Setting up for success in the metaverse: Intellectual property considerations for businesses

March 07, 2023

Key takeaways

- Companies can quickly ease their way into the metaverse by entering into intellectual property license deals or buying assets from companies that are already well positioned in the metaverse.
- Another potential way to enter the metaverse is through licensing rights or purchasing assets.
- Seeing how the metaverse is borderless, brand owners must consider how to protect their intellectual property assets in multiple countries and pay attention to the scope of protection and enforcement. They must also remain aware of how any given metaverse platform addresses intellectual property issues by way of terms and conditions and policies.
- Brand owners may want to consider the metaverse's potential for data collection, as well as the legal and ethical ramifications for such collection and impact on their brand.

Introduction

The concept of a metaverse, which is often summed up as a virtual-reality space where users can interact with a computer-generated environment and other users, is beginning to come to life. Some examples of metaverse platforms include Roblox, Fortnite, Horizon World and Decentraland, as well as a precursor, Second Life. These platforms provide some insight into what brand, marketing and intellectual property (IP) protection will look like in the metaverse as it expands to other realms than entertainment.

In addition to generating sales of digital products, the metaverse offers significant marketing opportunities for brand owners to reach a bigger audience, increase their digital footprint, collect data, and drive consumer behaviour. This article discusses important intellectual property and related commercial issues for brand owners to consider. It also provides suggestions for how businesses may set up for success and protect and enforce their intellectual property in the metaverse.

How to structure for success in the metaverse

Collaboration and acquisition

Taking a step into the metaverse can be daunting for some brand owners, including navigating where to start, how much to invest and where to focus their efforts.

For these reasons, brand owners looking to position themselves in the metaverse may wish to collaborate with others who are already present in this space. Companies can quickly ease their way into the metaverse by entering into intellectual property license deals or buying assets from companies that are already well positioned in the metaverse. These experts can help develop brands using innovative technologies.

According to TechMonitor and based on M&A data collected by GlobalData,[1] metaverse mergers and acquisitions in the past 18 to 36 months reached a combined value of US$77 billion, as buyers snapped up targets ranging from video game publishers to VR headset manufacturers.

Buying or licensing considerations

Not every brand can enter the metaverse in the same manner as Microsoft, which made a US$69 billion purchase of gaming giant Activision Blizzard in January 2022. Similarly, Nike jump-started its launch in the metaverse by acquiring RTFKT, a company that uses game engines, NFTs, blockchain authentication and augmented reality, combined with design and manufacturing expertise to create phygital fashion, sneakers, and digital artifacts.[2] Companies should note that market entry by acquisition can have its pitfalls, including possible anti-competition claims such as the one faced by Meta regarding their acquisition of Within Unlimited, makers of the fitness app Supernatural.[3]

In light of the above, another potential way to enter the metaverse is through licensing rights or purchasing assets. There are some essential elements that brand owners will want to consider when entering into such transactions, including brand ownership and rights to use brands and other intellectual property for all virtual and digital purposes.

Intellectual property licensees and owners should look at existing license terms to ensure the rights granted or received are broad enough to capture such uses that may not have been contemplated at the time of licensing. Brand owners may also contemplate what they can develop independently and what would be more suited for acquisition or license. Due diligence on and valuation of targets in the metaverse space also comes with unique challenges due to the unique and untested offerings within innovative technology.

Branding considerations

i. Protection and enforcement of intellectual property rights in the metaverse

The metaverse, as an online virtual world, transcends the boundaries of traditional countries and jurisdictions. This means that brand owners must consider how to protect their intellectual property assets in multiple countries in order to ensure that their rights are respected and that no one is infringing upon them. This will require developing a

thoughtful strategy that takes into account the appropriate jurisdictions for protecting intellectual property rights, scope of rights and enforcement mechanisms.

For example, brand owners will have to consider whether the scope of any existing trademark registration for traditional goods and services (such as shoes) are sufficient to protect digital goods and services in the metaverse (such as digital shoes), or whether these registrations need to be expanded to include digital versions of goods and services.

Another challenge brand owners in the metaverse face relate to trademark issues. These include protecting their trademarks against confusion and dilution, defending against infringement and cybersquatters, and ensuring that their trademarks are not being used in a disparaging manner. Likewise, brand owners in the metaverse face a variety of copyright issues, from protecting their intellectual property from infringement to being able to use the latest technology to create a unique virtual experience for their customers.

For instance, 3D models, music, and other digital assets need to be properly licensed and tracked to ensure that brand owners are not unintentionally violating the intellectual property of another user. Additionally, the metaverse's open-source nature allows users to remix and build on the work of others, making it difficult for brand owners to maintain control over their creative works.
In addition to intellectual property law, most observers expect that a metaverse platform's policies or guidelines will play a vital role in driving or curtailing infringement activities in that metaverse, and determine a brand owner's ability to police and enforce their rights. Most metaverse platforms have policies or guidelines that address intellectual property issues, although some may play a more active role than others.

For example, Roblox has a set of "Community Standards," which allows the platform to remove infringing content upon receiving a valid notice based on the *Digital Millennium Copyright Act* in the U.S. or trademark infringement removal request. On the other hand, Decentraland (which is built as a "decentralized" platform), has created a Decentralized Autonomous Organization where decisions are voted on within a virtual community, while also maintaining a terms of use and content policy that prohibits intellectual property infringement). Horizon World has a dedicated webpage and policy dealing with intellectual property infringement similar to its social media counterpart, Facebook. For Horizon World users, infringement reports can be sent to a dedicated email address and a trademark report should include the trademark registration information, if applicable.

ii. Domains, usernames and profiles – Choosing a domain that captures your brand in the metaverse

Most brand owners have been using domain names (.com, .ca, etc.) to both promote and protect their brands on the Internet, and securing the appropriate social media platform profiles for some time. The advent of the metaverse may require brand owners to consider new domain name registrations, usernames, and profiles that reflect the brand in the metaverse.

Data collection and ownership of assets in the metaverse

The vision of ownership of the metaverse is still in flux and will inevitably evolve considerably as we prepare for Web3. The value of the metaverse for brands may come in the form of property or goodwill, but it may also be an opportunity for data collection about consumers, especially those that interact with the brand in the metaverse. Current data collection of page views or likes may give way to, in interactive VR, measuring how long a person stares at something, or sharing data on what brand affinities their avatars suggest, or mining user hand movements.[4]

Brand owners may want to consider the potential for collecting such data, its value and use as well as the legal and ethical ramifications for such collection. This will necessitate specific data collection and security policies and procedures, and how such practices may make an impact on a brand.

Conclusion

The age of the metaverse is here and brand owners will need to consider how they want their brand to live, grow and be protected in these new environments. Creative thinking, technical knowledge, and willingness to experiment with new environments and technology will all be essential traits for those developing and protecting brands in the metaverse.

If you have any questions regarding intellectual property in the metaverse, do not hesitate to contact one of our Intellectual Property advisors or any of the contacts listed below. We are committed to providing business-specific strategies as well as to guiding how your business can most safely navigate the metaverse.

[1] TechMonitor: "Virtual worlds, real money: Why big business is investing in the metaverse", by Afiq Fitri, June 12, 2022, updated June 14, 2022 4:05 p.m.

[2] Nike website accessed: 01.03.23

[3] Federal Trade Commission accessed: 01.03.23

[4] Slate: "What Comparisons Between Second Life and the Metaverse Miss", by Diami Virgilio, Feb. 9, 2022, 5:50 a.m. accessed 01.03.23

By

Jennifer Ponton, Jacky Wong

Expertise

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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