



HOW HIGH FASHION BRANDS AND NFTS ARE CHANGING THE FUTURE OF THE ART MARKET AND TRADEMARK PROSECUTION

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HOW HIGH FASHION BRANDS AND NFTS ARE CHANGING THE FUTURE OF THE ART MARKET AND TRADEMARK PROSECUTION

*Grace Hodges**

I. INTRODUCTION

Luxury fashion is not a new craze. The world has used luxury brands as a status symbol for years. From the inception of the very first luxury fashion brands in the 19th century to runways across the globe, having Louis Vuitton or Gucci clothing, sunglasses or handbags is a sign that you are a high-climber of the world's social rungs.

Incredibly, even with the rise of fast fashion, cheap materials, and the growing wealth disparity worldwide, luxury brands have immense staying power.¹ One trip down Chicago's Magnificent Mile or a stroll down the Champs-Élysées in Paris brings such luxury goods into your line of sight. The goods in these stores are incredibly expensive—even a pair of earring studs can cost upwards of 600 USD or Euros from any one of these stores.² And because they're so expensive, and in such high demand, that brings the cheap knock-offs, replicas, and counterfeits out of the woodwork.

Counterfeit and replica luxury brands have been around for a long time, but a study as recent as 2019 shows the uptick in counterfeit and replica purchases.³ Replicas were originally made

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¹ Joseph DeAcetis, *The Perfect Balance: How Luxury Brands Can Maintain Exclusivity and Still Be Relatable Online* (2020), <https://www.forbes.com/sites/josephdeacetis/2020/10/24/the-perfect-balance-how-luxury-brands-can-maintain-exclusivity-and-still-be-relatable-online/?sh=2899a04f7e44>.

² *Jewelry and Watches*, Hermes.com, https://www.hermes.com/us/en/category/jewelry/silver-jewelry/?facet_category=boucles_d_oreilles# (last visited Apr. 10, 2023).

³ Courtney Wolfe, *When Did Counterfeit Become Cool?* (Aug. 4, 2022), <https://losspreventionmedia.com/when-did-counterfeit-become-cool/>.

to be so close to the original that your peers would believe you were able to afford an original, but now they are considered in fashion.⁴ The International Trademark Association's 2019 research shows that purchases of counterfeits and replicas by Gen Z are largely due to wanting the look of the luxury brand but at a fraction of the price.⁵ Additionally, the rise of social media influencers promoting their purchases of counterfeits has created a surge in counterfeit demand.⁶

So, imagine you like luxury brands, and you want to buy a specific luxury item—specifically, you want a Birkin handbag made by Hermès. You navigate to their website and realize there is nowhere to buy them; there is a waitlist six years long, and even a used bag from Sotheby's is over 30,000 USD.⁷ You don't have a budget, but you want it now, either for status or general desire. What do you do when Birkin bags are no longer available?

You find something called a Digital Birkin, marketed as the new way to own a Birkin bag and art all in one. Digital Birkins are NFTs created by a marketing specialist and digital artist who understands the fashion world, so you feel as though you are getting what you will pay for it. Especially since NFTs are the cool, new digital art form of the world, you know that everyone from artists to celebrities are taking part in buying and selling. You might even think Digital Birkins are by Hermès. But there are conflicting reports: you're not sure if the NFT is a Hermès product or if it's one of those replicas. What's the value given by the Digital Birkin, anyway?

II. BACKGROUND

Hermès International v. Rothschild is the suit drawn out of the previous situation. Hermès, the luxury fashion business that

⁴ *Id.*

⁵ International Trademark Association, *Gen Z: Brands and Counterfeit Products*, United States Country Report (2019).

⁶ *Id.*

⁷ *Hermès Bags*, Sotheby's, <https://www.sothebys.com/en/buy/fashion/handbag/hermes> (last visited Apr. 10, 2023).

