

## Meta Logo Suit May Test How Virtual TM Disputes Unfold

By **Tiffany Hu**

*Law360 (May 19, 2022, 4:04 PM EDT)* -- As companies race to establish their brands in the metaverse, a new lawsuit alleging that Meta's infinity-loop logo is too similar to a Swiss blockchain company's logo could illuminate whether courts are going to play by different rules in the virtual space, attorneys say.

Zurich-based nonprofit Dfinity Foundation's lawsuit filed in California federal court last month aims to block Facebook Inc.'s corporate parent Meta Platforms Inc. from registering a logo that the nonprofit says will harm its business if people were to associate it with Meta's "sordid online privacy history."

The case is among the first Web3-related trademark cases, which means that there's potential for the court to answer novel questions about how trademark use differs in the virtual world and how traditional factors for determining consumers' likelihood of confusion between similar trademarks will be examined, attorneys told Law360. Web3 refers to the idea of a more decentralized version of the internet based on blockchain technology.

"The court likely will not simply focus on how the marks appear in trademark office filings or on billboards or the signs at corporate headquarters," Kristin J. Achterhof of Katten Muchin Rosenman LLP said by email. "The fact that the marks will be used in the metaverse/Web3 space may affect how they are analyzed by the court."

One of Dfinity's primary arguments is that customers are likely to be confused by the two companies' logos because they use the same marketing channels and target the same users. But the infinity symbol by itself is not uncommonly used, which can make cases like this fairly challenging, according to Preetha Chakrabarti of Crowell & Moring LLP.

"There does appear to be some visual similarity between the two logos at issue," Chakrabarti said. "And I understand Dfinity's concern: It perceives its product offerings as diametrically opposed to Meta's, so any confusion could be harmful to its brand."

In its complaint, Dfinity claims that the comparison to Meta harms its business because it would "cause consumers, including users and developers, to question Dfinity's core mission" — which is to provide an open Internet — and it would suggest that Dfinity is affiliated with Facebook's alleged privacy violations and its alleged refusal or resistance to protecting user data.

Given the "growing push" for moving, multidimensional logos in the digital space — including Netflix's fluid "N" logo and Google's animated logo that can transform into a microphone — there's a possibility

that "when used in the metaverse, Meta's logo may morph at times into a shape that more closely resembles that of Dfinity's logo," according to Achterhof. Attorneys have noted, however, that similar logos can coexist in the marketplace without causing confusion if consumers can recognize that the designs don't all come from the same source.

"It will be interesting to see how closely Meta's service offerings intersect with Dfinity's blockchain-focused business model, and whether there is a sufficient overlap in channels of trade for the court to find a likelihood of confusion, assuming the marks are considered sufficiently similar," Achterhof said.

There are a few other companies that have recently launched suits to protect their virtual brands, though most have involved whether nonfungible tokens, or NFTs — unique digital assets that are stored on a blockchain and can be used in the metaverse — infringe physical goods.

In January, French luxury brand Hermes accused designer Mason Rothschild of selling "MetaBirkins"-branded NFTs that rip off the name and look of the iconic Birkin handbag. The next month, Nike filed suit alleging that sneaker resale marketplace StockX's "The Vault" NFT collection was composed almost entirely of unauthorized images of Nike's shoes.

While Dfinity's case may potentially raise novel trademark issues in the metaverse, it may ultimately boil down to a more traditional infringement dispute between two companies that offer similar products using a somewhat similar design in the same channel. Aaron Hendelman of Wilson Sonsini Goodrich & Rosati says that at least for now, he's "betting the latter."

Hope Hamilton of Holland & Hart LLP shared similar sentiments, noting that the companies' "house marks" — marks used to show that all of a companies' products come from the same source — would likely weigh against a confusion finding, especially given that Dfinity's complaint doesn't appear to allege evidence of actual confusion in the marketplace, she said.

Still, "as early Web3 trademark cases proceed to judgment, we may get more insight on some of the open metaverse-specific trademark questions," including how traditional, "offline" trademark rights carry into a Web3 world, and what the parameters of defensible fair use are in the metaverse, Hendelman said.

These types of cases in the metaverse are just beginning to get off the ground, Crowell & Moring's Chakrabarti said.

"How does one create a consumer survey that accurately captures the consumer experience? Will survey respondents be given VR headsets to experience the brands in the metaverse? And what happens if one of those headsets happens to be created by one of the biggest players in the metaverse — and a party here — Meta!"

"There are so many exciting unknowns in this space," Chakrabarti added. "The key is to keep asking these questions."

Counsel for Dfinity and a Meta spokesperson did not immediately respond to requests for comment.

--Additional reporting by Elise Hansen. Editing by Kelly Duncan.

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