

2022 EMERGING TECHNOLOGY TRENDS

MARKET AND LEGAL INSIGHTS FOR INNOVATORS



DIGITAL MEDIA & ENTERTAINMENT

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Advances in technology represent the new face of media and entertainment, for example in video gaming and live streaming.

SECTOR OVERVIEW

What Is Digital Media and Entertainment?

“Digital media” and “digital entertainment” are umbrella terms that refer to technology-supported media and entertainment in any form. Advances in technology represent the new face of media and entertainment, for example in video gaming and live streaming.

Associated Sectors

- Content Creation
- Production and Editing
- App Development
- Streaming Services and Devices
- Music Production
- Video Game Production
- Social Media Platforms
- Immersive Reality

Emerging Sector Twist: International Markets With State Support, Intervention

Innovation in digital entertainment has facilitated the flow of media across national borders, creating opportunities—and potential obstacles—for digital media technology and production companies. In this globalized environment, some governments respond with protectionist barriers, while others want to support their own cultural industries, and still others focus on protecting the consumer. To accomplish these goals,

governments have generally taken a combination of two approaches: restrict the flow of foreign products and increase domestic producers’ competitiveness.

The French cultural exception (*l’exception culturelle*) is one of the best-known examples of the first approach, where cultural products are treated differently from other commodities in international trade agreements. Another example of this approach is the Chinese quota on foreign movie imports. The second approach consists of providing production incentives. These are sometimes controversial in the United States, where 13 states have eliminated their film production subsidies in the past 10 years. The directives and regulations promulgated by the European Union as part of its “Digital Single Market” approach are an example of the third approach, which was in some instances at odds with the views of copyright owners.

One of the biggest challenges facing governments today is how to support their domestic industries in a digital environment. The French government is requiring major streaming services to invest at least 25% of their revenue generated in the country to fund local productions. Meanwhile, China is easing restrictions on foreign investment in entertainment venues (such as theme parks and cinemas), which represents an opportunity for U.S. business.

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ENABLING SCIENCE AND TECHNOLOGY

Convergence Observed in Digital Media and Entertainment

The barriers between different forms of digital entertainment are collapsing. Increasingly, concerts take place as multidisciplinary events, art galleries offer immersive experiences, social media platforms change their interfaces to look like each other, and streaming services, which have already introduced interactive movies and shows, will soon expand into immersive reality and gaming platforms too.

These new forms of digital entertainment are supported by a growing list of industries and occupations in the arts and entertainment sector. The U.S. Bureau of Labor Statistics estimates that 1.8 million people are employed in arts, design, entertainment, sports, and media occupations in the United States.

Recommendation Engines Face Growing Scrutiny

Leveraging powerful algorithms and artificial intelligence (AI) has allowed streaming services and other platforms to pool

AI Voice Actors and Digital Humans Improve in Quality, Raise Concerns of ‘Deepfakes’

Startups have leveraged deep learning, a subset of machine learning that uses architectures of neural networks often referred to as deep neural networks, to create synthetic voice actors and digital humans that are more convincing than ever. These systems are so powerful, they are increasingly used for corporate e-learning videos, digital assistants, call center operators, video game characters, and even music. The technology has implications for the livelihood of voice actors and singers as well as the right of publicity. Deepfakes are becoming more common, and more convincing, while the legitimate use of an actor’s voice and likeness is an area where the law is evolving.

XR Set for More Growth in 2021, While Adoption Rates Improve

Extended reality, or XR, faced setbacks early in the COVID-19 pandemic. However, a survey of industry stakeholders conducted in April 2021 by Perkins Coie and the XR Association

LEVERAGING POWERFUL ALGORITHMS AND ARTIFICIAL INTELLIGENCE (AI) HAS ALLOWED STREAMING SERVICES AND OTHER PLATFORMS TO POOL DATA FROM MILLIONS OF USERS TO IMPROVE THE ACCURACY OF THEIR RECOMMENDATION ENGINES.



data from millions of users to improve the accuracy of their recommendation engines. Questions are now being raised about the ease with which these engines can be manipulated, namely to further misinformation and hateful content. There are also questions about whether recommendation engines can be used for programming, as research shows that engines can actually change users’ preferences.

found 83% of respondents expressed optimism about increased investment in immersive technology. Alongside this optimistic outlook, the number of applications for XR is growing. Opportunities are found in education, retail, healthcare, and medical devices, as well as the automotive industry. Lack of content is one of the most salient barriers to mass adoption, so software development offers great potential as well.

