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ARTICLE

"Mind the (Virtual) Gap": A Critical Analysis of UK and Japanese Copyright Exceptions Relating to Immersive Environments and the Metaverse

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Abstract This paper explores the future of immersive environments such as the metaverse and considers the applicability and effectiveness of the freedom of panorama and incidental inclusion exceptions. Drawing on the laws of the UK and Japan, the paper demonstrates that these exceptions can indeed be beneficial in designing the metaverse although they are riddled with challenges. Whilst the UK's freedom of panorama exception is broader than other countries, the wording of this exception restricts its use when compared to Japan's broader and inclusive terminology – or even to the wording of the EU Directive. Similarly, the incidental inclusion exception is beneficial but yet again the manner in which the UK has interpreted it raises issues. In conclusion and in drawing a comparison between the two countries, the paper establishes that whilst these exceptions can effectively be applied to the metaverse, the UK can certainly learn lessons from Japan. In this context, the paper calls for reform and policy change.

Keywords Metaverse · Copyright · Freedom of panorama · Incidental inclusion · UK · Japan

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1 Introduction

Immersive technologies, such as virtual reality (VR),[1] augmented reality (AR),[2] mixed reality[3] (MR) and haptics[4] "transform the digital experience by providing new ways of creating, displaying and interacting with applications, content and experiences. It allows a person to feel part of an artificial, simulated environment".[5] Using such technologies, Meta unveiled metaverse in 2021 to much hype, branding it as the next most advanced immersive technological development, rebranding Facebook to Meta. Soon after Meta released its Quest headset[6] enabling consumers to experience VR and AR as never before. A year prior to that (in 2020), non-fungible tokens (NFTs) – a cryptocurrency used to transact within such immersive environments – gained much fame, leading to Collins Oxford Dictionary shortlisting "NFT" as its Word of the Year in 2021.[7]

Since then, both of these technologies have seen a downturn. The NFT market crashed in 2022[8] and Mark Zuckerberg has also backtracked on some of his predictions.[9] However, recent reports demonstrate that following a downturn in the fortunes of the NFT market and metaverse landscape, things are on the up again.[10] In 2023, Apple entered the immersive technology market with its Vision Pro headset and introduced "spatial computing", and in doing so, revived the concept behind the emergence of immersive environments. Moving away from labelling it as the "metaverse", Apple's spatial computing enables powerful immersive and spatial experiences simply with the user's eyes, hands and voice.[11] As such, Vision Pro has been widely regarded as the most powerful headset integrating AR, VR, MR into a single device.[12] Some believe that the term "metaverse" may be losing

[1] A fully immersive software-generated, 3D artificial environment which is experienced through the use of a headset.

[2] Provides enhanced vision of reality overlaid on top of a user's real-world environment. Pokémon Go is a good example of augmented reality.

[3] Seamlessly blends the user's real-world environment with digitally created content, so both environments can co-exist.

[4] Also known as 3D touch, haptics allows a consumer to engage with their environment by creating a tactile sensory experience of touch by applying forces, vibrations or motions.

[5] Digital Catapult, Everything you need to know about immersive technology (17 April 2024) at https://www.digicatapult.org.uk/expertise/blogs/post/everything-to-know-about-immersive-technology/ (accessed 14 April 2025).

[6] Meta Quest is a headset offered by Meta which can be used for augmented reality. In August 2024, Meta announced its latest development – mixed reality glasses – which will allow consumers to engage with virtual and mixed realities without having to wear bulky headsets. *See* Singh (2024).

[7] Flood (2021).

[8] The NFT market crash, 2 January 2023 at https://supraoracles.com/academy/nft-market-crash/ *See also*, NFT market collapse, reasons, effects and future (19 February 2023) *UPYO Blog* at https://upyo.com/en/post/nft-market-collapse (accessed 14 April 2025).

[9] Capone (2023).

[10] Pivnev (2023); Kaur (2023).

[11] Press Release, Introducing Apple Vision Pro: Apple's first spatial computer (5 June 2023) at https://www.apple.com/uk/newsroom/2023/06/introducing-apple-vision-pro/ (accessed 14 April 2025).

[12] Bajarin (2024).

traction due to Apple's "spatial computing" gaining more recognition.[13] However, as the authors reason, although the terminology may change and may continue to do so over the years, the aim and concept of building an immersive environment remains the same amongst all competitors. Whether it is called the "metaverse" by Meta or "spatial computing" by Apple, the ethos of this technological advancement remains the same: it paves the way for an immersive environment through the power of immersive technologies.

