Exploring the metaverse: What laws will apply?

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By: Tom K. Ara | Mark F. Radcliffe | Michael Fluhr | Katherine Imp

During the last decade, virtual interactions have become an increasingly important part of life for consumers and businesses. This trend has accelerated during the COVID-19 pandemic, with both consumers and businesses gravitating towards video-conferencing and other forms of virtual interactions. Recently, interest in virtual interactions has focused on the “metaverse,” with major companies, among them Facebook, announcing metaverse initiatives. In fact, Facebook, predicting the metaverse as the next wave in technology, has gone so far as incorporating the term into its new name, Meta.

However, like any new foundational technology, the metaverse remains confusing and unknown to many. So, what precisely is the metaverse? What metaverse use cases currently exist, and which do we expect to emerge? What laws will apply to the metaverse? In this article originally published in Chambers TMT 2022, we explore these and other questions in more detail.

What is the metaverse?

Despite widespread discussion of the metaverse as if it were already an existing, finished construct, the metaverse is
currently not much more than a rapidly evolving idea. Discussing the metaverse in 2022 may be a bit like discussing the Internet in the 1960s. In both cases, even computer scientists can only imagine what the future might hold. Modern-day authors and filmmakers such as Ernest Cline and Steven Spielberg – who collaborated on Ready Player One – have given us just a small glimpse of what they envision one aspect of the metaverse to look like.

The metaverse is not a new concept, and efforts at building a metaverse have been afoot for decades. For example, in 2003 San Francisco-based firm Linden Lab released Second Life, an online multimedia platform in which users create an avatar and build a “second life” in an online world. And as is often the case, science fiction precedes and predicts reality. In 1992, writer Neal Stephenson published the novel Snow Crash, a dystopian story featuring a “Metaverse” urban environment complete with virtual real estate accessible through VR goggles. In the 2018 film (and book of the same name), Ready Player One, much of humanity interacts using the fictional OASIS virtual reality simulation. In real life, during the COVID-19 pandemic, humanity has already taken its first step in this direction with education migrating online and video meetings supplanting business travel around the world at a magnitude never before imagined.

Many people also view the development of the metaverse as the natural evolution of the Internet from Web 2.0 to Web 3.0. For context, Web 1.0 is described by many as the first stage of Internet evolution, whereby users primarily consumed content. In Web 2.0 (the currently dominant paradigm), users also interact with the Internet to create and share content. Web 3.0 adds disintermediation (gradual removal of intermediaries) and decentralization, giving users tremendous control over their experience on the Internet.

Loosely defined, the concept of a metaverse refers to the migration of various parts of the human experience from the physical world to an increasingly immersive virtual world. At its core, the metaverse is a pronounced intersection of technology and content. For example, video games such as Fortnite and Roblox allow players to enter a complex, extensive virtual world and engage in a wide variety of virtual experiences and interactions – including with other players from around the world. Platforms such as Sensorium allow users to create their own alter egos and enter a shared virtual space where top DJs play virtual shows, complete with a massive crowd of fellow users. Facebook recently announced Horizon World, a “mixed reality” meeting space that allows users to participate in meetings in a virtual world, complete with avatars, virtual meeting rooms and tables, and even virtual chalkboards.

Some platforms, such as Pokémon Go and Illust Space, allow users to explore the physical world which has been supplemented with digital characters and other artifacts. Many of these platforms can be made more immersive with the use of VR headsets, and future developments in technology – such as haptic feedback suits (which facilitate 3D touch) and omnidirectional treadmills – promise to add to the experience.

Thus, despite reference to “The Metaverse,” there is at present no unitary metaverse experience. Rather, “The Metaverse” refers to an idea likely to be embodied in numerous virtual worlds, where technology has the opportunity to bring content to those worlds in ways never before imagined and, with it, legal issues and challenges never before contemplated.

Present and future uses of the metaverse

As noted above, several aspects of the present versions of the metaverse are already in use and/or in the late stages of development. The need for mankind to continue to advance its experiences in commerce, entertainment and education, particularly in a world where personal interaction is forbidden or discouraged due to health risks, has fueled rapid advances in the development of the metaverse in a number of key areas discussed more fully below.

**Commerce**

The fully immersive metaverse is being built on a foundation of Web 3.0 technologies, including blockchain, cryptocurrencies, and non-fungible tokens (NFTs). We have already seen major companies accept cryptocurrencies as a form of payment for goods and services, and El Salvador recently became the first country to adopt the cryptocurrency Bitcoin as a second legal tender. In a fully immersive metaverse, commerce may use cryptocurrencies as consideration. Digital goods, ownership of which is often recorded with NFTs, have recently found great success, further evidencing the commercial possibilities in the metaverse.