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SECTOR AND INDUSTRY SIGNALS

NFTs Present New Opportunity for Content Monetization

NFTs, short for “non-fungible tokens,” are unique units of data stored on a blockchain and associated with photos, videos, audio, and other digital content. Whereas each Bitcoin is the same (and thus “fungible”), this is not true for NFTs; indeed, each NFT is, at least potentially, one of a kind and not interchangeable.

Although NFTs have been in existence for a while, they suddenly became headline news in March of 2021 when the artist Beeple sold an NFT tied to digital artwork at [Christie's](#) for over \$69 million, one of the highest prices ever paid for a work by a living artist. As we [explained](#) in a recent webinar, NFTs represent an opportunity for sports leagues, music companies, video game developers, and other media and entertainment companies to monetize their content in a digital form; however, due to legal and regulatory concerns, companies do need to exercise care in launching their NFT initiatives.

Intermediary Channels and Advertisers Challenged by DTC Trend

The direct-to-consumer (DTC) media trend reduces the importance of, and demand for, advertising. Ad-free streaming is seen as a benefit for which consumers are ready to pay, while at the same time, streaming companies' own ad spend becomes less important as they gain market share. Although

these trends began before the pandemic, they accelerated as more consumers turned to online-only content and streaming services boomed. The DTC media trend continues to represent a challenge for traditional intermediaries (such as movie [distributors](#)) as well as for [advertisers](#).

E-Sports Influencer Marketing Emerges, Along With Specialized Talent Agencies

E-sports—competitions involving multiplayer video gaming—have [transformed](#) from a niche form of entertainment into an entertainment industry of their own, one that is expected to surpass \$1.5 billion in revenue by 2023. This is leading to the development of related industries and services, such as talent industries. Specialist firms have [emerged](#), and one of the biggest talent agencies in the United States now has an e-sports talent [roster](#). Likewise, e-sports stars have acquired [influencer](#) status and entered into brand partnerships.

Social Media Platforms Turn to Direct Payment

As social media platform TikTok grows in popularity, prominent social media incumbents such as Snapchat, Meta, and Instagram are [paying](#) creators to use their platforms or enabling fans to pay their favorite influencers. This strengthens content creation's outlook as one of the fastest-growing segments of small business. Meta CEO Mark Zuckerberg said in a Facebook post that by paying \$1 billion to content creators, the company “want[s] to build the best platforms for millions of creators to make a living.”

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IMPACT

ONE OF THE BIGGEST CHALLENGES FACING GOVERNMENTS TODAY IS HOW TO SUPPORT THEIR DOMESTIC INDUSTRIES IN A DIGITAL ENVIRONMENT.



Economic

Questions are being raised as to the effectiveness of [movie subsidies](#), but this issue is connected to a broader debate on the role of government in creating and shaping markets. The state of Georgia is one of the most popular destinations for filming movies and series, in part due to its tax credit. Industry lobbyists [point out](#) that the success of the industry should support the continuation of the tax credit.

Social

Advancements in artificial intelligence—such as synthetic voices, voice clones, digital “resurrections,” and deepfakes—all have implications for artists whose livelihoods depend on the right of publicity. The right is not applied evenly across the United States, and without legislative protections, some artists will receive a smaller share of profits from the use of their image, likeness, and voice.

Environmental

The quality of animation is constantly improving, which produces more convincing video games, movies, and series. To produce this animation, however, requires powerful computers and data centers. On the users’ side, strong internet connections, powerful computers, and consoles are needed to fully use and enjoy large data files. These factors mean the animation industry has a significant carbon footprint. Efforts are underway within the industry to [reduce](#) this footprint, while consumers also have [decisions](#) to make about their individual data usage.