Now that the hype surrounding the metaverse and NFTs has settled and the media's focus has moved firmly to generative artificial intelligence, a more realistic approach to immersive environments can be adopted. According to the Gartner hype cycle for emerging technologies in 2022, it was predicted that it would take a minimum of 2–5 years for NFTs to achieve their true potential and more than ten years for a metaverse-like immersive environment to become a true reality for its users.[14] It is for this reason, that organisations such as the World Economic Forum are progressing rapidly on initiatives such as "Defining and Building the Metaverse" in an effort to understand the legal, economic and social issues surrounding this virtual world.[15]

Similarly, the interest surrounding NFTs and the metaverse has not waned amongst policymakers and governmental organisations. From the Law Commission of England and Wales[16] to the UK Culture Media and Sport Committee,[17] the EU Intellectual Property Office (EUIPO)[18] as well as the United States Copyright Office and United States Patent Office (USPTO),[19] consultations have been launched, responses published, and roundtables organised. Similarly, the Japan Intellectual Property Policy Headquarters hosted a "Public-Private Joint Meeting on New Legal Issues Concerning Contents in the Metaverse" between November 2022 – May 2023, which focused on IPRs with a particular focus on "Use of Intellectual Property in Virtual Space and Protection of Right Holder's Rights".[20]

[13] *Ibid*.

[14] Activate Consulting (2023). *See also*, Goodson (2022).

[15] World Economic Forum (2022). One of the present authors, Prof. Dinusha Mendis has been a member of the Metaverse Governance Team on "Defining and Building the Metaverse" since 2022 and has contributed to reports published by the World Economic Forum.

[16] Law Commission (England & Wales) (hereinafter Law Commission) (2022). *See* consultation response: Law Commission (2023).

[17] House of Commons, Digital, Culture, Media and Sport Committee (2023). *See* consultation response: House of Commons, Culture, Media and Sport Committee (2023).

[18] European Intellectual Property Office (2022).

[19] United States Copyright Office and United States Patent and Trade Mark Office (2023).

[20] メタバース上のコンテンツ等をめぐる新たな法的課題への対応に関する官民連携会議 Public-Private Joint Meeting on New Legal Issues Concerning Contents in the Metaverse (Japan Intellectual Property Policy Headquarters, May 2023, in particular *see*, Chapter 3). Prof. Tatsuhiro Ueno was a participant at this meeting.

Therefore, from a policy point of view, the interest has been very high. Moving away from the hype and noise surrounding the metaverse, Apple's spatial computing as well as NFTs, a realistic and measured view can now be taken. Accordingly, this paper takes a deep dive into the IPR implications relating to immersive environments such as the metaverse and spatial computing particularly from a copyright perspective. NFTs present some very interesting points for discussion; however, these have been covered widely in the literature and will not be discussed in this paper. Accordingly, the focus of this paper will be on immersive worlds such as the metaverse, and as such, the authors identify some of the IP aspects that need addressing in the coming years and will question whether the current law is fit-for-purpose or whether it needs a review and revision. In particular, the paper focuses on copyright law and in particular two copyright exceptions – freedom of panorama and incidental inclusion – and their applicability to immersive environments. Furthermore, the paper is the first to explore both UK and Japanese laws in the context of the metaverse and in doing so, presents new paradigms for consideration, drawing upon the legal foundations of these two countries. Also, through a comparison of a common law and civil law legal system, the paper aims to provide a holistic overview of these issues.

2 The Metaverse and Spatial Computing: A Brief Introduction

The word "metaverse" was first used in the book *Snow Crash* authored by Neal Stephenson in 1992.[21] In this book, the main character, Hiro Protagonist, accesses the metaverse through goggles, earphones and appears in the virtual world as a customised avatar.[22] Having entered the metaverse, Hiro strolls around the streets and entertains himself by accessing amusement parks, shops and entertainment complexes.[23] This concept described by Stephenson over 30 years ago is a reality today, although it needs much more development for broader public engagement.

A single definition of the metaverse does not exist at present; however, it can be said that it largely relates to a person's move from the physical reality of their life to an immersive virtual reality. "It is envisioned as a digital space where we can interact with virtual objects and people in real time … it is the internet, but, with an enhanced immersive dimension".[24]

The genesis of "spatial computing" goes back to 1965 when a postgraduate student, named Ivan Sunderland unveiled the SKETCHPAD at MIT.[25] Sunderland wrote an interactive program allowing users to experience the first-ever graphical

[21] Stephenson (1992).

[22] The word "avatar" comes from the Sankrit word "descent" and appeared in the English language in the 18th century, to refer to the descent of a deity into terrestrial form, although it later referred to any human form and then to any embodiment. In technology, "avatar" refers to an image chosen by an individual as his or her "embodiment" in electronic medium. *See*, Merriam-Webster dictionary (online).

