



 DREW & NAPIER

# The Singapore Copyright Act 2021 and the Metaverse

10 February 2022

# LEGAL UPDATE

# In this Update

The Copyright Act 2021, which came into force on 21 November 2021, replaces the old Copyright Act.

In this second of our three - part series on the Copyright Act 2021, we explore key issues in copyright (or other areas of IP law) inherent to the Metaverse and set out a practical framework that users and creators may find helpful in tackling these budding issues.

**03**  
INTRODUCTION

**03**  
PART 2 – THE  
METAVERSE AND  
DIGITAL REALITIES

**07**  
CONCLUSION

## INTRODUCTION

Previously, we explored [key changes to the new Copyright Act](#) (“CA 2021”).

In this second part, we examine how the CA 2021 may operate in and around the Metaverse – an online platform that employs virtual and augmented reality to simulate the real world.

### KEYPOINT

*With reference to guidance in the CA 2021 and elsewhere, we explore key issues in copyright (or other areas of IP law) inherent to the Metaverse and set out a practical framework that users and creators may find helpful in tackling these budding issues.*

## PART 2 – THE METAVERSE AND DIGITAL REALITIES

### Code of the Metaverse

One key issue relates to the infrastructure of the Metaverse itself – its algorithmic backbone.

The CA 2021 makes clear that “computer programs” (defined to include expressions “in any language, code or notation”) are “literary works” and therefore copyrightable subject-matter. There is also American jurisprudence suggesting that non-literal aspects of computer programs, such as their structure, sequence, and organisation of code, may fall to be protected under copyright law. As far as Singapore law is concerned, the broad definition of “computer program” in the CA 2021 does not suggest otherwise.

The issue arises due to the desire for interoperability in the Metaverse; to allow computer programs to communicate with one another so as to create one seamless digital space, rather than numerous fragmented digital spaces (think: a video game character being able to step outside the bounds of his own game and freely ‘crossover’ to another game).

It remains to be seen whether the underlying code facilitating this ‘crossover’ should be copyrightable (perhaps giving rise to concerns of monopolistic and anti-competitive behaviour); and, if so, whether the fair use defence would apply (especially given that the CA 2021 no longer requires the Singapore Court to consider whether it was possible for the

alleged infringer to obtain the copyrighted work within a reasonable time at an ordinary commercial price).

Perhaps the broader question is whether such code should fall within the copyright regime at all, when a shorter and stricter protection can be afforded under the patent regime. The latter regime, however, has its own difficulties as algorithms and mathematical formulae *per se* may not be regarded as patentable inventions; one can expect that the code must solve a specific problem in a manner that goes beyond the underlying mathematical method in order to qualify as a patent.

Overall, the question of whether the code ought to be copyrightable or patentable may have to be answered on a case-by-case basis, depending on the nature, purpose and the intended implementation of the code in question.

### **Copyrightable works in the Metaverse**

What about digital representations of objects and environments that form the heart and soul of the Metaverse? Some problems may arise out of the perceived need to achieve fidelity to reality whereas other problems may arise out of the desire for artistic expression.

#### *Problems with Realism*

Some people who wish to truly “live” in the Metaverse may find solace in the familiar, shaping this new virtual reality in the likeness of actual reality.

At the outset, under the usual principles of copyright law, the unauthorised inclusion of real-life copyrighted works in the Metaverse should ordinarily amount to *prima facie* copyright infringement, perhaps as unauthorised reproductions and/or communications to the public (although it remains to be seen if statutory distinctions between the exclusive acts comprised in the copyright will hold up given the immersive nature of the Metaverse). Additionally, it is important to note that new provisions of the CA 2021 relating to moral rights generally grant authors and performers the right to be identified whenever their works are used. In other words, Metaverse users would have to find some way to ensure that such copyrighted works reproduced in the Metaverse contain the identity of the original author or performer in a clear and reasonably prominent manner.

**The freedom of panorama.** However, for real-life buildings, sculptures, and other works of artistic craftsmanship (permanently) located in public places, the CA 2021 contains exceptions permitting their inclusion in film (so long as their inclusion is “incidental”; and this is even assuming the Metaverse can be regarded as a “film”) or their copying in different dimensions (so long as these virtual counterparts do not appear to laypersons as copies; and this is even putting aside the question of whether such virtual counterparts are to be regarded as a 2D or 3D work).

It appears that the Metaverse and its objects do not fall neatly within the scope of these exceptions, suggesting that those who strive to re-create real-life environments may find themselves at risk of copyright infringement. The question is one of balance, with no clear consensus across jurisdictions as to the extent the freedom of panorama should be recognised.

**The use of trademarks and trade signs.** Going one step further, what if we want to create richer virtual environments; if Metaverse users seek to re-create real-life buildings containing prominent trade signs? While intuitively this would appear to be actionable under trademark law and/or the tort of passing off, there is American jurisprudence suggesting otherwise.

