



Top Reasons Marketers Should Partner with Legal Teams

- Ad Law in the Metaverse
- IP and Brand Enforcement Trends
- Building and Protecting your Brand through Sponsorships
- Trends in Promotions, Contests, and Sweepstakes
- Social Media Campaigns and Influencer Agreements

OCTOBER 24, 2022

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Advertising in the Metaverse

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What is the Metaverse?

“I always think it’s important that people understand what something is, and I’m not really sure the average person can tell you what the metaverse is”

Tim Cook, Apple CEO



“Metaverse isn't a thing a company builds. It's the next chapter of the internet overall.”

Mark Zuckerberg, Meta



“There’s not an agreement on what the metaverse is, even though one company has changed its name in anticipation of defining it”

Eric Schmidt, Google CEO

What is the Metaverse?

Virtual reality (VR) platforms where people can interact, work, shop, and play games using immersive technology like a VR headset.

The metaverse mimics the real world, and people can use avatars in 3D to interact and purchase virtual goods.

In the context of advertising and marketing, the metaverse is a persistent, virtual space where users can spend time and may be targeted with brand-related content and sales tactics on billboards, product placement, influencers, “stores” where you not only view ads but can also trial products and make purchase decisions.

In the next ten years, the metaverse is expected to sign on a billion users and eventually earn over \$1 trillion in revenues

What is the Metaverse?

Metaverse Statistics and Highlights

400 million monthly active users in 2022

Roblox is the biggest virtual world with 230 million monthly active users, followed by Minecraft and Fortnite with 165 and 85 million monthly active users, respectively

51% of the user base is 13 or younger; 83.5% are under 18

68% of adults are not interested

Over \$500 million in virtual real estate purchased in 2021

In 2021, Christie's sold the first purely digital artwork (a photo collage) as an NFT for \$69.4mil

A \$6 digital Gucci bag re-sold for \$4,115 on Roblox (\$800 more than the real world counterpart)

What Law Applies?

- The metaverse is no more special in the eyes of the law than the internet we use every day.
- It is a medium in which multiple laws assert jurisdiction simultaneously. For example, a comment posted by a user in one country on a platform operated in another can breach the laws of a third country or result in liability in yet another.
- If an avatar hands virtual goods to another avatar in the metaverse, that action will be subject to the same rules as other online transfers of things of value. The action may be taxable, restricted or prohibited. It may create legal effects or constitute performance of a contract.
- Identity verification and data privacy will be issues.
- The metaverse presents a massive opportunity for brands, marketers, and advertisers to reach customers, but the not-so-new rules regarding truth in advertising continues to apply.
- The FTC enforces truth-in-advertising laws, and it applies the same standards no matter where an ad appears – in newspapers and magazines, online, in the mail, or on a billboard in the metaverse.



Claims in the Metaverse

“These Nike shoes can make you fly higher than any other shoes.”



Claims in advertisements must be truthful, cannot be deceptive or unfair, and must be evidence-based.

Is it truthful and not misleading in the context in which it is delivered (i.e., in that fully immersive 3D world) and is clear and conspicuous to the consumer in any world they are living in at the moment.

The FTC clarified that the formatting of ads can render them deceptive and that clear and conspicuous disclosures may be required for ordinary consumers to hear and understand them. – Who is an ordinary metaverse consumer?

Influencers in the Metaverse

Advertisers and influencers must disclose any material connections in accordance with the FTC's Endorsement and Testimonial Guidelines.

These disclosures are often primarily textual in social media platforms.

In certain media, textual disclosures are not sufficient (video streaming, podcasts). Applications in the metaverse may not include a textual feature through which an influencer can disclose a material connection.

Advertisers and influencers must consider how to disclose a material connection when the advertising appears in the metaverse.

FTC has stated “[d]eception occurs when an advertisement misleads reasonable consumers as to its true nature or source, including that a party other than the sponsoring advertiser is the source of an advertising or promotional message, and such misleading representation is material.

Potential risk of deception to consumers arising from the failure to disclose that a digital human is not real.”

“I’m not real, but I’m sponsored by Gucci”



What is the Metaverse?

“This metaverse is going to be far more pervasive and powerful than anything else. If one central company gains control of this, they will become more powerful than any government and be a god on Earth.”

Tim Sweeney, Epic Games



“I don’t see someone strapping a friggin screen to their face all day and not wanting to ever leave.”