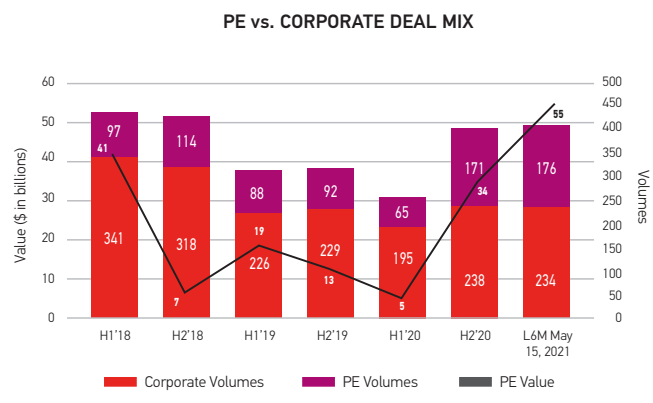
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LEGAL IMPLICATIONS

OUTLOOK

Transactions and Financing | Private Capital Makes Inroads in Entertainment, Sports

Institutional investors and private equity (PE) firms are increasingly buying minority stakes in professional sports franchises. Specialized venture capital firms have also emerged specifically to invest in games, while Epic Games had several successful financing rounds that valued it to around \$29 billion. In addition, private equity has always been an important component of movie financing, but it appears to be playing a bigger role. PwC’s 2021 research found “continued deal activity” in the media and telecom sector and attributed a growing portion of this activity to private equity deals, as shown by the following chart.



Source: PwC Analysis

M&A | Dealmaking Increasingly Reflects Convergence in Media, Entertainment Industries

As mentioned above, a convergence is taking place in the digital media and entertainment space as different forms of art and entertainment combine. This creates novel opportunities for dealmaking, with companies offering different services under one roof.

M&A | Consolidation Occurring in Video Game, Media Industries

Holding companies are facilitating the consolidation of the video game industry, as shown by the acquisitions of the Daybreak Game Company by Enad Global and the acquisition of Snapshot Games by the Embracer Group. This is a relatively popular business model, as dozens of video game holding companies exist globally, and the video game industry is undergoing a period of consolidation.

Intellectual property protections are more important than ever for content creators and copyright holders.

The media sector also offers opportunities for acquisition, whether of an entire company or of a portion of its assets. For example, Fox Corporation acquired television stations from Nexstar Media in 2020. This is the continuation of a years-long trend as a wave of consolidation has reshaped the local television landscape in the United States.

Litigation | Copyright Infringement Suits Increasingly Common in Music Industry

Reports indicate a substantial increase in copyright infringement lawsuits in the music industry, following a landmark decision involving Marvin Gaye’s 1977 hit “Got to Give It Up.” A federal court ruled that parts of the 2013 pop hit “Blurred Lines” by Robin Thicke and Pharrell Williams used parts of the song and awarded substantial damages and profits to the plaintiff. On appeal, the judgment was cut to \$3.2 million in damages and

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LEGAL IMPLICATIONS (CONT'D)

\$357,000 in profits. The trend may have had a potential chilling effect on artists and songwriters, who are increasingly buying insurance policies to protect against such lawsuits. More recently, a U.S. federal court ruled compositional rights to a remix are limited, in a decision that could reduce the flow of music copyright litigation.

