

Music

As one of the first of the content industries to be heavily disrupted and changed beyond recognition in the early days of the internet, in many respects, the music industry has, since the turn of the century, been one of the first to adopt change and new business models online.

When the possibility of performing and delivering live music performances to large crowds disappeared almost overnight with the advent of the COVID-19 pandemic, the music industry and, particularly, performing artists were forced to innovate and find new ways to reach their fans. Naturally, they started performing online. It is worth noting at the outset of this discussion that online livestreaming is not a new thing – the Rolling Stones were doing it in 1995, and many companies were delivering livestreams of musicians, including internet pioneers such as AOL and Yahoo!, long before musicians started using platforms provided by modern players like Twitch and Facebook.

Several defining characteristics distinguish this new form of music consumption in the metaverse from traditional “vanilla” livestreaming or even subscription streaming:

- A walled-garden platform environment
- The ability to build, style, and control, or just perform in, a virtual venue
- The possibility of using an avatar or other visual representation of the artist, sometimes comingled with a true video representation of the artist
- New production capabilities, including manipulating the virtual environment and combining digital visual production with the artist’s own musical production
- The ability to interact with the audience in real time
- In some instances, the combination of more than one artist performing from a different location or virtual venue

There have been many fantastic examples of this innovative musical art form in recent years, but perhaps the most striking and commercially successful was the Travis Scott performance in the Fortnite video game. The traction and audience for this event were phenomenal, with Scott himself commenting: “It was an opportunity to go to the max, to create a world that permits won’t let you do, fire marshals won’t let you do, building codes won’t let you do.” Little did he know that these comments would gain prescience after a tragedy at one of his concerts involving people in real life. Where Scott started, others followed; Future, Zara Larsson, Ariana Grande, and other superstars have pursued performances in virtual environments.

Aside from virtual events and NFTs (covered elsewhere in this guide), another metaverse phenomenon affecting the music sector has been the emergence of virtual “artists.” While the idea of engaging with a virtual artist, created by artificial intelligence and not having a human personality, may be anathema to many true music fans, there is no denying that such artists are gaining huge traction among digital natives. We’ve already discussed FN Meka, described as a “robot rapper who is known for his extravagant style and Hypebeast aesthetics. He has the appearance of a cyborg with green hair and eyes, lots of tattoos, and a hand made of gold.” While this may all seem to be a bit of harmless, somewhat futuristic fun, it has a foundation of serious commercial potential, as FN Meka’s fanbase shows. As a means of comparison, at the time of this guide, Chance the Rapper – often spotlighted as one of the new breed of superstar rappers – has only two million TikTok followers compared to FN Meka’s 10 million.

Is the metaverse an opportunity or a threat to music?

As the prominent examples above demonstrate, the metaverse can be an opportunity and a threat to the music industry. Certainly, as the production and experiential capabilities of technology continue to push boundaries and create new consumer experiences, artists who rely on old-style production techniques and traditional channels to reach their audiences risk getting left behind. Some of the more one-dimensional approaches to the music industry – such as purely owning rights and monetizing through subscription streaming channels – will quickly become commoditized and mechanized to the extent that they don't yield the profit margin to make them worthwhile.

Meanwhile, the commercial promise available to those who are prepared to push the boundaries and use all of the available technology to engage and create is galactic. Even the biggest arena tours cannot accommodate anything close to the instant, one-time global audiences that can be attracted to an online metaverse performance. The COVID-19 pandemic, which forced the world to migrate online for entertainment, has shown the music industry that ticketed, cleverly produced, and engaging livestreaming will be here for the long term. It is likely that the most significant concerts and festivals that happen in the real world will, in the future, have a more dedicated, slick, and transactional online component. For that reason alone, the metaverse is here to stay in music.

More interestingly, we can already see that the combination of virtual value tokens and music is a match made in heaven. Companies are furiously trying to work out how to enable fans to invest directly in their artists and engage with them in a way that enables value exchange and support. Royalty streams could be fractionalized, with the blockchain underlying such royalty streams acting as a permanent record of who gets paid, and how much.

What are the legal issues for music in the metaverse?

As always in music, the primary consideration when music is created, performed, streamed, and exploited online is rights clearances. Mostly, the traditional legal and licensing rules applicable to online exploitation apply equally in the metaverse. However, the proliferation of music, performance, and exploitation within new, closed, or even open online environments adds yet another potential layer of complexity to an already complex chain of rights in the music licensing process.