Elon Musk, Tesla, SpaceX CEO



IP and Brand Enforcement Trends

OCTOBER 24, 2022

Donna Schmitt

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Trademarks in the Metaverse

Nike's applications seem somewhat bare bones in comparison to other fashion brands, but include the key classes most companies are reviewing when filing their trademarks to cover usage in the Metaverse.

Classes	Goods/services
009	Downloadable virtual goods; namely computer programs featuring footwear, clothing, headwear, eyewear, bags, sports bags, backpacks, sports equipment, art, toys and accessories for use online and in virtual worlds
035	Retail store services featuring virtual goods; namely footwear, clothing, headwear, eyewear, sports bags, backpacks, sports equipment, art, toys and accessories for use online Online retail store services featuring virtual merchandise; namely footwear, clothing, headwear, eyewear, bags, sports bags, backpacks, sports equipment, art, toys and accessories
041	Entertainment services; namely providing online, non-downloadable virtual footwear, clothing, headwear, eyewear, bags, sports bags, backpacks, sports equipment, art, toys and accessories for use in virtual environments



Trademarks in the Metaverse

Three Ways Companies are Using the Metaverse

1. Selling virtual goods:

- a) i.e. selling NFTs, character skins and items in games.

2. Virtual showrooms or vStores:

- a) vStores allow customers to take tours of showrooms and interact with all kinds of objects, including products. One can even visualize and interact with NFT assets.

3. Customizers and configurators:

- a) The metaverse allows businesses to show their customers “virtual demos” of customized products, such as furniture, automobiles, homes and commercial spaces.



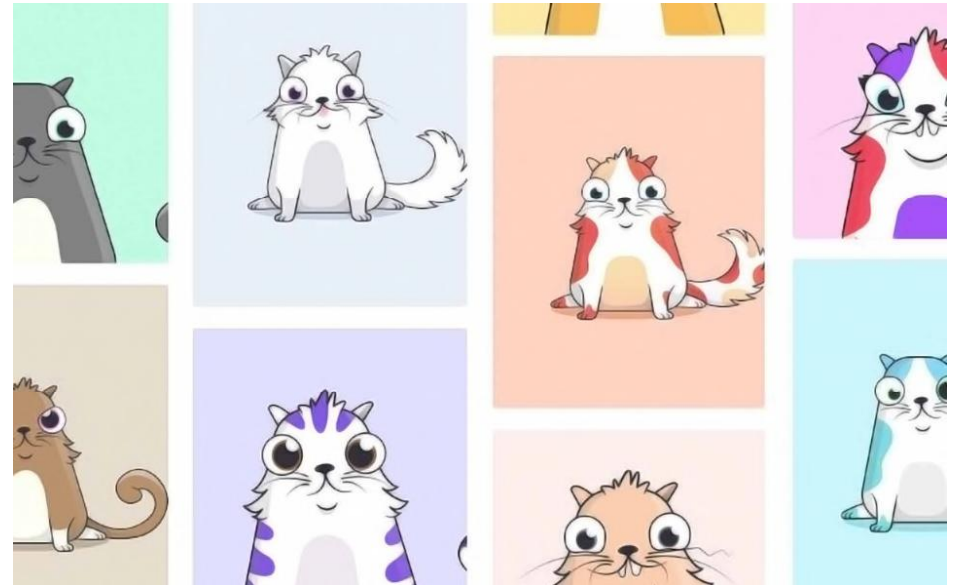
Proving Use of Trademarks in the Metaverse

It's a bit hard to say what the USPTO is looking for when it comes to proving use of a trademark in the metaverse. The current filings are either based on intent to use and no specimens have been filed, or have not been examined by the USPTO to confirm they are acceptable. Some suggestions include:

1. Screen shots from a player's perspective in the metaverse of your vStore, branded games, brand promoters or product customizers.
2. Video from a player's perspective in the metaverse interacting with your vStore, branded games, brand promoters or product customizers.
3. Screen shots of the purchasing forms or purchasing prompts used in the metaverse (Roblox, etc.) by customers.

What is an NFT?

