermès Int’l}, 654 F.Supp.3d at 281 (outlining newfound issues regarding NFTs and trademark infringement). Which suggests application of the Lanham Act only where public interest in avoiding consumer confusion outweighs the public interest in free expression. \textit{Id.} at 281. \textit{See Rogers v. Grimaldi} 875 F.2d 994, 996 (2d Cir. 1989) (showing the Rogers test applied). Further, the test will “not support application of the [Lanham] Act unless the title has no artistic relevance to
i. The Fight Against Deception

When broken down, the FTC Act prohibits unfair or deceptive advertising in any medium.121 Given that the future of advertising is moving toward the Metaverse and NFTs, the FTC Act must be strictly applied to NFTs that resemble real people, as well as NFTs that are designed to promote and sell products to consumers.122 When viewed as a source of promotion, NFTs that resemble people—and more importantly, people who have an established fan base—have the potential to mislead consumers by appearing to show that that person endorses the given product.123 By applying the FTC Act while carefully considering these new technological advancements, there will be more opportunities for business to consumer outreach.124 Consequentially, consumers will benefit from transparency regarding products, services, and who is promoting them.125

the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.” *Id.* at 999.

121 See Frankfurt Kurnit Klein & Selz PC, *supra* note 28 (describing the principal statutes that regulate advertising as “the FTC Act, which prohibits ‘unfair or deceptive acts or practices’; the Lanham Act, which is the federal false advertising statute; and the Dodd-Frank Wall Street Reform and Consumer Protection Act.”).

122 See Kazi, *supra* note 77 (listing examples of brands that are utilizing NFTs in marketing and advertising initiatives). Brands include McDonald’s, who minted a limited number of MCNFTs to promote the re-release of the McRib. *Id.* The 10 MCNFTs were made available to those who reshared the brand’s invitation tweet—it saw 90k+ retweets by the start of 2022. *Id.* A different example regarding merchandise involves metaverse platform Decentraland, who “hosted an immersive Fashion Week wherein luxury fashion brands like Dolce & Gabbana, Tommy Hilfiger, and Forever 21, among others participated. Apart from driving the brands’ engagement with the visitors, the platform also allowed visitors to buy NFT merchandise that was exclusively a part of the show.” *Id.* Lastly, an interactive example includes Anheuser-Busch, who hosted a #NFTBeerFest at its flagship brewery where “[h]olders of the Budweiser Heritage Can NFT or Royalty Collection NFT were provided with free beers, performances, and other freebies at the festival.” *Id.*

123 See Coffee, *supra* note 87 (describing the ethical and legal issues with real-life celebrity digital simulations in advertising).

124 See Sundararajan, *supra* note 16 (explaining how companies can benefit from utilizing NFTs).

125 See McDowell, *supra* note 77 (giving an in-depth summarization of Decentraland’s Metaverse Fashion Week). Further, CEO of Tokens.com Andrew Kiguel noted the event, “is amazing to see so many brands validating the metaverse as a new venue for advertising and reaching consumers.” *Id.* See also Kazi, *supra*
C. A Whole New World

Following the Hermès Int’l v. Rothschild verdict in February 2023, Hermès simultaneously reported in a 23% jump in sales revenue for their fourth quarter of 2022.126 Perhaps this was due in part to the notoriety of the case, however, had Hermès and Rothschild collaborated initially, both parties would have likely benefited from the sales of the “Metabirkin” and a trial would have been unnecessary.127 Given the extravagant costs of both the Metabirkin and Hermès Birkin, selling anywhere from $23,000 to $45,100, and $10,000 to $450,000 respectfully, a partnership between the two could have been an unprecedented marketing maneuver connecting both virtual and physical luxury to consumers.128

The NFT marketplace by nature incentivizes original work due to how NFTs are created.129 Given that there is only one authenticated

