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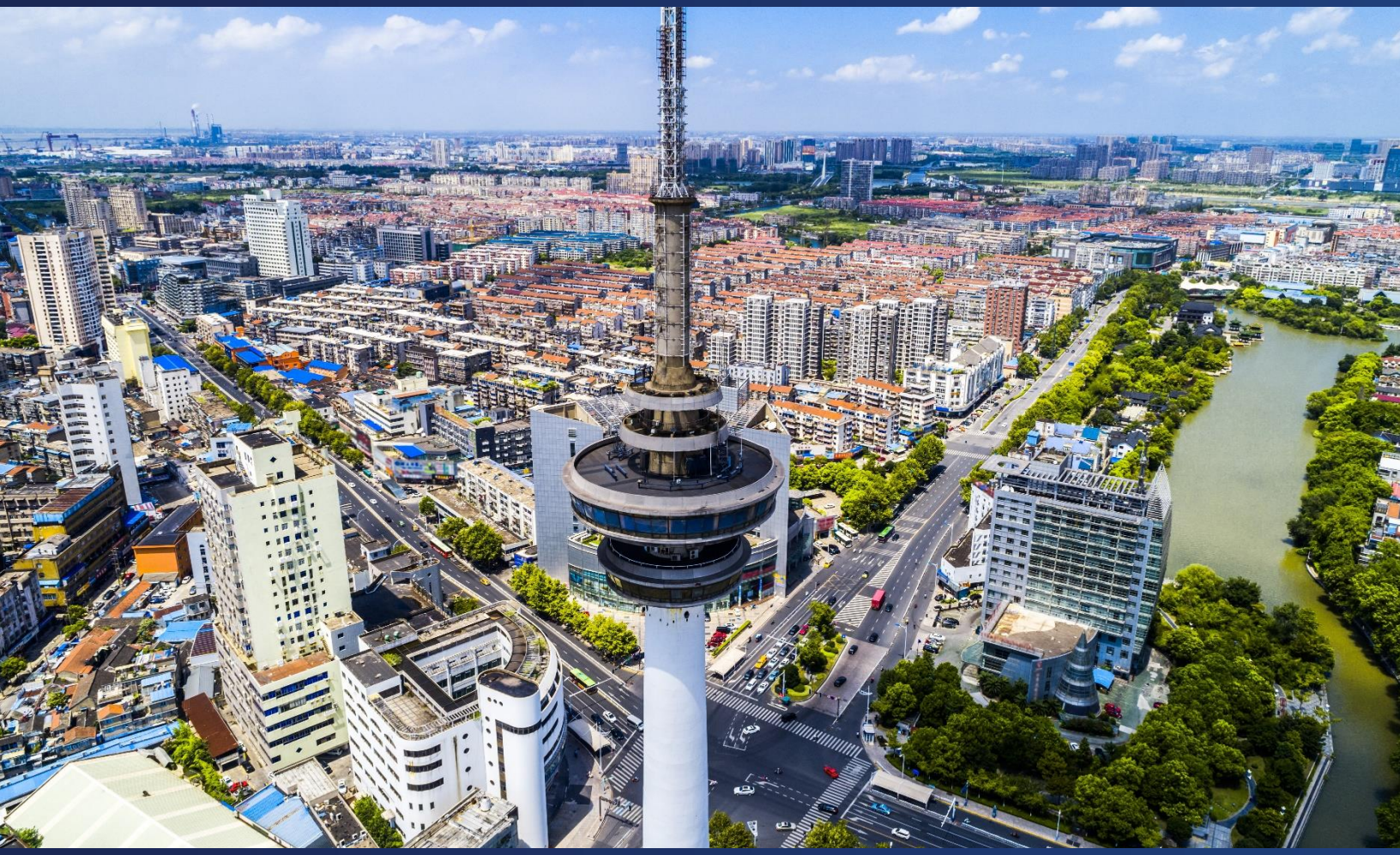

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Holland & Knight
美国霍兰德奈特律师事务所

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China Practice Newsletter

Holland & Knight is a U.S.-based global law firm committed to provide high-quality legal services to our clients. We provide legal assistance to Chinese investors and companies doing business or making investments in the United States and Latin America. We also advise and assist multinational corporations and financial institutions, trade associations, private investors and other clients in their China-related activities. With more than 1,700 professionals in 32 offices, our lawyers and professionals are experienced in all of the interdisciplinary areas necessary to guide clients through the opportunities and challenges that arise throughout the business or investment life cycles.

We assist Chinese clients and multinational clients in their China-related activities in areas such as international business, mergers and acquisitions, technology, oil and energy, healthcare, real estate, environmental law, private equity, venture capital, financial services, taxation, intellectual property, private wealth services, data privacy and cybersecurity, labor and employment, ESOPs, regulatory and government affairs, and dispute resolutions.

We invite you to read our China Practice Newsletter, in which our authors discuss pertinent Sino-American topics. We also welcome you to discuss your thoughts on this issue with our authors listed within the document.

霍兰德奈特律师事务所是一家位于美国的全球性法律事务所，我们致力于向客户提供高质量的法律服务。我们向在美国及拉丁美洲进行商业活动或投资的中国投资人及公司提供他们所需的各类法律协助。我们也向跨国公司、金融机构、贸易机构、投资人及其他客户提供他们于其与中国相关活动中所需的咨询和协助。我们在 32 个办公室的 1700 多名对各领域有经验的律师及专业人员能够协助客户处理他们在经营或投资过程中所遇到的各种机会及挑战。

我们向中国客户及从事与中国有关活动的跨国客户提供法律协助的领域包括国际商业、企业并购、科技法律、石油及能源、医疗法律、房地产、环保法律、私募基金、创投基金、金融法律服务、税务、知识产权、私人财富管理法律服务、信息隐私及网络安全、劳动及雇佣法律、员工持股计划、法令遵循及政府法规、及争议解决。

我们邀请您阅读刊载我们各作者就与中美有关的各议题所作论述的 China Practice 期刊。我们也欢迎您向本期刊的各作者提供您对各相关议题的看法。

Writing NFT Trademark Applications That Protect Brands

By Thomas W. Brooke and Rodrigo Javier Velasco

Non-fungible tokens (NFTs) continue to gain popularity and the protection of the underlying intellectual property, ranging from patent protection for unique methods, copyright protection for the artwork and trademark protection for the brands are essential to building and sustaining value.

The market for NFTs grows daily. Some of these electronic creations are valued with a market price that even surpasses a tangible equivalent product in the physical world.

This innovative form of blockchain-backed asset is found in a wide range of industries and its use is likely to keep expanding. Entrepreneurs have created NFTs to include digital artwork, music, virtual real estate and fashion goods.

In order to protect any brand name as a trademark, it is essential to identify the goods and services that the applicant plans to protect under the mark with precision.

The U.S. Patent and Trademark Office (USPTO) constantly issues a wide range of office actions in relation to trademark applications stating that the applicant's description of its goods and/or services are too broad or indefinite. Applications for NFT brands are no different.

Examining attorneys at the USPTO require the use of words used regularly to describe a product or service; the common commercial name.

For example, an office action issued in relation to one of the first trademark applications for the well-known collection of NFTs sold under the Bored Ape Yacht name and mark (Serial No. 90739977) states that "if the goods have no common commercial or generic name, applicant must describe the product, its main purpose, and its intended uses."

The applicant's original wording in this application includes "digital collectibles" (Class 09) and "providing a website featuring an online marketplace for exchanging digital collectibles" (Class 35). This was interpreted by the USPTO as too broad or indefinite as the language "does not sufficiently indicate the nature of the goods and/or services."

Some applicants have made the challenging jump to include more direct wording in their goods/services description such as non-fungible tokens.

Even use of this now commonly used expression has been interpreted as too broad. An acceptable description requires the complete expression "nonfungible tokens (NFTs)" or "nonfungible token used with blockchain technology" or even "nonfungible tokens but with a very definite complementary description of the goods/services."

Each application will have its own particularities and the applicant's commercial activity should be understood fully for describing the products/services subject to registration.

Below are some office action examples from applications in relation to the Bored Ape Yacht Club collection, along with language from office actions issued in relation to other well-known companies and celebrities who have encountered similar issues on their trademark applications.

Highlighted in bold text is what the USPTO examining attorney recommends to clear up — either in the same class and or other — the broad scope of the wording. The words or phrases that are not in bold are the original wording that the applicant pursued on the applications:

Bored Ape Yacht Club (Serial No. 90739977)

Class 9: *Digital collectibles* ***in the nature of downloadable multimedia file containing artwork relating to {indicate field or subject matter of file} authenticated by non-fungible tokens (NFTs); Digital collectibles in the nature of downloadable image files containing {indicate subject matter or field, e.g., trading cards, artwork, memes, sneakers, etc.} authenticated by*** *non-fungible tokens* ***(NFTs)***

Bored Ape Yacht Club (Serial No. 90739977)

Class 35: *Maintain****ing*** *and record****ing*** *ownership of* ***art prints comprised of*** *digital illustrations* ***originating from photographs****; maintain****ing*** *and record****ing*** *ownership of* ***downloadable image files featuring*** *digital illustrations* ***authenticated*** *by non-fungible tokens;* ***Provision of*** *an online marketplace* ***for buyers and sellers of downloadable*** *digital collectibles* ***in the nature of {indicate type of downloadable digital goods, e.g., art images, music, video clips, etc.} authenticated by non-fungible tokens (NFTs).***

Saks (Serial No. 90789965)[1]

Class 09: *Digital media, namely,* ***downloadable*** *digital collectibles* ***in the nature of {specify, e.g., images featuring beauty and fashion}, downloadable electronic data files featuring*** *digital tokens,* ***downloadable electronic data files featuring*** *non-fungible tokens (NFTs) and* ***downloadable*** *digital art;* ***downloadable electronic data files featuring*** *non-fungible tokens (NFTs) and other application tokens;* ***downloadable electronic data files featuring*** *non-fungible tokens used with blockchain technology;* ***downloadable digital collectibles in the nature of {specify, e.g., art, images featuring beauty and fashion} provided with*** *non-fungible tokens* ***based on*** *blockchain technology;* ***downloadable images and videos featuring {specify, e.g., fashion, beauty} provided with*** *non-fungible tokens* ***based on blockchain technology****; downloadable digital art provided with non-fungible tokens* ***based on blockchain technology****; downloadable collectible items, namely {specify, e.g., art} provided with digital tokens* ***based on*** *blockchain technology.*

Hot Wheels NFT Garage (Serial No. 90767267)

Class 09: non-fungible tokens, namely downloadable multimedia files containing artwork, text, audio, and video relating to collectible toy cars authenticated by non-fungible tokens (NFTs)

Class 035: 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 non-fungible tokens

Andy Warhol (Serial No. 90602664)

Class 42: ***"Providing temporary use of online non-downloadable simulation software for trading*** *non-fungible tokens used with blockchain technology;* ***Providing temporary use of online non-downloadable simulation software for trading*** *non-fungible tokens used with blockchain technology to represent a collectible item; Providing customized on-line web pages featuring user-defined information, which includes search engines and on-line web links to other web sites in the field of art, and collectables, and Non-Fungible Tokens"*

There are many other similar examples to the aforementioned in the same or other trademark classes. The good news is that some of trademark applications covering NFTs are now being published and have overcome the rejections for indefinite and broad language describing goods and services related to this new type of virtual asset.