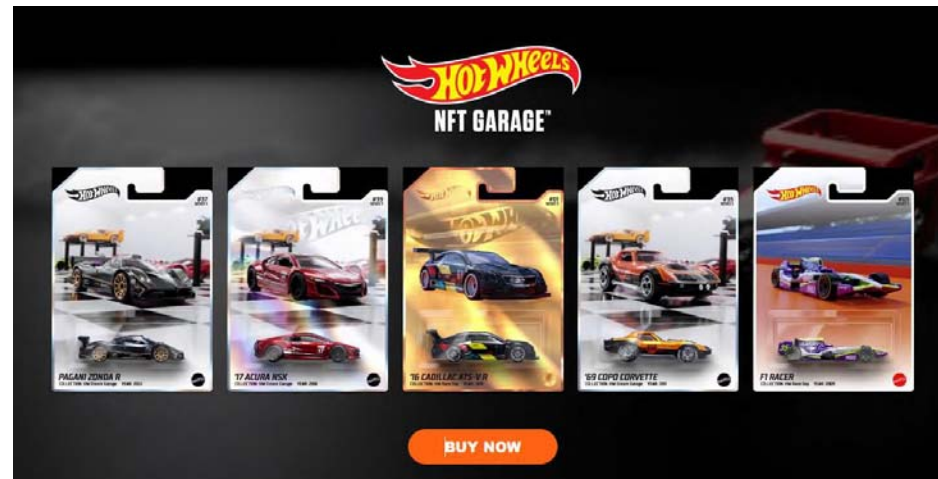
Non-fungible tokens (NFTs) are digital assets based on blockchain technology. They cannot be exchanged or traded equivalently like other cryptographic assets. They can be purchased generally with cryptocurrency and are subject to the terms of the blockchain contract, thus they may not transfer actual IP rights, but limited use of the unique digital asset.



Trademarks as NFTs

Mattel filed HOT WHEELS NFT GARAGE :

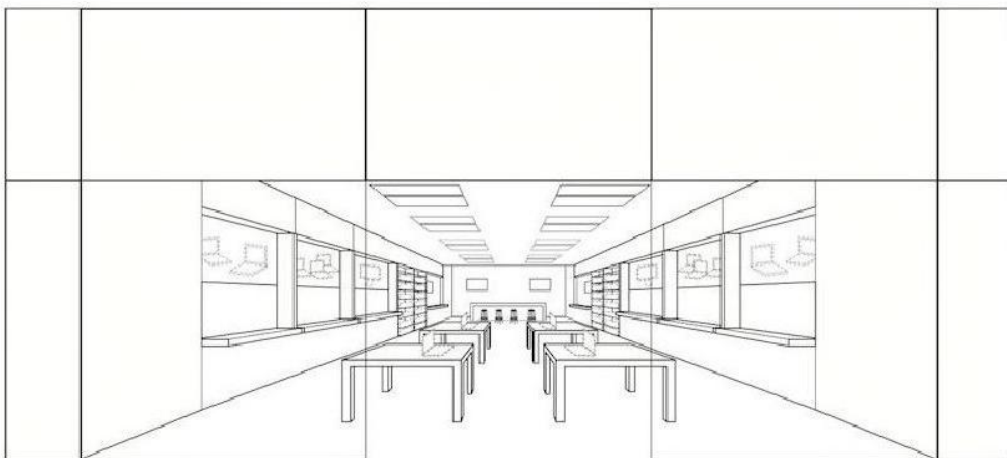
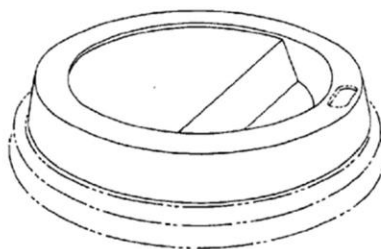
- For class 9: NFTs, namely downloadable multimedia files containing artwork, text, audio and video relating to toy cars authenticated by NFTs
- For class 35: provision of an online marketplace for buyers and sellers of downloadable digital multimedia files featuring artwork, text, audio and video relating to collectible toy cars authenticated by NFTs



Design Patents/Trademarks/Trade Dress



Design patent for key pendant design
Tiffany & Co. D635482



Design Patents

Trademark Registrations

Establish Secondary
Meaning

Trade Dress

Types of Domain Name Abuse

- **Phishing.** Domain names that support web pages that masquerade as a trustworthy entity such as a bank, known brand, online merchant or government agency.
- **Malware.** Domain names that facilitate the hosting and/or spreading of hostile or intrusive software that is installed on end systems, potentially without the permission of the user.
- **Botnet command-and-control.** Domain names that are used to identify hosts that control botnets, which are collections of malware-infected computers that can be used to perpetrate various abusive activities like denial of service attacks and spam email or phishing campaigns, among others.
- **Spam.** Domains that are advertised in unsolicited bulk email or used to name spam mail exchange systems. The term spam no longer describes only unsolicited bulk email but has become a major means of delivery for identifiers (domain names, hyperlinks, or addresses) used to support the security threats listed above.