Data Privacy | Media and Entertainment Companies Face Growing Regulation

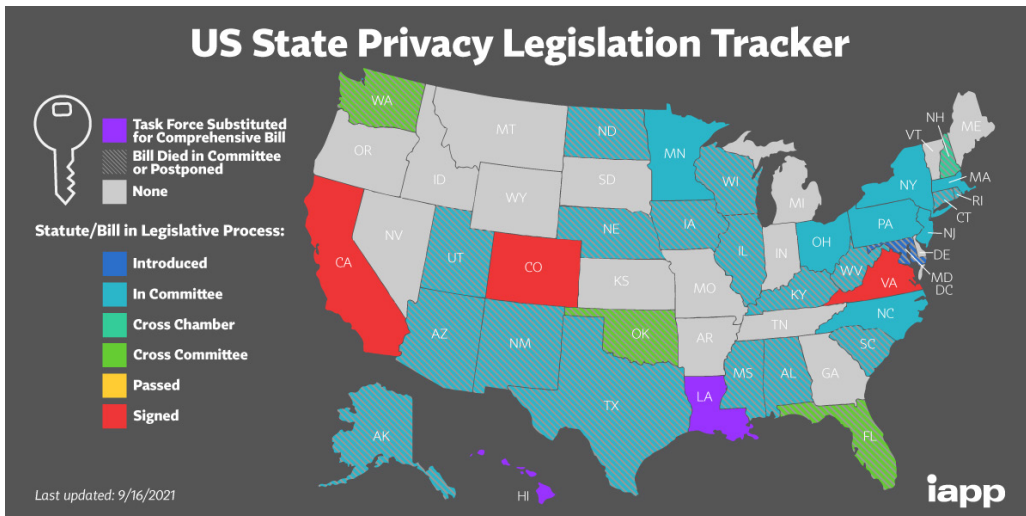
Although the United States does not have an omnibus federal privacy law, states are increasingly regulating this space.

Questions have recently been raised about the collection of user data through a messaging service, but data privacy considerations are inherent in any media and entertainment subsector—from gaming and e-sports to streaming and social media.

Property Law | Physical and Digital Worlds Are Merging Through XR

In 2017, a Milwaukee ordinance was struck down in federal court on the basis that it was likely to infringe on freedom of assembly under the First Amendment. The ordinance required producers of virtual games to obtain a permit before releasing their games for use in public parks. The court ruled the ordinance “does not employ sufficient procedural safeguards to ensure the protection of First Amendment rights.”

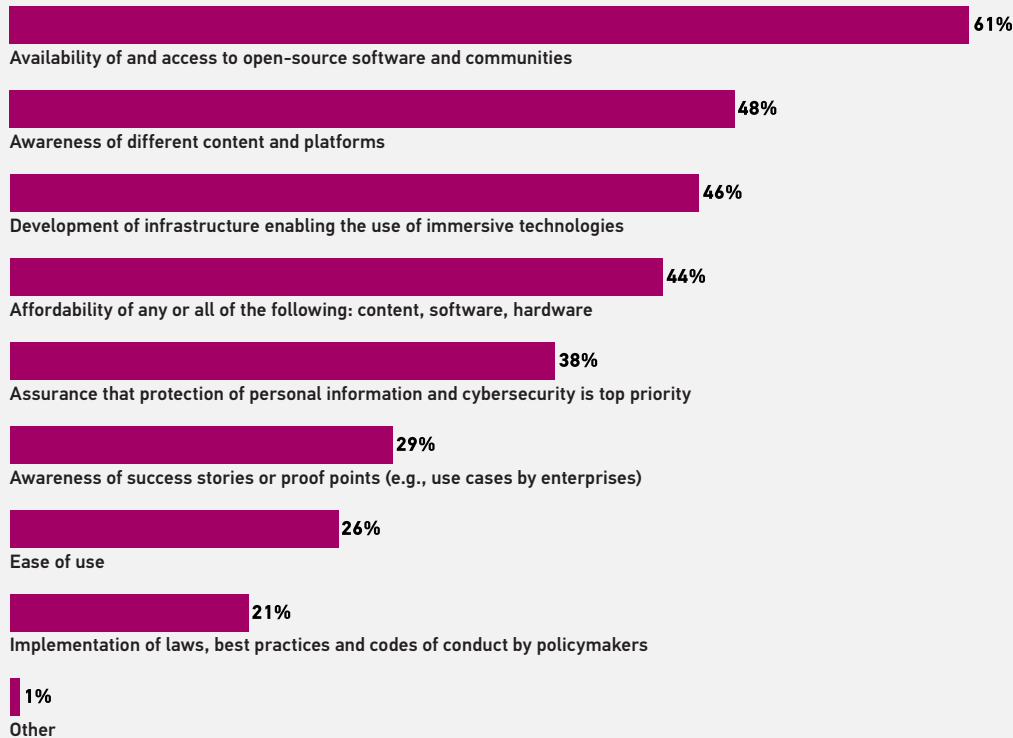
Since that decision, there have been outstanding questions on the ownership of digital spaces and on the extension of public law into digital places. Governments have an opportunity here to clarify the law and to support the implementation of best practices and codes of conduct. As shown in a recent survey, around 20% of XR industry stakeholders think the implementation of laws, best practices, and codes of conduct would influence greater consumer adoption.



