刑事與行政制裁區別理論的再檢討
--以酒後駕車的制裁為中心

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大綱

- 1. 現狀、理論與殘存問題
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1. 現狀、理論與殘存問題

- (1) 現狀
  - 同一酒駕行為分別適用刑事、行政制裁規定。
  - 刑法第185條之3第1項第1款：「...處2年以下有期徒刑，得併科200,000元以下罰金」。
  - 道交條例第35條第1項第1款：「機車駕駛人處新臺幣15,000元以上90,000元以下罰鍰，汽車駕駛人處新臺幣30,000元以上120,000元以下罰鍰，並均當場移置保管該汽機車及吊扣其駕駛執照1年至2年...」。

- (2) 理論
  - A. 行政罰與刑罰競合：法律單數（侵害同一法益，從重處斷）
  - B. 行政罰與刑罰區別理論：量的區別說（二者僅有程度差異，本質上並無不同）

- (3) 殘存問題
  - A. 法律單數理論：制裁程度輕重之比較基準難以釐定。
  - B. 刑事與行政制裁「量的區別說」
    - (a) 將「行政目的」考慮進來。
    - (b)「從一種處斷」，僅限於「處罰之性質與種類」相同的部分；「處罰之性質與種類」不同的部分，在為達行政目的所必要的範圍內，無所謂重複處罰的問題。
    - (c)「量的區別說」底下，仍須參照處罰的行政目的，亦即仍有「質的區別」的可能性？
  - C. 程序法的觀點？
    - 取締酒駕，應採取單一或雙重程序標準？

2. 思考軸線

- (1) 實體法上的檢討：禁止重複處罰
- (2) 程序法上的檢討：正當法律程序

3. 實體法軸線：禁止重複處罰

- (1) 臺灣法院見解
  - A. 罰鍰能否與罰金併罰？
    - (a) 臺北地院96交聲106：即便罰鍰比罰金高，法院仍認為在罰金後不能對行為人課予罰鍰。
    - (b) 司法院釋字第751號解釋：行政機關在行為人履行檢察官於緩起訴處分同時所命履行之負擔後，仍有權另外裁處罰鍰的規定，無涉於「一行為不二罰」的違反，未違反「比例原則」。

- B. 刑事制裁外能否吊扣執照？
  - (a) 臺北地院96交聲106：罰鍰以外之沒入或其他種類行政罰，因兼具維護公共秩序之作用，為達行政目的，行政機關得併予裁處」。
  - (b) 臺北地院101交聲更字3：「……就其他種類之緩起訴處分處遇措施及負擔或罰鍰以外之各類行政罰，法無明文規定可扣抵或被扣抵，是此時應認行政機關自得依違反行政法上義務規定對行為人裁處。是本件原處分機關對異議人所為吊扣駕駛執照12個月並應參加道路交通安全講習部分之裁罰，並未違反『一事不二罰』之規定。」。

- (c) 司法院釋字第503號解釋：「處罰之性質與種類不同，必須採用不同之處罰方法或手段，以達行政目的所必要者外，不得重複處罰」。

- —> 在行政制裁的領域，是否構成重複制裁，除了行為數目與其所侵害的法益數目等問題外，還必須綜合衡量處罰種類或處罰目的。

- (2) 美國法院見解
  - A. United States v. Halper, 490 U.S. 435 (1989)：
    - 行政制裁也可能具有懲罰性格，而有「過度懲罰禁止」條款的適用以外，也對於前述可能構成懲罰的行政制裁附加要件限制，亦即限於「壓倒性的不成比例」（overwhelmingly disproportionate），且與補償政府所受損失的目標欠缺合理關連的行政制裁，才能將其視作一種「懲罰」。
    - 一個已經在刑事程序中遭受懲罰的被告，就不能使其再次受到於救濟目的之外，尚具有威嚇及重分配目的的行政制裁。

- B. Austin v. United States, 509 U.S. 602 (1993)
  - 沒收本質上屬於民事或刑事並非重點，應聚焦於沒收是否構成「懲罰」之上。
  - 具有救濟目的的沒收，如果解釋上亦寓有部分懲罰的意涵，就應有「過度罰鍰禁止」條款的適用。

- C. Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994)
  - 即便高稅率及課稅的威嚇目的，不當然使得稅捐能自動被歸類為一種懲罰，但是稅的前述基本特質，與懲罰的目標是具有一致性的。
  - 系爭州稅是以某項犯罪行為的存在為前提，由此可見其徵收確實具有懲罰或禁止的考量，而非只是單純基於稅收的目的
  - 「『稅』構成『重複處罰禁止』條款所禁止的第二次懲罰」。

- D. United States v. Ursery, 518 U.S. 267 (1996)
  - 使用「雙階段分析」（two-part test），作為判斷透過民事程序沒收被告財產的行為，是否構成重複處罰禁止原則下的「處罰」：
    - 首先應衡量立法意圖。
    - 其次，倘若法院認定立法意圖包括救濟在內，則必須查明該等救濟意圖，是否為實際的懲罰意圖與效果所凌駕。
  - 聯邦最高法院主張所謂「民事對物沒收機制」（rem civil forfeitures），並不構成重複處罰禁止條款所禁止的處罰。

- E. Hudson v. U.S., 522 U.S. 93 (1997)
  - 主管機關所制裁的行為，同時也具有刑事可罰性的事實，不足以使罰鍰與停業處分等制裁因此成為刑事制裁。
  - 單純就同一行為課予不同處罰的事實，不足以認為構成「雙重危險條款」的違反。

- (3) 延伸思考：
  - A. 量的區別說？強調的是「制裁目的」
  - B. 質的區別說？強調的是「其他行政目的」
  - C. 兩項區別理論，代表的其實是兩套不同的司法違憲審查基準？

4. 程序法軸線：正當法律程序

- (1) 臺灣法院見解
  - A. 為實施酒精濃度測試攔停之合法性
    - 最高院101 臺上763 ：搜索為強制性之司法處分，如係執行司法警察之犯罪偵查職務，固須符合刑事訴訟法有關搜索之規定，其扣押可為證據或得沒收之物，始告合法；至臨檢係屬非強制性之行政處分，執行一般維護治安之警察任務，其執行程序是否合法，則須依警察職權行使法觀察之，是臨檢之實施手段、範圍，僅能對人民之身體或場所、交通工具、公共場所為目視搜尋，亦即只限於觀察人、物或場所之外表（即以一目瞭然為限），若要進一步檢查，尚不得擅自為之。