The USPTO has now established and will keep establishing precedent. On a parallel track, U.S. courts are also grappling with whether and how to protect the ideas, methods and brands associated with NFTs. Famous brand owners are plaintiffs in the February *Nike Inc. v. Stockx LLC* and *Hermes International v. Rothschild* cases in the U.S. District Court for the Southern District of New York — cases that could provide a more in-depth legal understanding of the true legal status and nature of NFTs.

The answer may be: it depends. Some NFTs may function merely as instruments to prove and certify ownership of a physical good or object. Other NFTs take the next step beyond proving ownership of a physical object and actually represent, if not become a unique product per se, containing an underlying virtual asset by itself.

The nature of NFTs can get even more complex when considering how an entity known as a decentralized autonomous organization, or DAO, leverages the functionality of NFTs.

DAOs are member-owned communities without centralized leadership for crypto enthusiasts. They typically operate without centralized leadership, yet share a goal and give each member equal say in making decisions. Because of their investments in cryptocurrency, they often have plenty of money and need a place to put it.

Yuga Labs LLC, the creator of the Bored Ape Yacht Club NFTs collection and applicant for various trademark applications, is a community member of ApeCoin DAO, a cryptocurrency created and derived from the Bored Ape Yacht Club NFT collections.

Comprehending and defining the legal nature of NFTs will be challenge to the legal system. The nature and use of NFTs will likely become more complex and basic trademark law principles, such as the fair use doctrine and/or the first sale doctrine applicability, will require analysis and structure.

Over the last 30 years, the courts have had to determine what was being sold — a product or a service — and how broadly should a trademark owner's rights be to something that cannot be physically held in one's hands.

Court decisions that define the law around protection for NFT brands will certainly affect how applications for protection of these trademarks are handled at the USPTO.

Precedent from the USPTO relating to trademarks applications for NFT brands combined with what courts decide on these ongoing disputes regarding the nature of NFTs will presumably give more clarity to future applicants for trademark protection for NFTs and NFT-related goods and services.

This precedent is likely to define what is considered to be trademark infringement and what will be permitted as noninfringing use, if not fair use, of names, logos, images and other intellectual property.

Ongoing and future applicants need to be cautious on their chosen wording for trademark applications, as both vagueness and too narrow a definition could sidetrack the mark's progress or even lead to refusals to register.

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Notes

[1] Not full description. Only intended display

撰写保护品牌的 NFT 商标申请

原文作者：Thomas W. Brooke 及 Rodrigo Javier Velasco

不可替代代币（NFT）继续受到欢迎，而对构成 NFT 的知识产权的保护，包括对独特方法的专利保护、对艺术品的版权保护、及到对品牌的商标保护，对建立和维持 NFT 的价值至关重要。

NFT 的市场每天都在增长。其中一些电子创造品的市场价格甚至超过了现实世界中的有形同等产品。

这种创新形式的由区块链所支持的资产存在于广泛的行业中，且其使用可能会不断扩大。創業者创建了包含数字艺术品、音乐、虚拟房地产和时尚商品的 NFT。

为了将任何品牌名称作为商标加以保护，必须准确标示申请人计划在商标下保护的商品和/或服务。

美国专利和商标局（USPTO）不断发布一系列与商标申请相关的官方審查決定，規定什么情况下申请人对其商品和/或服务的描述过于宽泛和/或不明确。NFT 品牌的申請也不例外。

美国专利商标局的审查律师要求使用经常用于描述产品或服务的词语；即通用商业名称。

例如，针对以无聊猿游艇俱乐部名称和商标（序列号 90739977）出售的著名 NFT 收藏品的首批商标申请之一所作出的一個官方審查決定中，規定“如果商品没有一般商业或通用的名称，申请人必须描述产品、其主要用途及其预期用途。”

申请人在本申请中的原始措辞包括“数字收藏品”（09 类）和“提供一个以在线市场为特色的网站以交换数字收藏品”（35 类）。美国专利商标局将其解释为过于宽泛或不明确，因为该语言“不足以表明商品和/或服务的性质”

一些申请人在其商品/服务描述中加入了更直接的措辞，如不可替代代币，这一举措颇具挑战性。

即使使用这个现在常用的表达也被解释为过于宽泛。可接受的描述要求完整表达“不可替代代币（NFT）”或“使用区块链技术的不可替代代币”或甚至“包括对商品/服务有非常明确的补充描述的不可替代代币”。

每个申请都有其自身的特殊性，应充分了解申请人的商业活动，以描述需要注册的商品/服务。

以下是与无聊猿游艇俱乐部系列相关的申请中的一些官方審查決定示例，以及与其他知名公司和名人相关的官方審查決定中的语言，这些公司和名人在其商标申请中遇到了类似问题。

以粗体字突出显示的是美國專利和商標局审查律师對同一类别和/或其他类别措辞的广泛范围用詞的澄清建議。未加粗的用詞或文句是申请人在申请中使用的原始措辞：

*无聊猿游艇俱乐部（序列号 **90739977**）*

***9** 类：具有有关{表明文档的领域或主题}的可下载多媒体文档性质并通过不可替代代币（**NFT**）认证的*数字收藏品：*具有{表明主题或领域，如交易卡、艺术品、模因、运动鞋等}的可下载图像文档性质并通过*由不可替代代币*（**NFTs**）认证的数字收藏品*

*无聊猿游艇俱乐部（序列号 **90739977**）*

***35** 类：进行*维护和记录由*源自照片*的数字插图*组成的艺术印刷品*的所有权；*进行*维护和记录以数字插图为特征*的可下载图像文件*的所有权，并通过不可替代的代币*进行认证；为买家和卖家提供*一个在线市场，供其下载*具有{表明可下载数字商品的类型，如艺术图像、音乐、视频剪辑等}性质*的*可下载*数字收藏品，并通过不可替代代币（**NFT**）认证。*

***SAKS**（序列号 **90789965** ）*[1]

***09** 类：*数字媒体，即{表明，例如，以美丽和时尚为特征的图像}性质的可下载*数字收藏品、*以*数字代币为特征的可下载电子数据文件*、以不可替代代币（NFT）*为特征的可下载电子数据文档和可下载*数字艺术；具有*不可替代代币（NFT）和其他应用代币的*可下载电子数据文档*；以区块链技术支持的不可替代代币*为特征的可下载电子数据文件*；以由区块链技术*支持*的不可替代代币*所提供*的具有{表明，例如，艺术，以美丽和时尚为特征的图像}性质的可下载数字收藏品；以由区块链技术支持*的不可替代代币*所提供*的具有{表明，例如，时尚，美丽}为特征的可下载图像和视频；以由区块链技术支持*的不可替代代币所提供的可下载数字艺术；可下载的收藏品，及由区块链技术*支持*的数字代币所提供的{表明，例如，艺术品}。

***Hot Wheels NFT Garage**（序列号 **90767267**）*

***09** 类：不可替代代币，即包含由不可替代代币（**NFT**）认证的有关可收藏玩具车的艺术品、文本、音频和视频的可下载的多媒体文件*

***035** 类：为买家和卖家提供不可替代代币（**NFT**）认证的有关可收藏玩具车的艺术品、文本、音频和视频的可下载的多媒体文件的在线市场*

安迪 • 沃霍尔（Andy Warhol）（序列号 90602664）

***42** 类：“为由区块链技术支持的不可替代代币*的交易提供在线非下载模拟软件的临时使用；*为由区块链技术支持的表示一可收藏物件的不可替代代币*的交易提供在线非下载模拟软件的临时使用；*提供具有用户定义信息的定制在线网页，其中包括搜索引擎和连结艺术、收藏品和不可替代代币领域其他网站的在线网络链接”*

在相同和/或其他商标类别中，有许多与上述类似的其他示例。好消息是，包含 NFT 的商标申请现已公布，并克服了对描述与这种新型虚拟资产相关的商品和服务的不确定和宽泛语言的拒绝的问题。

美国专利商标局现已确立并将继续确立先例。与此同时，美国法院也在努力解决是否以及如何保护与 NFT 相关的概念、方法和品牌的问题。著名品牌所有者为在美国联邦法院纽约南区提出的 February Nike Inc. 诉 Stockx LLC 和 Hermes International 诉 Rothschild 案的原告，而这些案件可能提供对 NFT 真正法律地位和性质的更深入的法律理解。

答案可能是“视情况而定”。一些 NFT 可能仅仅作为证明/验证明实物/物体所有权的工具。其他 NFT 采取了不仅仅是证明物理事物的所有权及其所真正代表的事物的下一步，即 NFT 本身如果不是成为一种独特的商品，也实际代表了一种本身包含基础虚拟资产的商品。

当考虑一个被称为分散自治组织（DAO）的实体如何利用 NFT 的功能时，NFT 的性质可能变得更加复杂。

DAO 是成员所有的社群且没有加密热衷者的集中领导。它们通常在没有集中领导的情况下运作，但却有一个共同的目标，让每个成员在决策中拥有平等的发言权。由于他们在加密货币上的投资，他们通常有很多钱，需要一个地方来存放。

Yuga Labs LLC 是无聊远猿游艇俱乐部 NFT 集合的创建者，也是各种商标申请的申请人，是 ApeCoin DAO 的社区成员。ApeCoin DAO 是一种是由无聊猿游艇俱乐部的 NFT 集合所创建并源自其的加密货币。

理解和界定 NFT 的法律性质将是对法律制度的挑战。NFT 的性质和使用可能会变得更加复杂，且基本的商标法原则（如合理使用原则和/或首次销售原则的适用性）将需要分析和构建。

在过去的 30 年里，法院必须确定出售的是什么——商品还是服务——以及商标所有人对无法实际掌握的东西的权利范围应该有多广。

法院决定将定义围绕 NFT 品牌保护制定的法律的判决，肯定将会影响美国专利商标局处理这些商标保护申请的方式。

美国专利商标局关于 NFT 品牌商标申请的先例，以及法院对这些关于 NFT 性质的持续争议的判决应该会让未来的 NFT 和 NFT 相关商品和服务的商标保护申请人更加清楚。

这个先例可能将定义什么将被视为商标侵权，及什么将被视为是被允许的非侵权使用（即使名称、徽标、图像和其他知识产权不被认为是“合理使用”的话）。

目前和未来的申请人需要谨慎选择商标申请的措辞，因为模糊和过于狭窄的定义可能会影响商标的进展，甚至导致被拒绝注册。

本刊行获 Law360 的许可。

附注

[1] *非完整描述。仅为预计目的所作的显示*

Emerging Trends In Litigation Risk Insurance

By Matthew Grosack, Alex M. Gonzalez, Robert S. Hill and Leonie W. Huang

Litigation risk insurance refers to a relatively new set of insurance offerings that allow businesses to better manage the legal risks stemming from known litigation.

There is a growing market for such products, which gives companies a new set of tools for dealing with the uncertainty of high-stakes litigation. While these policies are all highly bespoke and cover a number of different risks, one form of litigation risk insurance, known as adverse judgment insurance, offers coverage for final judgments in litigation, but typically not for defense or settlement. This kind of insurance can be especially helpful in the mergers and acquisitions (M&A) context, where an otherwise attractive target company is involved in material litigation.

An adverse judgment policy can give a prospective buyer or merger partner the certainty to move forward with the transaction, even while the underlying case remains pending. Another form of litigation risk insurance, known as judgment preservation insurance, allows successful litigants who have won money damages to "lock in" some or all of that award, pending appeal. Given the expense and disruption of high-stakes litigation, in many cases such insurance would add great value by setting a "floor" for recovery and achieving considerable certainty well in advance of the appellate outcome. Decision-makers involved in M&A activity and big-ticket litigation may consider litigation risk insurance as a potential solution when facing material litigation uncertainty.