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LEGAL IMPLICATIONS (CONT'D)

Which factors are key in increasing the adoption of immersive technology by consumers? (Select all that apply)



Source: Perkins Coie *XR Industry Survey Report*

LITIGATION DEVELOPMENTS

Music Publishers Allege Roblox Allows Game Creators to Use Unlicensed Music

A group of music publishers is suing Roblox for copyright infringement, alleging the video game company failed to license the music used by creators on its platform. Roblox sells a “boombox” feature that allows users to upload copyrighted music. Roblox replied that it does not tolerate copyright

infringement and that it responds to valid requests to remove content. The lawsuit follows a series of disputes between platforms and music rights holders focused on how platform users can play copyrighted music. Some platforms have entered into broad licensing agreements to cover the music played by platform users.

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LEGAL IMPLICATIONS (CONT'D)

Regulators Crack Down on ‘Scalper’ Bots

The United States made ticket bots illegal in 2016 through the Better Online Ticket Sales (BOTS) Act, and in 2021 the Federal Trade Commission carried out the first enforcement case against three ticket bots. The problem isn't limited to tickets, however. Bots have notoriously snatched up the PlayStation 5 and increased prices dramatically, making it harder for individuals to secure the gaming consoles. Retailers such as Walmart have taken measures to stop the bots, but these have not been completely successful and bots continue to be a global problem.

App Revenue Commission Challenged Under Antitrust Rules

Some early legal challenges to app marketplace policies are forcing changes that give developers more flexibility to monetize their apps. In the *Epic Games v. Apple* litigation in the United States, the trial court held that Apple violated antitrust laws by restricting developers from including links or statements in an app that directs users to make payments outside of the app, and thereby avoid Apple's commissions. The decision came on the heels of a \$100 million settlement of a class action lawsuit by U.S. app developers against Apple, which resulted in other changes to its App Store practices. Outside the United States, legislation and regulatory investigations in numerous other countries may require operators of app marketplaces to make more significant changes to their policies in the future.

IP TRENDS AND OUTLOOK

NFTs Blend Art, Fashion, and Currency in Digital Media—With Implications for Brands and Their IP

Brands have opportunities to sell their own NFT items within video games and other digital platforms—for example, Hermès must decide whether it wants to sell digital items on Roblox and, if so, how tightly it will control its trademarks. NFTs are receiving more attention as they increase in value. One notable example is the “Baby Birkin” NFT, an image that represents an embryo growing inside a transparent Hermès Birkin bag. The NFT was created by artists not affiliated with the Hermès brand and sold for \$23,500—far more than the \$9,500 price tag of the “baby” Birkin handbags themselves.

New York Extends Right of Publicity to Digital Replicas

Following years of advocacy by the Screen Actors Guild - American Federation of Television and Radio Artists (SAG-AFTRA), the state of New York enacted legislation that extends actors' right of publicity to AI-enabled replicas of their image, voice, and likeness. The act likewise prohibits the use of a deceased individual's voice and image in advertising and for the purposes of trade without obtaining prior written consent. This new legislation joins the hundreds of state and federal decisions recognizing the right of publicity.

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ABOUT US

Technology Transactions & Privacy | Digital Media & Entertainment

Perkins Coie's Digital Media & Entertainment, Gaming & Sports attorneys partner with our established and emerging media, entertainment, and technology clients to capitalize on the digital media, next-generation entertainment, and interactive entertainment innovations that are dominating the industry. Our attorneys focus on meeting the business and legal needs of our clients by leveraging our collective experience in the transformative convergence of the media and entertainment, gaming, and sports industries.

We are at the forefront of representing some of today's most innovative content creators, content marketplaces, music streaming services, video streaming services and devices, immersive technology platforms and devices, digital media companies, app developers and publishers, mobile and broadband providers, gaming studios and platforms, regulated gaming platforms, e-sports providers, social media influencers, brands, and professional teams and leagues.

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