- B. 酒精濃度血液測試的合法性
  - 北高行105交上130：「呼氣酒精濃度測試」，是行政調查的範圍，執行員警或原處分機關具有裁量權限；但測試方式倘變更為侵入程度較高的「血液酒精濃度測試」時，就是刑事訴訟證據蒐集的範圍，除非駕駛人屬刑事訴訟法所定「現行犯」，或有法律明文為據，駕駛人甚至沒有要求以抽血方式進行酒測的權利。

- 111年憲判1：
  - 「我國現制下，立法者對違法酒駕行為係兼採行政處罰及刑罰制裁手段，兩種處罰間並無本質屬性之不同，僅依立法者所選定之標準而異其處罰類型」。
  - 由於「駕駛人酒駕行為無論應受行政罰抑或刑罰之制裁，均須以得自吐氣酒測或血液酒精濃度測試檢定之駕駛人體內酒精濃度值為主要證據」，系爭規定所強制取得之駕駛人血液酒精濃度值，即有可能成為酒駕犯罪處罰之證據，從而其所應具備之正當法律程序，「即應與刑事訴訟程序就犯罪證據之取得所設之正當法律程序相當」。

- 刑事與刑事制裁間「量的區別」，不能成為附掛於行政法規的系爭強制抽血規定淪於正當法律程序法外之地的遁詞。

- 正因系爭強制抽血規定有可能作為國家對於酒駕行為發動刑罰權所憑藉的證據，其程序的「規格」更應往刑事正當法律程序靠攏。

- 只不過，憲法法庭前揭判決似乎仍認為法院就強制抽血的正當法律程序，仍有異於刑事搜索程序設計的立法裁量空間（參閱判決理由第30段），畢竟多數意見並未否認強制抽血的合法性，仍容有「事後」審查、判斷的可能性，另外也似乎認同強制抽血合法性的審查、判斷，除了法官以外，檢察官亦有監督查核的正當性。

- (2) 美國法院見解
  - A. Schmerber v. California, 384 U.S. 757 (1966)
    - 違反上訴人意願所為的抽血檢測，並不構成聯邦憲法增修條文第4條所禁止的搜索。
    - 重點在於：執法員警要求上訴人從事抽血檢測是否具有正當性，以及其所用以採集血液檢體的方式與程序是否符合增修條文第4條所定的合理性標準。

- B. Missouri v. McNeely, 569 U.S. 141 (2013)
  - 只有「極為重要的」（compelling）政府執法利益，例如為了避免證據行將滅失的情況時，才足以豁免員警必須事先聲請搜索票，始能從事搜索行為的義務。
  - 即便人體的酒精濃度，會逐漸代謝、終至酒精完全消滅於血液中，但這不代表法院能脫逸於逐案檢視、評估是否具備豁免搜索令狀所需具備的緊急事由的常軌。
  - 警察應該逐一地、在個別個案中檢視豁免搜索令狀的緊急事態是否存在，酒精的代謝，只是衡量是否構成緊急事態所需眾多考慮因素其中的一項，無論如何不能劃定一個抽象、一般、過於寬廣的標準，認為基於血液中酒精會逐漸代謝的事實，一律構成豁免於搜索票取得義務的規範。

- C. Birchfield v. North Dakota, 136 S.Ct. 2160 (2016)
  - 憲法增修條文第4條僅允許就駕駛人酒後駕車的行為進行逮捕後，所附帶的無令狀呼氣測試，但不允許任何無令狀的抽血行為。
  - 憲法增修條文第4條固然允許在逮捕酒後駕車嫌疑行為人時，附帶對嫌疑行為人從事呼氣測試，但倘若要對嫌疑行為人從事抽血檢測，則必須以取得令狀為前提，方為適法。

- D. Mitchell v. Wisconsin, 139 S.Ct. 2525, 2528-2529 (2019)
  - 測試「血液酒精濃度」構成憲法增修條文第4條所欲規範的「搜索」。
  - 無意識的駕駛行為人也涉及到緊急程度的提高；當駕駛行為人的無意識剝奪了官員透過取證器材執行呼氣測試的合理機會時，抽血測試便成為完成血液酒精濃度測試目標的重要手段。

- E. Lange v. California, 141 S. Ct. 2011 (2021)
  - 在微罪案件中，單純『逃逸』的事實本身，不足以支持聯邦最高法院所要求的，豁免進入人民家宅所需令狀的緊急性。
  - 當系爭犯罪行為的本質、逃逸的本質，以及周邊事實等並未呈現出緊急性時，員警就必須尊重『家』的神聖性，亦即在進入前必須先取得相關令狀。

- (3) 延伸思考
  - A. 質的區別說：調查與偵查應該「換軌」？
  - B. 量的區別說：調查與偵查具有共通性？
  - C. 關鍵在於「正當法律程序」的堅持：建立起酒後駕車執法作業的「正當法律程序」，才是處理同一酒後駕車行為可能構成行政，也可能構成刑事不法的正辦。

5. 結論

- (1)「量的區別說」只是思考的起點。
- (2) 實體面：應關注是否構成重複處罰。比例原則的判斷居於關鍵。
- (3) 程序面：應關注正當法律程序的設計，是否足以保障當事人的尊嚴。

全球金融科技時代下之風險與監理議題

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壹、前言

1. 金融科技業者開發出的產品或商業模式，可能屬於某一政府機關應該監管的範圍，但依現行的監督管理法規架構，卻未必可以加以有效的監督管理，這些服務包括機器人顧問、群眾募資、大數據服務、網路銀行服務、網路借貸、行動支付服務、電子錢包服務、分佈式分類帳服務及網際網路等行動式裝置與新型態交易模式。

2. 金融監理之目的，則在於維持金融穩定、公平分配資源、追求經營效率及保障投資人或消費者之權益。但是相對於此，在一個發展迅速與隨時變動的數位金融環境中，金融監管就面臨二個難題，首先，過去的法規未必能符合未來商業發展；再者，金融科技或其應用如何改變現存的金融服務模式。




創新金融科技FinTech
(Financial Technology)