---

126 See Bloomberg, supra note 58 (detailing the increased sales by Hermes right at the same durational time of the trial).
127 See Bloomberg, supra note 58 (describing that Birkin bag sales grew by a quarter in the fourth quarter of 2022, surpassing all estimates).
128 See Loh, supra note 48 (listing the range of prices MetaBirkins sold for). See also Why are Birkin Bags So Expensive? And Worth the Price, supra note 48 (listing the range of Birkin costs from $8,500 to over $300,000 depending on size, material, and additional features).
129 See Ravikiran A S, supra note 42 (outlining the key features of an NFT).
owner of the NFT, artists and consumers benefit from a transparent sales process without fees or percentages taken out by third parties.130 A common factor responsible for the rise in popularity of blockchain technology is the inability of the blockchain to be copied—there truly only is one authenticated owner.131 While laws regulating the metaverse are essential, public policy regarding the metaverse supports trust and incentives for people to follow the rules of the cyberspace.132 Once companies start adopting NFTs and achieving a level of familiarity with the technology, there will likely be large scale incorporation of NFTs into advertising initiatives.133 Consider again Nike, Inc. v. StockX; given that the Vault NFTs have sold for significantly more than the physical shoes they are linked to, it is likely the court will rule in favor of Nike.134 However, had Nike, Inc. and StockX collaborated together initially, both would have benefitted due to the popularity of the NFTs and the products they are linked to, which

---

130 See Drobitko, supra note 44 (detailing the benefits NFTs allow their artists, such as not sharing profits with third party channels).
131 See Ravikiran A S, supra note 42 (outlining the key features of an NFT).
132 See Carroll, supra note 18 (emphasizing the history of copyright law pertaining to the wide dissemination to consumers); William M. Landes & Richard A. Posner, supra note 18 (summarizing the tradeoff as “[f]or copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.”); Adler, supra note 18 (stating that “copyright is necessary for the ‘progress’ of the arts”).
133 See Akbar, supra note 86 (describing how NFTs could help companies).
134 See Calia, supra note 65 (detailing the price disparity between the StockX NFT and the Nike product they are tied to).
is due in part to the notoriety, reputation, and popularity of Nike, Inc.\textsuperscript{135}

Government regulation must be paired with NFT marketplaces enforcing artists’ rights, as well as businesses adhering to the same advertising regulations within the physical space.\textsuperscript{136} These regulations must include deeper supervision of advertising industry practices, updated reports regarding NFTs and advertising within the Metaverse, and seminars educating businesses on how to practice fair and transparent advertising regarding NFTs.\textsuperscript{137} This collaboration will allow for a whole new world of opportunity for every aforementioned party.\textsuperscript{138}

V. Conclusion

The Federal Trade Commission has a heightened responsibility in policing the Metaverse to avoid consumer confusion as well as misappropriation of likeness regarding NFTs which resemble real persons. There is no question that the future of the Metaverse is confusing, albeit exciting for consumers and artists alike. Intellectual property law must be applied strictly to the Metaverse as it would to preexisting cases regarding infringement and celebrity deepfakes to

\textsuperscript{135} See Calia, \textit{supra} note 65 (highlighting Nike’s claims for consumer confusion based on the popularity of the Nike brand).

\textsuperscript{136} See FTC Proposes to Strengthen Advertising Guidelines Against Fake and Manipulated Reviews, \textit{supra} note 14 (indicating the need for heightened government regulation to avoid consumer confusion and misleading consumers).

\textsuperscript{137} See Truth in Advertising, \textit{supra} note 29 (detailing how the FTC currently monitors advertising).

\textsuperscript{138} See 15 U.S.C. § 1125, \textit{supra} note 30 (defining the elements of false designations of origin; false deception or representation). As defined in the statute,

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities . . . .

\textit{Id.}
promote the use of the Metaverse as well as its expansion. Once this space is effectively regulated, there will be new opportunities for which consumers, artists, and companies may benefit. There is untapped potential for accessibility and brand promotion within the Metaverse, which first requires brands to educate themselves and be open to ultra-modern brand partnerships.

In a world where everything is digitalized and “going viral” can happen to any artist, brand, or individual, companies have an amazing opportunity to expand their outreach and benefit from a new world of ultra-modern advertising which facilitates collaboration with NFT creators. This collaboration, even if at first such creations appear to infringe on the respective brand, is essential to consumer protection as corporate involvement will further heightened regulation of advertising among the Metaverse. Partnerships between artists and companies is the future of advertising and will help to effectively support the regulation of the Metaverse as it continues to expand.