To take an example, a digital music service provider (for instance, Spotify) could promote and host a live-streamed concert on a global games console platform (let's say, Sony PlayStation) during the interval of an eSports tournament being held and promoted by a leading games publisher (perhaps, Electronic Arts) working alongside a famous brand (maybe, Nike). To attend the concert, a consumer would need to be a user of the gaming platform and have purchased ticketed access to the eSports tournament. However, the live-streamed concert would only be available to a limited number of superfans who had entered a prize draw by buying an original NFT token issued by the headline performing artist (for example, Drake). Prizes might include, at the top level, attendance at the live virtual event and an authentic piece of digital merchandise, while runners-up might still get to see the concert on an on-demand basis at a later date, missing the live show.

The network of contractual obligations to navigate and the rights-clearance issues to think about that are illustrated by the example above are not wildly different from the issues that lawyers may be dealing with in the real world. The half-time performance at the NFL Super Bowl is well known in the music industry for being a highly prestigious, but complex, production and clearance exercise. However, in many respects, the level of complexity associated with clearing music and artist imagery for the metaverse can be significantly more complicated.

Walled gardens. If we accept that the metaverse, particularly looking forward, is made up of one or more dynamic environments in which we can interact and enjoy experiences, the obvious question is, how can each environment be regulated legally? In the early days of the virtual world of Second Life, disputes were common. In the 2000s, the discussion among lawyers concerned whether “virtual laws” could exist and whether avatars could find new freedoms to exploit their creations (or adapt and copy other people’s creations). The law has since moved on considerably; it is now more widely accepted that online environments are subject to offline laws. Any platform or environment of scale will be careful to prescribe the contractual terms on which users are permitted to use the platform or environment. Therefore, the use of music within a metaverse region will be subject to the terms of service applicable to that environment. Then, anyone seeking to use someone else’s music in the metaverse will need to be sure that the terms under which they obtain a license align with the terms of the walled garden in which the music is used. While this sounds easy in principle, a truly global virtual environment is regulated differently, according to the legal jurisdiction. Censorship and content standards affecting a live performance of a leading rap artist will be vastly different in the United States from, say, Indonesia, Dubai, or Hong Kong. Artists often have political views and make statements onstage (who remembers Rage Against the Machine’s protest against Guantanamo or Sinead O’Connor ripping up photographs of the pope?). These types of incidents are more containable in real life, but they are the stuff of nightmares for the legal compliance teams at big platforms who often seek to maintain good relations with local governments around the world.

Who clears the rights – I’m a user. It could be argued that consumers are accustomed to the platforms themselves covering music licensing, at least from a performance or communication to the public standpoint. Online services that have been reported to benefit from blanket licenses with music rights owners and collection societies include [Twitch](#), Facebook (reference [here](#) and [here](#)), [YouTube](#), TikTok, and PlayStation. Notwithstanding that such platforms are clear in their terms of service that music licensing is the responsibility of the uploader, at least consumers can feel more comfortable about using music in the environment in which they are operating.

However, things become more nuanced when music can be created, shared, and enjoyed in a real-time gaming metaverse or social environment. The tools by which any user can now instantly manipulate, edit, and deliver an entirely new musical creation by simply creating a meme are widely available and can be used to devastating viral effect. Whoever came up with the dance challenge to Jawsh 685’s “Laxed (Siren Beat)” could not have anticipated that a song created by an unknown New Zealand artist in four hours as a tribute to his Samoan heritage would soon become one of the world’s biggest hits, subject to a dispute over a sample featuring Jason Derulo, and become a number one hit song around the world. At the time of writing, TikTok is unarguably the most important platform for breaking and promoting new music, but now more than ever, it is users who are dictating whether and how a song catches fire. For lawyers advising artists, labels, publishers, and even the platforms themselves, the viral capacity of user-created mashups and multiple synchronizations creates never-ending potential for innovative licensing solutions, disputes, and lucrative transactions.



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Who clears the rights – I’m an artist. Reflecting on legal issues affecting music users in the metaverse is to say nothing, of course, of the tripwire territory created by the implementation of article 17 of the Copyright (Digital Single Market) Directive when it comes to music in the metaverse. By way of reminder, article 17 was the mechanism by which the music industry sought to make it compulsory for video platforms to obtain sitewide licenses as opposed to relying on safe harbor exceptions. While this goal may now have been achieved – and, in fact, arguably the majority of Western video platforms were already licensed or in the process of obtaining licenses when the new laws were finally ratified – the law of unintended consequences may now be taking effect when considering the scope of what those platform licenses should cover. To recap (and to grossly oversimplify), while the platform will be responsible for making efforts to obtain licenses for content uploaded by users, it will not be held responsible for licensing copyrights in content that is brought to a platform by commercial operators. In the context of music, this immediately raises the question of when an artist is a “professional user.”