金融科技
機器人顧問、群眾募資、大數據服務，網路銀行服務、網路借貸、行動支付服務、電子錢包服務)、分佈式分類帳服務及網際網路等行動式裝置與新型態交易模式

銀行獨佔金融服務
資產管理

銀行獨佔金融服務
借貸

銀行獨佔金融服務
付款




維持金融體系及
市場價格之誠信

穩定金融體系
對金融機構施以審慎監理，
避免金融危機之發生

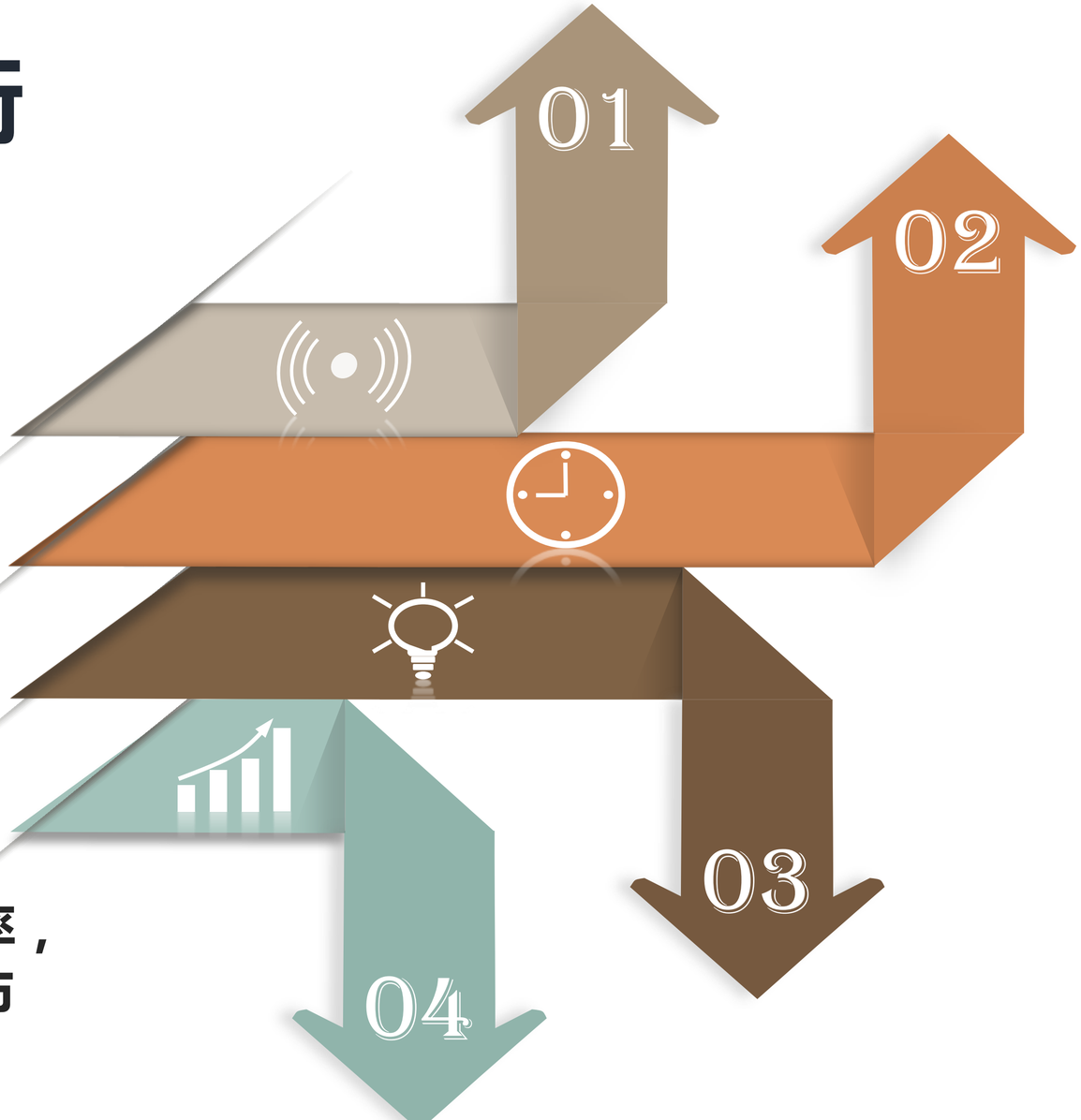
採取完善之金融監督技術
嚴密監控金融機構之營業活動，
以保護消費者或投資人權益

金融監理科技

- 傳統金融服務或創新金融科技皆受高密度的法規監理。
- 仰賴**監管科技**以取得更齊全的資料，整合及分析的資料的詳盡度(granularity)、清晰度(precision)與效度(frequency) 。
- 透過監管科技，即時監控市場上之創新商品、複雜的交易型態、操縱市場以及金融機構內部之詐欺行為與風險管理等等事項。
- 降低法律遵循成本、最佳化其法令遵循管理。

監管科技 = 法規+技術

- 金融危機後，監管機關需要大量數據資訊協助監管
- 數據科學的發展（例如人工智能），可以協助建構非結構資料(unstructured data)
- 透過經濟誘因使參與者盡量減少因配合法規遵循而快速上升的成本
- 監管機關努力提高監管工具的效率，促進競爭，達到維護金融穩定和市場誠信的任務






Ripple Labs Inc.案

金融科技業涉及之問題

Ripple Labs透過對銀行以及金融機構提供企業等級的解決方案，創造低成本的全球即時支付系統-Ripple payment protocol及Exchange Network。

違反美國銀行秘密法（The Bank Secrecy Act, BSA）中對貨幣服務業者（Money Services Business, MSB）的定義 ，在沒有註冊FinCEN貨幣服務業務（MSB）的情況下出售其網路的虛擬貨幣瑞波幣，被FinCEN罰款70萬美元 。

未能實施適當的反洗錢程序，其子公司XRP II，在沒有一個有效的反洗錢程序下非法從事貨幣服務業務，並且涉嫌漏報多次可疑的金融交易活動

現行反洗錢防治之困境

金融科技業者營運的商業模式，主要是透過非實體的匿名以及電子形式存在的虛擬貨幣，且不受法律實體或主權政府的法規約束，從而吸引客戶成為獨特商業模式。

只有當虛擬貨幣商品係透過銀行體系發行、清算或結算，聯準會才有權監理該種商品。




洗錢防制規範新趨勢

01 風險評估

02 客戶盡職調查

03 可疑交易申報

04 反洗錢防制
(anti-money laundering，AML)

05 知道你的客戶 (know-your-client，KYC)