In *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008), the proprietor of a business establishment called the “Play Pen” (“**ESS**”) sued video game developer Rockstar Games, Inc (“**Rockstar**”). ESS argued that the virtual depiction of its premises in Rockstar’s game world (re-named “Pig Pen” and with some differences between the real-life building and virtual building) infringed its trade mark and trade dress. The United States Court of Appeal dismissed the claim, primarily on the basis that players would not be confused into thinking that the Play Pen were somehow behind the Pig Pen or that it sponsored Rockstar’s game. Further, the Court found that the depiction of the Play Pen had some relevance to Rockstar’s artistic goal to create a parody of East Los Angeles, allowing the freedom of expression as enshrined in the First Amendment to operate as a defence to Rockstar’s use of ESS’s trademarks.

Since then, an increasing number of brands have taken steps to enhance their presence online, with some even hinting at bringing retail to the Metaverse. Indeed, Nike recently filed new US applications to register its brand name, “Just Do It” slogan, and “Swoosh” logo in respect of, among other things, downloadable virtual goods, toys and accessories for use online and in online virtual worlds, and related entertainment services. As more businesses take to the Metaverse, this interaction between copyright law (perhaps with special focus on the fair use defence) and trademark law may warrant further examination.

**The right of publicity.** Going further still, what if we turn our attention from the inanimate to the animate; if Metaverse users seek to re-create non-playable characters or playable avatars in the likeness of others?

Insofar as Singapore is concerned, the right of publicity is not recognised, whether under the common law or statute. The upshot is that, at least for now, any person aggrieved by the use of his likeness in digital realities will generally have to rely on privacy legislation such as the Personal Data

Protection Act 2012, the tort of passing off, or (in exceptional cases) even an action in defamation.

#### *Problems with Artistry*

Other people are drawn to the Metaverse precisely because it is untethered from reality, providing spaces for limitless artistic expression and, by extension, significant commercial potential.

Works of literature, art, film, and music created within the Metaverse are likely copyrightable subject-matter in their own right. Indeed, it is not so difficult to envision a future where someone, inspired by an artwork hanging in a Metaverse art gallery, decides to create his own artistic rendition of that painting for display in his Metaverse apartment, open to all other Metaverse users. As in the case where more conventional mediums are used, the same key questions arise in relation to works created in the Metaverse.

**Is such creation permissible?** As alluded to above, user creations in the Metaverse are not immune to allegations of copyright infringement. Complications, however, may lie in the persistent, interactive, interoperable, and potentially decentralised nature of the Metaverse.

For Metaverse stakeholders, this may be an opportune time to consider blanket licenses (as is done with content on Twitch, Facebook, YouTube, TikTok, etc.); for copyright owners and licensees, this may necessitate greater dialogue to ascertain the exact scope of permissible use (especially in terms of duration and jurisdiction); for end-users, this may warrant caution as, in the absence of protection afforded by Metaverse developers or formal licensing arrangements with IP rights holders, they may find themselves exposed to legal liability and having to rely on the fair use defence (often times amorphous in nature and presently untested in the context of the Metaverse).

**Who is entitled to ownership over such creation?** Under the CA 2021, the default rules (excluding transitory provisions and subject to any contractual arrangement) are that the person who authored/made the relevant work would be its first copyright owner, and so entitled to enforce the copyright, unless – (1) said person is an employee acting in the course of employment contract (in which case, the first copyright owner is the employer); or (2) in the case of photographs, portraits, engravings, sound recordings, and films, said person was commissioned to create the relevant work (in which case, the first copyright owner is the commissioner – another new change introduced by the CA 2021).

## **CONCLUSION**

As we have seen, some of the issues inherent to the Metaverse can be resolved with direct reference to the CA 2021 or with recourse to the first principles of copyright law.

However, the Metaverse brings to the fore other issues which previously lay on the fringes of copyright law. For these issues, the precise boundaries of copyright protection remain up for debate. Ultimately, the balance to be struck between creator rights and user enjoyment will have to be tested in litigation or clarified by policymakers.

This delicate balance may be further disrupted when one considers the possible interactions between the Metaverse and NFT technology – we turn our attention to this in part 3 of our series.

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If you have any questions or comments on this article, please contact:



**Meryl Koh**  
Director, Intellectual Property &  
Dispute Resolution

T: +65 6531 2736  
E: [meryl.koh@drewnapier.com](mailto:meryl.koh@drewnapier.com)

**Drew & Napier LLC**  
10 Collyer Quay  
#10-01 Ocean Financial Centre  
Singapore 049315

[www.drewnapier.com](http://www.drewnapier.com)

T : +65 6535 0733  
T : +65 9726 0573 (After Hours)  
F : +65 6535 4906

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