Sponsorships: Building and Protecting Your Brand

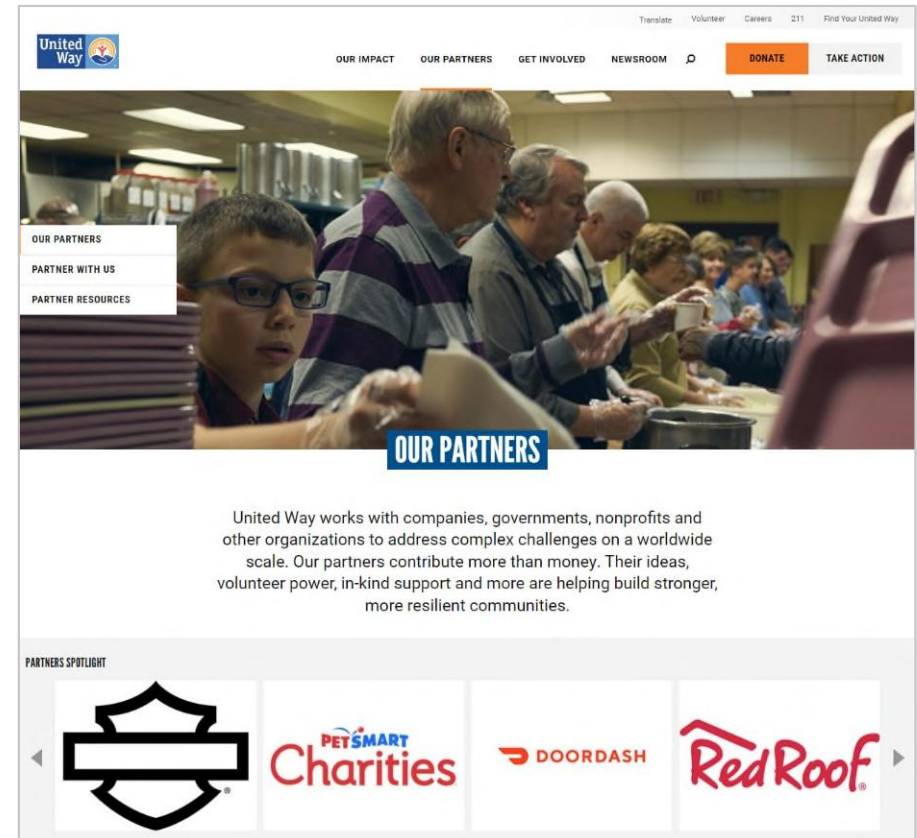
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Saraann Parker

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The Rewards of Sponsorship

- Brand Recognition
- Goodwill – City, State, Country, Beyond
- Building and Supporting Your Community
- Employee and Customer Engagement – A United Goal



(c) copyright United Way 2022

Charitable Sponsorships

- **Professional Events**
 - Medical, Legal, Accounting, etc.
- **501(c)(3) Campaigns and Events**
 - Komen Race for the Cure
 - United Way
- **Support a 501(c)(3) Business**
 - Scholarship or research funding
 - Internship or employment programs



Commercial Sponsorships

- **Create Co-Branded Merchandise**
 - Can be a for-profit or 501(c)(3) corporation
- **Athletes and Entertainers (Nike; Performance Tours)**
- **Theme Parks**



ORLANDO, Fla., USA, Dec. 16, 2011 /PRNewswire/
Artwork Copyright and Courtesy of Coca Cola

“SeaWorld Parks & Entertainment announced today a 10-year agreement with The Coca-Cola Company that makes Coca-Cola® the “Official Refreshment Beverage” of our parks beginning January 1, 2012.”

Protecting Your IP – Event Sponsorships

- **Do You Have a Trademark Policy?**
- **Ensure Final Approval Rights**
- **Pre-Event Marketing Materials, Event Set-Up**
 - Emails, website co-branding, mailers, invitations
- **Event Displays, Materials, Presentations, Giveaways**
 - Signage, banners, backdrops, brochures, swag
 - Speakers (name, bio, picture, A/V, presentation materials)
- **Post-Event Use of Your IP**
 - Cease immediately? Extend rights?
 - Is it beneficial to continue displaying the marketing materials? If so, for how long, and how will you monitor?

