Session 105 | Making of the Metaverse: What It Is and the Top Emerging Legal Issues

Meta Platforms announced in 2021 that it was committed to developing an immersive, virtual Internet called the "Metaverse." Since then, a growing number of companies and governments have started to invest heavily in the Metaverse, where people will be able to live, work and play together seamlessly. This dynamic set of panelists from the private sector and government will discuss what the Metaverse is, how it fits with Web3, and the top legal issues that are emerging in this space. The conversation will be wide-ranging, covering the Metaverse's potential for creating new opportunities within the legal profession, technical challenges, protecting privacy rights in a virtual world, the role of blockchain, including non-fungible tokens (NFTs) and cryptocurrencies, trends in metaverse-related applications filed with the USPTO, patent and trademark protection in the metaverse from the USPTO's perspective, ensuring diversity and inclusion, and how making the Metaverse safe is crucial to its success.

Moderator:
Chun T. Wright, Principal, Law Office of Chun T. Wright

Speakers:
Michael Cheng, Vice President, Head of Corporate, M&A, and IP, Dapper Labs
Elaine Dai, Director and Associate General Counsel - Reality Labs, Meta
Hope Shimabuku, Regional Director, Texas Regional USPTO
Jimmy Yun, Director and Associate General Counsel, Meta
MAKING OF THE METAVERSE:
What It Is and the Top Emerging Legal Issues

Session 105
Friday, November 4, 2022
9:00 a.m. – 10:15 a.m.
Las Vegas, Nevada
Speakers

- **Michael Cheng**, VP, Head of Corporate, M&A, and IP, Dapper Labs
- **Elaine Dai**, Director and Associate General Counsel - Reality Labs, Meta
- **Cammie Phan**, Associate General Counsel, Meta
- **Hope Shimabuku**, Regional Director, Texas Regional USPTO

Moderator

- **Chun T. Wright**, Principal, The Law Office of Chun T. Wright
Building towards the Metaverse
What is the metaverse (lowercase-m)?

- At its most simple, a virtual environment in which users can interact with each other to work, play, meet and learn

- “a massive communal cyberspace, linking augmented reality and virtual reality together, enabling avatars to hop seamlessly from one activity to the next.”¹

- “The ‘metaverse’ is a set of virtual spaces where you can create and explore with other people who aren’t in the same physical space as you.”²

- Not an entirely new conceptualization, has existed in many forms (think MMORPGs)

The metaverse is presence
Making the Metaverse: The 6 Stacks

1. Infrastructure
2. Interfaces
3. Virtualization Tools
4. Virtual Worlds
5. Economic Infrastructure
6. Experiences
Different Conceptualizations, Shared Features

Differing ideas/focuses of the metaverse exist depending on the platform, but commonly users in a metaverse can:

- Create an avatar
- Interact with other users and brands in virtual social spaces
- Purchase virtual goods/services (including NFTs)
- Test real world goods/services in VR
- Purchase real world goods/services and virtual goods/services with real world currency and cryptocurrency
- Conduct business operations (including presentations, meetings)
Metaverse Use Cases

Work

Create

Play

Experience
Meta’s Approach to Safety & Governance
Our Vision for Metaverse Safety

- **Building safe and healthy communities** starts with building shared intent, incentives, and positive norms.
- Our vision is for users to have *industry-leading, intuitive personal controls* to moderate their own experience and remediate unwanted interactions.
- **Communities will also have significant opportunity to govern their worlds**, through establishing rules, community enforcement mechanisms, and the propagation of norms. Creators will set relevant context and expectations for the spaces they own and have controls to govern that space.
- This is a **nascent product and medium**, and we are in early days of building real-time synchronous social experiences.
SAFETY AND INTEGRITY – Content Regulation

KEY REGULATIONS

• UNITED STATES: Section 230 of the Communications Decency Act (1996), 47 U.S.C. § 230
  o Provides immunity to providers and other users of interactive computer services from liability: 1) arising from the posting of third-party content; 2) for restricting or giving others the technical means to restrict access to certain harmful content, including constitutionally protected materials

• EUROPEAN UNION: The Digital Services Act, adopted July 2022
  o Intended to create a safer and more competitive digital space
  o Rules concern online marketplaces, social networks, apps stores and more and govern “gatekeeper” online platforms