Who clears the rights – I’m a promoter. Artists as diverse as Ava Max, BTS, Marshmello, and Kaskade have performed through graphic representations in online gaming environments, while cutting-edge virtual reality services like MelodyVR (now rebranded as the next-generation Napster) and Facebook’s Oculus permit users to view real-life concerts in a virtual reality format in real time. There is no one-size-fits-all approach to clearing rights for these types of events; much will depend on:

- The artist performing
- The basis on which the artist’s recording and ancillary rights are managed
- The songs or compositions that will feature, including whether those recordings were produced under the SAG-AFTRA Sound Code
- Production components that are included (for example, choreography – formerly the preserve of only the most diligent of production rights clearance professionals – [can now be a total minefield in the metaverse environment](#))
- The virtual engine powering or underpinning the production
- The creative input from digital artists and other virtual contributors

In more straightforward production environments, those responsible for delivering clearances and “legals” for an online concert can follow tried and trusted video production methodologies, supported inevitably by a music clearance house that can gather together the myriad reproduction licenses needed if the concert will be recorded and exploited. At the other end of the spectrum, however, lawyers are having to develop skill sets that combine (a) the copyright and intellectual property licensing disciplines associated with video game production and game studio development; (b) technology and software licensing expertise, especially where multiple platforms or SaaS (software as a service) products are used to power a virtual, avatar-driven performance; (c) rights acquisition and capture for proprietary elements; and (d) old-school live music performance clearances.

Fence hopping. Once the preserve of fantasists, but perhaps now more likely than ever before, it could soon be the case that a user's avatar can move between environments. Do you want your World of Warcraft character to play in Fortnite? Could Super Mario fight with Sonic the Hedgehog? That may happen. In such a scenario, metaverse environments will need to find new ways of clearing music. Similarly, if a user has a Spotify account, they may like to listen to their music playlists while playing multiple games, perhaps even in a seamless manner. Traditional music distributors – and remember that Spotify is more than 13 years old – may need to play catch-up to ensure that their services don't get swallowed up by the metaverse. Ideas that would have sounded like pure fantasy from a legal perspective 10 years ago are now fast becoming a reality that could burden lawyers for years to come (for example, creating a coffee shop in a virtual world where users can get together and listen to and share their music).

Creating new music in the metaverse. Of course, if people are going to exist, project their images, and spend their time in the metaverse, the next logical step for them is to move out of the real-life recording studio and into the virtual creative environment. Already, there are extensive examples of this taking place. VR headsets and controllers that allow users to interact with graphical interfaces that represent musical instruments are widely available. Literally, the air guitar becomes a real guitar - Rock Band VR anyone? Forming your own band online, transforming yourself from a balding, middle-aged guy with a "dad bod" into a lavishly coiffured, tanned, lithe rock god, and living out your fantasies of playing guitar in front of huge crowds is now completely possible. On a more prosaic level, metaverse environments such as Minecraft, Roblox, and Fortnite contain song codes, instruments, recording tools, and music manipulation controls that enable users to be musically creative. While the majority of this activity will result in original copyright that will be of almost zero monetary value, there are infinite possibilities for users to unwittingly infringe or encroach on well-known commercial songs or properties. Do you want to perform a Whitesnake track with your virtual buddies, only to a drum and bass beat and combined with lyrics from Dizzee Rascal, while playing your virtual DJ decks and sharing your live set with your new metaverse friends in Bangalore? No problem.

Of course, when the combination of creative technology, people, and connectivity moves up a gear, so do the legal issues. Music is already one of the most byzantine, challenging, and disparate areas of entertainment law.

The prevalence and expansion of music in the metaverse certainly presents new challenges, but it also creates massive opportunities for legal professionals to innovate and help their clients – not only to navigate through the existing frameworks but also to create new models and ways of exploiting copyrights that help drive incremental revenues and value to the industry, artists, creators, and the platforms that invest in the metaverse itself.

What about music NFTs?

While we have covered NFTs in general in other parts of this *Guide to the Metaverse*, it would be remiss of us not to explore how the music industry is taking advantage of this technology.