ADVERSE JUDGMENT INSURANCE

As introduced above, and as its name suggests, adverse judgment insurance is designed to protect a defendant (or other intended beneficiary) in the event of an adverse judgment. This kind of insurance can be a valuable tool for businesses engaged in M&A activity.

Litigation risk can be one of the biggest problems in the context of deal diligence. In addition to the substantive risk of loss, in many cases prospective buyers will find litigation risk much harder to evaluate than the ordinary course aspects of the business. As such, open litigation can be a significant problem for otherwise attractive target companies, especially where target companies are defendants. In some cases, open litigation will make an otherwise attractive target too risky to acquire.

To address this issue, a target company may attempt to achieve a settlement pre-transaction, but this gives significant leverage to the other side and may fail in any event.

Indemnification agreements are another alternative in some situations, but these can raise their own risks of future litigation.

Adverse judgment insurance is an option that can help to cabin the risk of pending litigation — and give comfort to a potential buyer — without having to deal with an adverse party or the potential complexity of an indemnification situation.

Adverse judgment insurance may also eliminate the need for large escrows, and the resulting loss in liquidity, for potentially lengthy and uncertain periods of time. The coverage may also offer value where a litigant wishes to offer additional assurance to investors, commercial partners or the market as a whole as to its financial and commercial stability. This approach may also provide some level of certainty on a balance sheet by making a contingent liability a quantifiable insurance cost, which can be a considerable advantage for some companies.

Adverse judgment insurance can potentially add value outside the M&A context, as well. Litigation financing is here to stay, and many commentators predict a rapid rise in such activity in the coming years as capital providers look to turn lawsuits into investment portfolios. Adverse judgment insurance potentially provides a way to counterbalance the strategic asymmetry that can occur when a financed plaintiff sues an uninsured defendant. In this dynamic, plaintiff side risk is distributed across multiple entities (a strategic advantage), but the uninsured defendant is burdened with all downside risk, which may prompt it to consider less attractive settlement possibilities.

Whether or not a plaintiff has outside funding, there are many circumstances where the underlying litigation dynamics tend to favor the plaintiff obtaining an early settlement that is "too large" compared to the underlying merits of the case. For example, many forms of litigation that can generate large damages awards — including patent, antitrust, securities and products liability class actions — require extensive fact and expert discovery, which tends to drive the high cost of litigation. These costs, plus the inherent uncertainty of litigation and the risk of loss down the road, mean that many defendants will be willing to settle at significant amounts even where they think that plaintiffs' claims are weak. Even a remote chance of a bad outcome can push a defendant to make expensive settlement decisions, especially if it would exceed other insurance coverage or otherwise be particularly disruptive.

However, in cases where there is sufficient information for an insurer to underwrite litigation risk, adverse judgment insurance can help level the playing field by allowing a defendant to negotiate a more reasonable early settlement with the understanding that the risk of not settling has been controlled.

JUDGMENT PRESERVATION INSURANCE

Judgment preservation insurance, also as its name implies, is designed to underwrite the risk associated with a judgment being overturned or significantly decreased on appeal. In this case, a plaintiff who has prevailed at trial can be confident that a win is insured at a certain level slightly below the total award, even in the unlikely, yet possible, event of reversal on appeal.

This is particularly applicable in the intellectual property (IP) litigation context. Take the example of patent litigation or contractual licensing dispute involving underlying confidential or otherwise protected and extremely valuable IP. The winning IP owner may have spent significant amounts of money, not to mention significant time, to secure a litigation victory at the trial court level. But that successful plaintiff now faces an even longer appeal horizon and continued uncertainty as to whether the trial court result will be upheld, reduced after more time on remand to the lower court, or overturned entirely on appeal.

Indeed, the larger the damages award at trial, the greater defendant's motivation to pursue a vigorous appellate challenge to that outcome. On top of an already lengthy trial process, appellate timelines are often measured in years, significantly reducing the practical value of a hard-fought judgment. Another concern is that the uncertainty involved in preserving the value of the judgment may be material to a corporate earnings report or other important communications with investors, commercial partners or the market. All things considered, even after a victory at trial, uncertainty still looms.

In each case, judgment preservation insurance can be used to provide further certainty and potentially accelerate recording a significant amount in earnings or other income, serve as collateral for more competitively priced financing than might otherwise be offered by a judgment monetization lender, or otherwise improve the successful litigant's position.

HOW IT WORKS: THE NUMBERS

So, how does litigation insurance work in terms of the numbers? Much like other insurance products, potential insureds pay a premium for the coverage subject to a retention and certain defined limits. In return, insureds receive bespoke coverage, and peace of mind, for many of the litigation risks discussed above. These are highly tailored and bespoke policies and subject to detailed diligence, given the sophisticated and high-stakes nature of the underlying litigation, so the specific terms will vary.

For illustrative purposes only, for example, a carrier providing coverage for an adverse judgment after underwriting may determine that damages claimed are in the range of $60 million to $100 million. The carrier may assess the claimed amount and determine that a more likely damages award is closer to about $8 million to $10 million. In such a situation, assuming the insured and carrier can come to agreement on premiums, retentions and limits, a carrier may provide coverage that exceeds $10 million in likely damages, up to the full damages claimed of $100 million. Thus, if a final non-appealable adverse judgment is entered against the defendant for $100 million, under this illustrative example, an insured would be exposed only to a $10 million retention, and the carrier would bear the risk of damages in excess of $10 million up to $100 million (or $90 million of covered loss). If the final decision was $25 million, then the insured would be subject to satisfying a $10 million retention, and the carrier would cover the additional $15 million, subject to other terms in the policy (such as bespoke exclusions).

For judgment preservation (and drawing on our earlier example of the hypothetical IP dispute), assume an IP plaintiff wins a $100 million judgment at trial. The plaintiff could insure the appellate risk in preserving the $100 million damages judgment less a retainer (usually tied to the amount thought likely to be reduced), for example $10 million, such that coverage extends up to $90 million. In the event the final award is reduced by the expected $10 million, to $90 million, there would be no payout due to the retention.

But, if after all appeals have been exhausted, the award is reduced to $60 million, the insurance policy would pay out $30 million (the $90 million coverage less the $60 million final award, subject to a $10 million retention). In the event of complete defense victory on appeal and the damages award is zeroed out, then the policy would pay out the $90 million.

Again, the above figures are purely hypothetical; premium, coverage limits and retentions will vary greatly depending on the facts of the underlying litigation (potential exposure, procedural posture, previous settlement interactions, etc.).

OTHER MATERIAL CONSIDERATIONS

Much like the bespoke provisions of the policy, litigation risk insurance has its own unique facets. First, coverage will typically be excluded for losses resulting from material misrepresentations or omissions made during the underwriting process.

Second, coverage under litigation risk insurance is almost uniformly triggered on the ultimate and non-appealable final judgment or disposition of a litigation. Thus, while flexible in the sense that each coverage plan is customized and can provide other more immediate benefits, the insurance payout comes only if there is a judgment and after any applicable appeals are exhausted, such that the triggering adverse judgment or order is truly final and can no longer be challenged. For certain coverage, this could mean that if a case settles, the litigation insurance policy would be inapplicable since there would not be a final judgment on the merits, and therefore those seeking to include coverage for defense costs including settlement would need to be clear as to that goal for the coverage.

Additionally, the coverage applies to the final judgment and would not protect against the risk of a judgment-proof defendant, where the plaintiff receives only a portion of the full award because the judgment debtor cannot pay or be collected against.

Third, due diligence and underwriting of these policies are fact-intensive and detailed. A prospective insured should be ready to provide feedback on the opposing party's litigation tactics and tone, potential damages, and, in the context of adverse judgment insurance, an assessment of the procedural path forward (timeline, dispositive motions, trial and appellate issues). While this process is unavoidably involved, the insured not only benefits from the coverage that may be afforded by the policy, but also the value of an objective review and assessment of litigation risks by a carrier that has aggregated hard data on litigation trends and risks.

CONCLUSION

In summary, litigation insurance is not a solution for any and all litigation risk, but in the case of the winnable or defensible legal position, it can provide an important tool for safeguarding against the vagaries of civil litigation. And at the stage where there is sufficient information for an insurer to conduct its diligence review, a litigant would do well to consider the benefits of a stronger negotiating position and the peace of mind that custom litigation risk insurance can provide.

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诉讼风险保险的新趋势

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诉讼风险保险是指一套能使企业更好地控管来自已知诉讼的法律风险的相对较新的保险产品。

此类产品的市场不断扩大，这为企业提供了一套用于处理高风险诉讼的不确定性的新的工具。虽然这些保单都是高度定制的，且涵盖了许多不同的风险，其中一种形式的诉讼风险保险，称为不利判决保险，为诉讼中的最终判决提供保险，但通常不为辩护或和解提供保险。这种保险在本来具有吸引力的目标公司卷入重大诉讼的并购（M&A）情形中尤其有用。

不利判决保单可以提供潜在买家或合并伙伴为推进交易的明确性，即使所涉及的案件仍悬而未决。另一种形式的诉讼风险保险，称为判决维持保险，允许成功获得金钱赔偿的诉讼当事人在未决上诉中“锁定”部分或全部裁判金额。考虑到高风险诉讼的费用和其造成的干扰，在许多情况下，此类保险将通过设定追偿的“底线”、并在上诉结果之前取得相当大的确定性而增加巨大的价值。当面临重大诉讼不确定性时，参与并购活动和大额诉讼的决策者可能会考虑使用诉讼风险保险作为一种潜在的解决方案。

不利判决保险

如上所述，正如其名称所示，不利判决保险旨在在发生不利判决时保护被告（或其他预期受益人）。这种保险可以成为从事并购活动的企业的宝贵工具。

诉讼风险可能是交易尽职调查中最大的问题之一。除了实质性的损失风险外，在许多情况下，潜在买家会发现诉讼风险比业务的正常过程方面更难评估。因此，公开诉讼对于本来应具有吸引力的目标公司来说可能是一个重大问题，尤其是在目标公司是被告的情况下。在某些情况下，公开诉讼会使原本具有吸引力的目标公司风险过高而难以收购。

为了处理这一问题，目标公司可能会尝试进行完成交易前结算，但这会给另一方带来巨大的谈判优势，并且无论如何很可能失败。

在某些情况下，补偿协议是另一种选择，但这些协议可能会增加其本身未来诉讼的风险。

不利判决保险是一种可以帮助限制未决诉讼风险的选择，并为潜在买家提供无需面对需与对方打交道或赔偿情况的潜在复杂性的慰藉作用。

不利判决保险还可以消除对大型资金监管安排的需求，并在潜在的漫长和不确定的时间段内消除由此造成的资产流动性损失。如果诉讼当事人希望就其财务和商业稳定性向投资者、商业合作伙伴或整个市场提供额外保证，则该保险也可能提供价值。这种方法还可以通过将或有负债作为可量化的保险成本，为资产负债表提供一定程度的确定性，这对一些公司来说可能是一个相当大的优势。

不利判决保险也可能在并购背景之外增加价值。诉讼融资将继续存在，许多评论家预测，随着资本提供商希望将诉讼转化为投资组合，未来几年此类活动将迅速增加。不利判决保险可能会提供一种方式，以抵消融资原告起诉未投保被告时可能出现的战略不对称。在这种动态中，原告方风险分布在多个实体之间（这是一种战略优势），但未投保的被告方承受着所有下行风险，这可能促使其考虑较差的和解方案。