[23] *Ibid*.

[24] Danks (2022), p. 12.

[25] Pesce (2024).

user interface (now commonly known as the "interface" on any computing device). However, Sunderland realised interaction can be more than what the SKETCHPAD offered and in 1968, he unveiled the world's first head-mounted display nicknamed, the "Sword of Damocles".[26] The idea was to bring computing into the third dimension, meaning "the system is spatially aware by definition".[27] This is the origin of spatial computing, and as outlined above, it goes even further back than the birth of the metaverse.

In light of the emergence of these different immersive environments and experiences, there is a debate as to whether there will be a single immersive environment or multiple environments in the future. According to Stephenson, this demonstrates a lack of understanding. He states that there should be one immersive environment in the future – i.e., *the* metaverse, for example – with a collection of virtual worlds and environments within it, leading to a seamless experience for the user.[28] However, at present the companies investing in the creation of these metaverses or virtual worlds such as Meta,[29] Microsoft,[30] Apple,[31] Epic Games[32] and Roblox[33] amongst others are creating their own environments, which has resulted in multiple immersive worlds. If there is to be one immersive environment, as envisaged, then standards will need to be developed for real-time exchange of data and user interactions although "standards in computing only emerge after much tactical jockeying and positioning by competing technology companies, each eager to impose their own views and practices onto final standards, though perhaps unwilling to be seen to be doing so".[34]

In reality, it will take more than ten years for such an immersive environment to become meaningful in our everyday lives.[35] This is unsurprising as it took almost three decades before the world wide web became a reality and reached its full potential;[36] therefore, such a prolonged timeframe is to be expected.

[26] *Ibid*.

[27] *Ibid*.

[28] Roberts (2023).

[29] Meta Quest VR headsets (previously known as Oculus) is the forerunner in creating virtual reality headsets for interacting with a 3D, immersive world. *See* https://www.meta.com/jp/en/quest/ (accessed 14 April 2025).

[30] Minecraft owned by Microsoft invites players into a blocky, procedurally-generated, three-dimensional world with virtual infinite terrain from which they can extract craft tools and items, build structures, earthworks and machines. *See* https://www.minecraft.net/en-us/login (accessed 14 April 2025).

[31] Fiske (2023).

[32] Epic Games, Fortnite, is a hugely popular videogame, similar to Minecraft but is free to play. However, it involves players having to exchange real money for virtual money, known as "V-Bucks" and promotes many in-game purchases. *See* https://www.fortnite.com/ (accessed 14 April 2025).

[33] Roblox, developed by Roblox Corporation is an online game platform and game creation system that allows uses to program games and play games created by other users. Similar to Fortnite, it is free to play, but promotes, in-game purchases available through the game's virtual currency known as "Robux". *See*, https://www.roblox.com/ (accessed 14 April 2025).

[34] Murphy et al. (2021), p. 21.

[35] Active Consulting (2023).

[36] Kahn et al. (2023).

With respect to the terminology, the metaverse has become synonymous with immersive environments. As a term, it caught the attention of the public in 2021 and has been commonly used since then[37] although some suggest that it may be losing in popularity since the emergence of spatial computing.[38] However, for ease of reference, this paper will broadly refer to immersive environments as the metaverse although the authors recognise that immersive environments encompass more than simply the metaverse.

Either way, as consumers engage more and more with these virtual environments, it is prudent to consider the legal implications surrounding them. Rather than constantly playing catch-up with technology, an exploration of the IPR considerations relating to the metaverse, can help with designing it effectively as well as serving those with commercial and consumer interests. As such, the next part of this paper, will provide an introduction to IPR considerations in the metaverse before moving on to consider the freedom of panorama and incidental inclusion exceptions in detail.

3 A Virtual Gap in the Virtual World? IPR Considerations in the Metaverse

There are many IPR and regulatory issues which arise from a consideration of immersive environments such as the metaverse – some which have already been debated in relation to *Second Life*[39] – seen as the first iteration of the metaverse and which gave rise to IP issues around 2008.[40] The metaverse raises a similar set of questions – and more.

Furthermore, it is worth pointing out that whilst this paper focuses on copyright, the role that could be played by trade marks in the metaverse is equally very important. This is relevant because in the absence of copyright, many may turn to the haven of trade marks for protection. It is possible that such a scenario may play out in the metaverse where trade marks may be used to circumvent the restrictions placed by copyright. Similarly, parody may be used as a further mechanism; for example, in 2013, a parody version of Toronto's transportation system was published. Although the names of stations raised a few questions, being a parody version of the map, it avoided any infringement claims particularly by Toronto Transit Commission (TTC) in Canada.[41] A search on Google indicates there are many parody versions of street maps – which in turn demonstrates that parody can be used as an effective exception when recreating a virtual city, and in this case street views.