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sells Birkin bags, owns the trademark rights in both Hermès and Birkin trademarks and owns trade dress rights in the Birkin bag designs.⁸ Mason Rothschild is a digital artist with a background in the fashion industry.⁹ Rothschild created what he called the “Baby Birkin,” which was an image of a 40-week-old fetus inside a transparent Birkin bag.¹⁰ He then sold that image as an NFT for \$23,500, which then resold for \$47,000.¹¹ With that success, in December 2021, Rothschild created what he titled “MetaBirkins,” which are images of faux-fur-covered Birkin bags, and he proceeded to sell MetaBirkins as NFTs at a price comparable to real Birkin bags.¹²

NFTs, or non-fungible tokens, are a form of digital asset stored on blockchain that has a unique identification code which, in theory, prevents copying.¹³ NFTs tend to function as a form of investment—they increase in value over time, and, when stored in the blockchain, can be easily bought and traded.¹⁴ NFTs are, therefore, a new way to buy and sell art. And buying and selling art, already a not well-regulated marketplace, is far more regulated than buying and selling NFTs.¹⁵

NFTs are often linked to digital media, and once they have been linked to digital media, they are stored in the block chain, along with the “smart contract” that governs the terms of the transactions.¹⁶ A smart contract is a program stored in the blockchain that begins to run automatically “when preconditioned

⁸ *Hermès, International v. Rothschild*, No. 22-CV-384 (JSR), 2022 WL 1564597 (S.D.N.Y. 2022).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Mitchell Clark, *What are NFTs?* The Verge (Jun. 6, 2022, 7:30 AM), <https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq>.

¹⁴ *Id.*

¹⁵ U.S. Dept. of Treas., *National Money Laundering Risk Assessment*, 43 (February 2022).

¹⁶ *Hermès*, 2022 WL 1564957 at 3.

terms are met.”¹⁷ The aforementioned preconditioned terms function similarly to regular contract terms; the terms allow the transfers to have an agreement that automatically governs the sale.¹⁸ Once the digital media and smart contracts have been transferred, the digital media is stored separately from the link on the blockchain.¹⁹

Many popular brands have latched onto the NFT wave, and luxury fashion brands are no exception, as they are beginning to offer NFTs as an alternative form of ownership of their items.²⁰ Hermès currently has plans to expand to NFTs, but at the time the suit was filed, had not expanded their business into the “Metaverse,” or the NFT blockchain storage, according to a trademark application filed in August 2022.²¹ When Rothschild began selling what he called “MetaBirkins,” he intended for the NFTs to be a tribute to Hermès and one of its most famous luxury items.²² Birkin handbags are hugely popular; they are an oft-coveted luxury item and are so desired the waitlist can be years long, according to the website. When asked about “MetaBirkins,” Rothschild stated that he wanted to see if he could replicate the same fervor about Birkin bags with the MetaBirkin NFTs.²³

Rothschild sold the MetaBirkins across four different NFT sale platforms, has advertised the sale through social media presence on both Twitter and Instagram, with slogans like “Not Your Mother’s Birkin.”²⁴ Rothschild professed, too, that there was no real difference to him between owning a “MetaBirkin” and a real Birkin bag because status and wealth is the whole point.²⁵ And, ultimately, consumers found there to be no real difference

¹⁷ *What are smart contracts on blockchain?*, IBM.com, <https://www.ibm.com/topics/smart-contracts> (last visited Apr. 10, 2023).

¹⁸ *Id.*

¹⁹ *Hermès*, 2022 WL 1564957 at 3.

²⁰ *Id.*

²¹ Banquist, Judith. *Hermès reveals plans for Metaverse fashion shows, crypto, and NFTs.*, Cointelgraph.com (Sept. 1, 2022).