无论原告是否有外部资金，在许多情况下，所涉的诉讼动态往往有利于原告获得与案件基本案情相比“过大”的早期和解。例如，许多可能产生巨额损害赔偿金的诉讼形式——包括专利、反托拉斯、证券和产品责任集体诉讼——都需要广泛的事实和专家的证据发现程序，这往往会导致诉讼成本高昂。这些成本，再加上诉讼固有的不确定性和未来损失的风险，意味着许多被告即使认为原告的索赔较弱，也愿意以巨额金额和解。即使是些微出现不好的结果的可能性也会迫使被告做出代价高昂的和解决定，尤其是如果该不好的结果会超出其他保险范围或造成特别的破坏。

然而，如果有足够的信息供保险人承保诉讼风险，则不利判决保险可以帮助公平竞争，允许被告在了解未和解的风险已得到控制的情况下，协商更合理的早期和解。

判决维持保险

判决维持保险，顾名思义，旨在承保与判决被推翻或上诉时大幅减少相关的风险。在本案中，在庭审中胜诉的原告可有信心，即使在不太可能（但还是有可能发生）的上诉撤销事件中，将赢得略低于总赔偿额的保障。

这尤其适用于知识产权诉讼。以专利诉讼或合同许可纠纷为例，涉及基础机密或其他受保护的极有价值的知识产权。胜诉的知识产权所有人可能花费了大量资金，更不用说花费了大量时间，以确保在初审法院取得诉讼胜利。但是，这个胜诉的原告现在面临着更长的上诉期限，以及是否会维持初审法院判决、是否会在退回到下级法院花更多时间重审后减少判决金额、及判决结果是否会在上诉时被完全推翻的持续不确定性。

事实上，审判时的赔偿金越大，被告就越有动机对结果提出有力的上诉质疑。在已经漫长的审判过程之外，上诉期间通常以年为单位，这大大降低了艰难取得的判决的实际价值。另一个担忧是，维护判决价值所涉及的不确定性可能对公司盈利报告或与投资者、商业合作伙伴或市场的其他重要沟通至关重要。综上所述，即使在审判中取得胜利，不确定性仍然产生。

在每种情况下，判决维持保险可用于提供进一步的确定性，并可能加速在收益或其他收入中记入大量金额、或作为基于判决进行融资的贷款人可能提供在金钱上更具竞争力的融资方案的抵押品、或以其他方式改善胜诉当事人的地位。

如何操作：数字

那个么，诉讼保险在数字方面是如何运作的呢？与其他保险产品非常相似，潜在被保险人根据保留金和某些规定的限额支付保险费。作为回报，对于上述许多诉讼风险，被保险人可以获得定制的保险，并可以放心。鉴于潜在诉讼的复杂和高风险性质，这些都是高度定制的保单，需要进行详细的尽职调查，因此具体条款会有所不同。

例如，仅出于说明目的，承保后为不利判决保险的保险人可确定索赔的损害赔偿金在 6,000 万美元至 1 亿美元之间。保险人可以评估索赔金额，并确定更可能的赔偿金额接近 800 万至 1,000 万美元。在这种情况下，假设被保险人和保险人可以就保费、保留金和限额达成协议，保险人可以提供超过 1,000 万美元的可能损害赔偿，最高可达 1 亿美元的全额索赔。因此，如果对被告作出不可上诉的最终不利判决，要求赔偿 1 亿美元，那么在这个示例中，被保险人将只承担 1,000 万美元的保留金，保险人将承担 1,000 万美元以上至 1 亿美元（或 9,000 万美元的承保损失）的损害风险。如果最终决定为 2,500 万美元，则被保险人将有义务支付 1,000 万美元的保留金，保险人将根据保单中的其他条款（如定制的除外条款）支付额外的 1,500 万美元。

而就保全判决（并借鉴我们之前假设的知识产权纠纷的例子），假设知识产权原告在审判中赢得了 1 亿美元的判决。原告可以为上诉风险投保，以维持 1 亿美元的损害赔偿金判决减去一笔保留金（通常与认为可能减少的金额

挂钩），例如 1,000 万美元，这样保险范围可以扩大到 9,000 万美元。如果最终判决结果减少了预期的 1,000 万美元而减为 9,000 万美元，则因保留金而无需支付任何款项。

但是，如果在所有上诉结束后，赔偿金减至 6,000 万美元，保单将支付 3,000 万美元（在 1,000 万美元保留金的规定下，以 9,000 万美元的保险范围减去 6,000 万美元的最终赔偿金）。如果抗辩方在上诉中取得完全胜利，赔偿金归零，那么保单将支付 9,000 万美元。

同样，上述数字纯属假设；保费、保险限额和保留金将因所涉及诉讼的事实（潜在风险敞口、程序态势、之前的和解互动等）而发生很大变化。

其他重要注意事项

与保单的定制条款非常相似，诉讼风险保险有其独特的方面。首先，承保过程中重大失实陈述或遗漏导致的损失通常不在承保范围内。

其次，诉讼风险保险的承保范围几乎都是在最终和不可上诉的最终判决或诉讼完结时触发的。因此，虽然每个保险计划都是定制的，可以提供其他更直接的利益，但只有在有判决并且在任何适用的上诉用尽之后，保险支出才会出现，这样触发的不利判决或命令才是真正的最终判决或命令，并且不再受到质疑。对于某些保险范围，这可能意味着如果案件和解，诉讼保险单将不适用，因为不会对案情做出最终判决，因此那些寻求包括和解在内的辩护费用保险的人需要明确保险范围的目标。

此外，该保险范围适用于最终判决，不会保护原告免受无力履行判决的被告的风险，在该情形下，因为判决债务人无法支付或被无法被索偿，原告只收到全部裁决的一部分。

第三，这些保单的尽职调查和承保是事实密集和详细的。潜在被保险人应准备好就对方的诉讼策略和风格、潜在损害提供反馈，并在不利判决保险的情况下，评估程序前进的路径（时间表、处置动议、审判和上诉问题）。虽然不可避免地涉及到这一过程，但被保险人不仅受益于保单可能提供的保险范围，还受益于保险人对诉讼风险进行客观审查和评估的价值，因该保险人收集了有关诉讼趋势和风险的硬数据。

结论

总之，诉讼保险并不是解决任何和所有诉讼风险的解决方案，但在胜诉或可辩护的法律立场的情况下，它可以为防范民事诉讼的变幻莫测提供重要工具。在有足够信息供保险人进行尽职调查的阶段，诉讼当事人可考虑定制的诉讼风险保险可提供强化其谈判立场及使其安心的好处。

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Marketers Beware: Your Social Media Sweepstakes or Contests Could Be an Illegal Lottery

By Da'Morus A. Cohen and Gary Klubok

HIGHLIGHTS

- A current marketing trend is to use social media sweepstakes for promotion purposes. But with many advertising and promotional campaigns, the law may complicate things.
- Social media sweepstakes and contests raise several important legal issues that businesses must consider when launching a sweepstakes or contest, or businesses run the risk of violating state lottery laws and other applicable laws relating to lottery and gambling operations.
- This Holland & Knight alert discusses how states define lotteries and ways that businesses can structure sweepstakes or contests to comply with various lottery laws.

A current marketing trend is to use social media sweepstakes for promotion purposes, e.g., "Like and Share Our Facebook or Instagram Post For a Chance To Win a $100 Gift Card!" or "Take Our Five-Minute Survey For a Chance To Win a Free Month of Gas!" But with many advertising and promotional campaigns, the law may complicate things. Social media sweepstakes and contests raise several important legal issues that businesses must consider when launching a sweepstakes or contest, or businesses run the risk of violating state lottery laws and other applicable laws relating to lottery and gambling operations.

WHY DISCUSS "LOTTERIES" WHEN MARKETING WANTS TO ONLY CREATE A "SWEEPSTAKES" OR "CONTEST"?

The answer is simple: If a sweepstakes or contest does not comply with applicable laws, the promotion runs the risk of being considered an illegal lottery and could subject the business to regulatory action, including civil and criminal exposure. States usually define lotteries as having three elements: 1) a prize, 2) chance and 3) consideration. Stated another way, an illegal lottery occurs when participants provide something of value (consideration) for the chance to win a prize.

If your sweepstakes or contest has these three elements, it is likely a lottery and may violate applicable lottery laws unless it falls within a recognized exception. This article provides more detail on these three elements of an illegal lottery. A prize, which is the primary reason (along with consumer engagement) that businesses conduct these promotions, is self-explanatory. Chance and consideration require more explanation.

THE CHANCE ELEMENT

When chance is involved in a promotion, this means that winning (or selection of the winner) is dependent on chance (in some manner), not necessarily dependent on skill. For example, winning a sweepstakes is dependent on chance because winners are drawn at random. On the other hand, a golf tournament is dependent primarily on skill because the golfer who played with the most skill during the tournament wins.

The line between a game of skill and game of chance can become blurry in games such as poker, which have both a material chance and skill component.

States generally use one of three different tests to determine whether mixed games with skill and chance – e.g., poker – are legally considered a game of chance or skill: 1) The predominant factor test; 2) the material element test; and 3) the any-chance test. The predominant factor test, which is the most common one that states use, analyzes whether the predominant factor in the game is chance or skill. States using the predominant factor test for poker might hold that although the random cards that players receive are chance, skill predominates that chance because knowing how to play the cards, reading other players and a strategically placed bet is skill. As such, states using the predominant factor test may hold that poker is either a game of chance or game of skill. Second, the material element test holds that if chance is a material element in a game, then the game is one of chance. States using the material element test would likely hold that poker is a game of chance because the chance element of random cards is material to poker. Lastly, the any-chance test, which is the least common test that states use, holds that games with any element of chance are games of chance. Hence, a poker contest may be a game of skill under the predominate factor test and a game of chance under the material element and any-chance tests. This is important because chance is an element of an illegal lottery, which companies must avoid.

THE CONSIDERATION ELEMENT

Consideration is a legal concept. In nonlegal terms, consideration is either 1) doing something you are not legally required to do, or 2) promising not to do something you have the right to do. To explain consideration, let's use a social media sweepstakes that requires entrants to like and share a post to win a company gift card.

The issue with "consideration" in social media sweepstakes is whether requiring participants to "like," "comment" or "share" a post reaches the level of "doing something you are not legally required to do" – or "consideration." On one end, someone without social media would have to make a social media account, like a post and share the post – doing something that they are not legally required to do (not to mention the effort required to create an account along with the valuable personal identifying information that the participant would have to provide). On the other end, so many people have social media accounts nowadays that a regulator or court may hold that liking and sharing a post does not satisfy the "consideration" element of illegal lottery laws, even though users are technically doing something that they are not legally required to do. Again, the lines are blurry here. The conservative approach is to analyze consideration under contract law. If a sweepstakes requires entrants to like, comment on or share a post on social media, it is likely consideration because the promotion is requiring participants to complete an action or tasks that they are not legally required to do. Luckily, there is an easy workaround to minimize and, potentially, avoid consideration issues when conducting social media and other sweepstakes.

BEST PRACTICES TO AVOID ILLEGAL LOTTERY ISSUES WHEN CONDUCTING A SWEEPSTAKES OR CONTEST

Making Your Sweepstakes Legal

As discussed above, it is an easy mistake for a business to fail to identify that all three elements of an illegal lottery are present in a proposed sweepstakes. Again, following a conservative viewpoint, a typical social media sweepstakes has 1) a prize, 2) chance and 3) ***likely*** consideration because entrants typically have to do something – e.g., like, comment and share a post – to enter. To make your sweepstakes legal, you must remove one of these elements. Because prize and chance usually can't be removed, businesses typically remove the consideration element.