The metaverse also offers a significant opportunity for virtual occupational training. Companies will likely continue to develop and build upon the virtual and augmented reality occupational training modules currently employed.
metaverse may offer significant opportunities for candidates to gain experience in occupational skills and display such skills to prospective employers.

The metaverse has and will continue to revolutionize the marketing and advertising of products and services by creating brand experiences that are more engaging and exciting and give the consumer a bespoke experience. Many major brands have already embraced the medium in numerous ways, and their brand engagement and awareness has already yielded meaningful results. Virtual events, virtual storefronts, and digital collectibles are – and will continue to be – just some of the ways that brands and products will reach virtual consumers.

Entertainment

Technological advances relating to online video games have been a major driver in the necessary technology for the metaverse. From the early pioneers such as Second Life to the leading interactive online video games of today, these games have resulted in rapid evolution of an interactive virtual world for competitive play and have opened the door for new virtual experiences, from concerts to movie premieres to NFTs of all types. For example, musical artists such as Lil Nas X, Travis Scott, and Ariana Grande have each held successful virtual concerts within online game platforms Roblox and Fortnite, attracting millions of viewers worldwide. As the metaverse becomes a part of popular culture, virtual concerts and sporting events can provide artists and athletes with a new platform to interact with fans on a global scale. Similarly, game play will also continue to evolve with opportunities for interconnectivity among different metaverse platforms.

Sports and entertainment memorabilia and collectibles in both the traditional form and virtual form will also find growing adoption in the metaverse, in the form of conventional NFTs or NFTs with real-world components. For example, the NFL has created virtual commemorative NFT tickets for its games. Other leagues and events have sold NFTs that provide access to real-world experiences and perks. The metaverse has also spawned interest in sports memorabilia and collectibles that exist solely in the virtual world. ZED RUN, for instance, combines NFTs, cryptocurrency and blockchain technology to create digital horse racing, allowing its users to buy, trade, breed and race their digital horses.

Education

Until a few years ago, distance learning was viewed as a viable yet occasional means of attaining a post-secondary degree. During the pandemic, that changed, with interactive distance learning being put into action for many students from primary school to universities. The COVID-19 era has opened the gates to this form of learning, with its potential to create learning experiences that are rich and meaningful.

Virtual classrooms are only the beginning of what may evolve into an educational experience that allows educators and students together to visit, for example, archaeological ruins, the surface of a planet in our solar system, or the DNA of person. Educators will also be able to incorporate aspects of the metaverse into class projects. For example, using Roblox’s “learn and explore” experiences, students can build virtual theme parks to demonstrate their knowledge of angles and math concepts. As the metaverse expands and develops, so too will the ways in which educators and students can talk, learn, plan and exist together in a virtual environment.

Law in the metaverse

Much of the application of existing laws, as well as potential creation of new laws, in the metaverse remains unknown. In some cases, existing legal schemes may clearly apply. In other cases, existing laws make an awkward fit, and courts may be tasked with novel issues of application to new technology. In still other cases, existing laws may prove insufficient to address problematic conduct, which might trigger passage of new laws and regulation. The scope of all laws and regulations that can or might be implicated in a metaverse is practically unbounded and might generate innumerable legal issues.

Intellectual property

Intellectual property disputes will almost certainly feature prominently among these legal issues – and, indeed, metaverse and other Web 3.0 projects have already seen a number of intellectual property disputes arise. In June 2021, record label Roc-A-Fella sued one of its co-founders, Damon Dash, seeking to enjoin him from auctioning a NFT of the cover of the Jay-Z album *Reasonable Doubt*. Roc-A-Fella claims it owns the copyright in the album cover and that Dash has no rights to sell the album cover as an NFT.
In another example, back in 2018, several well-known figures and celebrities filed lawsuits against Fortnite developer Epic Games, alleging that the game implemented each plaintiff’s trademarked dance moves without permission. Tracking and pursuing intellectual property enforcement in the virtual world has generally proved to be a difficult game of whack-a-mole, and we can expect similar challenges in the metaverse.

The creation of new types of digital assets, such as digital collectibles documented via NFT, has already raised novel intellectual property issues, among them the scope of the right to use the content held by the NFT owner. NFT creators and content licensors are developing a number of different licensing models. For example, the holder of an NBA Top Shot Moment NFT receives a limited license to use, copy and display the underlying content for personal, non-commercial use.