KEY ISSUES FOR THE METAVERSE

• Content moderation and rules
• “Grey area” between on/off-platform safety issues
• User safety controls
Examples: Metaverses in the Making

- **Meta**: Quest VR headset + social VR platform Horizon (Worlds, Venues, Workrooms)

- **Epic**: Fortnite video game and virtual experiences

- **Nvidia**: Omniverse

- **Roblox**: Virtual Universe

- **Snap**: Snap Spectacles 4 AR glasses
Perspective from the USPTO

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Reimagine the Future!
Metaverse/Virtual Realm Patent Applications

- Human Body: 1331
- Head Tracking: 489
- Eye Tracking: 1003
- Hand Worn: 195
- Nervous System: 198

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Trademark Applications Filed (FY2018-22)

- **Class 9**: Downloadable virtual goods, image, computer game software.
- **Class 35**: Online Retail store services in virtual environment.
- **Class 41**: Entertainment Services.
- **Class 42**: Scientific and technical services.

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Metaverse: 619 + 549 + 765 = 1933
Virtual world: 1302 + 1772 + 2042 = 5116
Virtual goods: 1546 + 2079 + 2583 = 6208
NFTs: 3093 + 2898 + 3614 = 9505

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Trademark Registrations (FY2018-FY2022)

- **Metaverse**
- **Virtual world**
- **Virtual goods**
- **NFTs**

### Class 9
- Downloadable virtual goods, image, computer game software.

### Class 35
- Online Retail store services in virtual environment

### Class 41
- Entertainment Services

### Class 42
- Scientific and technical services
Perspective from the USPTO re Legal Questions

- Patent and trademark protection in the metaverse from the USPTO's perspective
- Legal Questions to Answer:
  - What is the definition of goods, services, and commerce in the Metaverse/Virtual Realm in the trademark context?
  - Are NFTs simply certificates of ownership? Or can they be considered a virtual good? Or both?
  - What is the scope for the likelihood of confusion analysis? Is it physical goods and services, virtual goods and services or both?
  - Who is the inventor in the Metaverse/Virtual Realm? Is it the avatar or the person controlling the avatar?

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Blockchain, NFTs, Cryptocurrency in the Metaverse

<table>
<thead>
<tr>
<th>How its defined</th>
<th>What it actually is</th>
</tr>
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<tbody>
<tr>
<td><strong>Blockchain</strong>: a decentralized ledger of all transactions across a peer-to-peer network; transactions can be confirmed without a central authority</td>
<td><img src="table" alt="Investor" /></td>
</tr>
<tr>
<td><strong>NFT (non-fungible token)</strong>: a record on a blockchain that is associated with a particular digital or physical asset. The owner of an NFT is recorded on the blockchain and can be transferred.</td>
<td><img src="image" alt="Property Information" /></td>
</tr>
<tr>
<td><strong>Cryptocurrency</strong>: a digital currency in which transactions are verified and records maintained on the blockchain</td>
<td><img src="image" alt="Cryptocurrency" /></td>
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Web3: Current Challenges

• True decentralization not possible in the near term

• Only the fun things have been decentralized thus far. Things that are boring or hard are still centralized.

• Lack of course of dealing, norms. Norms first, then regulation.

• Unbanked exactly the folks who need protection

• Bad engineering (Web 1.5)
Web3: Interesting Elements

• Time Dilation / Relativity Effect: Example: NFT TM Enforcement

• De-Fi: re-learning finance lessons from 1970s, 1980s

• DAOs: re-learning politics lessons from ancient Greece

• Awakened brands to the untapped value in community

• Social, political, cultural undertones
Legal Issues in the Metaverse

• Privacy, Personal Data
• Rights of Publicity
• Content Integrity
• Safety/Health
• Cybersecurity
• Free Speech (Content Moderation)
• Conduct – trespass, harassment, threats, user disputes
• IP & Licensing
• Marketing/Advertising Law
• Business and Reputational Injury
• Antitrust
AR Safety: Snapchat Speed Filter Litigation

• **Lemmon v. Snap**: In 2017, a 17-year-old driver was speeding when a passenger pulled open the Snapchat app and activated the “speed filter” (showed him going at 123 mph). The car crashed, killing all 3 occupants. The parents of two of the passengers (one of whom was using the Snapchat speed filter) sued Snap for negligence and punitive damages, claiming that the negligent design of the Snap app contributed to the deaths because it encouraged speeding. A similar case is also proceeding in Georgia state court.