The workaround to remove consideration is to add an option in the terms and conditions to enter the sweepstakes via an "alternative method of entry" (AMOE) or "free form of entry" that eliminates consideration. A common AMOE is permitting entrants to mail the sweepstakes sponsor a 3-by-5-inch notecard with the entrants personal information, which courts have previously held ***is not*** consideration. Although this AMOE technically requires entrants to do something they are not legally required to do, courts typically hold this method is too minimal to constitute consideration. In legal terms, this is a "token" amount of effort that is not consideration. Another potential AMOE could be to permit entrants to submit their contact information online, requiring nothing more. With that said, it is important for businesses to note that AMOE entrants must be treated with equal dignity as other participants – hence, the AMOE entrants' odds of winning must be the same as the paid or consideration entrants. In addition, businesses should avoid implementing any procedures or similar requirements that restrict or deter AMOE entrants. Engaging in any such activity not only presents illegal lottery concerns, but potential claims that the business has engaged in unfair and deceptive trade practices.

Yes, you heard right. You can ask entrants to do *almost* anything on social media (that wouldn't otherwise violate the law) that could be consideration as long as there's an alternative method of entry option that "cancels out" consideration. As such, sweepstakes generally need AMOEs to eliminate consideration in connection with their proposed sweepstakes. These AMOEs are why businesses routinely use the language "no purchase necessary to enter" in connection with the promotion of sweepstakes.

Making Your Contest Legal

Unlike sweepstakes where the main issue is removing consideration, the main issue in contests is the chance element (contests have a prize, and consideration is requiring entrants to participate in the contest). To make a contest legal, therefore, businesses usually remove the "chance" element.

With that said, companies must consider where they will host a contest because there are three different analyses that states use to evaluate whether a game is one of chance or one of skill: 1) the predominate factor test; 2) the material element test; and 3) the any-chance test. As such, it is extremely important to understand which test is used in the state where the contest will be held because the contest's legality differs by test.

Lastly, regardless of how the contest is conducted, it is important to have concrete, clear and objective criteria by which the contest winner will be selected. This criteria helps affirm that the contest is indeed a contest and not a sweepstakes because the winner is determined by objective criteria, not by chance. Otherwise, the contest runs the risk of being deemed a sweepstakes.

CONCLUSION

While sweepstakes and contests are commonplace in social media (and online) and present great opportunities for businesses to engage with customers and consumers, these promotions present unique legal risk considerations. It is important for businesses to implement policies and procedures (along with official rules) relating to such promotions. And, finally, while businesses may have sufficient policies and procedures, it is always important for businesses to consult a lawyer prior to conducting any such promotions as there may be unique requirements imposed by state law (and applicable federal law) – such as registration, bonding, required disclosures and notices, and other reporting obligations – based upon the structure and prize of the promotion.

For more information or questions about the specific impact that your sweepstakes or contest may have on your company, contact the authors.

营销人员请注意：你的社交媒体抽奖或竞赛可能是非法彩票

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重点摘要

- 当前的营销趋势是利用社交媒体抽奖进行促销。但由于有许多广告和促销活动，法律可能会使事情复杂化。
- 社交媒体抽奖和竞赛引起了一些重要的法律问题，企业在开展抽奖或竞赛时必须考虑这些问题，否则企业有违反州的彩票法律和其他与彩票和赌博业务相关的适用法律的风险。
- 本 Holland & Knight 提示文章讨论了各州如何定义彩票，以及企业如何根据各种彩票法律规划抽奖或竞赛

当前的一种营销趋势是使用社交媒体抽奖进行促销，例如，“喜欢并分享我们的 Facebook 或 Instagram 帖子，就有机会赢得一张 100 美元的礼品卡！”或者“参加我们的五分钟调查，有机会赢得一个月的免费汽油！”。但由于有许多广告和促销活动，法律可能会使事情复杂化。社交媒体抽奖和竞赛引起了一些重要的法律问题，企业在开展抽奖或竞赛时必须考量这些问题，否则企业可能会违反州的彩票法律以及其他与彩票和赌博业务相关的适用法律。

当市场营销只想创建“抽奖”或“竞赛”时，为什么要讨论“彩票”？

答案很简单：如果抽奖或竞赛不符合适用法律，则促销活动有被视为非法彩票的风险，并可能使企业面临监管行动，包括民事和刑事风险。各州通常将彩票定义为具备三个因素：1）奖品、2）机会和 3）对价。换句话说，当参与者为中奖机会提供有价值的东西（对价）时，就会发生非法彩票。

如果你的抽奖或竞赛包含这三个因素，则很可能是彩票，并且可能违反适用的彩票法律，除非是属于公认的例外情况。本文详细介绍了非法彩票的这三个因素。奖金是企业开展（以及消费者参与）这些促销活动的主要原因，这一点不言而喻。机会和对价需要更多的说明。

机会因素

当促销涉及机会时，这意味着获胜（或选择获胜者）（在某种程度上）取决于机会，而不一定取决于技能。例如，中奖取决于机会，因为中奖者是随机抽取的。另一方面，高尔夫球赛主要取决于技能，因为在竞赛中用到最佳技能的高尔夫球选手获胜。在扑克等游戏中，技能游戏和机会游戏之间的界限可能变得模糊，因为这类游戏同时具有机会与技能这两个重要成分。

各州通常使用三种不同测试中的一种来确定有技能和机会的混合游戏（如扑克）是否在法律上被视为机会游戏或技能游戏：1）主导因素测试；2） 重大因素测试；3）任意机会测试。主导因素测试是各州最常用的测试，它分析游戏中的主导因素是机会还是技能。对扑克使用主导因素测试的州可能会认为，虽然玩家收到的随机牌是机会，但技能主导了机会，因为知道如何玩牌、阅读其他玩家和战略性下注是技能。因此，使用主导因素测试的州可能会认为，扑克要么是一场机会游戏，要么是一场技能游戏。第二，重大因素测试认为，如果机会是游戏中的重

大因素，那么游戏就是机会。使用重大因素测试的州可能会认为扑克是一种机会游戏，因为随机牌的机会因素对扑克来说是重大的。最后，任何机会测试是各州最不常使用的测试，它认为具有任何机会因素的游戏都是机会游戏。因此，扑克竞赛可能是在主导因素测试下的技能游戏，也可能是在重大因素和任何机会测试下的机会游戏。这一点很重要，因为机会是非法彩票的一个因素，公司必须避免。

对价因素

对价是一个法律概念。在非法律术语中，对价要么是 1）做法律上不要求你做的事情，要么是 2）承诺不做你有权做的事情。为了解释对价因素，让我们使用社交媒体抽奖，要求参赛者喜欢并分享帖子，以赢得公司礼品卡。

社交媒体抽奖中的“对价”问题是，要求参与者点击“喜欢”、“评论”或“分享”帖子是否达到了“做法律上不要求你做的事情”或“对价”的程度一方面，没有社交媒体的人必须创建一个社交媒体帐户，比如帖子并共享帖子——做一些法律上不要求他们做的事情（更不用说创建一个帐户所需的努力以及参与者必须提供的有价值的个人识别信息）。另一方面，如今有如此多的人拥有社交媒体账户，以至于监管机构或法院可能会认为，喜欢和分享帖子并不符合非法彩票法的“对价因素”，即使从技术上讲，用户在做法律上不要求他们做的事。这里的界限也很模糊。保守的方法是根据合同法分析对价。如果抽奖活动要求参赛者在社交媒体上点击喜欢、评论或分享帖子，这可能是一种对价，因为促销活动要求参赛者完成法律不要求他们完成的行动或任务。幸运的是，在进行社交媒体和其他抽奖活动时，有一个简单的解决方法可以最大限度地减少并潜在地避免对价问题。

在进行抽奖或竞赛时避免非法彩票问题的最佳做法

使你的抽奖合法

如上所述，企业未能发现非法彩票的所有三个因素都存在于拟议的抽奖活动中是一个很容易犯的错误。同样，按照保守的观点，典型的社交媒体抽奖活动有 1）奖品、2）机会和 3）*可能的*对价因素，因为参赛者通常必须做一些事情，例如，点击喜欢、评论和分享帖子。要使你的抽奖合法，你必须除去其中一个元素。由于奖品和机会通常无法除去，企业通常会除去对价因素。

消除对价的解决方法是在条款和条件中添加一个选项，通过消除对价的“替代进入方式”（AMOE）或“自由进入形式”进入抽奖。AMOE 的一个常见做法是允许参与者向抽奖赞助商邮寄一张 3×5 英寸的记事卡，上面写着参与者的个人信息，而法院此前认为这***不是***对价。虽然这项 AMOE 在技术上要求参与者做一些法律上不要求他们做的事情，但法院通常认为这种方法过于简单，无法构成对价。在法律用语上，这是一种“象征性”的努力，而不是代价。另一个潜在的 AMOE 可能是允许参与者在线提交他们的联系信息，无需其他任何要求。尽管如此，企业必须注意到，AMOE 参与者必须与其他参与者被同等对待，因此，AMOE 参与者获选的几率必须与有付费或对价的参与者相同。此外，企业应避免实施任何限制或阻止 AMOE 参与者的程序或类似要求。从事任何此类活动不仅会引起非法彩票问题，而且可能会产生该企业有从事不公平和欺骗性的交易行为的主张。

是的，你没听错。你可以要求参与者在社交媒体上做*几乎任何*（不会违反法律）但可能是对价的事情，只要有一个替代的进入方式选项可以“取消”对价。因此，抽奖通常需要 AMOE 取消与拟定抽奖相关的对价。这些就是为什么企业在推广抽奖活动时经常使用“无需购买”的语言。

使你的竞赛合法

与抽奖不同，抽奖的主要问题是取消对价，竞赛的主要问题是机会因素（竞赛有奖，而要求参赛者参加竞赛是对价）。因此，为了使竞赛合法，企业通常会除去“机会”因素。

尽管如此，公司必须考量在哪里举办竞赛，因为各州有三种不同的分析方法来评估一场竞赛是机会还是技能：1）主导因素测试；2） 重大因素测试；3）任意机会测试。因此，了解竞赛所在州使用的测试极为重要，因为竞赛的合法性因测试方法不同而异。

最后，无论竞赛是如何进行的，重要的是要有具体、明确和客观的标准来选择竞赛的获胜者。这一标准有助于确认竞赛确实是一场竞赛，而不是抽奖，因为胜利者是由客观标准而不是偶然决定的。否则，竞赛就有被视为抽奖的风险。

结论

虽然抽奖和竞赛在社交媒体（和在线）中司空见惯，为企业与客户和消费者接触提供了巨大的机会，但这些促销活动提出了独特的法律风险对价。对于企业来说，实施与此类促销相关的政策和程序（以及官方规则）非常重要。最后，虽然企业可能有足够的政策和程序，但在进行任何此类促销之前，咨询律师始终很重要，因为州法律（和适用的联邦法律）可能会有独特的要求——例如基于促销的结构和奖项的注册、担保、所需的披露和通知，以及其他报告义务。

有关您的抽奖或竞赛可能对公司产生的具体影响的更多信息或问题，请联系作者。

Preventing Sexual Harassment In The Metaverse Workplace

By Timothy Taylor

We're told the metaverse is the tsunami of the future, a collection of virtual wonderlands where we'll live, work, play and fly around on jetpacks[1] — all very awesome. But, sigh, the operative word for our purposes today is work.