In designing the metaverse, the convergence of physical reality with virtual reality will mean that our cities and towns will be recreated in the virtual world, allowing seamless movement between these two environments. Whilst the gaming world will continue to create a reality that lacks similarity to the physical world, the

[37] Bajarin (2024).

[38] *Ibid*.

[39] Mendis (2008), p. 1. *See also*, https://secondlife.com/ (accessed 14 April 2025).

[40] *Ibid*.

[41] Armstrong (2013).

ultimate goal of the metaverse is to "create a virtual world for work, gaming, socialising and just about anything we want to do in the 'real' world."[42] In this sense, recreating surroundings that are familiar to the users of the physical world, will be pivotal in designing immersive environments.

There has been much focus, from a technical perspective, on the application of technologies such as AR, VR and MR to the metaverse. However, attention has not been devoted to the legal considerations surrounding the design of immersive environments and architectural works in particular. As immersive environments such as the metaverse are being designed, businesses and consumers alike will wish to know how they can navigate through this virtual world, whilst staying within the confines of the law – and for this purpose, clarity of the law is critical, particularly from a copyright and trade marks point of view.

For example, in the UK, buildings such as the London Eye, The Shard, the Millennium Dome and The Gherkin are amongst those which are protected by copyright. In such cases, the copyright in the building, model or plan will belong to the architect, as the creator of those architectural plans, and unless agreed to the contrary[43] last for their lifetime plus 70 years after their death. It is for this reason, that whilst buildings such as those mentioned above are in copyright, others such as St Paul's Cathedral in London or the Eiffel Tower in Paris are out of copyright.[44]

On the other hand, St Paul's Cathedral as well as Harrod's Department Store, Buckingham Palace, the Tower Bridge, London Eye, The Shard, the Millennium Dome and The Gherkin amongst others are also registered trade marks. This means that the recreation of these buildings in the metaverse can present a barrier to those designing it. This is crucial, as following the expiry of copyright, protection of such buildings – or creative works – can continue through registered trade marks, as seen with many other works.[45] It is possible that such a scenario may play out in the metaverse where trade marks may be used to circumvent the restrictions placed by copyright.

However, it is not the intention of this paper to explore the application of trade marks nor other copyright exceptions such as parody, although the authors recognise their importance.

For purposes of this paper, the consideration of designing the metaverse-like environments, will be examined purely from the perspective of copyright exceptions, in particular, freedom of panorama and incidental inclusion. These exceptions have so far not been considered in detail from the perspective of the metaverse, and as such, this paper will provide the first comprehensive analysis of the relevant issues taking a comparative approach between UK and Japan.

[42] Metaverse Explained: What it is, why it exists and where it's going (2023).

[43] Section 11(2) Copyright, Designs and Patents Act 1988 (as amended).

[44] However, following the installation of a new and distinctive lighting display around 2003, the lighting design of the Eiffel Tower remains in copyright. This means that any photographs taken at night cannot be distributed by professionals unless prior authorisation has been sought and a fee has been paid. However, the website clarifies that this does not apply to general members of the public, who may wish to share such photographs on social media platforms. *See*, https://www.toureiffel.paris/en/news/history-and-culture/everything-you-need-know-about-eiffel-tower-night (accessed 14 April 2025).

[45] Watts (2024).

4 Is There True Freedom in the Metaverse with the Freedom of Panorama? Perspectives from the UK and Japan

Both the UK and Japan offer freedom of panorama exceptions in their copyright statutes, although the sections vary significantly from each other. In this section, the paper will take an in-depth view of these sections, highlighting the challenges and opportunities they present as well as questioning whether they are fit-for-purpose in their application to the metaverse.

4.1 Freedom of Panorama in the UK and Its Application to the Metaverse

In the UK, the freedom of panorama exception is set out in Sec. 62 of Copyright, Designs and Patents Act 1988 (as amended) (hereinafter CDPA 1988). The section reads as follows:

> 62 – Representation of certain artistic works on public display
>
> (1) This section applies to –
> (a) buildings, and
> (b) sculptures, models for buildings and works of artistic craftsmanship, if permanently situated in a public place or in premises open to the public.
> (2) The copyright in such a work is not infringed by –
> (a) making a graphic work representing it,
> (b) making a photograph or film of it, or
> (c) making a broadcast of a visual image of it.
> (3) Nor is the work infringed by the issue to the public of copies or the communication to the public, of anything whose making was, by virtue of this section, not an infringement of the copyright.