貳、個人資料保護與跨境傳輸

- 近年來大數據技術及其應用對資訊經濟、科學發展與商業利益帶來極大貢獻，但一般人經常於未知情下被他人或電子產品蒐集與其個人有關之各種資料，滋生隱私侵害疑慮；不過資料保護法律並非將隱私權視為至高無上，在法益衡量上仍須與其他社會價值進行權衡，在資料利用方面或可透過去識別化做法，確保資料處理的合法性。

- 近來歐盟一般資料保護規則也相當強調資料處理須經資料當事人的明確同意，因此如何建構與維持資料主體與資料利用者間的信賴關係，誠為資料利用的首要之務。

貳、個人資料保護與跨境傳輸

- 根據歐盟一般資料保護規則(GDPR)第3條之規定，於歐盟境內設立登記之企業，如有蒐集、處理與利用個人資料，須適用GDPR；設立登記於歐盟境外者，因遠距對歐盟境內居民提供商品或服務，或因監控歐盟居民在歐盟境內的行為，而涉及其個人資料之蒐集、處理與利用者，仍有GDPR之適用。

- 為協助臺灣產業因應GDPR之施行，我國政府部門除於2018年正式加入APEC跨境隱私保護體系外，亦與歐盟洽談GDPR適足性認定事宜。有關於適足性認定之洽談其係為解決歐盟境內個人資料傳輸至臺灣境內之議題，蓋如前所提及的，歐盟GDPR對於個人資料之跨境傳輸採取「原則禁止、例外允許」原則，其允許之情形有數種，其中之一為資料接受國為經歐盟認定之對個人資料有採取適當程度保護者。

貳、個人資料保護與跨境傳輸

- 惟隨著科技技術之發展，個人資料等資訊有越來越多留在服務供應鏈中，其中最重要的不外乎是金融資料，金融科技改變金融服務業之營運模式，除了自身可辨明身分的資料，消費者是否得將其過往留在各個金融服務業的資料授權他人運用，衍生消費者資料權及開放銀行之新議題。

- 國家發展委員會已會同其他行政機關盤點我國與歐盟之貿易關係、政治關係、資料傳輸量等情況，並於2018年完成適足性自我評估，並向歐盟提出適足性認定之洽談要求。目前國家發展委員會於其網站即有成立「歐盟一般資料保護規則專區」，提供GDPR相關訊息。

參、精準醫療、健康聯網及純網銀

- 精準醫療、健康聯網及純網銀與一般產業不同的是，這些產業的基礎是奠基在敏感的個人數據之上，因此涉及的法律與道德問題也更形複雜。

- 臺灣所稱之特種個人資料其內容與GDPR所稱者並不相同，臺灣所稱之特種個人資料與此有別，尤其是未來須詳加考量者是否將生物特徵納入特種個人資料之範疇、以及考量是否在概念與立法上以有關健康之資料取代病歷、醫療與健康檢查等資料，以較周延地保護個人資料本人之權益。

參、精準醫療、健康聯網及純網銀

- 一來，此類個人資訊過於敏感，遠非一般個人的消費或行為面資訊，對產業需求而言卻又是必要的資料；其二，資訊的全部或其中部分為公部門所擁有，其資訊蒐集的目的、使用範圍必須重新定義。

- 臺灣近年在建置臺灣人體生物資料庫與國家衛生研究院人體生物資料庫不遺餘力，加上各家基因檢測公司及研究機構的投入，精準醫療發展已具雛形。隨著基因體檢測技術的進步，配合電子病歷、癌症登記資料以及臺灣特有的健保資料庫，臺灣精準醫療科技的崛起指日可待。惟臺灣電子病歷交換則由電子病歷交換中心依據醫療法、個人資料保護法等運作，若因應精準醫療發展需要，欲將病歷資料轉做研究使用時，尚有法規面的挑戰。

參、精準醫療、健康聯網及純網銀

- 多數已開發國家，因幅員廣大、醫療成本昂貴等因素，隨網路普及化後便開始發展數位化遠距醫療或健康聯網。例如在美國，家長可透過打電話至熟識的家醫科，藉由電話問診來釐清小孩病症，再以電子方式取得藥單至藥局領藥。

- 然而在臺灣，直至2018年政府才因顧及高齡化社會需求，立法放寬遠距醫療的照護對象，從原先僅有的「山地離島偏僻地區」患者，開放至「特殊情形」（如急性住院後需追蹤治療、長照機構內持慢性病連續處方箋等）及「急迫情形」（如遇生命危急意外）之病人，允許其接受通訊診療 。

參、精準醫療、健康聯網及純網銀

- 金管會於2018年11月開放純網銀執照申請後，當時共有將來銀行、LINE Bank、樂天國際商業銀行三家業者投入角逐。次年，金管會宣布三家候選的純網銀均獲得執照，其中樂天國際銀行於更於今年1月19日正式對外營運。

- 純網路銀行的業務均存放於系統中，內部員工擁有最大的系統訪問權限，員工監守自盜的道德問題不容忽視；管理階層與職員的技術能力若不足夠，也容易產生操作失誤問題。另外如網路病毒、駭客、網路釣魚等外來的不法威脅日增，人為因素與系統缺陷均可能使得銀行的資訊安全受到威脅，網路安全、交易安全、資料安全、傳輸安全等各方面都可能無法得到充分保障。

金融監理沙盒之優點
(Regulatory Sandbox)

- 降低進入市場的時間並降低成本
- 融資取得容易
- 法規不確定性的消除可促進多元化

「金融監理」與「監理沙盒」之規範辯證1

監理沙盒

- 對於原本並非金融機構的新創業者而言，最大的好處在於，能暫時將繁重且複雜的金融法規遵循放在一旁，先透過測試使市場了解新產品或服務帶來的利益，並使監理者有信心處理該產品或服務正式上市後所可能帶來的各種風險，進而提高該業者未來正式申請核准或執照的成功機率。
- 對於原本就受監理的金融機構而言，這種測試機制的主要優點在於，協助釐清未來該業者於法令遵循實踐中所可能遭受的問題，並在必要時由監理者以個別行政指導、賦予法規豁免或是核發主管機關承諾函（No-Action Letter）的方式來避免不合理的法律責任。與此相對者，對於監理者而言，此種測試機制可以幫助其進一步瞭解創新科技的發展，以及可能對消費者與金融體系帶來的風險，促使監理者制定相應的監理標準。