Use and exploitation of previously licensed or acquired intellectual property rights in the metaverse raise novel questions for licensees and acquirors around the breadth and scope of rights they have obtained under agreements that may have long predated the Internet, much less the metaverse. These important issues around the scope of rights licensed or granted — many of which have previously led to disputes between parties with the advents of new content exploitation methods over the past decades (eg, CDs, DVDs, digital copies, streaming) — have and will arise in the context of the metaverse and may pose new legal questions and challenges which are unique due to the way the metaverse operates.

While the scope of intellectual property protection in the metaverse is not clear, the new NFT market has already seen a number of intellectual property disputes. The possibility of disputes in the metaverse is even greater. Companies and developers need to carefully consider whether they have the necessary intellectual property rights for the proposed use within a metaverse, and traditional approaches on enforcement of intellectual rights may be revisited or significantly challenged, as we have seen in recent years with intellectual property incorporated into user-generated content.

**Regulation of virtual assets**

Virtual assets in the metaverse, such as NFTs, may be subject to traditional financial regulatory regimes such as securities, banking, money transmission, and commodities laws. The manner in which some blockchain-based assets are developed and sold might render them “investment contracts” and, thus, subject to securities laws. Application of securities laws would trigger a complex set of regulations on sales, trading and other activities.

The metaverse will undoubtedly use cryptocurrencies and tokens, which may be subject to these regulatory regimes. The SEC is already struggling with the appropriate application of securities laws to cryptocurrencies and tokens, and one SEC commissioner recently stated that securities laws might apply to certain NFT projects, particularly NFT projects that offer fractionalization or entitle the holder to a revenue stream. In addition to securities laws, the issuance, trading, exchange, lending and other activities concerning in-world currencies may trigger certain regulatory regimes — for example, those concerning banking, money transmission and other financial activities.

**Tax**

Similarly, when such assets are purchased and sold, they may be subject to various taxes, including income and sales taxes. The US Internal Revenue Service (IRS) has issued guidance clarifying that cryptocurrencies constitute property, the profit from which is taxable. NFTs are understood to receive similar treatment. Indeed, the IRS has already issued myriad subpoenas to cryptocurrency exchanges seeking information that could lead to the identification and collection of income taxes, and it would not be surprising to see taxing authorities targeting metaverse projects in similar fashion.

Whether NFT and other metaverse asset sales are subject to state sales tax presents another open issue. While many states have guidance on sales tax as applied to digital assets, to date no state has issued guidance specifically on whether sales tax applies to NFTs.

**Regulation of conduct in the metaverse**

Another major issue concerns the legal limits of conduct in a metaverse and who will police them. Roblox recently filed a lawsuit against content creator Benjamin Robert Simon, alleging that Simon has been engaging in a variety of harassing behavior against other users in violation of the Roblox terms of service, as well as federal and state computer fraud and abuse statutes. A beta tester of Facebook’s VR platform Horizon World recently made allegations that she had been virtually groped in a virtual Horizon World meeting space called the Plaza. Facebook has thus far responded by noting that users can block each other, but did not address the potential legal consequences of such actions, which may require novel application of laws designed to address misconduct in the physical world.
On this front, many metaverse projects have terms of service that purport to govern user conduct contractually, allowing remedies for violation such as banning from the platform and confiscation of in-world assets. For example, the virtual worlds Fortnite and Roblox both require users to accept terms of service before entering the game. These terms typically address an array of conduct, from restriction of various behaviors to measures taken to achieve platform security to methods for dispute resolution. The enforceability of such contractual provisions may raise novel issues, particularly with respect to enforceability between users and for individuals who purchase in-world assets outside of the metaverse who may not have viewed or agreed to such terms of service.

**Gambling and lottery laws**

Gambling and lottery laws, which typically regulate certain activities concerning games of chance with prize awards, may also be implicated in metaverse projects that feature chance-based opportunities to win prizes. For example, some metaverse games feature “loot boxes,” virtual unopened treasure chests that users can discover or purchase and open to receive a randomized selection of various virtual assets. The regulation of loot boxes as a form of gambling has already triggered scrutiny in several jurisdictions.

**Privacy and cybersecurity**

Two other emerging issues concerning metaverse projects involve privacy and cybersecurity. Privacy impacts activities concerning personal data, including processing activities such as the collection, use, and transmission of personal data. Metaverse projects may collect a variety of personal data from users, which can range from basic identifying information, to information about movement and activities in the metaverse.

To address these, metaverse creators should consider implementing privacy policies and internal compliance programs. That said, the application of existing privacy laws to the metaverse poses new issues. This challenge will only grow as more jurisdictions continue to pass new comprehensive privacy laws – for example, California, Virginia and Colorado’s laws.

