

Navigating the metaverse: A global legal and regulatory guide

Part 6: Digital marketing, advertising and social media in the metaverse

The background of the page is a dark blue gradient with several glowing, curved lines in shades of blue and purple, creating a sense of motion and digital connectivity. Small white dots are scattered throughout, resembling stars or data points.

Introduction

In the space of a very short time, businesses are focusing on what the metaverse means for them. In addition to commercialising the opportunities available to them, such as new channels to market and enhanced customer engagement, businesses will need to understand and address the associated risks.

Such matters are extremely important for businesses, consumers, law-makers and lawyers alike. In this seven-part guide we consider the following key legal and regulatory issues in relation to the metaverse:

Part 1

What is the metaverse?

- Who are the current big players building it?
- What will the metaverse mean for business?
- What are key technical, operational and governance considerations?

Part 2

Intellectual property and the metaverse

- What are virtual reality worlds and virtual items?
- Non-fungible tokens
- How do traditional IP concepts sit with non-fungible tokens and other works in the metaverse?

Part 3

Anti-trust/competition law issues

- Developer and participant conduct
- Will the EU Digital Markets Act apply to the metaverse?
- Competitors communicating and co-operating with each other in relation to metaverse offerings



Part 4

Decentralised models and data issues

Data in the metaverse

Decentralised networks

Who is responsible for data protection law compliance?

Data subject consents

Special categories of data

Children and the metaverse

Data sharing

Data export and localisation

Responsibility for data breaches and cyber attacks

Part 5

Transacting in the metaverse

Buying “land” in the metaverse

What are the key issues when contracting in the metaverse ecosystem?

Non-fungible tokens, smart contracts and blockchain

Financial crime

Will metaverse risk and control considerations be similar to those relevant to the Internet?

Part 6

Digital marketing, advertising and social media in the metaverse

How will businesses be able to advertise in the metaverse?

Social media regulation

Regulating advertising content in the metaverse

Will AI have implications for marketing and the use of avatars in the metaverse?

Part 7

AI and the metaverse

Why is AI relevant to the metaverse?

How might AI regulation impact upon the metaverse?

How to operationalise AI risk mitigation in the metaverse

Data protection and AI

Overview of the legal and regulatory issues

The diagram shows the key legal issues and subject areas this guide covers. The breadth of issues means that mitigating risk associated with the metaverse is going to be a significant challenge for any business, but particularly so for a regulated business.



Digital marketing, advertising and social media in the metaverse

Here we deal with regulating online safety and digital content in the metaverse, with a particular focus on how regulations will impact advertising in the metaverse.

How will businesses be able to advertise in the metaverse?

How will businesses be able to advertise in the metaverse and will they be able to “target” adverts in the same way as they do on the internet? Businesses in the online world typically use cookies or other identification and tracking technologies to ensure that advertising campaigns are targeted to people (or devices used by people) who are most likely to buy the product based on a profile made up of their browsing history and other information they know about the person.

Targeted advertising is subject to specific requirements in some jurisdictions, such as the EU under the E-Privacy Directive and the GDPR (which apply under retained EU law in the UK); and as we are all too aware in Europe, this translates to cookies consent banner pop ups on almost every website you visit.

It is likely that business will want to target specific users in the metaverse in a similar way to the internet, but the practicalities of doing this are still evolving.

Ad tech players, such as Anzu.io and cookie3, are developing means of linking profiles obtained through internet and mobile browsing relating to a cookie or other unique identifier through to an avatar navigating the metaverse or a game. This could allow businesses to advertise with similar precision to the user of an avatar in the metaverse, based on his or her internet and mobile activity.

Trackers

Ad tech players could also seek to track a user's activities in the metaverse to add to the user's profile for advertising in that metaverse or indeed back out on the Internet.

The fully-digitised nature of the metaverse, coupled with augmented reality technology, could broaden the opportunities for tracking. For example, it was reported in the FT that a global online business has obtained patents that allow it to track eye pupil and body movements as they related to what the user is looking at in the metaverse while using oculus-type augmented reality headsets and other hardware. The FT reports that one of the patents explores how to present users with personalised adverts based on how the users interact with the platform.

This technology could mean that simply looking at a product or service for a set number of seconds in the metaverse would trigger targeted ads in or out of the Metaverse for those products or services or otherwise add to the user's behavioural profile. Unlike on the internet, this removes the need for "direct interaction" of at least visiting a site to trigger the tracking, merely looking from afar/glancing at a product or what others are doing could be recorded and analysed.

The E-Privacy rules on use of tracking technologies might mean that the website consents to serve ads need to become more granular to cover serving them both in the "real-world internet" and in the metaverse. Initially this might be quite easy to slip into those pop ups, and if a user is comfortable with targeted advertising on the internet they are probably comfortable with the same advertising in the metaverse.

However, it is not clear if users will be happy with same level of tracking in the metaverse, particularly if the tracking can be as thorough as watching your gaze suggests it could be. Also currently the appropriate point and method for obtaining consent for tracking in the metaverse itself is not so obvious – for example, as of now the experience is not punctuated by consent pop ups each time you enter a different land or estate in Decentraland. Putting this in (which will have to be done) could seriously irritate users or put them off visiting sites with such tracking – so how this plays out remains to be seen.

The direction of travel in the EU and US with the European Data Protection Board (EDPB) and New York Attorney General articulating and outlawing the concept of "dark patterns" where consents are obtained through psychological manipulation techniques such "false scarcity" (*only 3 tickets left at this price*) and "false urgency" (*33 people are looking at this product*) means that obtaining such consents will have to be a much more honest transaction with the consumer. Indeed, with the Google privacy sandbox and its intention to kill off third party cookies, it may be that this type of tracking becomes impossible to use.