「金融監理」與「監理沙盒」之規範辯證2

金融監理與監理科技1

- 透過Regtech 3.0的輔助，以金融機構而言，Regtech 3.0能使其更佳控制風險與費用；對於監理機關而言，其因取得更有效率的監控工具以及模擬系統(simulation system)，可對於未來修法改革之結果預做評估。
- Fintech與 Regtech 3.0演進的過程均必須以數據資料為中心(data-centricity)分享資訊，由此可知，如果未來能設計並落實合比例的以及以數據資料為導向的監理法規或工具時，對於積極而主動的監理機關而言，其監理方式將會由「監控數位身分」轉向到「監控數據資料主權」，其金融監理效果將極為顯著。對於監理機關而言，確保數據資料的安全性將遠比先前的消費者保護更重要；審慎監理將著重於「資料演算法的遵循」，而金融安定性則將著重於金融與資訊網路的安全性上。

「金融監理」與「監理沙盒」之規範辯證3

金融監理與監理科技2

- 在Regtech 3.0概念下：

1. **有使用監理沙盒**：監理沙盒在此應被理解為是一種過渡階段，此是由於Regtech 3.0之發展尚未完全成熟到足以「泛市場的監理」。在此階段，伴隨著廣泛使用監理沙盒，其可做為Regtech 3.0的試行者，監理機關得觀察其試行效果，隨時彈性修正其監理模式。

2. **除去監理沙盒**：嚴格以言，新創事業於沙盒中進行測試時，其實即有扭曲市場競爭的可能。為避免產生此種瑕疵，合理之道應為，當Regtech 3.0發展至成熟時，應除去監理沙盒；但基於扶持新創事業之必要，仍應導入「最低法規義務」或「復原與處理計畫」以為因應。

創新與監理的衡平

「金融科技創新實驗條例」，內容涵蓋金融科技創新實驗之申請、審查、監督及管理、消費者保護相關程序，以及實驗期間法令調整與法律責任排除等內容

CFTC也朝三個主要面向，研究CFTC 如何促進金融科技產業的發展：
(1)利用金融科技的創新，使CFTC成為更有效的監管機構
(2)藉由金融科技的創新來幫助CFTC建構，數位金融市場所需要的法規
(3) 確保CFTC在監管金融市場同時，仍能促進美國金融科技產業的創新

OCC在2017年3月15日公布向金融科技業者發放銀行營業執照的草案

監管政策須從「金融機構為主」轉型到以「金融交易為主」
採取「管制中立」與「原則基礎的監理」模式

肆、結論

- 資料本身的開放、可攜性、跨境傳輸，對全球各國而言都是持續發展中的課題。
- 對於企業蒐集、處理與利用個人資料行為之監督與管理係由其中央目的事業主管機關為之，採取分散式的管理架構。我國各主管機關因為資源、預算...等因素，對於所管產業之個人資料保護法遵循的監督與管理程度亦不相同，同時，實務常可見行政機關為處理民眾之個人資料保護陳情案，須先就該案之管轄先行釐清之情形，亦形成不同產業之資料跨境傳輸限制不一致的情況。

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USPTO Breaks Last Ties With Russia's Patent Office

*By **Andrew Karpan** · Listen to article*

Law360 (March 22, 2022, 7:33 PM EDT) -- The U.S. Patent and Trademark Office said Tuesday that it has officially broken all engagement with various equivalent agencies in Russia and warned applicants that even paying the Russian patent office to conduct prior art searches "may prevent successful processing of international applications."

The move comes a little over two weeks after the patent office **said it suspended communication** with Russia's federal patent and trademark agency, known as Rospatent, in response to "**the events unfolding in Ukraine**." The break-off also includes the Eurasian Patent Organization — a Russia-based international patent agency — and the national intellectual property office of Belarus.

The latest move from the patent office added guidance targeted at patent filers who might be using Rospatent as a low-cost international search authority. For the past decade, the country's patent office **had been promoted as a low-cost alternative** when it comes to fees charged for prior art searches.

"Applicants filing international applications under the Patent Cooperation Treaty are advised to exercise caution before selecting Rospatent as an international searching authority or international preliminary examining authority," the patent office said in a press release.

Ukrainian Patent Office Presses On, With International Support

Just shy of a week after Russia launched its invasion of Ukraine, the Ukrainian Institute of Intellectual Property — better known as Ukrpatent — said it was operating full time and "providing all the necessary functions" to protect intellectual property.

"Main divisions of the enterprise carry out the reception and processing of applications for intellectual property ensuring the availability of relevant information resources and state registers," Director General Andrew Kudin said in the March 1 statement. "Our employees make significant efforts for securing the stability in operation of the enterprise."

During March, Ukrpatent has received letters of support from the patent agencies of Lithuania, Finland, Austria, Slovakia, Poland and the European Union.

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Uncertainty Clouds Attys' Strategies For Pursuing IP In Russia

Law360 (April 13, 2022, 3:58 PM EDT)

In March, Russia made a **decree** that opens the possibility of allowing IP from a broad list of "unfriendly countries" to be used without compensation to the owner, and the Russian prime minister has allowed branded products to be **imported** without the brand owner's permission or any payment offered.

There have been several **trademark applications** from individual citizens and companies copying major Western brands like McDonald's and Starbucks. In addition, the equivalent to a trial-court-level judge in Kirov in March **refused to enforce** trademarks for the British children's show "Peppa Pig" specifically because of the "restrictive" political and economic sanctions placed on Russia.

Trademark prosecution is relatively inexpensive, Gerben said, so there's a sense of "why not?" If anything, he said the increase in gray-market goods cleared by the prime minister strengthens the need for trademark protection in the long term. Delays may also lead to Russian entities getting trademark registrations for company names or logos in the hopes of getting paid to hand them over, he said.

Trademark registrations can also be canceled in Russia if there are no products sold or services provided involving them for three years, Lisovenko said as a caution for companies that have pulled out of Russia, noting that similar laws apply across a range of countries.

"Those well-known Western companies that decided to leave the country should take this fact into account and clearly realize that even if they are not present in the Russian market, their products should be imported to Russia to secure the possibility of maintaining exclusive rights," he said.

Patents, however, are more complicated and expensive, Kilpatrick's Mathison said. While an outcome where U.S. IP rights are permanently disregarded in Russia could make patent prosecution a huge waste of money now, if the war ends in a regime change, those patents are extremely important, he said.

No matter how the war ends, Russia's place in the IP landscape has been altered. For example, as companies pull out of Russia, many have instead been building up their business in Ukraine.

