



# Music

**A**s 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.

Since the possibility of performing and delivering live music performances to large crowds disappeared almost overnight with the advent of the COVID-19 epidemic, the music industry and, particularly, performing artists have been 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 live online streaming is not a new thing – the Rolling Stones were doing it in 1995, and many companies have delivered live streams of musicians over the years, 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” live streaming or even subscription streaming:

- A walled-garden platform environment
- The ability to build, or 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 on Fortnite. 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.”

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. A good example is 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. FN Meka has over 9 million followers on TikTok. 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 fewer than 2 million TikTok followers.

### **Is the metaverse an opportunity or a threat to music?**

As the two 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 live streaming 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.

### **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 that was 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 drawing 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 would 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 to 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 for the metaverse can be significantly more complicated. For instance:

**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, Second Life, disputes were common. In the 2000s, the discussion among lawyers concerned whether “virtual laws” could exist and 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 off-line laws. Any platform or environment of scale will be careful to prescribe the

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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. Anyone seeking to use someone else’s music in the metaverse, then, 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 Top 10 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, for example, or Sinead O’Connor ripping up photographs of the pope?). These types of incidents are more containable in real life, but 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 may be 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,<sup>1</sup> Facebook,<sup>2,3</sup> YouTube,<sup>4</sup> 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 instantly now 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) tribute to his Samoan heritage could not have anticipated that a song created by an unknown New Zealand artist in four hours would soon become one of the world’s biggest hits, subject to a sample dispute featuring Jason Derulo, and become a number 1 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 if and how a song catches fire. For lawyers advising artists, labels, publishers, and even the platforms themselves, the viral capacity of user-created mash-ups and multiple synchronizations creates never-ending potential for innovative licensing solutions, disputes, and lucrative transactions.

**Who clears the rights – I’m an artist.** Reflecting on legal issues affecting users of music in the metaverse is to say nothing, of course, of the trip wire 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 site-wide 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

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1. <https://variety.com/2020/digital/news/twitch-music-licensing-copyright-delete-videos-1234829256/>.

2. <https://www.prsformusic.com/help/what-rights-are-covered-by-the-facebook-licence/>.

3. <https://www.musicbusinessworldwide.com/facebook-secures-major-label-rights-for-its-twitch-rivalling-gaming-app/>.

4. <https://www.theverge.com/2012/6/6/3067636/youtube-music-licensing-deal-bmg>.



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 begs the question, when is an artist a “professional user”? This topic could easily occupy many more pages of this guide, but thankfully we have covered it in substantially more detail elsewhere.

**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<sup>5</sup>)
- 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 the 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 platform or SaaS 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 catchup 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 can 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).

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5. <https://variety.com/2018/gaming/news/fortnite-dance-lawsuit-1203092141>.

**Creating new music in the metaverse.** Of course, if people are going to exist, project their image, 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?<sup>6</sup> Forming your own band online, transforming yourself from a balding, middle-aged “Dad bod” into a lavishly coiffured, tanned, lithe rock god 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 some Whitesnake with your virtual buddies, only to a drum and bass beat and combined with Dizzee Rascal lyrics, 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 move up a gear, and 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.



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6. [https://www.oculus.com/experiences/rift/744866972281509/?locale=en\\_GB](https://www.oculus.com/experiences/rift/744866972281509/?locale=en_GB).