Protect Your IP – Merchandise and Co-Branding

- **Do You Have a Trademark Policy?**
- **Quality Review & Performance Milestones**
- **Approvals are Final**
- **Payment; Royalties; Duration**
 - One-time event or long-term sponsorship?
 - Merchandise and co-branding campaigns
- **Expected Revenue Targets**
- **Termination for Convenience**

If things go wrong...

- **Termination For Cause**

- Poor quality co-branded merchandise
- Performance issues (event, personnel)
- Missed Sales Targets/revenue

- **Force Majeure and Pandemics**

- **Damages – Direct and Consequential**

- Recalls
- Infringement claims
- Confidentiality
- Indemnity (infringement, rights of publicity, products liability)

If things go very, very wrong...



Nike Ad copyright (c) 2001; Courtesy of YouTube

Invoke the Morals Clause

“Due to the seemingly insurmountable evidence that Lance Armstrong participated in doping and misled Nike for more than a decade, it is with great sadness that we have terminated our contract with him.” Nike Statement, October 17, 2012.

Nike terminates 5-year commitment for \$3.2 billion in endorsements.

“We have decided not to renew our relationship with Lance Armstrong when our current contract expires at the end of 2012.” Paul Chibe, vice president of U.S. marketing for Anheuser-Busch [AB InBev], October 17, 2012.

Takeaways

- **Control Use of Your Brand Before, During, and After the Sponsorship**
- **Termination Rights**
 - Pre-event & pre-production breach
 - Contract performance; quality; payment; morals clause
 - Force majeure
- **Post-Termination**
 - Damages
 - What happens to IP? Website, Materials, etc.





Trends in Promotions, Sweepstakes and Contests

OCTOBER 24, 2022

Courtney Jackson

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Trends in Promotions, Sweepstakes and Contests



Types of Promotions

- Sweepstakes
- Contests
- Raffles
- Lotteries
- Door Prizes

The Elements of a Promotion

- **Prize**: Anything of value awarded to the winner
- **Chance**: Random drawing
- **Consideration**:
 - Monetary – the payment of money for the opportunity to participate
 - *e.g., payment of an entry fee, purchase of a product*
 - Non-monetary – the expenditure of a substantial degree of time or effort for the opportunity to participate; an action that results in commercial benefit to the sponsor
 - *e.g., completion of a lengthy questionnaire, traveling to a location, referring a friend*

Lotteries

- **Chance + Prize + Consideration**
- The right to conduct a lottery is reserved to the states.
- Non-state entities must ensure that one of the three elements is eliminated.





Sweepstakes

- Prize + Chance
(NO Consideration)
- If consideration is present, the promotion may be considered an illegal lottery.
- “No purchase necessary.”



Trend Alert: Influencer “Giveaways” on Social Media

- “Follow our account, like our post, tag a friend, and use the hashtag #giveaway to enter.”
- Benefit flowing to the promoter vs. incidental inconveniences undertaken to enter a promotion



Sweepstakes

- **Eliminate Consideration with an Alternative Method of Entry (AMOE)**
 - Must be universally available to all participants (*e.g., a mail-in entry*)
 - Odds of winning must be the same
 - No separate deadlines
 - No separate prize pool or prize value
 - AMOEs must be clearly and conspicuously disclosed in all advertisements and be given equal prominence as other entry methods
- **Registration in New York, Florida and Rhode Island**
 - NY and FL: Total prize value offered exceeds \$5,000
 - RI: Total prize value offered exceeds \$500 and sweepstakes is offered at retail outlets

Contests

- Prize + Skill (NO Chance)
- Consideration may not be present in some states (CO, MD, NE, ND, AZ, CT, IL, IA, VT)
- **Best Practice:** If a national contest, eliminate consideration or exclude those states



Trend Alert: User-Generated Content Required for Entry

- “Post a video showing us how you would style these jeans.”
- Consider FTC “endorsement” guidelines.
- Obtain releases from all individuals appearing in the content if it will be used in future marketing.
- Be mindful of third-party IP in content.

Contests

▪ The Element of Skill

- Essay Contests
- Photography Contests
- Puzzle Contests
- Athletic Contests
- Mathematical Contests
- Cooking Contests
- Art Contests
- Spelling Bees

▪ No Skill (No Objective Standards)

- First 100 to respond
- Guess the number of candies in the jar
- Predict the results of an athletic event
- Slot machines
- Spot the mystery shopper
- Accumulate the most proofs of purchase

Eliminating the Element of Chance

- All entries must be given equal dignity.
- Judging criteria must be objective and clearly disclosed.
- Judges must be qualified to apply the judging criteria.
- Ties must be broken on the basis of skill and not chance.