Kyiv-based Popov said that since the war began, large companies have been reaching out to Ukrainian law firms, either because they no longer have counsel in Russia or because they don't want to work with them.

Lisovenko said that over the last five years, Rospatent — as Russia's patent and trademark office is known — has reported that 30% of its patent applications have come from foreign companies, and 20% to 25% of those have been from the U.S. He said the U.S. is the most active foreign user of Russia's IP system.

4 Questions For Cos. Seeking To Recover Value Of Russian IP

Law360 (April 7, 2022, 1:13 PM EDT) -- The Russian Federation is threatening to effectively nationalize the patents, trademarks, copyrights and other intellectual property assets of foreign investors from countries that have imposed sanctions on Russia.

Companies with affected Russian IP may be able to recover the value of their assets by bringing international arbitration claims under Russia's bilateral investment treaties.

In evaluating the benefits and costs of IP-related investment claims against Russia, companies should evaluate four key questions: (1) whether their assets are protected by an investment treaty; (2) whether they can show that their losses were caused by Russian government measures; (3) how they will be able to quantify, prove and collect damages; and (4) whether they need to take any immediate action to preserve the possibility of a future claim.

4 Questions For Cos. Seeking To Recover Value Of Russian IP

1. Are my company's IP assets in Russia protected by an investment treaty?

IP assets are likely to be protected under Russia's investment treaties, so long as the IP rights are held by or through companies from jurisdictions that benefit from treaty protection.

Many of Russia's bilateral investment treaties expressly define IP as a protected asset, and there is a track record of investment tribunals considering claims relating to IP.

IP licenses and unregistered IP may also qualify for treaty protection.

To benefit from treaty protection and enforce it, IP has to be held directly or indirectly by a company that is from a country that maintains an investment treaty with Russia, and the investment treaty has to include a dispute resolution clause that extends to pertinent categories of investment claims.

Russia maintains relevant investment treaties with several European countries, as well as Canada, Japan, South Korea and Ukraine, among others.

There is no Russia-U.S. investment treaty, but U.S. firms should consider whether their Russian IP is held through foreign subsidiaries that do benefit from treaty protection.

2. Can I show that my company's losses were caused by the Russian government?

Russia may seek to defend against investment claims by arguing that it revoked an investor's IP in a manner that was consistent with preexisting Russian law.

For example, if an investor does not make routine maintenance payments or otherwise take necessary steps to preserve its IP rights, that might be used against the investor in any future investment case, with Russia arguing that the investor's losses were caused by its own inaction.

Exceptions to sanctions regimes may ultimately allow for investors to make routine maintenance payments, but investors will still need to consider whether the steps necessary to maintain IP are consistent with their legal obligations, their ethics and compliance policies, and any public commitments they have made on exiting the Russian market.

Investors will also need to consider whether such steps are practically viable, if banks and other intermediaries have suspended operations in Russia.

4 Questions For Cos. Seeking To Recover Value Of Russian IP

3. How will damages be quantified, and will they be collectible?

In other disputes, Russia has sought to undervalue expropriated assets for damages purposes by pointing to the immediate political and economic climate at the time of the expropriation.

Companies should consider taking steps to preserve documentation that reflects the full, long-term value of their IP assets in Russia — including, for example, preserving contemporaneous reports and forecasts relating to the economic performance of the businesses to which the IP relates.

Companies that are withdrawing from Russia should also consider whether they would have had the ability to sell their IP to others, or to otherwise derive economic value from their Russian IP, in light of their plans to withdraw.

An award for damages under Russia's investment treaties is likely to be enforceable in a similar manner to any other international arbitration award. In other words, it should be recognized and enforced against Russian assets in a wide range of international jurisdictions.

Tracing and identifying nonimmune Russian government assets can be a complex process, but investors may also be able to monetize their awards in other ways.

For example, companies can assess whether an award, or the economic value of an award, can be sold to a party that specializes in asset recovery and judgment enforcement.

4. Does my company need to decide on a claim now — and if not, what steps should I take today?

Investors likely do not need to make a final decision on whether to bring an investment claim today, or any time in the immediate future.

However, investors that may seriously consider a future claim should take steps now to preserve their position.

Among other things, investors can:

- Evaluate whether their Russian IP is held by or through companies from countries that have relevant investment treaties in place with Russia;
- Assess whether they may need documents or other evidence that is physically located in Russia, and if so, take steps to preserve copies of such evidence outside of Russia; and
- Consider the procedural requirements of the relevant investment treaties, which may include election of remedy clauses or waiting period provisions that require advance planning, as well as limitation periods that investors can use to set internal decision-making deadlines.

Investment arbitration involves different procedural and evidentiary standards from domestic litigation, and focused advance planning can help lay the foundations for a successful claim.

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A To-Do List For New USPTO Director Kathi Vidal

Law360 (April 6, 2022, 10:21 PM EDT)

PTAB Denials

The PTAB's so-called Fintiv policy, which was put in place by former director Andrei Iancu and allows the board to use its discretion to refuse to review patents if there is an upcoming trial in district court, has become a lightning rod, generating litigation, debate and more than **800 public comments**.

One of the most closely watched decisions Vidal will make as the new director is whether to maintain the policy, as patent owners have advocated for, revise it or abolish it, as patent challengers are seeking. Those on both sides made their case Wednesday.

Since the office sought public comments at the end of 2020, the rules "have only become more chaotic and unpredictable," he said. "It is basically impossible these days to know, when you're filing an [inter partes review] petition, whether that petition will be considered on the merits."

During her nomination process, Vidal was asked repeatedly whether she would reverse the NHK-Fintiv rule — derived from the Patent Trial and Appeal Board's decisions in NHK Spring Co. Ltd v. Intri-Plex Technologies Inc. in 2018 and Apple Inc. v. Fintiv Inc. in 2020 — that was instituted by the previous USPTO director.

This rule, which never actually went through the required rulemaking process for public comment, as required by law, instructs the PTAB to deny a request to examine the validity of a low-quality patent through the inter partes review process if parallel litigation related to the dispute is already in progress in federal district court.

The NHK-Fintiv rule has unquestionably tilted the playing field in favor of patent trolls at the expense of America's innovators and job creators. Since it was implemented, abusive patent litigation has risen by more than a third, forcing countless American companies to cut their research and development budgets in order to defend themselves against frivolous lawsuits — often asserted in far-flung locations, such as Waco, Texas.

