

Content exploitation

The metaverse will continue to provide new opportunities for content creation, consumption, and exploitation. However, the successful monetization of such content presents new challenges for stakeholders. In short, rights holders who create and license content will want robust protection to ensure that they are fairly remunerated for each new form of exploitation. In contrast, licensees who acquire and exploit content will want licenses sufficiently broad to adapt to the evolving use cases. End users' interests will be primarily focused on the user experience, but their interests may also overlap with those of rights holders and licensees, subject to whether they participate in content creation or consumption. Regardless, it is clear that the metaverse is changing the way we think about content licensing.

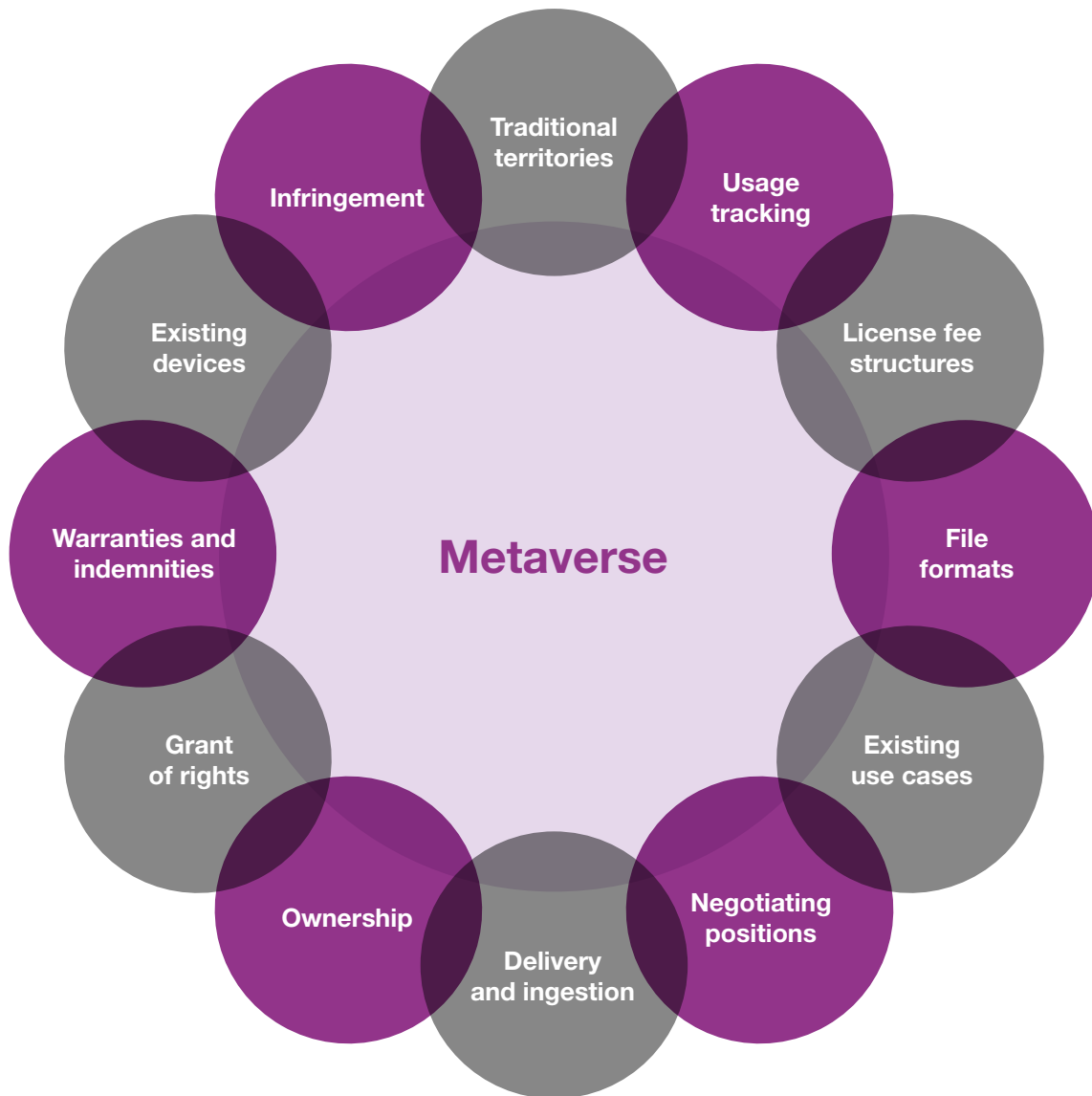
Key challenges

While the terms of any license will vary depending on the content and use case, among other factors, there are several common factors that will need to be carefully considered when licensing content for use in the metaverse, as further set out below.