Raffles



- A “game in which a participant buys a ticket for a chance at a prize, with the winner determined by a random drawing to take place at a location and date printed on the ticket.”
 - Missouri Attorney General definition
- Only federally recognized religious or charitable organizations are allowed to sponsor raffles.

Other Considerations

- Use of Third-Party Intellectual Property
- Special Rules for Social Media Networks
- Use of Information Collected
- FTC Endorsement Guidelines
- Civil and Criminal Penalties
- Example: *The Great Atlantic and Pacific Tea Company Sweepstakes*
 - \$50 in frozen food products = automatic entry into sweepstakes.
 - NY AG found that the instructions for the AMOE were buried within advertisements and not promoted equally with the “frozen food purchase” method of entry.
 - Settlement required A&P to pay a fine of approximately \$102,000 and to change its promotions policies.



Influencer Agreements in Social Media Marketing

OCTOBER 24, 2022

Gabriela Baeza-Stout

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What is an influencer?

“A person who is able to generate interest in something (such as a consumer product) by posting about it on social media”

“influencer,” Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/influencer>. Accessed 10/20/2022.

Influencers are advertisers



Stock Images by Microsoft 365

What is the impact of influencer advertising?

Influencer Marketing Statistics and Highlights

(Figures from The State of Influencer Marketing 2022 by Influencer Marketing Hub)



Stock Images by Microsoft 365

More than 50 million people worldwide consider themselves content creators.

- The influencer industry is set to grow to \$16.4 billion in 2022
- Over 75% of brand marketers plan to allocate budget to influencer marketing in 2022
- Zara is the most mentioned brand on Instagram, with a reach of over 2,074,000,000 (Its official account only has 54.1M followers and 3,855 posts)
- Netflix was the most followed brand on TikTok in 2021
- Instagram is used by almost 80% of the brand marketers that engage influencers

Who is considered an influencer?

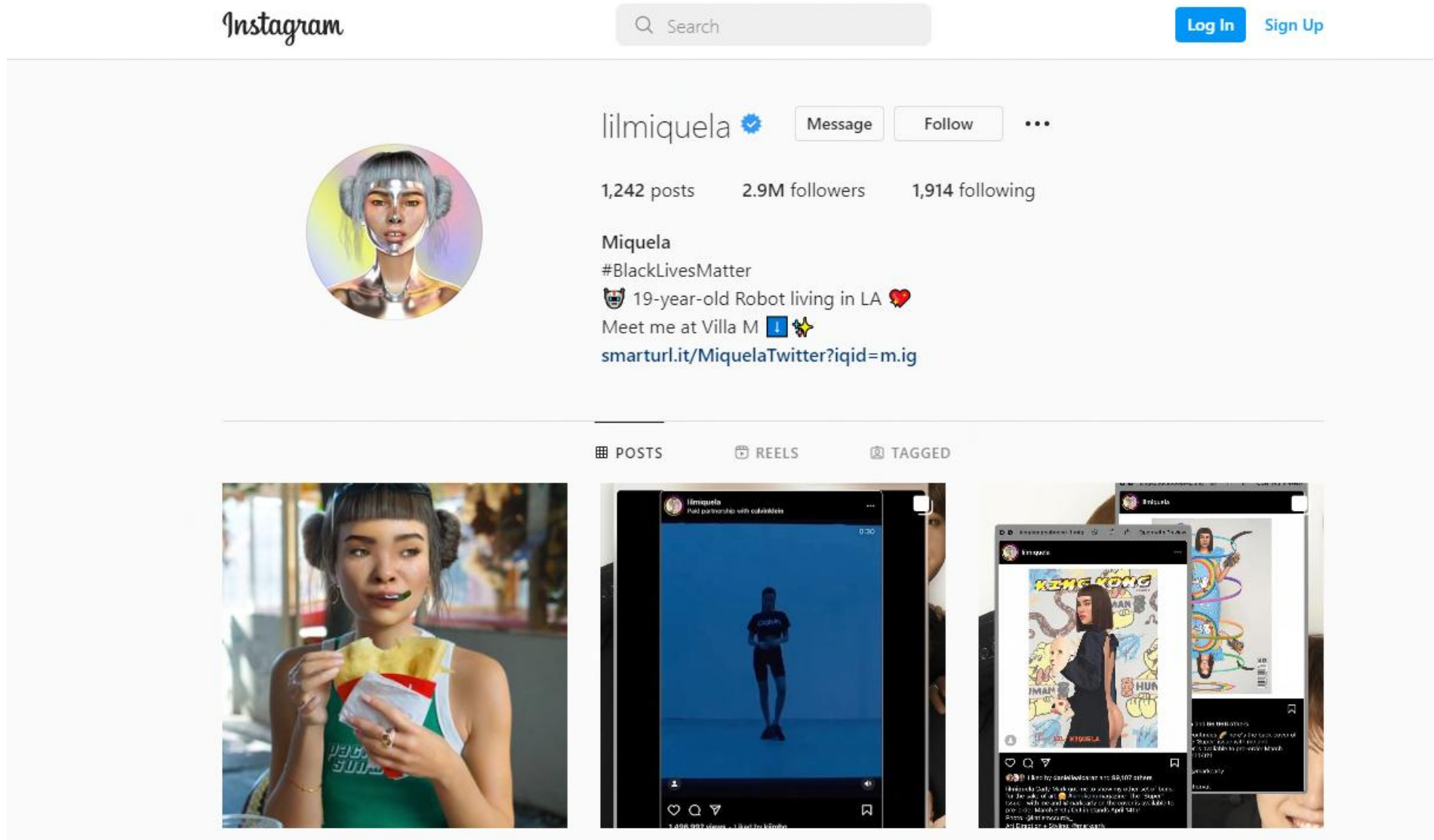
- Nano-influencers: 1,000–10,000 followers
- Micro-influencers: 10,000–50,000 followers
- Mid-tier influencers: 50,000–500,000 followers
- Macro-influencers: 500,000–1,000,000 followers
- Mega-influencers (generally celebrities): 1,000,000+ followers
- Influencers generally specialize in one industry to reach a niche population. Can be humans, pets or virtual personas (avatars)
- Influencers are content creators and gain followers based on their native content
- The most popular social media platforms for influencer marketing are:
 - Instagram (82%)
 - YouTube (41%)
 - TikTok (23%)
 - Twitter (23%)
 - Facebook (5%)