A To-Do List For New USPTO Director Kathi Vidal

Law360 (April 6, 2022, 10:21 PM EDT)

Director Reviews

During the 14-month interlude when there has not been an official director of the patent office, the U.S. Supreme Court gave the position more power in its U.S. v. Arthrex **decision**, which held that the director can review and overturn PTAB decisions.

The agency's interim director, commissioner for patents Drew Hirshfeld, has been conducting those reviews, which has **led to disputes** over whether that is legally permissible. But with Vidal officially in place, attorneys will be watching how she wields the power granted by the justices.

While it may not be used often, "the Arthrex authority is potentially a means to implement substantive changes at PTAB," said Nicholas Matich of McKool Smith, who was the USPTO's acting general counsel in 2020.

"She can take up any case and issue a decision in her own name saying this is how this issue should come out," which could then be binding on the board's judges going forward, he noted.

Patent Eligibility

The perennially contentious state of the law on what types of inventions are eligible for patenting under Section 101 of the Patent Act drew more than 100 **sharply divided comments** to the USPTO last fall. Vidal now has an opportunity to put her own stamp on how the office handles the issue.

Since Vidal has on-the-ground experience seeing how disputes over patent eligibility play out in litigation, she can bring a unique perspective to how the USPTO puts out guidance on the issue going forward, said Ian Blum of Cozen O'Connor.

"We as attorneys need a lot of clarification on how the patent office is going to be handling 101 issues," he said. "It'll be interesting to see what she will bring to the table as a litigator."

The USPTO itself can only implement guidance on how examiners can apply the law and court decisions, but the director is in a position to help shape policy on patent eligibility more broadly.

"Director Vidal appears to have made a commitment to work with Congress on 101 reform, and that is a good thing," Matal of Haynes and Boone said. "The director could play an important role in assisting Congress and helping to achieve consensus on this complex issue."

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NFT Suits May Blaze New Trail For Trademark Law

Law360 (April 6, 2022, 12:01 PM EDT)

With the increasing popularity of NFTs, unique digital assets that are stored on a blockchain and can be bought and sold, a spate of intellectual property suits has followed. These cases are expected to further define what NFTs are exactly and could test whether trademark protection extends into the metaverse, some attorneys say.

Of those newly filed suits, Nike **brought an action in February**, alleging online reseller StockX LLC's collection of NFTs, known as The Vault, is composed almost entirely of unauthorized images of Nike's shoes. U.S. District Judge Valerie E. Caproni will weigh StockX's argument that it's making fair use of Nike's images. StockX **is also arguing** it's entitled to use the images under the first sale doctrine, which allows buyers of trademarked goods to display and sell them under their original trademarks.

The Nike suit could be the first to decide not only whether NFTs can infringe trademarks on physical goods, but also if an NFT is the actual underlying image or just the code a purchaser obtains, according to Alston & Bird senior associate Daniel Dubin.

If it's just a code, it can be likened to a receipt or proof of ownership of the underlying blockchain token, which is what StockX is arguing it amounts to.

"If it's just that, it's hard to imagine that a receipt can infringe intellectual property," Dubin said, noting that NFTs also come with the underlying image. "If the NFT is both proof of ownership and the underlying image, then the underlying image can likely infringe."

Such a ruling could spur "a flood of litigation," according to Dubin, with trademark owners like Nike empowered to enforce their trademark rights against NFT minters and Web3 creators that incorporate their intellectual property.

"It also means that the digital images of NFTs could themselves be protected by trademark rights, thereby creating a new form of protection for NFT creators," Dubin said.

"If a plaintiff asks for these NFTs to be destroyed, I don't know how a court is going to enforce that kind of request, because NFTs can't be destroyed," Estoesta said. "That's something the current framework is lacking. I don't know what avenues courts have to enforce that."

There's a process called "burning" that can potentially eliminate NFTs from the market by rendering them unusable in the future, but the process can be carried out in different ways, so there doesn't appear to be a set definition currently for what it entails, according to Estoesta.

Hermes Fights To Keep 'MetaBirkin' NFT Suit In Play

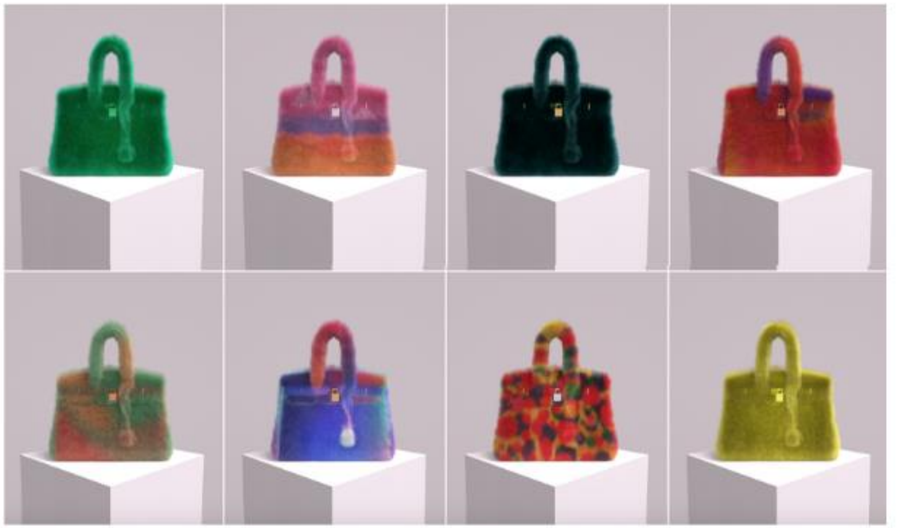
Law360 (April 5, 2022, 10:33 PM EDT) -- A Los Angeles designer's nonfungible token series called "MetaBirkins" is not merely a metaverse experiment, but rather a trademark infringement of the Hermes Birkin bag, the luxury brand told a New York federal court.

Hermes International and Hermes of Paris Inc. urged the court on Monday to keep their trademark infringement suit against designer and artist Mason Rothschild in play. The iconic fashion company called Rothschild's motion to dismiss the case "a diversion" and slammed Rothschild as "an opportunistic infringer."

Rothschild started selling the MetaBirkins series online last year. Each MetaBirkin is a digital image of a handbag. Many of them are fur-covered, although one "Baby Birkin" piece consists of "a 40-week-old fetus on top of a transparent version of a Birkin bag," according to the complaint.