²² *Hermès* 2022 WL 1564957 at 3.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

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either; many consumers have assumed “MetaBirkins” to be an Hermès marketing campaign.²⁶ Less understandable but still pervasive is that official sources such as *Elle*, *L’Officiel*, and the *New York Post* all erroneously reported that “MetaBirkins” were part of a partnership between Hermès and Rothschild.²⁷

At that point, Hermès filed suit claiming multiple violations of the Lanham Act, 15 U.S.C. §§ 1501 et seq., alleging unfair competition claims.²⁸ This suit was filed in New York; under New York law, the complainant must also show that the alleged infringer acted in bad faith.²⁹ Additionally, Hermès’s complaint included claims of artistic relevance from *Rogers v. Grimaldi*.³⁰ The court held that the alleged infringement was not artistically relevant, i.e. *Rogers*, but did hold that the alleged infringers use of the mark was explicitly misleading.³¹

III. ANALYSIS

A. *NFTS, the Metaverse, Trademark Infringement*

Trademark infringement traces its roots to the late 18th century, when then Secretary of State Thomas Jefferson stated he thought a law protecting goods and services and the marks associated with them would be prudent.³² While copyright and patent law find their roots in the U.S. Constitution, federal trademark protection would not fully take root until many years

²⁶ *Id.* at 4.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (citing *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).)

³¹ *Hermès, International v. Rothschild*, No. 22-CV-384 (JSR), 2022 WL 1564597 (S.D.N.Y. 2022).

³² “In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law,” 83 *St. John’s L. Rev.* 827 (2010).

later when today's trademark laws were codified in state law, taking from both copyright and patent protections.³³

The reason that NFTs and the ease with which they allow a potential infringer to infringe have become such an important fabric of our conversation into intellectual property protection requires a close look at the intersection of art, digitization, and the spread of information via the internet.³⁴ NFTs seem to present a myriad of issues, especially copyright and trademark issues. For example, NFTs are a new facet of digital art, and digital art protection relies on copyright protection to protect the works.³⁵

Relevant here is trademark infringement. Trademark infringement is defined as the unauthorized use of a trademark or service mark in connection with goods and services in a manner that is likely to cause confusion, deception, or a mistake about the source of the mark, according to the United States Patent and Trademark Office.³⁶ Trademarks exist to protect marks on goods and services; it finds difficulty in being brought before a tribunal if the mark is unregistered, or if the common law trademark enforcement does not apply.³⁷

The discussion surrounding trademarks and their relationship to the metaverse is ongoing and ever-changing. The metaverse, today, can be defined as a “simulated digital environment” that includes certain concepts like virtual reality, social media, and blockchain—each of these are spaces that rely on user interaction to mimic the world we live in today.³⁸ As stated previously, NFTs are stored on blockchain technology, and exist in the form of any kinds of digital property, leaving a good amount of intellectual property stored on NFTs vulnerable to lawsuits.³⁹

³³ *Id.*

³⁴ Cam Thompson, *NFTs and intellectual property: What do you actually own?*, CoinDesk Latest Headlines RSS (2022), <https://www.coindesk.com/learn/nfts-and-intellectual-property-what-do-you-actually-own>.

³⁵ *Id.*

³⁶ 15 USC § 1114.

³⁷ Michael Grynberg, *Trademark Law* 8 (2d ed. 2022).

³⁸ Trademark law, NFTs and the Metaverse, 22 WL 2336180.

³⁹ Clark, *supra* note 13.

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Trademark law specifically has gone through rapid changes due to the metaverse.⁴⁰ Now that fashion brands and industries are getting involved in the metaverse, the importance of registration of marks has increased. Trademark law still exists to protect both consumers and brands, and as noted by major confusion by fashion writers and consumers alike, there is a pretty clear case of confusion over the MetaBirkins and the Birkin bag itself. Hermes's intent to enter the metaverse aside, the continued confusion may bode well for Rothschild, but Hermes's stake in protecting its mark would only become more difficult.