Stock Images by Microsoft 365

Figures by Influencer Marketing Hub

Virtual Influencers



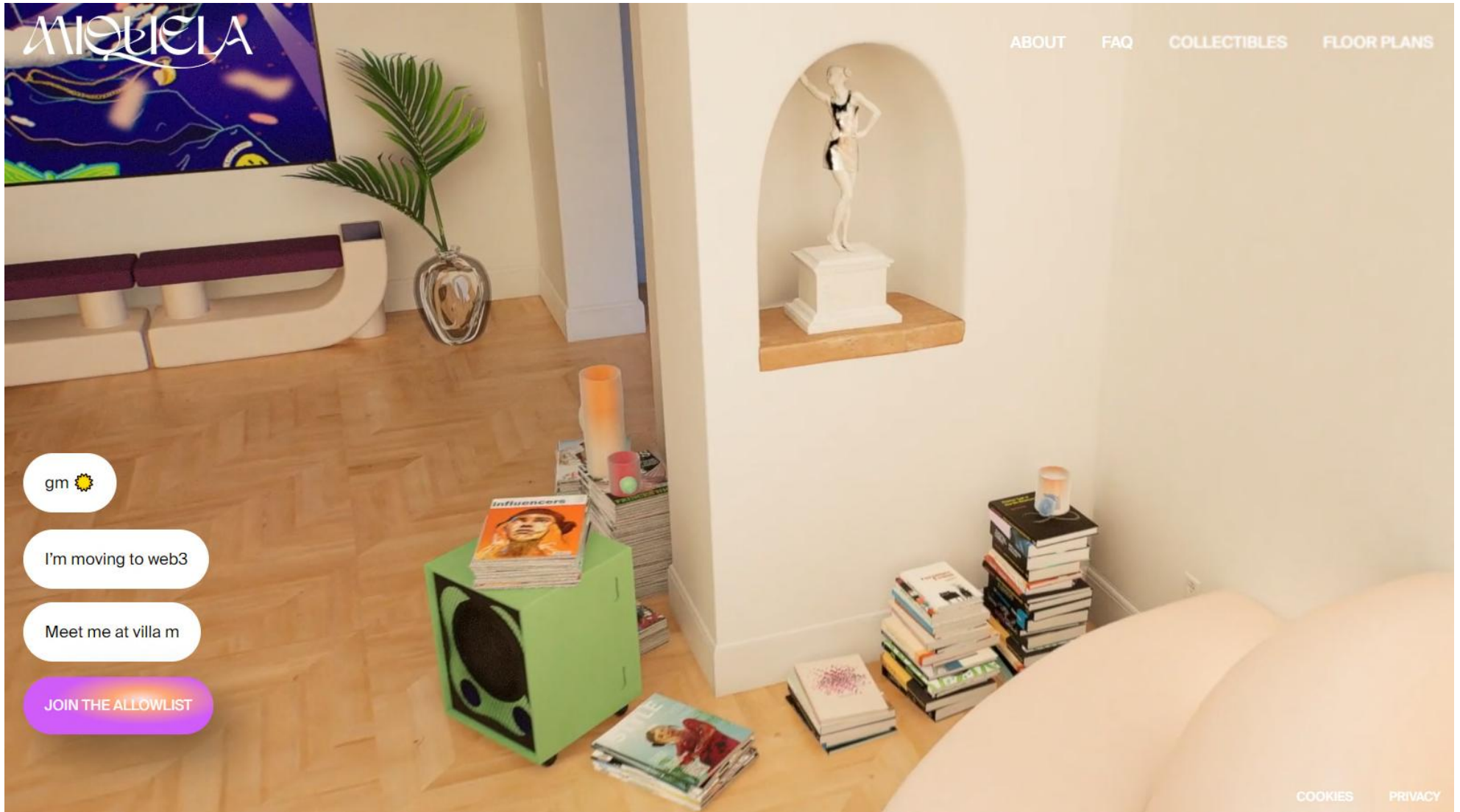


Image via Dapper Labs: https://www.miquela.fyi/?utm_source=twitter&utm_medium=social&utm_campaign=bio_link&utm_term=miquela#/

How does influencer marketing work?

Influencers work with companies to promote their brands via:

- Shoutouts (mentions to the brand)
- Sponsored Content
- Giveaways
- Platform Takeovers
- Product Seeding and Gifts
- Long Term Brand Ambassador Relationships
- Exclusive Agreements



Stock Images by Microsoft 365

What Law Applies?

- Section 5 of the Federal Trade Commission Act (FTC Act) (15 USC 45) prohibits “unfair or deceptive acts or practices in or affecting commerce.” The prohibition applies to all persons engaged in commerce.
- Because influencers are advertisers, their activities fall within the regulations of the FTC, particularly within the realm of endorsements and testimonials in advertising.
- According to the FTC guidelines, U.S. law applies if it’s reasonably foreseeable that the post will affect U.S. consumers even if posting from abroad, in which case foreign laws might also apply.
- The FTC requires that an influencer’s work has clear disclosures of its relationship with a brand, by taking the following actions:
 - Disclosing influencer’s material connection to a company clearly and conspicuously in their postings
 - Not making any unsubstantiated claims about a company’s products
 - Ensuring sponsorship disclosures are hard to miss
 - Treating sponsored tags, including tags in pictures, like any other endorsement
 - On image-only platforms, superimposing disclosures over the images
 - Avoiding assumptions that followers know about all existing brand relationships