The images are sold using nonfungible token technology, or NFTs, which are digital tokens used to demonstrate and transfer ownership of an item. As of early January, total sales volume had **topped $1.1 million**, according to court filings.

The case is Hermes International et al. v. Mason Rothschild, case number 1:22-cv-00384, in the U.S. District Court for the Southern District of New York.



The Hermes brand says the total volume in sales for the allegedly counterfeit "MetaBirkins" has already surpassed $1.1 million. (Source: Court documents)

CourtLink (Dockets)

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追蹤Hermes v Rothschild案件的司法程序和過程，包括瀏覽當中的法律文件

1:22cv384, Hermes International Et Al V. Rothschild

US District Court Docket

United States District Court, New York Southern

(Foley Square)

This case was retrieved on 04/14/2022

Header

Case Number: 1:22cv384
Date Filed: 01/14/2022
Assigned To: Judge Alison J. Nathan
Referred To: Magistrate Judge Gabriel W. Gorenstein
Nature of Suit: Trademark (840)
Cause: Trademark Infringement (Lanham Act)
Lead Docket: None
Other Docket: None
Jurisdiction: Federal Question

Proceedings

Retrieve Document(s)

	Availability	#	Date	Proceeding Text	Source
☐	Online	40	04/12/2022	MEMO ENDORSEMENT on re: 39 Letter filed by Mason Rothschild. ENDORSEMENT: The Court will decide the motion in due course and will inform the parties if the Court requests oral argument. SO ORDERED. (Signed by U.S. Circuit JudgeSitting by designation Alison J. Nathan on 4/12/2022) (vfr) (Entered: 04/12/2022)	
☐	Free	38	04/11/2022	REPLY MEMORANDUM OF LAW in Support re: 26 MOTION to Dismiss Plaintiffs' Amended Complaint. . Document filed by Mason Rothschild..(Millsaps, Rhett) (Entered: 04/11/2022)	
☐	Free	39	04/11/2022	LETTER addressed to Judge Alison J. Nathan from Rhett O. Millsaps II dated April 11, 2022 re: Oral Argument on Rothschild's Motion to Dismiss. Document filed by Mason Rothschild..(Millsaps, Rhett) (Entered: 04/11/2022)	
☐	Online	36	04/08/2022	PROPOSED SCHEDULING ORDER. Document filed by Hermes International, Hermes of Paris, Inc...(Wallace, Kevin) (Entered: 04/08/2022)	
			04/08/2022	Minute Entry for proceedings held before Magistrate Judge Gabriel W. Gorenstein: Initial Pretrial Conference held on 4/8/2022. (cf) (Entered: 04/08/2022)	
☐	Free	37	04/08/2022	SCHEDULING ORDER: Amended pleadings may not be filed and additional parties may not be joined except with leave of the Court. Any motion to amend or to join additional parties shall be filed within thirty (30) days from the date of this Order. Depositions shall be completed by August 9, 2022. All fact discovery is to be completed no later than August 9, 2022. All expert discovery, including depositions shall be completed by September 23, 2022 with disclosure of expert reports by July 29 and rebuttal disclosures by August 26. The parties anticipate	

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NFT Due Diligence Lessons From Recent Cases

Law360 (April 12, 2022, 7:22 PM EDT)

Key Questions for Future NFT Diligence

The cases described above highlight some important issues to consider when conducting a due diligence on the purchase and sale of an NFT, including the following:

- What is the asset underlying the NFT? Does the seller own the artwork, video clip, shares, copyright, contract rights, or physical goods that underlie the NFT and give it value?
- Is there a terms of use, contract, or other document that conveys the underlying asset or grants licenses or other legal rights in the NFT?
- Do the marketing materials for the NFT correctly describe the asset? Do the terms of use for the NFT match the marketing materials?
- What does the seller claim the buyer of the NFT will be able to do with the asset that underlies the NFT? Will the NFT transaction transfer ownership of the asset, grant the buyer exclusive or non-exclusive license rights to the asset, or grant the buyer the right to collect rents or royalties from third parties who use the asset?
- Does use of the asset in the manner contemplated by the seller infringe or misappropriate any third-party intellectual property rights? In other words, can the buyer of the NFT make use of the NFT without infringing on a third party's IP rights?
- Will the buyer of the NFT have the rights to police use of the underlying asset? Can the buyer pursue claims for infringement against third parties who may be viewing or copying the asset without the buyer's consent?
- Does the NFT have a metaverse use case? If so, is use in the metaverse included or excluded from the rights granted by the seller?

Stuart Irvin is of counsel, and Phillip Hill and Dallin Earl are associates, at Covington & Burling LLP.

NFT Strategies for Corporations

Unauthorized NFTs based on another party's intellectual property are an important growing factor in the marketplace. If a client's intellectual property is implicated, its business may be pulled into this new world, regardless of its desire to be there.

To avoid conflicts related to NFTs, counsel should make sure clients have the necessary rights to the content that they intend to use in NFTs, should seek protection for content they intend to exploit through NFTs in the future, and should monitor NFT platforms for intellectual property infringement.

- **Clear intellectual property rights for NFTs with existing content**. Make sure that clients have the necessary rights to the content that they intend to use in NFTs. Be aware that copyright ownership may not be sufficient because some rights may be licensed to third parties. If the rights in the NFT content are owned by third parties, ensure that the license is sufficiently broad to cover the development and licensing of NFTs. Content, particularly videos, may include copyright rights in the video, music, and background art (such as street art) that each need to be cleared. For a discussion of rights clearance, see Rights Clearance. For a related checklist, see Rights Clearance Checklist.

- **Prepare for the future**. The market for NFTs is likely to increase in the future. Ensure that clients obtain the rights in newly acquired content in order to be poised to exploit it through NFTs. Practitioners should also recommend that clients protect their brands in the new categories represented by NFTs by registering their trademarks in the appropriate trademark classes. For more on trademark registration, see Trademark Registration and Maintenance Resource Kit.

- **Monitor NFT platforms for intellectual property infringement**. The NFT market is young and many participants are casual about intellectual property rights. Some participants are willing to misappropriate the rights of others for quick financial gain. Make sure that clients are monitoring the major platforms, such as OpenSea, Crypto.com, Binance, Rarible, Enjin, and Nifty Gateway. In addition, many large companies such as Coinbase and Kraken have announced their intention to open NFT marketplaces.

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