Social media regulation

Despite social media being a very global phenomenon, there is no doubt that the EU and the UK are really the ones leading the way when it comes to regulating social media. UK aside, the key piece of legislation that would really impact many businesses on the metaverse is the EU Digital Services Act.

The Digital Services Act

The Digital Services Act (DSA):

- Places a number of obligations on intermediary services, hosting services, online platforms and search engines.
- Will extend to metaverse platforms, such as Decentraland, as an “Online Platform” – being a provider of a hosting service which, at the request of a service recipient, stores and disseminates information to the public.
- Is wide-reaching, targeting illegal content and dark pattern technology, among other things.

There are certain obligations on online platforms which we would expect to be flowed down to businesses advertising on the metaverse, particularly under Article 24 of the DSA. Specifically, for each advert displayed to a user, the user must be able to identify:

- That they are seeing an advert.
- On whose behalf that advert is displayed.
- The main parameters used to determine why that user is being targeted by that advertisement.

How will advertisers be able to comply with this in practice? As with the internet, there will need to be icons in ads that users can click through. The interesting development here is letting users know why they are seeing the ad – this means that the parameters driving the placement will be transparent to the user and so better be something the user wants to be identified with – we can see a lot of relabelling of audience buckets. It is not clear how detailed this information will need to be, but it will mean that parameters chosen by a business or its ad agency will need to be squeaky clean in order not to backfire when interrogated.

UK Online Safety Bill

Turning to the UK, the Online Safety Bill will be something that some businesses will need to consider in connection with advertising in the metaverse. It is very much a “world first” in promoting online safety specifically, going further than the measures used to address illegal content under the Digital Services Act.

As at the date of publication, the Online Safety Bill is not yet law – it is still making its way through Parliament in the UK, having faced a number of setbacks in the past months. It is unclear the extent to which the Online Safety Bill would apply in the metaverse, and in any event we expect it would apply to providers of the user-to-user service (e.g. Decentraland), rather than to businesses operating therein.

Given the purpose of the Online Safety Bill is to address harmful content and encourage the safety of users, the requirements placed on platform owners regarding content will be flowed down to businesses by way of a platform’s use policy.

Regulating advertising content in the metaverse

Turning now to advertising content in the metaverse, has there been any indication from regulators as to their expectations with regards to the content of advertisements in the metaverse?

If we use UK as an example of how a regulator might approach this, the Advertising Standards Authority (ASA) (the main UK regulator of the advertising sector) is yet to publish any formal guidance on its expectations around advertising in the metaverse. In 2021 the ASA published its guidance on in-game purchases, and in 2022 it published guidance on advertising cryptoassets – both of which it has stated would be highly relevant to the metaverse. Advertisers are expected to ensure that marketing does not materially mislead (or risk materially misleading) consumers, and adverts must be clear and intelligible.

The ASA expects that many of the issues likely to arise in the metaverse, whether they relate to the identification of marketing, the targeting of under-18s, or the absence of significant information (among other things), will be similar to those seen in the “real” world and the internet. They say that such issues can be dealt with via existing principles in the current UK Code of Non-broadcast Advertising and Direct and Promotional Marketing (Code), which they have traditionally applied to new technology over the years.

One of the key marketing rules under the Code is that marketing communications must be obviously identifiable as such, making clear their commercial intent even if not clear from the context. This is commonly met by businesses incorporating “ad” in the ad image or graphic shown, particularly where the context of the ad space alone may not be clear.

This can be seen nowadays in YouTube videos as an example, where content creators will often insert a label stating “ad” in the portions of their video which are paid promotions. These disclaimers must be clearly visible and directly accessible. Disclaimers that are only visible to users taking a specific action or clicking on an information box will not meet the criteria under the Code.

For normal “billboard”-type ads in the metaverse, meeting these requirements may not be overly burdensome and will build on existing practices. However, how would the position change if a business wanted to use popular members of the metaverse community, such as famous avatars, to promote their business? On web-based social media platforms, we see brands using “influencers” to promote content. In the UK, the ASA is the active regulator in the influencer advertising space. Where an influencer receives compensation of some kind to advertise a brand, and where that brand has editorial control over the message or content that is being conveyed by the influencer, this will fall under the remit of the ASA as an ad. As mentioned before, this means that the ad must be clearly identified, for example, by using a clear disclosure such as “ad”.

There are practical challenges around ad disclosure in the metaverse when using influencers or product placement. Marketers will need to find ways to ensure the ad disclosure is clear and upfront. Use notices or symbols will be best (and will cause the least friction if common terminology/symbols are agreed) but failing this (not completely compliant) mitigation steps might be to include the commercial relationship on the influencer’s avatar page/passport provided this is accessible to any users who see the influencer.

Will AI have implications for marketing and the use of avatars in the metaverse?

On the question of marketing and the use of avatars in particular, the EU’s proposed AI Act might apply once it is agreed and comes into force, but these principles have a habit of being picked up by regulators before the law comes into force if they are sensible.

Under Article 52 of the EU’s AI Act (see *AI and the metaverse*), businesses will be required to make clear (where applicable) that users are dealing with a bot rather than a human. Among other things, this would kick in if a business used automated avatars at events in the metaverse to promote its products through speaking to users. We anticipate that a convention of some sort will emerge so it is clear to all that you are dealing with an AI rather than a human-controlled avatar.



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