 - Avoiding assumptions that disclosures built into social media platforms are sufficient
 - Not using ambiguous hashtags as disclosures
 - Not relying on disclosures that consumers must click on a hyperlink to see



Tips for a Successful Influencer Agreement

When drafting an Influencer Agreement, covering these areas brings clarity and stability to the commercial relationship between a brand and a social media influencer:

- Length of the contract term
- Clear payment terms and calculation of fees. Will influencer be paid per post, or after reaching a certain milestone? Will there be payment of commissions?
- Causes of termination
- Exclusivity or noncompete considerations within a specific industry
- Clear description of the activities that the influencer will conduct
- Approval and quality control, how the company will vet the content that is published online. Content must be original, favorable to the company and not disparage the company or its services in any way.
- Influencer's responsibility to follow the Federal Trade Commission (FTC) advertisement endorsement guides and rules, and to follow the rules of the social media platform used. The FTC has published influencer guides available at <https://www.ftc.gov/influencers>.
- Intellectual property clause. Will the company own the intellectual property rights on the content published by an influencer as "work for hire"?
- Trademark licenses. What type of license is needed for an influencer to promote the brand on social media? Does the influencer have any trademarks that must be licensed to the company to repost the content?
- Representations and warranties from the influencer as to the quality of the online publications
- Independent contractor clause
- Indemnification and limitation of liability





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