• In 2021, Snap announced that it was discontinuing the speed filter due to “decreased usage.”

• **Procedural Status**: The district court granted Snap’s MTD under CDA § 230 (which shields social media companies from liability based on content created by their users if the companies are publishers or speakers of that information), but the 9th Circuit reversed because Snap was not a publisher or speaker in this instance because the suit concerned the design of the Snapchat app rather than Snap’s failure to monitor its users’ content. The case is currently in discovery and a trial is tentatively scheduled for August 2023. *Lemmon, et al. v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) and *Lemmon v. Snap, Case No. 19-4504 (C.D. Cal. February 25, 2020)*
Conduct: Snap Cyberbullying Litigation

• *Bride v. Snap*: Mother of a teen who committed suicide, sued Snapchat in May 2021, claiming that Snapchat app add-ons Yolo and LMK (also co-defendants) facilitated anonymous messaging that allowed the cyberbullying that led to her son’s death. The suit seeks to have the apps and any others that lack safeguards against cyberbullying removed from Snap’s platform. The complaint raises 10 causes of action including strict liability, negligence, fraudulent misrepresentation, negligent misrepresentation.

• The plaintiff reached a settlement with Snap (not publicly disclosed). Settlement discussions did not pan out with Yolo and LMK, and their MTDs are currently being briefed.
AR Trespass: Niantic Pokémon Go Settlement

• Pokémon Go: mobile game collab by Niantic, The Pokémon Company, and Nintendo, which uses GPS coordinates to locate/interact with virtual, make-believe creatures called Pokémon that are overlaid onto the physical, real world. Pokémon can also be trained to fight in virtual battles.

• In re Pokémon Go Nuisance Litigation: the lawsuit alleged that Niantic failed to consider trespass and nuisance issues when designing the game Pokémon Go, which designated real world landmarks on private property, like the Holocaust Memorial Museum and cemeteries, as destinations. Case No. 3:16-cv-04300-JD (N.D. Cal.)
AR Trespass: Niantic Pokémon Go Settlement Cont...

• Per the settlement agreement:
  o Settlement Class: All people in the US who own or lease property w/in 100 meters from a Pokémon Go designated location

  o Injunctive Relief: remedial steps to 1) prevent the future placement of virtual games assets on private property, and 2) promptly address future complaints of trespass/nuisance; 3) over a three-year settlement period

  o Monetary Damages: Individual mediation
NBA 2K Avatar BIPA Litigation: *Mayhall v. AWS*\(^1\)

- The plaintiff brought suit in May 2022 on behalf of their minor child against AWS/Amazon, alleging that the companion app to the popular video game NBA2K collects scans of the user’s facial geometry and stores the scans on Amazon’s servers without proper consent or disclosures, in violation of BIPA.

- Users can use a “Scan Your Face” feature on the companion app which takes a picture of their face and creates a personalized avatar in the NBA 2K video game that they can play with.

- Procedural Status: AWS/Amazon filed a MTD principally arguing that neither AWS nor Amazon possessed the plaintiff’s biometrics because an Amazon account holder retains full ownership of their account (in this instance, the account holder was Take Two, the publisher of NBA 2K) and additionally, the Scan Your Face feature did not collect biometric data. The magistrate judge has filed a report and recommendation denying the MTD because the plaintiff has plausibly alleged possession and that AWS/Amazon failed to show that having exclusive access or control were required for possession under BIPA. AWS/Amazon has filed an objection to the report and recommendation and the issue is currently being briefed.

\(^1\) *Mayhall ex rel. D.M. v. Amazon Web Servs. Inc.*, 2022 WL 2718091 (W.D. Wash. May 24, 2022)
Other Notable Case

- **Doe v. Roblox Corp.**, Case No. 3:21-cv-03943 (N.D. Cal. Nov. 2, 2021): Minor user of online “metaverse” in which account holders control avatars of themselves brought putative class action against Roblox, arguing that it incentivized account holders, mostly minors, to purchase virtual items for avatars, took a portion of the profits, and deleted items to induce more purchases (“deletion scheme”). Claims this violated California’s Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA), and constituted fraud, conversion, unjust enrichment, and breach of the covenant of good faith and fair dealing.
QUESTIONS?
Thank You