

Breaking News - Hermès Makes History With First NFT Trademark Trial Victory

Article By:

Yusef Abutouq

Elizabeth H. Cohen

Michelle A. Cooke

A New York City jury just returned a verdict in favor of Hermès in a historic dispute between the luxury fashion house and digital artist Mason Rothschild over Hermès' alleged trademark rights relating to Hermès' famous Birkin handbag. The jury awarded Hermès \$133,000 in total damages for trademark infringement, dilution, and cybersquatting.

The jury finding that the First Amendment did not shield Rothschild from liability in connection with his MetaBirkins NFTs project is significant, particularly as this matter involved the first trial by jury to consider the interplay of free speech and trademark protection in the context of NFTs. This decision, which may be appealed, provides guidance for artists, brands, and others seeking ingress into metaverse, including to what extent "real world" intellectual property rights apply to and may be enforced in virtual worlds.

Haute-ly Contested NFTs

Throughout the dispute over this past year, the parties have contested each other's characterization of the MetaBirkins NFTs. To Hermès, the MetaBirkins NFTs are merely the instruments of a "digital speculator" looking to exploit one of its most exclusive assets via NFTs. In contrast, Rothschild argues that the MetaBirkins NFTs project, a series of 100 NFT images that depict a range of reimagined Hermès Birkin bags featuring a variety of colorful fur, is digital art and a commentary on the famed BIRKIN bag, consumerism, and animal cruelty within the fashion industry. As a result, he argues that the MetaBirkins NFTs are artistic works that should be shielded from liability under the free speech principles of the First Amendment of the Constitution. The nine-member jury disagreed, finding that the MetaBirkins NFTs were more like commodities that are subject to trademark and other laws, rather than artwork. A factor that may have influenced the jury's decision was evidence suggesting that Rothschild may have seen the MetaBirkins NFTs as a "cash cow." This may have cast doubt on the authenticity of his characterization of the MetaBirkins NFTs as an art project.

The Test is Yet to Come

Although the jury found the MetaBirkins NFTs to be infringing, the final disposition of this dispute remains pending with the possibility of appeal. Given the importance of the issues at stake, the outcome of this case is bound to be subject to debate regardless of any appeal.

Moreover, while no NFT-specific legal test appears to have emerged from this case and the legal landscape for IP in the Metaverse (and beyond) continues to lack clear guidance, this case has nonetheless provided insight on how courts (and juries) may view the interplay of IP and NFTs. The ultimate outcome of this landmark case is likely to form the basis of the emerging law involving IP rights and NFTs.

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