And make no mistake, the world of work is coming to the next iteration of the internet. Chipotle has even set up a virtual restaurant in gaming platform Roblox where you can roll virtual burritos and exchange them for real ones — at least on National Burrito Day.[2]

WHAT IS THE METAVERSE?

The metaverse is an umbrella term for many emerging technologies that promise a more immersive online experience and a more connected and secure online economy.

It includes virtual reality worlds experienced with a headset — and gloves, and headphones and one day perhaps an entire suit; augmented reality technologies, where digital information is projected into the real world; and new forms of commerce, including digital currencies and nonfungible tokens, like digital clothing and artwork.

Companies are setting up shop in the metaverse. Often this is through virtual real estate platforms: places like The Sandbox, Decentraland and Cryptovoxels that have a map and sell virtual parcels of land, with prime pieces going for hundreds of thousands of real dollars.[3] On that virtual land, an enterprise can build anything that its programmers can imagine.

For instance, virtual platform Decentraland recently hosted Metaverse Fashion Week, where luxury brands like Etro and Dolce & Gabbana set up runways, concerts and afterparties to show off digital-only outfits.[4]

Meanwhile, a survey of The Sandbox's map reveals virtual land claims taken by performers like Snoop Dogg and Steve Aoki for concerts and hangouts, as well as by video game makers like Atari for fun and games.[5] And of course, crypto exchanges and NFT minters are ubiquitous.

Why do it? Because the metaverse offers new ways to attract customers — and their wallets. Through metaverse events and permanent virtual storefronts, companies can increase customer engagement with their brand and open a new revenue stream through sales of digital assets.

With time, metaverse technologies might also offer new and better ways to connect and train employees. But as with the internet in its nascency, we can't yet foresee all the ways metaverse technology might change how we work, think, play and do business. As put by business analyst Tuong Nguyen, "The 'I-don't-know' bucket is by far the biggest bucket of use cases." [6]

Fictional works like "Snow Crash," "Total Recall," "Tron," "Ender's Game," "The Matrix," "Ready Player One" and the "Persona" series show the promise and the perils of immersive cyberspace.

And our own metaverse may be subject to very real employment problems.[7] One of those problems is sexual harassment.

In this article, we discuss a legal framework for understanding employment-based sexual misconduct in the metaverse, and what companies can do to mitigate their risk of metaverse-based sexual harassment claims.

TWO COMPETING FRAMEWORKS FOR METAVERSE SEXUAL MISCONDUCT

There has been media coverage of incidents of sexual hostility in the metaverse. Some of the coverage has used the language of sexual assault.

That's understandable. The metaverse is intentionally immersive. And avatars are a ready stand-in for our actual selves, so even though we understand in principle that we're not really there in the metaverse, its overwhelming sensory stimulation, and its coalescence with our mind and identity, can make it feel very real indeed.

Some critics, however, have a ready rejoinder: It feels real, but it's not actually real; an avatar is not your body.

Avatars get shot to pieces in Fortnite and blown sky-high in Halo Infinite. A person might find it unpleasant to be attacked in the metaverse, including in a sexual way, but nothing has actually happened in the real world, and no legal damage has been done — unless we want to start suing Call of Duty players for wrongful death.

A LEGAL FRAMEWORK FOR SEXUAL MISCONDUCT IN THE METAVERSE

Both of these approaches have weaknesses. Critics are correct that an attack on one's virtual representation in cyberspace is not an attack on one's physical body. But they incorrectly dismiss the psychological harms and objectively offensive aspects of sexual misconduct in the metaverse.

Meanwhile, proponents of a sexual assault model are correct that sexual misconduct in the metaverse can cause real and even visceral anguish. But an element of nearly all claims for battery, sexual assault and the like is an actual physical touching of the victim's body.

An alternative, and perhaps more appropriate, legal framework for sexual misconduct in the metaverse workplace is that of sexual harassment. Sexual harassment includes unwelcome communications, gestures and depictions of a sexual nature. And these are essentially the same in the metaverse.

A sexually inappropriate spoken or written statement in the metaverse can be harassing, just like one uttered face to face, or in a text or email. A sexual gesture in the metaverse can be harassing, just like sexual gestures in the real world. Today, handsets and VR goggles let a person control the hands and head of their avatar with precision; tomorrow, who knows what technology will be available.

In fact, given their purposely closer correspondence to the real world, these modes of communication in the metaverse are even more easily analogized to in-person interaction than their electronic cousins of email, text and social media.

What about unwelcome avatar-on-avatar contact? Even at its most egregious, there is no actual physical contact, so generally it wouldn't rise to the level of sexual assault or battery, as opposed to sexual harassment. Avatar-on-avatar behavior is still essentially notional, a form of communication.

With that said, the metaverse can make avatar behavior particularly impactful. As discussed above, the metaverse is purposely immersive and can blur actual reality and virtual reality in a person's psychological experience. So when a person's avatar is touched or worse, it can have a visceral impact — symbolic communication, but with amplified physiological oomph.

Other aspects of the metaverse may further heighten the impact of avatar behavior. For one, part of what makes the metaverse immersive is the sense of place — of not just being there, but being somewhere.

We use the word "environment" metaphorically when talking about online things. But typical metaverse environments are not metaphorical: They are places with buildings, floors, a sky, objects and so on, through which your avatar moves. It is more like the real world and wholly unlike like a web-browsing or social media experience.

That geographic aspect can be combined with a physics engine, common in video games, that allows its participants to interact with the environment in realistic ways. For avatars, that can mean picking up a teacup, throwing a ball or hopping onto a train. But it could also mean pushing a fellow avatar, blocking its movement and so on.

A geographic environment where one has limited ability to move, just like the real world, combined with physics-governed avatar interactions, could add to the sense of realism — and of pseudo-physical violation — when those interactions go bad.

A second aspect of the metaverse to consider is that people's avatars there, especially in the work environment, are more likely to be representative of who they are, both in physical appearance and in psychological identification.

In virtual reality geared toward amusement, a selling point is escapism: It's fun to have an alter ego unlike your boring real self and more like, say, Channing Tatum.[8] But in a metaverse work environment, you're expected to project your true identity into a virtual space to better reach coworkers, customers, clients and others.

And with technology that can map human faces in three dimensions with uncanny accuracy — think Mark Hamill in "The Mandalorian" or Keanu Reeves in Cyberpunk 2077 — our metaverse identity might soon be close to our real self indeed.

Harassment of that avatar, so close to our true selves, can be particularly visceral and offensive.

These unique features of the metaverse may heighten employer exposure for harassment claims in several ways when compared to previous online infrastructure.

First, liability risk may be heightened because the metaverse combines both the isolating separateness of the internet with the intimacy of in-person interaction.

The online disinhibition effect is just what it sounds like: Some people write things online that they would never say to the other person's face, and act in ways online that they would never act in the real world. Yet the immersive nature of the metaverse may make harassment particularly impactful.

The U.S. Supreme Court observed nearly 30 years ago in its 1993 *Harris v. Forklift Systems Inc*. decision that sexual harassment requires both objectively offensive behavior and that it be experienced subjectively as such.[9] The metaverse may foster both elements.

Second, the metaverse may heighten employer exposure to vicarious liability for failing to take reasonable steps to prevent or stop harassment. Because the metaverse is technology-based, it opens up numerous features that can exacerbate or mitigate sexual misconduct.

It also may place a duty on employers to select an appropriate metaverse platform for work. Dereliction of these duties may result in liability — more on that below.

Third, the metaverse may heighten employer exposure to damages from harassment. Part of the job of a plaintiff's attorney is to help the jury empathize with his or her client. Now consider what might happen in a future courtroom:

> Your honor, I move to admit exhibit 101, the recording of the sexual incident from my client's perspective. And with your permission, I'd like to display it to the jury.
>
> Granted. Ladies and gentlemen, please put on your VR headsets.

Having a jury experience literally firsthand what happened to the plaintiff may leave an extraordinary psychological imprint, with high emotions leading to high damages.

Fourth, the metaverse may heighten employer exposure to other causes of action. Perhaps the most prominent of these is intentional infliction of emotional distress.

As noted above, psychological harm is perhaps more easily experienced from interactions in the metaverse than through previous types of online activity. And due to the ease of recording things online, it also may be easier to prove than in-person interactions.

Finally, all these risks are heightened further if haptics are used. Haptic technology engages the sense of touch.[10] Haptic suits are under development that can deliver full-body stimulation, including feelings of smoothness or roughness, hot or cold, dry or wet, and kinetic impacts.[11]

The legal imagination runs wild at the possibilities for catastrophe. Key for our purposes is that haptics may allow a plaintiff to cross the line from communication — mere harassment — to touch, which could comprise assault and worse.

It is black-letter law that battery does not require someone to physically contact another person's body with their own.[12] It is sufficient to cause an offensive touching, such as by throwing water or siccing one's dog at a victim[13] — or, perhaps, by activating unwelcome sensations in another person's haptic vest.

WHAT IS A GOOD COMPANY TO DO?

Companies considering metaverse workplaces can protect employees through several layers of controls. These include the platform layer, i.e., which metaverse services a company chooses to use; the virtual workplace layer, i.e., how a company sets up its workspace on that service; and the compliance layer.

At the platform layer, companies should carefully consider the features of various metaverse platforms, including what tools are available to prevent sexual harassment and monitor online behavior. Platforms with insufficient protections could potentially expose employers to claims of vicarious liability for selecting a platform negligently.

Prevention tools can include barriers that allow workers to block audio, text or even the virtual presence of unwelcome others; virtual bubbles that prevent avatars from getting uncomfortably close to each other; rules for who can and cannot go into particular virtual spaces; and progressive disabling features that, for instance, prevent avatars from using their hands when they approach each other.

Monitoring tools can include options to record text, audio and visual interactions in the metaverse — though such tools must be used carefully and in accordance with license agreements, applicable privacy laws and biometrics laws.

Employers should also review the platform's terms of service, its general code of conduct, its procedures and track record for dealing with toxic users, and the frequency of toxic and harassing events on the platform.

In short, companies should perform due diligence to ensure they are not setting up shop in a seedy district of the metaverse.

At the virtual workplace layer, companies should maintain a professional work environment. This too can be considered part of the company's duty of care to prevent and be aware of harassment.

Actions can include opting for the platform tools mentioned above that will protect workers from unwelcome interactions with coworkers, as well as clients, customers and the public.

Companies should also consider carefully which tools and features not to use. Take haptics for instance. Haptics offer the promise of useful applications for training, work, fitness and fun. But in the wrong hands, so to speak, haptics could also offer liability.

The virtual workplace itself should be conducive to professional behavior. In the metaverse, a workplace need not be limited to drab cubicles — but maybe the IT team shouldn't be working from a Star Destroyer either.

Companies should also remember that sexualized posters and the like, which can create a hostile work environment in the real world, can do the same in the metaverse.

And companies should also consider extending their usual rules for professional appearance and dress to their workers' avatars, consistent with anti-discrimination laws. This might help counter the online disinhibition effect. Rules around professional appearance help remove anonymity, and may encourage workers to act like their real selves rather than their afterhours alter ego on GTA Online.

Finally, at the compliance layer, companies need to continue managing the actual human beings who work for them. Metaverse workplace problems are, in the end, human problems. But companies can take many actions to prevent these problems.

They can update their employee handbooks, employment agreements and policies to clearly apply to the metaverse. They can put into place clear rules about metaverse conduct, including disciplinary rules. They can define what is considered the workplace and work time in the metaverse to avoid legal gray zones analogous to after-work happy hours. They can undertake training specific to the metaverse. And they can have clear protocols for investigating instances of metaverse sexual harassment.