Term	Current position	Implications for licensing parties
Territory	Licenses are typically granted on a territorial basis, with the licensed territory being defined at a national, regional, or worldwide level. Some agreements specify "the universe" as the applicable territory.	Is the metaverse included in existing territorial definitions? When air travel became popular, the rights to in-air entertainment were carved out so that they could be licensed separately. This may also be the case with the metaverse. As the metaverse continues to grow, we will continue to see the creation of new virtual worlds. To exploit content in these environments, licensees and licensors will need to consider how the virtual world is defined. This is particularly relevant in the context of augmented reality where real and virtual worlds may overlap. Licensees also may seek to include provisions granting them a right of first refusal for new virtual worlds.
Ownership	There are well-established laws and principles governing ownership of copyright in audio, audio-visual, and other traditional content formats. Any person intending to exploit third-party content is required to identify and then obtain a license from the copyright owner.	The metaverse will create new opportunities for AI-generated content. However, as in the real world, there are challenges in establishing ownership of such content, which means there will be additional challenges for anyone seeking to further exploit content that has been created by AI. As the metaverse extends beyond traditional territorial boundaries, licensors will need to ensure they can evidence adequate territorial ownership. This will require particular diligence where the licensor is an intermediary who had obtained its rights from the original content creator.

Term	Current position	Implications for licensing parties
Rights granted	The owner of a piece of content has certain exclusive rights in that content by way of copyright and other intellectual property rights laws. A licensor will grant certain rights to use the content, depending on the licensee's intended use case.	While basic copyright principles, as further set out in the <i>Intellectual property</i> section, will likely translate into the metaverse, the use cases are likely to be incredibly broad and constantly evolving. From a licensee's perspective, a grant of rights will need to be broad enough to adapt to the constantly changing environment without the need to repeatedly amend and renegotiate the underlying license. For example, the law remains unsettled on what rights are required to exploit content through NFTs, so it is important for licensees to obtain as broad a grant of rights as possible. Licensors should also review any exclusive grants of rights they have made to determine whether there is scope to argue that the metaverse falls outside the exclusivity conditions. To the extent the content contains any underlying third-party rights, whether intellectual property or publicity rights, the licensor will need to ensure that it can pass those rights on to the licensee. In addition, to the extent that a piece of content (for example, a clip from a music video, television show, movie, video game, or commercial) was produced under one of the many SAG-AFTRA collective bargaining agreements, the creator of such content must ensure the licensee's compliance with any payments due to the performers as a result of the licensee's use of the content.
Negotiating positions	Traditionally, the bargaining power between licensors and licensees has been determined by several key factors, such as (i) who the more powerful entity is, (ii) whether the licensor has a monopoly on the rights being granted, (iii) the perceived value of the content, and (iv) whether the licensee is under pressure to obtain a license (for example, if it was previously operating without a license). Often, this results in major licensors having a strong bargaining position in content licensing negotiations.	The metaverse will likely continue to disrupt the power balance between licensors and licensees by presenting new opportunities for content exploitation and enabling less established licensors to make their content available. There will also likely be more opportunities for individual or independent content creators to distribute their content directly, which may mean greater competition for original content. This could result in licensees being required to offer more attractive licensing packages to obtain licenses for original content.
Licensed services, devices, and uses	Licenses are often limited to a particular service, device, or use (or a combination thereof). For example, a licensor may grant a license that allows end users to stream music through a branded service on named devices.	The interactivity of the metaverse may make it more challenging for licensors and licensees to agree to limit the license to specific use cases. Licensees will likely demand greater flexibility to facilitate the development of and interaction with the metaverse, while licensors will want to rein in the grant of rights as tightly as possible and maximize the number of licenses that can be granted in connection with the same content. As licensors and licensees become more attuned to how content is exploited in the metaverse, key use cases will likely develop as industry standards for granting rights, subject to the further evolution of the metaverse.
Fees	A license fee may be based on a flat fee, a fee per subscriber, a fee per viewer hour, minimum guarantees, advances, proportions of revenue, or other usage models (or a combination thereof) in exchange for the grant of rights from the rights holder.	While the basic fee mechanisms may remain the same, the metaverse will complicate (1) the definitions of revenue and usage metrics; (2) how usage can be tracked across different services, devices, and use cases; and (3) how the fee is calculated. Fees may also be impacted by the collective bargaining obligations referred to above. Additionally, the metaverse tends to attract alternative payment structures as parties may agree to cryptocurrencies or digital wallets. Licensors and licensees alike will need to make sure they are well versed in the laws governing both, and what implications they may have on their businesses.


The above is by no means an exhaustive list of the challenges the metaverse brings to content licensing, but it represents some of the key commercial and legal issues that will need to be considered by licensees and licensors. Flowing from these overarching considerations are other challenges that will also need to be assessed, such as usage tracking, file format standardization, delivery and ingestion of content, scope of warranties and indemnities, and conduct of claims for infringing use, among others.



