

The Metaverse: Alcohol Beverage Industry's Next Marketing Frontier?

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The metaverse is widely regarded as the next frontier in digital commerce, with businesses across industries spending millions of dollars buying digital real estate and investing in platforms to be market leaders. Alcohol beverage brands are also leading the charge, with companies like Jose Cuervo and Heineken announcing forays into the metaverse. But what opportunities does the metaverse hold for the alcohol beverage industry, which ultimately relies on “real world” product sales? And what legal challenges do alcohol beverage companies face in the metaverse in light of the regulatory scrutiny they face in the physical world?

Overview of the Metaverse

At its core, the metaverse is a three-dimensional version of the internet that allows individuals to transition between physical and virtual spaces. Imagine, for example, a consumer browsing wines in a virtual wine store—picking up bottles, inspecting labels, turning the bottle over to read about provenance or tasting notes, and then purchasing a bottle to be delivered to their home. For the alcohol beverage industry, the metaverse offers suppliers and retailers an opportunity to transform the e-commerce experience while providing ample new marketing opportunities. While some elements remain aspirational, many tech companies are already working on next-generation consumer electronics such as smart glasses intended to make three-dimensional e-commerce more accessible than, and preferable to, the two-dimensional experience of browsing on a smartphone or desktop computer.

But the metaverse will also pose challenges for an industry that is governed by a 50-state patchwork of Prohibition-era regulations. Even more than the internet of today, the metaverse is a borderless digital network without a definite physical presence or central authority (such as a social media network or web hosting provider). With many of its most popular platforms built on blockchain technology, these platforms do not operate on a single web server. Instead, content is distributed

across numerous computer servers via a peer-to-peer network, raising a host of questions about applicable law, such as licensing requirements, tied-house and trade practice issues, and the location of e-commerce sales for tax and regulatory purposes.

Relevance to the Alcohol Beverage Industry

There are a number of ways that alcohol beverage companies can use the metaverse to generate value, including:

a. *E-commerce.* As noted above, the metaverse has the potential to transform brands' e-commerce experience. While much improved in recent years, today's e-commerce experience mostly cannot rival the experience of browsing in a wine or liquor store. The drawback of online shopping is especially acute for luxury, limited supply, or craft beverages that depend on attractive labels, branding, or shelf placement to draw consumers' attention. By building a virtual, three-dimensional experience in the metaverse, alcohol beverage brands can build the platform and the virtual space that will power their next-generation e-commerce experience.

b. *Consumer Sales and NFTs.* In addition to providing a more robust and immersive e-commerce experience, the metaverse and blockchain technology afford an opportunity to commercialize products in new ways. Unlike most consumer products, every vintage or batch of fine wine or distilled spirit may offer subtle differences in flavor profile. Collectors often seek products of specific vintage or from specific vineyards or distilleries. While more widely known to certify ownership of digital assets, such as artwork or videos, NFTs can also be used as a secure and verifiable digital receipt for the purchase of a physical asset. Imagine, for example, a Scottish distillery selling an NFT redeemable for a future bottle of aged single cask Scotch whisky or a French vineyard selling an NFT redeemable for the product of a particular vintage year. Collectors could sell the NFT, and thereby the future right to possess the physical product, on the secondary market before the product ever leaves the distillery or vineyard, with each transfer recorded securely on a blockchain. After bottling, high-value collectors' items could be auctioned or sold while the product remains safely in a climate-controlled warehouse or cellar, with the NFT verifying current ownership. Smart contracts coded into the NFT could require payment of a royalty to the producer every time the product is re-sold. Indeed, alcohol brands such as Glenfiddich and LVMH have already started experimenting with NFTs redeemable for actual bottles.

c. *Marketing and Sponsorship Opportunities.* Virtual events in the metaverse present a new platform for sponsorship opportunities for alcohol beverage companies. Concerts, games, and other events in the metaverse all provide venues for alcohol beverage companies to market products. The popular online video game, Fortnite, for example, hosted a digital concert with rapper Travis Scott that attracted more than 45 million viewers over five performances, while Roblox hosted a virtual concert experience with Lil Nas X that attracted more than 30 million viewers.