B. *Hermès v. Rothschild* — *Denying the Motion to
Dismiss*

After Hermès filed the lawsuit alleging trademark infringement, the legal impact of the decision is important to the future of virtual IP litigation.⁴¹ While art protection is important, so is consumer protection, and a fair amount of the Hermes argument relies on likelihood of confusion considering people are calling NFTs the next fashion frontier.⁴² Hermes's complaint alleged trademark infringement, trademark dilution, and cybersquatting, with Rothschild then filing a motion to dismiss the Hermes complaint.⁴³

The Lanham Act claims fall under Sections 32 and 42 as well as unfair competition claims under New York law.⁴⁴ New York additionally requires the alleged infringer act in bad faith under *Empress Cubana*. Because trademark infringement necessarily relies on some sort of confusion or mistake of a trade

⁴⁰ Trademark law, NFTs and the Metaverse, 22 WL 2336180.

⁴¹ Demystifying NFTs and intellectual property: trademark and copyright concerns, 2022 WL 2181176.

⁴² The Future of Fashion: NFTs and the Metaverse, Harper's Bazaar.

⁴³ *Hermes Int'l v. Rothschild*, 590 F. Supp. 3d 647 (S.D.N.Y. 2022).

⁴⁴ *Hermès v. Rothschild: A Timeline of Developments in a Case Over Trademarks, NFTs, TFL* (Apr. 4, 2023), <https://www.thefashionlaw.com/hermes-v-rothschild-a-timeline-of-developments-in-a-case-over-trademarks-nfts/>.

or service mark, any improper use of a mark may be subject to claims. Rothschild did not dispute his use of the recognizable imagery/trademark. He explicitly stated that he has used the mark in an attempt to produce some sort of social experiment to see if he could replicate the same Birkin bag craze that already exists.

Because Rothschild admits to the appropriation, the question then becomes whether the dismissal of his claims is necessary. The district court for the Southern District of New York believed that Hermès' claims held enough water to show that there were genuine issues of material fact that would allow its claims to proceed in court. This case provides an interesting framework by which NFTs operate in our consumer-led society.

Here, the parties dispute which test applies. Rothschild argues that Hermès has not stated a real claim that would provide the possibility of relief, and thus all of Hermès's claims should be dismissed in a 12(b)(6) motion. But, even if the claims did give rise to an actual dispute, Rothschild argued that any trademark infringement claims should fail under the Rogers test, a Second Circuit case that addressed specifically the likelihood of confusion issue.⁴⁵ Conversely, Hermès argued that the test should use the eight *Polaroid* factors instead, applying the *Gruner* test.⁴⁶

C. Analysis of the Mark - Rogers test

A proper *Rogers* analysis requires that two standards be met: (1) artistic relevance and (2) explicitly misleading. Hermès argues that the Rogers test has no application, but Rothschild argues it applies in full, that the mark itself fails the test, and thus should dismiss the Lanham Act claims.

Rogers v. Grimaldi dealt with a movie created about the life and career of Ginger Rogers and Fred Astaire.⁴⁷ Ginger Rogers, upon finding out about this movie, objected to it, claiming that the movie (1) gave consumers a false impression that she was involved with the creation or production of the movie under Article 43 of the Lanham Act, (2) violated her right of publicity,

⁴⁵ *Rogers v. Grimaldi*, 875 F.2d 994, 1001 (2d Cir. 1989).

⁴⁶ *Hermès Int'l* at 653 (S.D.N.Y. 2022).

⁴⁷ *Rogers* at 997 (2d Cir. 1989).

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and (3) defamed her by depicting her in a false light.⁴⁸ The court created its two prong test—looking to artistic relevance and whether the infringement is explicitly misleading—and concluded that the movie and Rogers’s claims failed the Second Circuit’s two-pronged test.⁴⁹

The court in *Hermès* follows this same thought as it goes through an analysis of the *Hermès* mark through the *Rogers* test.⁵⁰ The first step of that test is artistic relevance.⁵¹ The threshold for artistic relevance is extremely low. The reason the threshold is so low is intent to ensure that that the qualification will be satisfied unless the use of the mark has “no artistic relevance to the underlying work whatsoever.”⁵² The court agreed that the *Rogers* test applies, but found that *Hermès*’s amended complaint contained sufficient allegations of explicitly misleading actions, denying the motion to dismiss.⁵³