Cybersecurity also presents unique issues in the metaverse. Cybersecurity relates to how a company protects itself from an attack by a third party that could impact data, whether personal or not, as well as information systems. There are a number of emerging issues regarding cybersecurity, including new guidance regarding disclosure and controls.

Both privacy and cybersecurity have legal implications, as well as other implications, including under governance.

As mentioned above, these are just a few of the many legal areas that may be triggered by metaverse projects. Others may include sanctions and export control laws, employment laws, criminal laws, and many others. Furthermore, metaverse projects are generally global, allowing use and interaction by participants across the world. Companies using the metaverse must consider the risk of complying with the laws and regulations in multiple jurisdictions.

**Strategies for metaverse projects**

The opportunities in the metaverse are new and are likely to evolve over time as the technology evolves. Creators building metaverse projects should consider at least the following.

**Be prepared to experiment with different strategies and metaverse platforms**

Metaverse technology is new and evolving. The companies building metaverse platforms are taking different approaches, including different functions that may evolve over time. Some existing and future metaverse platforms may fail over time, and a company should be prepared for this risk. Companies should thus be prepared to experiment with multiple metaverse platforms as well as different strategies, adjusting the strategy as needed.

**Consider the consumer experience**

A metaverse strategy should consider the desired consumer experience and the cost to the consumer of hardware or other technology needed to access the metaverse platform. For example, the current cost of VR headsets is still relatively high and may limit mass consumer adoption of metaverse platforms requiring such headsets. The metaverse strategy should also be coordinated with other components of the company’s digital strategy such as the use of NFTs, social media and communication channels (eg, Discord or Telegram) as well as with real-world events.
Ensure that the company has the necessary intellectual property rights for its existing content

Companies will probably wish to use existing content to implement their metaverse strategies, but they should be sure that they have the necessary rights to use any content developed by third parties. For example, the rights to music in television advertisements are generally licensed for use solely in a single commercial. Indeed, disputes have already arisen in the NFT market about the rights to using existing content: Miramax Pictures has sued director Quentin Tarantino over the right to sell copies of scripts and other material relating to the film, *Pulp Fiction*.

If the rights in the content are owned by third parties, a company creating a virtual experience on a metaverse platform should ensure that its license from the intellectual property owner or licensor is sufficiently broad to cover the development and licensing of the content for virtual experiences on metaverse platforms. Even if the company owns the intellectual property in the content, it may have already licensed the intellectual property rights relevant to metaverse use to third parties.

For example, *National Geographic* was in litigation for years with its authors over the right of *National Geographic* to publish a CD-ROM collection of its magazines. Content, such as pictures, videos and music, can involve complex rights that require special expertise to assess the scope of embedded intellectual property and obtain the rights to use it. Videos, for instance, may include copyright-protected moving images, still images, music and background scene features (such as street art), as well as other forms of property such as trademarks and rights of publicity, all of which might need to be cleared for the specific use.

**Future-proof your strategy**

The use of the metaverse is likely to continue to expand in importance in the future, and companies should ensure that licenses to third-party content in the future include rights to exploit such content for virtual experiences on metaverse platforms. The company can learn from the experience of the entertainment industry through the technology changes from films to television to videocassette and DVD to streaming. Companies should also protect their brands in the new categories represented by the metaverse by registering their trademarks in the appropriate new classes.

**Monitor metaverse platforms for infringement of IP owned by your company**

The metaverse is in its infancy, and many participants are casual about intellectual property rights (and some participants are willing to misappropriate the rights of other parties to make a quick dollar). To give just one example: a digital artist, Mason Rothschild, created “MetaBirkins,” which were NFT versions of Hermes’ famous Birken bags. Hermes has sent him a cease-and-desist letter. However, at the time of writing, the MetaBirken NFTs are still available on some platforms. As the metaverse provides new opportunities for misappropriation of intellectual property, content owners and licensors should consider the appropriate scope of monitoring such platforms and enforcing their rights.

**Conclusion**

Mankind is only beginning to arrive at the event horizon of the metaverse. As we delve deeper into the metaverse, organizations and individuals will increasingly embrace its use and incorporate this foundational technology into their real-world existence. As the metaverse evolves and expands, so too will the number of legal and regulatory issues which will arise that legal counsel must help their clients navigate. If the metaverse evolves into the ultimate convergence of technology, content and the human experience – as it is expected to – anticipating and addressing the legal and regulatory issues the metaverse presents will be critical to its successful adoption by mankind.

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**AUTHORS**

Tom K. Ara  
Partner  
Los Angeles (Century City) | T: +1 310 595 3000  
Shanghai | T: +86 21 3852 2111  
tom.ara@dlapiper.com