THE FUTURE OF THE FUTURE

In 1995, Bill Gates appeared on "The Late Show With David Letterman." Letterman asked about "this internet thing … what the hell is that exactly?" [14] In the exchange that followed, Letterman joked about how his radio, phone and magazines covered pretty much anything the internet had to offer.

We may be at the same point now with the metaverse. We don't know exactly where it will lead. But as metaverse platforms continue to improve and grow in popularity, our virtual lives will change in breathtaking ways — and so will the workplace. Companies should be thinking now about how to leverage metaverse technology, and how to protect their workers in it.

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Notes

[1] @JaduAVAs, Twitter (Sept. 7, 2021, 4:04 PM),

[2] @ChipotleTweets, Twitter (April 7, 2022, 6:31 PM),

[3] See Prabhjote Gill, "Battle of Metaverses: The Sandbox, Decentraland and CryptoVoxels See Sales Surge as Companies Look to Get in on the Ground Floor," *Business Insider India,* (Dec. 24, 2021)

[4] See Maghan McDowell, "Metaverse Fashion Week: The Hits and Misses," *Vogue Business,* (Mar. 29, 2022). Virtual clothes for real people is the fascinating flipside of an earlier trend of companies modeling real clothes on virtual people. See, e.g., Dan Crawley, "Final Fantasy's Lightning Turns Louis Vuitton Model," *VentureBeat* (Dec. 29, 2015).

[5] See The Sandbox, Map.

[6] See, e.g., Mary K. Pratt, "10 Examples of the Metaverse for Business and IT Leaders," *TechTarget* (April 5, 2022).

[7] To plumb the depths of human virtual depravity, just look at the early days of Ultima Online. 5 stories of murder and theft that prove Ultima Online was one of the best MMOs ever | PC Gamer.

[8] "Channing Tatum Cameo in Free Guy," YouTube (Sept. 24, 2021).

[9] See *Harris v. Forklift Sys*., 510 U.S. 17, 21–22 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

[10] The first mainstream example of haptics we can think of is the Nintendo 64's Rumble Pak, released in 1997 to our young self's Star Fox-playing delight. The PlayStation 5's controller, released with the new console in 2020 (both of which our now-mature self-purchased last Christmastime strictly for legal-research purposes), has won numerous awards for its advanced haptic feedback.

[11] James Purtill, " 'Haptic Feedback' Virtual Reality Teslasuit Can Simulate Everything from a Bullet to a Hug," *ABC Science* (March 31, 2021).

[12] Restatement (Second) of Torts § 18 cmt.c (1965).

[13] *Id*.

[14] "What is [sic] Internet? Explained by Bill Gates 1995," YouTube (Nov. 17, 2019).

防止元宇宙工作场所的性骚扰

原文作者：**Timothy Taylor**

有人告诉我们，元宇宙（metaverse）是未来的海啸，是一个虚拟仙境的集合，而我们将在那里生活、工作、玩耍和穿戴喷气背包飞行[1] —— 这一切都非常棒。唉，但是对于我们今天的目的而言，要谈的是工作。

毫无疑问，工作的世界正进入互联网的下一次迭代。Chipotle 甚至在游戏平台 Roblox 上开了一家虚拟餐厅，在那里你可以卷包虚拟的墨西哥卷饼并将其换成真正的墨西哥卷饼 ——至少在全国墨西哥卷饼日可以这样做。[2]

什么是元宇宙？

元宇宙是许多承诺提供更沉浸式的在线体验和更互联、更安全的在线经济的新兴科技的总称。

它包括使用耳机和手套体验的虚拟现实世界，还有耳机，也许有一天还需要一整套套装；增强实境技术，将数字信息投射到现实世界中；以及新的商业形式，包括数字货币和不可替代的代币，如数字服装和艺术品。

各公司正在元宇宙开设店铺。通常，这是通过虚拟房地产平台实现的：Sandbox, Decentraland 及 Cryptovoxels 等公司都有地图，并出售虚拟地块，其中主要地块的价格高达数十万美元。[3] 在虚拟土地上，企业可以构建程序设计员可以想象的任何东西。

例如，虚拟平台 Decentraland 最近举办了元宇宙时装周，Etro 和 Dolce & Gabbana 等奢侈品牌在这里设立了伸展台、音乐会和之后的派对，展示纯数字化的服装。[4]

与此同时，一项对 Sandbox 的地图的调查显示，史努比 • 多格（Snoop Dogg）和史蒂夫 • 青木（Steve Aoki）等表演者为音乐会和聚会目的、以及雅达利（Atari）等视频游戏制造商为娱乐和游戏目的，而取得的虚拟土地权利。[5] 当然，加密交换和 NFT 造币机无处不在。

为什么要这样做？因为元宇宙提供了吸引顾客和及他们的钱包的新方法。通过元宇宙活动和固定的虚拟店面，公司可以提高顾客对其品牌的参与度，并通过数字资产的销售开辟新的收入来源。

随着时间的推移，元宇宙技术还可能提供新的更好的方式来联系和培训员工。但正如互联网刚刚起步一样，我们还无法预见元宇宙技术可能会改变我们工作、思考、游戏和做生意的所有方式。正如业务分析师 Tuong Nguyen 所说，“我不知道”这一句话是至今最常被用到的一句话。[6]

小说作品如《Snow Crash》、《Total Recall》、《Tron》、《Ender's Game》、《The Matrix》、《Ready Player One》和《Persona》系列展现了虚拟网络空间的前景和危险。

我们自己的元宇宙可能会面临非常现实的就业问题。[7] 其中一个问题是性骚扰。

在本文中，我们将讨论一个法律框架，以了解元宇宙中基于就业的性不端行为，以及公司可以采取哪些措施来降低其元宇宙产生的性骚扰索赔的风险。

元宇宙性不端行为的两个相互竞争的框架

媒体一直有在报道元宇宙中的性敌对事件。一些报道使用了性侵犯的语言。

这是可以理解的。元宇宙有意让人身临其境。而化身是我们真实自我的现成替身，因此，尽管我们原则上理解，我们并不真正存在于元宇宙中，但它压倒性的感官刺激，以及它与我们的思想和身份的结合，可以让它感觉非常真实。

然而，一些评论家却有一个立即的反驳：它感觉真实，但实际上并不真实；化身不是你的身体。

化身在 Fortnite 中被击碎，在 Halo Infinite 中被吹向天空。一个人可能会觉得在元宇宙中受到攻击很不愉快，包括以性的方式，但现实世界中实际上没有发生任何事情，也没有造成任何法律损害，除非我们想开始起诉 Call of Duty 的玩家的过失致死行为。

元宇宙中性不端行为的法律框架

这两种方法都有其弱点。评论家认为，攻击一个人在网络空间中的虚拟代表并不是攻击一个人的身体，这是正确的。但他们错误地忽视了元宇宙中性不端行为的心理伤害和客观冒犯层面。

与此同时，性侵犯模式的支持者们正确地认为，元宇宙中的性不端行为会导致真正的甚至是内心的痛苦。但几乎所有对殴打、性侵犯等指控的一个要素是对受害者身体的实际接触。

对于元宇宙工作场所的性不端行为，另一个或许更合适的法律框架是性骚扰。性骚扰包括不受欢迎的通信交流、与性有关的姿态表示和描述。这些在元宇宙中本质上是相同的。

元宇宙中不恰当的性言语或文字陈述可能会造成骚扰，就像以面对面、文本或电子邮件方式做出的一样。元宇宙中的性的姿态表示可能造成骚扰，就像现实世界中的性的姿态表示一样。现今，手机和 VR 护目镜可以让人精确地控制化身的手和头；明天，谁知道会有什么技术。

事实上，考虑到他们有意与现实世界保持更密切的联系，与电子邮件、文本和社交媒体等电子同辈相比，元宇宙中的这些沟通模式更容易被类比为面对面互动。

那么不受欢迎的化身对化身的接触呢？即使在最恶劣的情况下，也没有实际的身体接触，因此除构成性骚乱外，一般不会上升到性侵犯或殴打的程度。化身对化身的行为本质上仍然是概念性的沟通形式。

虽然这么说，元宇宙可以使化身行为特别有影响力。如上所述，元宇宙有目的地让人沉浸其中，且可以模糊一个人心理体验中的实际现实和虚拟现实。因此，当一个人的头像被触摸或更糟时，它会产生一种内心的影响——是一种具有强化的生理影响的象征性交流。

元宇宙的其他方面可能进一步增强化身行为的影响。其中之一是让元宇宙身临其境的部分原因是位置感——不仅仅是在那里，而是在某处。

当我们谈论在线事物时，我们用“环境”这个词来比喻。但典型的元宇宙环境并不是隐喻性的：它们是有建筑物、楼层、天际、物体等的地方，而你的化身通过这些地方移动。它更像真实世界，与网络浏览或社交媒体体验完全不同。

这一地理方面可以与电子游戏中常见的物理引擎相结合，使其参与者能够以真实的方式与环境互动。对化身来说，这可能意味着拿起茶杯、扔球或跳上火车。但这也可能意味着推着另一个化身，阻止它的移动等等。

一个使人移动能力有限的地理环境，就像真实世界一样，当这些互动变得糟糕时，又加上物理控制的化身互动，可能会增加真实感和伪物理破坏感。

元宇宙的第二个需要考虑的方面是，那里的人们的化身，尤其是在工作环境中的化身，无论是在外表上还是在心理认同上，都更有可能代表他们是谁。

在面向娱乐的虚拟现实中，一个卖点是逃避现实：有一个不同于无聊的真实自我的另一个自我更有趣。Channing Tatum 这么说。[8] 但在元宇宙工作环境中，你需要将真实身份投影到虚拟空间中，以便更好地接触同事、顾客、客户和其他人。

有了能够以不可思议的精确度绘制三维人脸的技术——想想在《曼达洛人》（The Mandalorian）中的马克·哈米尔（Mark Hamill）或在《赛博朋克 2077》（Cyberpunk 2077）中的基努·里夫斯（Keanu Reeves）——我们的元宇宙身份可能很快就会接近我们真实的自我。

骚扰那个如此接近真实自我的化身，可能会特别发自内心，令人反感。

与之前的在线基础设施相比，元宇宙的这些独特功能可能会在多个方面增加雇主对骚扰索赔的风险曝露。

首先，由于元宇宙将互联网的独立性与人与人之间的亲密互动结合在一起，责任风险可能会增加。

网络去抑制效应听起来就是这样的：有些人在网上写下他们永远不会当面说的东西，且网上做出他们永远不会在现实世界中做出的行为。然而，元宇宙的沉浸式本质可能会使骚扰尤其具有影响效果。

近 30 年前，美国最高法院在 1993 年 *Harris 诉 Folklift Systems Inc.*案的判决中指出，性骚扰既需要客观的冒犯行为，也需要主观的感受。[9] 元宇宙可以助长这两种元素。