Rothschild claimed he was not using the Birkin mark as a source identifier, allowing the mark to be analyzed under the *Rogers* test.⁵⁴ While the Second Circuit developed the test in response to a movie title, the test is not just applicable to movies, but “is generally applicable to Lanham Act claims against works of artistic expression.”⁵⁵ The amended complaint discusses the possibility that NFTs have artistic relevance and reflect some form of creativity. While digital art existed pre-NFT, NFTs changed the way consumers of digital art can think of and prove ownership of the work.⁵⁶ The smart contract built in provides an immediate paper trail.⁵⁷ Additionally, the fine art world tends to now classify

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Hermès Int’l* at 654 (S.D.N.Y. 2022).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Hermès Int’l*, F.Supp.3d at 103.

⁵⁵ *Cliffs Notes v. Bantam Doubleday Dell Pub. Group*, 886 F.2d 490, 495 (2d Cir. 1989).

⁵⁶ Hamilton, *supra* note 56.

⁵⁷ “Smart Contracts for NFTs.” Real Vision (Jan. 2023).

digital art in NFT format as art, leading again to more value in the NFT.⁵⁸ Rothschild's "MetaBirkins" do constitute a form of artistic expression, which requires balancing the First Amendment concerns with protections offered by the Lanham Act.⁵⁹

Hermès argued that *Rogers* can be distinguished based on the originating source code, the NFT as a URL, and the sale of images.⁶⁰ As discussed above, the Second Circuit has held that this specific test applies to works with artistic creativity.⁶¹ However, the Second Circuit here goes on to say that NFTs simply offer code allowing users to authenticate their purchases and allow for traceable resale, allowing it the protections other commodities with First Amendment protections receive.⁶²

However, this does not necessarily lead to the dismissal of the entire complaint. Artistic relevance is so stated to show that the specific use of the trademark was "non-commercial" in nature. In a different case by a high-end fashion brand, *Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc.*, citing *Rogers*, held that the defendant in the case satisfied the artistic relevance prong where its use of the trademark was not merely "arbitrarily chosen just to exploit the publicity value of [the plaintiffs' mark] but instead had genuine relevance to the film's story."⁶³

The court here found that the amended complaint submitted by Hermes has enough evidence to show that Rothschild intended to associate his "MetaBirkins" entirely with the Birkin Bag rather than intending just an artistic association, and that specifically, he intended it as a tribute to Hermès.⁶⁴ While the MetaBirkins are absolutely a form of artistic expression, the fact remains that there is documented evidence of both consumer confusion and even market confusion, with multiple fashion

⁵⁸ Hamilton, *supra* note 56.

⁵⁹ *Hermes Int'l* 560 F.Supp.3d at 103.

⁶⁰ *Id.*

⁶¹ *Rogers*, 875 F.2d at 1001.

⁶² *Id.*

⁶³ *Louis Vuitton Malletier S.A. v. Warner Bros. Ent. Inc.*, 868 F. Supp 2d 172, 178 (SDNY 2012).

⁶⁴ *Hermès Int'l.*, F.Supp.3d at 105.

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magazines reporting the MetaBirkins project as a partnership with Hermès.

