

## Emerging Issue

# Welcome to the Metaverse: Legal Issues Marketers Need To Consider

Since the concept of the “metaverse” was widely introduced to the public in 2021, it seems as though every day brings news of another company, brand, celebrity or product trying to establish a foothold in this digital space.

Clearly not a passing fad, the metaverse is rapidly shaping up to become a multidisciplinary and multi-sensory venue where new methods of interaction, community-building and self-expression can be found. It has already featured powerhouse pop stars’ performances at hugely successful concerts on Roblox; opportunities for the fashion-forward to flex rare non-fungible tokens (NFTs) minted by luxury brands in Fortnite; and, in Decentraland, beer-brand-sponsored virtual bars where consumers’ avatars can enjoy a cold one while watching the big game.

### What Exactly is the Metaverse?

At this stage in the technology, there is not yet a single, overarching digital universe that a user can plug into like *The Matrix*. Currently, there are a variety of different metaverse platforms, each with its own look, feel, capabilities, goals and technologies.

In short, a metaverse is:

*characterized by its ability to allow individuals to immerse themselves into a given platform, interact with others and participate in consumer activities in a way that more closely resembles the physical world than any other technology to date.*

The pre-metaverse digital and social media landscape is two-dimensional. Looking at flat screens, users type, click on and view pictures and words to communicate, purchase products and watch content. Conversely, in the metaverse, users are immersed in a three-dimensional platform. Instead of users sending their friends direct messages through their social media profile pages or messenger apps, users of a metaverse platform are able to actually see their friends' avatars and walk up to them to have a conversation. They can watch a live concert being performed on a stage in front of them or take a stroll to check out the digital merch booth and snack stations.

Metaverse platforms in this vein have been around for quite some time. Video games – particularly massively **multiplayer online games (MMOGs)** and immersive role-playing games – have been operating in this manner for many years. It is not surprising, then, that some of the biggest metaverse platforms currently available are those associated with video games: **Fortnite**, **Roblox** and **Axie Infinity** are just a few.

Other companies have their own view of what the metaverse should look like, however. **Facebook**, for instance, which brought the term “metaverse” into the mainstream as part of its corporate rebrand as **Meta**, sees the metaverse as an immersive world utilizing virtual reality and accessible through VR headsets, where consumers can enjoy living in an entirely separate sphere. Put on your headset and be transported from your two-bedroom apartment to your luxury mansion by the ocean – in the metaverse. Conduct video meetings with your colleagues face-to-face in a magnificent boardroom – in the metaverse.

Still others view the metaverse as something that should be fundamentally deregulated and decentralized. These idealists envision a way for consumers, creators and everyone else to interact freely without being subject to the control of large private corporations. Platforms such as **Decentraland** espouse this view, and notably are operated by a **decentralized autonomous organization (DAO)** – a collective of like-minded individuals working together to achieve their shared goals, similar to a cooperative—rather than a traditional corporate entity.

Despite their differences, these metaverse platforms share some things in common in addition to their immersive nature. They function largely on **blockchain technologies**, which power many transactions that take place in the metaverse. Using **cryptocurrency**, consumers purchase **non-fungible tokens (NFTs)** that correlate to goods and services ranging from luxury products to fast food. Some NFTs are meant to remain solely within the metaverse (such as the digital handbag that your digital avatar carries). Others come with physical-world benefits, such as a discount coupon, offer code or trade-in token that can be used to obtain physical products that correlate to the digital item purchased in the metaverse. Many metaverse platforms – notably, **Decentraland** – also encourage the purchase and development of **digital land** that buyers can use to do things like set up a house, a virtual storefront, a restaurant or a pop-up location that can be rented out to others. If you can dream it, you can achieve it (for a price) – in the metaverse.

Until all these different platforms and experiences become interoperable and unified to the point where a person can take their assets from

Fortnite and use them in Decentraland, for example, there will be no single “Metaverse.” For now, various metaverse platforms will essentially be competing to see which vision of the future resonates most with today’s consumers.

### How Did We Get Here?

When social media emerged in the mid-aughts, it took a few years before this creator-driven digital landscape – often referred to as “**Web 2**” – was transformed into a vehicle for marketers to expand their audiences. Bloggers and YouTubers, and the brands that gave them free products and increasingly large fees in exchange for promoting the brands’ products, eventually became the subject of specific legal regulations and policies intended to protect consumers from false or deceptive advertising. The Federal Trade Commission (FTC) issued its first set of regulations focused on paid endorsements by social media bloggers in 2009, only a few years after YouTube and Facebook were introduced. Despite the increased sophistication of social-media-promotion strategies and the growth of digital tools that strengthen paid endorsers’ reach, these regulations and guidelines have served as the primary guidelines for influencer marketing ever since.

Now, at the outset of **Web 3** – conceived as an even more creator-driven regime, operating on decentralized technologies such as **blockchain** – there is another shift in the digital landscape as marketers and tastemakers find new ways to build audiences and engagement in a decentralized, open-source internet, with augmented and virtual reality weaving their way

into everyday physical life.

Over the last several years, consumers have become increasingly comfortable with interactions taking place over digital and virtual platforms. Many have already used augmented reality in their daily lives by participating in the Pokemon Go craze of 2016 or using camera filters on platforms like Instagram, TikTok and Snapchat.

Marketers have long been experimenting with ways to utilize these tools to grow their audiences, communicate their brand messages, and ultimately sell products and services. As brands explore methods of achieving these goals in the metaverse, they must remain mindful of the numerous legal and practical considerations posed by this new technology. Mastering the metaverse will require brands to become adept at navigating **blockchain technology**, **cryptocurrencies**, NFTs and **virtual property**. It will also require brands to embrace the drive toward decentralization that is at the heart of **Web 3** and to understand and keep in mind the well-established principles of advertising and marketing law.



