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5 KEY TAKEAWAYS

Doing Business in the Metaverse: Everything Your Other CLEs Didn't Tell You

Kilpatrick Townsend attorneys Michael Breslin, Marc Lieberstein, Rob Potter, and Anthony Glosson recently presented a webinar discussing doing business in the metaverse along with how to build a metaverse strategy, transact business within and for the metaverse, various legal issues for brands to consider before they enter the metaverse, and more.

Here are 5 key takeaways from the webinar, "Doing Business in the Metaverse: Everything Your Other CLEs Didn't Tell You:"

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Web3 & The Metaverse. Web3 is still largely conceptual. It is a big concept premised on a lot of smaller ideas, including decentralization, self-sovereign identities, and democratization of resources. But the larger concept of Web3 remains inherently intertwined with the future vision of the metaverse: a series of open worlds where users transact and exchange content directly, without going through a central authority. What we've currently seen from NFTs is only the tip of the iceberg. We anticipate that NFTs will eventually become ubiquitous, both in the metaverse and the real world. Digital luxury apparel and customer loyalty programs will almost certainly rely on NFTs, and brands will need to enforce against counterfeit NFTs just as they do for physical goods. There are currently several pending litigations concerning NFTs—including Hermes v. Rothschild (S.D.N.Y), Nike v. StockX (S.D.N.Y.) (for which the firm is co-counsel for StockX), and Yuga Labs v. Ryder Ripps (S.D.N.Y.). These litigations (and others that are sure to follow) are expected to decide issues regarding the strength of "old school" physical-goods trademarks in the metaverse, the extent to which allegedly expressive works are protected from infringement, and whether NFTs themselves can be counterfeited.

Metaverse Governance. The metaverse and the platforms it encompasses are still in very early stages, so the contours of how those platforms are governed, and what rules apply to users and their content, will continue to develop for years to come. At this early juncture, we believe most governance questions will touch on at least one of three subjects: identity, access, and content – with most legal questions arising from how governance decisions regarding two of those subjects impact the third. For instance, as to identity, each platform will have to determine if you are uniquely identifiable, or whether you can be truly anonymous. And if you are anonymous, what are the implications for what content you can access, or whether you can recover or take action to protect content you claim you created or that was pirated from you? Conversely, if you are uniquely identifiable, will (or should) a platform have the ability to impose

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to protect content you claim you created or that was pirated from you? Conversely, if you are uniquely identifiable, will (or should) a platform have the ability to impose restrictions on your access or content based on your prior conduct within other platforms?

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Legal Issues in the Metaverse. Traditional legal issues will certainly have their place and become the subject of disputes in the metaverse. For instance, to what extent does the First Amendment apply in common meta-spaces, such as within a public, virtual shopping mall? Or to what extent will a metaverse world be able to utilize real estate owned by a user under concepts such as eminent domain? Questions like these, when (not if) they arise, will undoubtedly be at the forefront of metaverse legal developments.

Brands in the Metaverse. Brands are gearing up for protecting and exploiting their intellectual property, e.g., licensing, franchising, collaborations, promotions, tech transfer. Brands are filing patents on their operation, as well as filing new trademark applications for their trademarks for use in the metaverse and in connection with NFTs and other digital products and services they think they may provide in the metaverse. Before a brand ventures into the metaverse it should consider at least the following:

(a) Can your brand/franchise pivot? Does it fit in the metaverse?
(b) Do you need/will you have the right partner to succeed in deliver the same quality service/product expected of your brand (quality control/supply chain)?
(c) Have you determined what your business objective(s) is/are for going to the metaverse – revenue, promotion, expansion, publicity?
(d) Are your able to assess your privacy/security risks, and comply with applicable and governing laws?

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Contracting with Web3 Vendors. Because metaverse assets are generally represented by NFTs, many "traditional" NFT contracting issues apply. Consider whether your vendor contracts include assurances that the vendor will, where applicable, mint NFTs to community-accepted standards, plan ahead for reliable long term hosting (whether centralized or distributed), and develop NFTs in a manner compatible with the metaverse platforms and marketplaces on which you expect them to be transferred, awarded, or traded. Further, determine how any applicable terms and conditions will be associated with the metaverse assets, both upon first minting and upon onward transfer of the asset. This issue takes on particular significance when metaverse assets confer real-world benefits, such as loyalty program perks, authentication of physical assets, or entry rights to real-world events. If a benefit carries terms and conditions when conveyed via traditional means, it should have those terms (and perhaps more) when conveyed via metaverse-based mechanisms. Finally, even for assets that exist and hold value only in the metaverse, ensure that your vendor is not incentivized to devalue those assets by minting, issuing, or creating more of them than anticipated.

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