其次，元宇宙可能会增加雇主因未能采取合理措施防止或停止骚扰而承担的替代责任。因为元宇宙是基于技术的，它提供了许多可以加剧或减轻性不端行为的功能。

它还可能要求雇主选择合适的元宇宙工作平台。忽略这些义务可能会导致责任，详情如下。

第三，元宇宙可能会增加雇主遭受骚扰损害的风险。原告律师的部分工作是帮助陪审团同情他的委托人。现在考虑一下未来法庭可能发生的情况：

> 法官，我同意证物 101，从我当事人的角度记录下的性事件。如果您允许，我想把它展示给陪审团。
>
> 同意。女士们先生们，请戴上 VR 耳机。

陪审团亲身经历原告身上发生的事情可能会留下非同寻常的心理烙印，情绪高涨会导致损失惨重。

第四，元宇宙可能会增加雇主对其他诉讼原因的风险曝露。其中最突出的可能是故意造成情绪抑郁。

如上所述，与之前的在线活动相比，元宇宙中的互动可能更容易造成心理伤害。而且，由于容易记录在线事物，也可能比证明面对面交流更容易。

最后，如果使用触觉，所有这些风险都会进一步加剧。触觉技术利用触觉感受。[10] 触觉套装正在开发中，可以提供全身刺激，包括平滑或粗糙、冷热、干燥或潮湿的感觉，以及运动冲击。[11]

法律界对灾难的可能性充满了想象力。我们的目的的关键是触觉可能会让原告从沟通延申致——单单的骚扰——再延申到触摸，而这可能包括攻击和更糟的行为。

殴打并不要求有人用自己的身体接触另一个人的身体是清楚的法律规定。[12] 例如向受害者泼水或向受害人甩狗。[13] 或者可能通过在另一个人的触觉背心上激活不受欢迎的感觉将足以引起冒犯性触摸。

一家好公司应该怎么做？

考虑使用元宇宙工作场所的公司可以通过多层控制来保护员工。这些包括平台层，即公司选择使用的元宇宙服务；虚拟工作区层，即公司如何在该服务上设置其工作区；以及合规层。

在平台层，公司应仔细考虑各种元宇宙平台的功能，包括可用于防止性骚扰和监控在线行为的工具。保护不足的平台可能会使雇主因疏忽选择平台而面临替代责任的索赔。

预防工具可以包括允许员工阻止音频、文本甚至不受欢迎的其他人的虚拟存在的障碍设置；防止化身彼此不舒服地靠近的虚拟泡泡；关于谁可以进入或不能进入特定虚拟空间的规则；以及渐进式禁用功能，例如，阻止化身在接近对方时使用手。

监控工具可以包括在元宇宙中记录文本、音频和视频交互的选项，但必须根据许可协议、适用的隐私法和生物特征法谨慎使用此类工具。

雇主还应审查平台的服务条款、一般行为准则、处理有害用户的程序和记录，以及平台上有害和骚扰事件的频率。

简言之，公司应该进行尽职调查，以确保他们不会在元宇宙的一个肮脏的地区开设店铺。

在虚拟工作场所层面，公司应保持专业的工作环境。这也是公司预防和意识到骚扰的注意义务的一部分。

行动可以包括选择上述平台工具，以保护员工免受与同事以及顾客、客户和公众的不受欢迎的互动。

公司还应仔细考虑不使用哪些工具和功能。以触觉为例。触觉为训练、工作、健身和娱乐提供了有用的应用可能。但可以说，在错的人手中，触觉也可能带来责任。

虚拟工作场所本身应该有利于专业的行为的发生。在元宇宙中，工作场所不必局限于单调的小隔间，但也许 IT 团队也不应该在歼星舰上工作。

公司还应该记住，色情海报等可以在现实世界中创造敌对的工作环境，在元宇宙中也可以这样做。

此外，公司还应考虑在符合反歧视法的情形下将其专业外观和着装的常规规则扩展到员工的头像。这可能有助于对抗在线去抑制效应。围绕专业外观的规则有助于消除匿名，并可能鼓励员工在 GTA 在线上表现得像真实的自己，而不是下班后的另一个自我。

最后，在合规层，公司需要继续管理为其工作的实际人员。元宇宙的工作场所问题归根结底是人的问题。但公司可以采取许多措施来防止这些问题。

他们可以更新员工手册、雇佣协议和政策，以明确适用于元宇宙。他们可以制定有关元宇宙行为的明确规则，包括纪律规则。他们可以在元宇宙中定义工作场所和工作时间，以避免类似于下班后快乐时光的法律灰色地带。他们可以进行特定于元宇宙的培训。他们可以有明确的协议来调查元宇宙性骚扰的事件。

未来的未来

1995 年，比尔 • 盖茨出现在《David Letterman 的晚间秀》中 Letterman 问“这个互联网的东西……到底是什么？”[14] 在随后的交流中，Letterman 开玩笑说，他的收音机、电话和杂志几乎涵盖了互联网可以提供的所有内容。

我们现在可能在元宇宙的同一点上。我们不知道它会带我们到哪里。但随着元宇宙平台的不断改进和普及，我们的虚拟生活将以惊人的方式发生变化，工作场所也将如此。公司现在应该考虑如何利用元宇宙技术，以及如何保护其在元宇宙上的员工。

本刊行获 *Law360* 的许可

附注

[1] @JaduAVAs，推特（2021 9 月 7 日下午 4:04）

[2] @ChipotleTweets，推特（2022 年 4 月 7 日下午 6:31）

[3] 参见 Prabhjote Gill，“元宇宙之战：沙盒、分散体和加密体素随着公司寻求进入底层，销售额激增”，《印度商业内幕》（2021 12 月 24 日）

[4] 参见 Maghan McDowell，“元宇宙时装周：热门与热门”，*Vogue Business*（2022 年 3 月 29 日），.针对真人的虚拟服装是早期公司在虚拟人上模拟真人服装趋势的另一面。例如，参见 Dan Crawley，《最终幻想的闪电将路易威登的模型转变》，*VentureBeat*（2015 年 12 月 29 日）

[5] 查看沙箱、地图、

[6] 例如，请参见 Mary K. Pratt，“元宇宙 for Business and IT Leaders 的 10 个示例”，*TechTarget*（2022 年 4 月 5 日）

[7] 要探究人类虚拟堕落的深度，只需看看 Ultima 在线的早期。5 个谋杀和盗窃的故事证明 Ultima Online 是有史以来最好的 MMO 游戏玩家之一。

[8] “Channing Tatum 在《自由人》中客串”，YouTube（2021 9 月 24 日）

[9] 参见 *Harris v. Forklift Systems* 510 U.S. 17，21-22（1993）(“不严重或不足以造成客观敌对或虐待工作环境的行为——一个理智的人会发现敌对或虐待的环境——超出了第七章的权限。同样，如果受害者主观上不认为环境是虐待性的，该行为实际上并没有改变受害者的就业条件，也不存在 Title VII 违反。“”。

[10] 我们能想到的第一个主流触觉示例是任天堂 64 的 Rumble Pak，1997 年发布给我们年轻的自己的 Star Fox playing delight。PlayStation 5 的控制器于 2020 年随新控制台一起发布（这两款都是我们现在已经成熟的自己在去年圣诞节购买的，完全是为了法律研究目的），因其先进的触觉反馈赢得了众多奖项。

[11] James Purtill，“触觉反馈”虚拟现实 Teslasuit 可以模拟从子弹到拥抱的一切”，ABC Science（2021 3 月 31 日）

[12] 侵权行为重述（第二次）第 18 条。（1965 年）。

[13] 同上。

[14] “什么是（原文如此）互联网？比尔盖茨 1995 年解释，”YouTube（2019 年 11 月 17 日）

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有关本期刊

Information contained in this newsletter is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel. Holland & Knight lawyers are available to make presentations on a wide variety of China-related issues.

本期刊所刊载的信息仅供我们的读者为一般教育及学习目的使用。本期刊并不是为作为解决某一法律问题的唯一信息来源的目的所设计，也不应被如此使用。此外，每一法律管辖区域的法律各有不同且随时在改变。如您有关于某一特别事实情况的具体法律问题，我们建议您向合适的律师咨询。美国霍兰德奈特律师事务所的律师能够对许多与中国相关的问题提出他们的看法及建议。

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Thomas W. Brooke handles matters ranging from serving as litigation counsel in major intellectual property disputes across the globe, to initial counseling and trademark selection, copyright and trademark registration around the world, licensing and technology transfers. Related matters include drafting and interpreting agreements regarding ownership and use of names, images, photographs, software, trade secrets, music and other intellectual property. His clients are located all over the world and range from large and small businesses, associations and trade groups to entrepreneurial individuals.

Da'Morus A. Cohen focuses his practice on a wide array of consumer protection and compliance matters, including governmental investigative and enforcement proceedings, regulatory compliance, and advertising and promotional marketing compliance, including social media and digital media. He regularly provides advertising counsel and regulatory advice to leading Fortune 500 and Fortune 100 companies in many different product and service categories, including telecommunications, healthcare, retailing, publishing, entertainment, social media, digital media, gaming, food and beverage, and financial services.

Alex M. Gonzalez has experience representing domestic and international business clients in the areas of international contract and business claims as well as various business torts. As lead counsel in complex litigation, he has supervised the preparation of global multidefendant strategies; argued dispositive multidefendant motions; and coordinated complex multidefendant cases, arbitrations, trials and settlements involving voluminous facts. In addition, he has supervised local counsel in numerous actions across the United States and in foreign countries. He also has significant experience in alternative dispute resolution, including arbitration and mediation. He has represented clients in matters involving most countries in Latin America.

Matthew Grosack is a litigation attorney who focuses on claims, controversies and trial practice involving high-stakes dispute resolution involving mergers and acquisitions (M&A), other change-of-control transactions and the healthcare industry generally. In connection with his M&A disputes practice, he represents purchasers (private equity and strategic investors), sellers, representations and warranties (R&W) underwriters and other transaction participants in M&A disputes that impact domestic and international transactions involving small, middle-market and large businesses. His experience includes post-transaction negotiation, purchase price adjustments, earnouts, working capital issues, indemnification disputes, R&W claims investigation and litigation or arbitration related to these issues.

Robert S. Hill focuses his practice on representing plaintiffs and defendants in complex patent litigation cases. He has litigated in a wide variety of technology areas, including image processing software, audio codecs, database software, e-commerce software, cache management software, wireless communications technology, enterprise communication systems, adaptive streaming technologies, electrical device shock protection technologies, global positioning systems, micro-electro-mechanical systems, medical imaging technology, data bus architecture, light emitting diodes, quantum dot technology, televisions, printer technology, hearing protection devices, chemical storage systems, specialty petrochemical products, fracking logistics technologies, wearable device technologies, pharmaceutical products, drug risk evaluation and mitigation strategies (REMS), and biotechnology products, including emulsion polymerase chain reaction (PCR) and other high-throughput sequencing and diagnostic technologies.

Leonie W. Huang is an intellectual property and litigation attorney. She practices in the areas of intellectual property (IP) and complex commercial litigation, including patent and technology-driven litigation and business tort defense. Her experience includes numerous patent litigations, as well as representing clients in trademark and brand disputes, copyright, licensing, contractual disputes and related business tort litigation. She works with clients in a wide range of technologies, product areas and industries – ranging from consumer-driven technologies, services and goods, such as wireless communications, consumer electronics, fashion, retail goods, and LED technologies, as well as biotech such as pharmaceuticals, biologics and medical devices.

Gary Klubok helps corporations set up sweepstakes and contests in accordance with applicable laws. Additionally, he assists on matters relating to unfair or deceptive business practices, the Federal Trade Commission (FTC), Federal Trade Commission Act, Consumer Financial Protection Bureau (CFPB), Consumer Protection Act and Federal Debt Collection Practices Act (FDCPA).

Timothy J. Taylor is an employment and litigation attorney who represents employers in employment litigation, employment investigations and employment defense vis-à-vis government regulators. He also has significant experience representing clients in a variety of civil cases and appeals as well as enforcement-defense matters, particularly under the False Claims Act (FCA). He serves clients in highly regulated industries, especially government contractors.

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