Legal Issues for Alcohol Beverage Companies in the Metaverse

The marketing and sale of alcohol beverages and related products in the metaverse raise a number of legal considerations, including:

a. *Licensing.* In all 50 states and the District of Columbia, the unlicensed sale of alcohol beverages is prohibited. Sales of alcohol beverages in the metaverse will almost certainly be subject to the same licensure requirements. But there's no certainty about whether federal, state, and local alcohol beverage regulators will treat the sale of NFTs entitling the bearer to redeem the NFT for an alcohol

beverage as a retail sale of an alcohol beverage requiring a license. Accordingly, unless and until there's a uniform response among the states, alcohol beverage companies issuing NFTs in the metaverse will need to evaluate the licensure requirements in each state in which the NFTs are sold.

b. *Tied-House Compliance.* In the United States, federal and state laws generally divide the production, marketing, and sale of alcohol beverages into three tiers: producers/importers, distributors/wholesalers, and retailers. Federal and state laws generally prohibit individuals and entities having an interest in one tier of the alcohol beverage industry from having an interest in another tier. These rules generally prohibit producers/importers of alcohol beverages from selling their products directly to consumers, with some *limited* exceptions (e.g., on-premise sales by wineries, breweries, and distilleries are permitted in some jurisdictions). Jurisdictions are still working out how these prohibitions will apply to sales of alcohol beverage NFTs that entitle their holders to redeem the NFTs for physical bottles of alcohol. Nevertheless, brands considering offering NFTs for sale in the metaverse (or anywhere else for that matter) should carefully evaluate whether these sales, or subsequent fulfillment upon redemption, would comply with tied-house rules in the jurisdictions in which they are being sold.

c. *Advertising Specialties.* Tied-house laws also generally prohibit producers/importers from giving anything of value to retailers. One exception is for point-of-sale advertising materials and promotional items that are intended to be carried away by consumers. For example, in many states, producers may provide retailers with branded glassware, bottle openers, corkscrews, coasters, etc., that are designed to be carried away by consumers, as well as point-of-sale signage advertising the producers' brands for display within the retail location. States differ, however, in their treatment of these permissible "advertising specialties." A small number of states prohibit them altogether, while others impose a variety of limitations on dollar value or type of item. Brands looking to provide virtual items such as NFTs or signage in a virtual bar will need to carefully evaluate the application of the advertising specialties rules across jurisdictions.

d. *Sponsorship Agreements.* Many states regulate sponsorship agreements between suppliers and retailers. These limitations frequently arise in the context of sponsorship agreements between suppliers and professional sports teams or their venue operators since most venues hold retail licenses to sell alcohol beverages. In states such as New York, suppliers must be careful to ensure that sponsorship revenues do not flow between the supplier and the entity holding the retail license, even indirectly. The metaverse may provide more flexibility for suppliers to sponsor virtual events hosted by retail licensees, including professional sports teams, but suppliers will need to work diligently to understand the jurisdictions implicated by their sponsorship activities.

e. *Labelling Compliance.* Physical bottles of alcohol beverages must comply with applicable labeling regulations (e.g., obtaining a TTB-required Certificate of Label Approval). Until there is further guidance on whether and how these regulations apply to virtual representations of alcohol beverages in the metaverse, companies should strive to mirror compliant labels included on physical bottles on virtual depictions of alcohol beverage products in the metaverse.

f. *Underage Advertising.* For decades, brands have carefully selected the venues and wording of their advertisements to ensure compliance with rules limiting advertising to underage consumers. In the metaverse, compliance may be more complicated as there is typically no central authority (such as a technology company) publishing reliable demographic data or prohibiting users below a certain age. Brands, distributors, and retailers will need to find other sources to determine with confidence that the metaverse platforms or events where they are advertising do not appeal primarily to an underage audience.

g. *IP Protection and Enforcement*. When making products available in the metaverse, alcohol brands will need to take steps to protect their intellectual property.

Key Takeaways

The metaverse poses a tremendous opportunity for alcohol beverage companies to connect directly with consumers in an interactive way that was considered science fiction just a few years ago. But like every new frontier, technological or otherwise, there are legal and regulatory hurdles to consider and overcome. Some are familiar, while others are novel. The lawyers in ArentFox Schiff's Beverage and Food practice offer a cross-disciplinary perspective to help producers, distributors, retailers, and their partners in the alcohol beverage industry come up with practical strategies to maximize the value of the opportunities created by the metaverse.

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