# Caution Ahead >>>

## What To Watch Out for in the Metaverse

The activities a brand undertakes in the metaverse can implicate a host of legal issues. For example, if a brand makes **NFTs** redeemable for goods or services for a period of time or indefinitely, the contractual terms would have to be robust enough to justify the unavailability or discontinuance of that good or service in the future. The brand's counsel and marketers would have to make certain that they don't inadvertently create a type of gift card that might be subject to escheat laws or implicate state and federal gift card issues.

Eventually, courts and regulators will have to determine which jurisdiction's or country's law applies to a brand's metaverse activities, especially activities taking place on platforms that aren't located in the United States.

Finally, don't forget that the **metaverse** and **Web 3.0** are still in their early stages. There have been recent reports of **NFT auctions** overloading **bitcoin platforms** and inadvertently charging hefty transaction fees or causing the purchases to fail. Brands can't count on nascent technology to be reliable, so be prepared for the possibility of trouble occurring and a resulting public relations backlash.

But, for now, let's touch on the basic legal issues that brands and their advertisers and marketers need to keep in mind when they're considering the metaverse as a venue for promotional activity.

### Influencers

As the metaverse continues to develop, social media influencers will increasingly move into this new digital landscape, and their audiences will follow. The FTC's well-established influencer marketing rules will apply to the metaverse as well.

Down the line, as computer-generated imagery and **virtual reality technology** improve, it may become impossible to distinguish a virtual influencer from a real person. This is especially significant for children's advertising, as children are less likely to understand that someone who looks and sounds like a person might not be real.



**However, the FTC has made clear that its disclosure requirements will continue to apply to virtual or digitally-created influencers that appear to be endorsers of a brand's products or services, even if such endorsers are not real people.**



"The **FTC's** well-established **influencer marketing rules** will apply to the metaverse"

### Talent/SAG

The anonymity and decentralization of the metaverse will make it easier than ever to create **AI-powered avatars, deepfakes** and **chat-bots** that convincingly appear to be celebrities. And this is just one of many issues that the metaverse poses for performers and those who engage them. SAG-AFTRA, the union representing professional performers, has moved quickly to assert jurisdiction over this space, expressly prohibiting advertisers from using the computer-generated image or voice of a performer (i.e., **digital doubles**) to evade union obligations.



Expect ongoing battles as the production and marketing industry experiments with how to best engage with talent in the metaverse while the union remains vigilant in protecting its members.

### Advertising

The law requires all advertising claims, including those in the metaverse, to be truthful and not misleading.



Advertisers can land themselves in hot water if their advertising claims are not accurate, especially when discussing a digital asset's rarity, functionality or any other aspects that might impact its value to consumers. To avoid running afoul of U. S. securities law, advertisers must also be cautious when discussing the potential monetary or investment value of a digital asset.

### Sponsorships

Brands and advertisers have quickly embraced branded sponsorships and product integrations in the metaverse. From popular character integrations into video games such as **Fortnite** and **Roblox**, to sponsored **virtual concerts** and the creation of **virtual restaurants** and **storefronts**, marketers are finding an array of opportunities to establish a presence for their brands in this new frontier.



As metaverse sponsorship opportunities continue to develop and grow more complex, sponsors will face new challenges, including accurately verifying and measuring the success of sponsorship campaigns, establishing effective brand safety parameters and managing exclusivity across real world and metaverse events.

### Trademark

As brand owners consider entering the metaverse, they should take steps to protect their intellectual property. The metaverse presents new and unique challenges for trademark owners.



Already, several lawsuits have been filed against NFT owners who created virtual goods mimicking iconic brands without permission. And, with brands themselves forging forward into the metaverse, there will be an increasing need for brand owners to enforce their trademark rights to prevent consumer confusion as to the source of virtual goods.

### **NFTs and Cryptocurrency**

**NFTs, cryptocurrency,** and the **blockchain technology** that enables them are the backbone of many applications in the metaverse. NFTs and cryptocurrency enable users to own digital assets in a decentralized environment, creating a virtual economy that otherwise could not exist.



The creation, sale and transfer of NFTs invoke a number of new and unique legal and transactional issues. The benefit to the buyer, the allocation of revenue, and the responsibility of the parties creating the NFTs often must be documented in legal contracts or website terms and conditions (in addition to the “smart contract” or computer code that dictates how the NFT itself behaves).

### **Sweepstakes**

Traditional sweepstakes and contests are taking on a new dimension in the metaverse. Interactive and virtual reality promotions are offering new and complex prizes, from **NFTs** and other **digital avatars** to **cryptocurrency**.



Nuanced entry-method and valuation issues must now be considered when applying the existing legal frameworks for sweepstakes and contests to these emerging promotions.

### **Charitable Solicitations**

The metaverse provides marketers with exciting new opportunities to appeal to consumers about charitable causes by executing experiences ranging from massive interactive live events to virtual auctions.



Marketers must think through complex disclosure and registration issues when working with charities or conducting fundraising activities in a fluid and interactive environment.

### **Privacy**

Privacy laws are rapidly expanding in the United States. However, their applicability to the metaverse is still being analyzed. These privacy laws often focus on a business or data controller’s obligation to disclose certain information to users and to grant users access to their data.



When operating in a decentralized environment such as the metaverse, it becomes challenging to determine who is obligated to fulfill these privacy requirements. That reality is not likely to keep regulators at bay for long.



# Are you ready...

# for the metaverse?

Have more questions? For more information, please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

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