So MetaBirkins clear the artistic relevance bar, but the amended complaint shows a likelihood of confusion in the marketplace, leading the Court to look to the explicitly misleading prong of the *Rogers* test.⁶⁵ Important to this analysis are the factors listed in the *Polaroid* case, specifically explicit misleadingness.⁶⁶ In *Rogers* and *Louis Vuitton* and the *Twin Peaks* case, the court held that the most relevant question was whether the defendant's use of the mark was misleading, specifically "in the sense that it induces members of the public to believe [the allegedly infringing use] was prepared or otherwise authorized."⁶⁷ This standard is a fact-intensive inquiry—the court was not in a position to decide that here due to the opinion being written on a motion to dismiss.⁶⁸

However, the court notes the important factors in analyzing explicit misleadingness to be the strength of the original mark—here, the Birkin mark—and the junior user's bad faith in adopting the original mark, as well as evidence of actual confusion.⁶⁹ These are just a few of the factors from the *Polaroid* case.⁷⁰ And the court additionally notes the amended complaint's allegations may not be overwhelming evidence of explicit misleadingness.⁷¹ However, they do serve to be enough for the court to deny Rothschild's motion to dismiss.⁷²

IV. IMPLICATIONS

⁶⁵ *Id.*

⁶⁶ *Id.* at 106.

⁶⁷ *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993).

⁶⁸ *Hermes International v. Rothschild*, 590 F.Supp.3d 647, 657 (SDNY 2022).

⁶⁹ *Id.* at 655.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 657.

Because NFTs are sold through third-parties on online blockchain, many of the works associated with NFTs include underlying imagery of well-known trade and servicemarks and well-known or public figures. This necessitates intellectual property considerations when creating and transferring NFTs.⁷³

Rothschild's MetaBirkins NFTs emulate the Hermes bag to the point of confusion—in just looking at the two, it has similar shapes and creations. While Rothschild's works could be protected by artistic relevance, his statements on why he created the MetaBirkins are telling on the point of the explicitly misleading prong of the *Rogers* test. He claims it is a statement on consumer culture, and whether consumers could and would ascribe the same value to a virtual, non-wearable handbag that they do to the regular Birkin bag.⁷⁴ This sows doubt into a good faith use of the mark; a good faith use allows defendants in infringement cases to say there was no intent to copy. Here, however, if his statements are accurate, Rothschild intentionally emulated the Birkin bag,⁷⁵ which could be seen as bad faith.

Creating what he called the “digital commodity” MetaBirkin, Rothschild also asserted, in his own words, that the line was blurred between material and virtual wealth. With the expansion into the metaverse by the fashion industry, with Rothschild doing it first, there is an argument that his NFTs hurt Hermès's ability to bring their own digital or virtual fashion products.⁷⁶

V. CONCLUSION

Trademark protection is necessary for our consumer public and for brands, as illustrated by the cases above. Whether the

⁷³ Hamilton, *supra* note 56.

⁷⁴ Hermès just sued this digital artist over his MetaBirkin NFTs, Bloomberg (Feb. 3, 2023, 3:00PM), https://www.scmp.com/magazines/style/luxury/article/3208951/hermes-just-sued-digital-artist-over-his-metabirkin-nfts-mason-rothschild-previously-worked?module=perpetual_scroll_0&pgtype=article&campaign=3208951.

⁷⁵ *Hermes* at 656 (SDNY 2022).

⁷⁶ *Id.*

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recent win by Hermès in the trial against Rothschild will affect the NFT market remains to be seen. The jury found Rothschild liable on all three counts he was charged with, and awarded Hermès damages.⁷⁷ This is a win with regard to IP protection, but whether it is a real deterrence for other digital artists creating NFTs based on a specific brand or to look like a specific brand will likely not come for a long time.

The question of real value is also not solved—Rothschild’s experiment worked well enough, but whether consumers were confused or knew they were buying something or viewing something unaffiliated with Hermès is not entirely clear. There is no answer to these questions, and it entirely depends on the consumer. Do we as a consuming public want these hot-button, high value items for the name affiliation, or do we want status? How this works with regard to NFT ownership too does not quite gain any traction here.

Since fashion brands are now expanding to the metaverse, trademark protection and law needs to continue to change rapidly. Whether high fashion should expand to the metaverse at all remains to be seen, with the problems surrounding NFTs and the issues regarding IP registration, but what is clear is that this litigation will be incredibly influential for the metaverse.

⁷⁷ TFL, *supra* note 44.