Different perspectives

Inevitably, licensors and licensees will have different perspectives on these key challenges. Licensors will likely seek to maintain a restrictive approach to licensing in the metaverse, for example, by limiting the grant of rights and clearly defining the licensed services, devices, and uses, unless there is a substantial financial incentive otherwise. The underlying considerations will remain the same – licensors want to control how their content (and ultimately their brand) is used and consumed. Licensees typically want as broad a license as possible, as this allows them to be more creative with content exploitation and to take advantage of market developments and trends. This will be even more important in the metaverse, as the rights implicated in certain key use cases, such as the exploitation of NFTs, remain subject to debate. Service providers with existing licenses will need to determine

whether such licenses are sufficient. The reach, immediacy, and interactivity of the metaverse will demand the broadest set of rights possible, and it will likely be more important than before for licensees to negotiate rights of first refusal for new forms of exploitation or new digital worlds. Licensors and licensees will need to consider the overarching user experience when negotiating the scope of the grant of rights. The licenses that facilitate content exchange in the metaverse will need to be flexible enough to ensure a seamless user experience between increasingly overlapping and interconnected services. This may force conservative licensors to provide greater flexibility regarding bundling and associated limitations, but equally makes it ever more important for licensors to ensure that their reputations and brands are adequately protected (as further set out in the *Deepfakes in the metaverse* section).



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Key industries

While there are some key challenges that will apply across a variety of different sectors (as further set out in the *Advertising*, *Games*, and *Music* sections), different industries will face their own particular issues in terms of content licensing in the metaverse.

Advertising – The right to include a song or other item of content in any form of advertising is often strictly controlled. Even if such rights are granted, they are often subject to numerous restrictions and approvals, such as payment obligations to performers, singers, and musicians under the various SAG-AFTRA and American Federation of Musicians (AFofM) collective bargaining agreements. While the licensee may not be a signatory, the licensor will typically include a specific provision that requires the licensee to nonetheless comply with such collective bargaining agreements. In addition, rights holders want to ensure that their content is not being used to promote a product they do not support, or in a way that does not fit with the creator's image. This will be even harder to manage in the metaverse because there will be numerous scenarios in which a particular advertisement is viewed, depending on how the viewer interacts with the metaverse. In the United States, individuals appearing in the content being licensed (including deceased individuals) may have rights of publicity that require permission for the use of their likenesses (including digital ones) in advertising. The metaverse will likely become a source of advertising inventory (for example, virtual billboards, point of sale at virtual stores, event sponsorships, etc.), raising questions regarding how best to track and measure the effectiveness of and engagement with virtual advertisements. Similarly, there will be sponsorship and branding opportunities, and sponsors will need to consider the extent to which any real-world restrictions on these activities will apply in the metaverse.

Games – Gaming and eSport companies will most easily be able to adapt their existing services and operations to function seamlessly in the metaverse. Because of this head start, “players” in this industry should, on the one hand, carefully consider how to protect their content and assets while also exploring how they can license out their rights to other less metaverse-ready industries. On the other hand, the traditional use of buyout models in the content creation process means they are not constrained by a limited grant of rights. Companies operating in this space will likely be the leaders in pushing the boundaries of content licensing as the metaverse continues to grow.

Music – Usage tracking poses a particular challenge for music licensing in the metaverse, particularly when you layer in the SAG-AFTRA and AFofM payment requirements for songs recorded under their collective bargaining agreements (which includes most songs from major labels). With different services, devices, and use cases, the likelihood of receiving duplicate or triplicate claims for a single use are even greater. Already complex and expensive usage tracking and reporting systems will need to be adapted to deal with the interactivity inherent within the metaverse. Existing collective management licensing structures will also need to be examined, particularly considering what rights such entities will hold in the metaverse and whether they will continue to license on a territorial basis.

Social media – The terms and conditions for the use of social media services set out intellectual property ownership provisions, but the increased interactivity across services and devices in the metaverse will likely blur the lines between where one service begins and another ends and, therefore, which terms will be controlling and also who owns the IP created. Similarly, if a user creates a piece of content in one corner of the metaverse, questions will arise as to how it will be licensed in another area and who will be liable for any infringing use. Increasingly, end users may demand compensation for any such exploitation – meaning that service providers will need to consider how revenues can be shared across different services and devices.

Film and TV – We are already starting to see increased interactivity in how we view film and TV – take, for example, interactive TV and films on Netflix, such as *Bandersnatch* and *You vs. Wild*. As the metaverse continues to grow, there will likely be additional opportunities to exploit existing audio-visual content formats within the metaverse as well (think of movie theatres and branded digital merchandise for your avatars). There is more opportunity for increased interactivity between content creators and viewers in the metaverse, both with and between viewers and also with their surroundings, which will create new opportunities for content origination and funding, and may also impact how stories are told. This may also raise ownership issues: to what extent does the viewer transition to a creator who holds certain rights in the content, and what does that mean for continued exploitation of the content? Also, what does it mean if the interactivity leads to infringement of another party's rights? And who is liable: the producer or the interactive viewer?

What you can do to prepare

As the metaverse evolves, we will see an influx of the development of new services and devices to facilitate user engagements. New entrants will need to prepare bespoke agreements for how content is licensed. At the same time, existing service and device providers will transition their services to fit the metaverse, and they may wish to review existing content licenses to determine whether they are sufficient. For the reasons set out above, this will not be an entirely straightforward exercise as there are new challenges to consider in the metaverse. Existing stakeholders will need to either enter new licenses or amend existing ones to build in the flexibility necessary to operate successfully in the metaverse.

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