Music NFTs have the potential to allow artists to build scalable, customizable offerings to engage and reward their fans. Artists will have access to a decentralized database of their core fan base that they can choose to reward over time without being at the mercy of a centralized platform to do so. We will begin to see how artists take advantage of this as music NFTs reach mass adoption. For instance, perhaps an artist will airdrop a free NFT to fans that have collected all of the artist's NFT music releases that will grant holders access to an unreleased track. Maybe fans that have gone to see the artist numerous times and have more than 10 proof-of-attendance NFTs in their wallet will be invited to an intimate private gig.

While there are limitless applications for NFTs to transform the music industry, from ticketing (such as GUTS Tickets), unique collectibles (such as Serenade), distribution (such as Audius), and beyond, two forms of music NFTs have been subject to much debate and discussion:

Tokenized ownership. A growing number of web3 businesses are exploring tokenizing underlying copyrights and/or royalty income streams (such as Royal, Opulous, etc.). Conceptually, fans acquiring proprietary ownership of rights to their favorite artist’s music is certainly compelling and arguably allows early fans to ride the wave of an artist’s success.

As you may suspect, there are numerous legal and practical issues that arise from these offerings, the most obvious of which is the extent to which such offerings are regulated as investment products or securities. It is fair to say that the answer to this question is not straightforward, and the outcome will be highly fact dependent. Businesses will need to keep abreast of international regulatory changes, as regulators start to establish what is and is not within their remit. We have considered this in further detail elsewhere in this guide.

Music NFT editions. Web3-savvy artists have taken full advantage of selling their music as NFTs directly to fans through music NFT platforms (such as Sound.xyz). With little to no take-rate applied by these platforms, artists are making significant sums from selling these limited-edition digital versions of their music.

With money to be made, we are beginning to see the various music stakeholders take their positions. Eager not to be left behind by the latest technical innovation, labels and publishers alike are already updating their artist agreements to accommodate NFTs.

Who has the right to issue and sell a music NFT? What rights need to be cleared in a music NFT? Who needs to clear those rights? And, most importantly, who is entitled to proceeds from sales and in what proportions? The answer to most of these questions comes down to a simple analysis of basic copyright principles – assessing what copyright-restricted acts are being undertaken (if

any) and by whom. Nevertheless, a key battleground between stakeholders will concern who gets paid what. We anticipate renewed arguments about what amounts to a “sale” or “license,” whether NFTs are a new format, and whether there is a “sync,” etc. Although on the face of it, everything is up for grabs, our view is that traditional rules and common sense will prevail.

What about investing in music using web3 technologies?

Notwithstanding an increase in the cost of capital in 2022 amid soaring inflation and rising interest rates, the corporate appetite for acquiring music copyrights at scale shows no real sign of abating. Partly, this appetite has been due to excess liquidity in the finance market and the strong revenue growth exhibited by music catalogs, in turn, due to a combination of better, more accurate distribution technologies and the growth of subscription streaming services like Spotify.

Web3 threatens to further disrupt the market for music copyrights. There are several companies either exploring or offering investment models via which members of the public can “invest” in the creation of new music in return for a fractionalized share of royalty revenue received from the exploitation of that music. These models typically work by a combination of (i) users paying money for the opportunity to fund or invest in an artist’s work, by paying in cryptocurrencies toward the artist’s costs of creating the music; and (ii) users receiving a token in return, which is intended to represent a fractionalized share of the overall royalty stream that is to be received from the track.

Although the idea of consumers being able to “invest” in music is not new, these models raise a number of legal issues:

- The offering of investments or the conducting of activities that are targeted toward the general public as investments are, understandably, heavily regulated. In many countries, it is illegal to offer investment opportunities unless through a heavily regulated business. Any entity that seeks to offer fractionalized royalty interests is likely to be subject to regulation. Some operators in the space seek to establish themselves as offshore businesses in favorable jurisdictions in an effort to indirectly avoid regulation.
- Traditional music distribution models don't lend themselves well to disaggregated royalty collection and distribution. In order to achieve a legitimate fractionalized royalties model, rights owners may need to transfer certain rights to the operator of the business and sign letters of direction or other instruments via which the artist's and even the label's or publisher's right to receive monies is instead assigned to the entity responsible for paying out a fraction of the royalties.
- There are abundant opportunities for fraudulent behavior, whether by the artist or creator, the consumer, or even the site or service operator. There is no centralized or globally recognized mechanism for preventing fraud or dealing with financially abusive conduct.

Although blockchain technology lends itself well to enabling the completely accurate distribution of royalties, many of the legal issues associated with fractionalized or automated investment models in music are difficult to overcome and may ultimately render such activities impossible in the longer term.

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