This is a broad exception giving users a wide set of rights. In effect, what this means is that it allows third parties to take photographs or make films that incorporate buildings or sculptures that are permanently located in public places. According to this provision – also known as the "freedom of panorama exception" – engaging in such acts will not infringe the copyright in a building or sculpture that is permanently located in a public place. On the one hand, the existence of such a provision seems logical, allowing tourists and members of the public to take photographs and films of iconic buildings and use them as they wish in uploading to social media platforms without infringing copyright law.

The UK's freedom of panorama exception is considered one of the broadest, when compared to European and other countries around the world.[46] This is significant, given that a number of countries do not have the exception at all or have restricted rights, preventing the use as well as commercial use of such photographs or films of buildings or sculptures. For example, European countries such as France,

[46] Newell (2011), p. 419. *See also*, Liu (2018), p. 466.

Greece, Iceland, Italy, Lithuania, Luxembourg, Romania, Ukraine and the Vatican City fall into this category.[47]

Therefore, at first glance, UK's freedom of panorama exception appears broad and unambiguous allowing third parties to take photographs; make films incorporating those buildings, sculptures, models for buildings or works of artistic craftmanship; make broadcasts of a visual image; and issue such photographs to the public. However, a closer look at the respective sections illustrates some limitations as discussed below.

4.1.1 There Is a Lack of Clarity about the Type of Works that Can Be Reconstructed in the Metaverse

The inclusion of the words "copyright in such a work" in Sec. 62(1)(b) clearly denotes that the section refers to particular categories of copyright works such as buildings, models of buildings, sculptures and works of artistic craftmanship and as such excludes all other types of works. However, in the UK, "artistic works" under Sec. 4 of the Act, is a broad umbrella term consisting of various types of work including "graphic works" which in turn is defined as including photographs, paintings, drawings, maps, charts, plans, engravings, etching, lithograph, woodcut or similar work.[48] According to the wording of this section, none of these works are included in the exception. As such it "excludes a variety of works encountered by inhabitants in a city's public spaces, including works of street art and graffiti".[49] It is interesting that this point was picked up during the brief parliamentary debate concerning this section, but clearly nothing came of it.[50] The wording as it is – a qualifier which was not present in the Copyright Act 1911[51] – plainly limits the scope of this section.

In this context, Art. 5(3)(h) of the EU InfoSoc Directive[52] seems broader. The Article refers to works "*such as* works of architecture or sculpture made to be located permanently in public places" (emphasis added). The wording here is more open and allows other types of works to be incorporated as long as they are permanently located in a public place. Whereas in the UK, the wording is prescriptive and is exacerbated by the use of the word "such works" thereby limiting the scope to only those works listed under Sec. 62.

Reflecting on this matter from the perspective of the metaverse gives rise to a number of issues. As the section clearly excludes graphic works as defined above, it would mean that a picture, painting, drawing or collage painted on a building or

[47] *Ibid* Newell (2011). *See also* for commentary on Japan, South Africa, Ecuador, China and USA.

[48] Section 4(2)(a)-(b), CDPA 1988.

[49] Iljadica (2017), p. 59.

[50] HL Deb, 08 December 1987, vol. 491, col 190, Lord Williams of Elvel.

[51] *See also*, Burrell and Coleman (2005), para. 233–234.

[52] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter the InfoSoc Directive).

sculpture, would not be covered by the exception.[53] Therefore, in the context of the metaverse, reconstructing a building which has a painting or drawing on it will be prohibited, even though the familiarity of those buildings (including the graphic work) will be of importance to those entering and inhabiting a virtual world. For example, if the building in question is a place of work, but, has a mural on the exterior, then recreating it in the metaverse, is going to be problematic. This limits the true potential of the metaverse. If certain buildings in London were to be reconstructed in the metaverse based on photographs or films taken of them, it would prohibit the recreation of Sculpture in the City[54] – a sculpture park that uses the "urban realm as a rotating gallery space", the Canary Wharf Trail,[55] The Broadgate Art Trail[56] and Loo Gardens London[57] to name a few, none of which are covered by Sec. 62 (Fig. 1).

This, therefore, is a glaring limitation of the section, which has implications when applying it to a virtual world, such as the metaverse. Seamless movement between the physical and virtual world will require familiar surroundings for its inhabitants and, as it stands, Sec. 62 precludes much of that.

4.1.2 In Light of the Metaverse Should "Works of Artistic Craftsmanship" Be Reviewed?

Section 62(1)(b) refers to "works of artistic craftsmanship" as a type of work that is covered by the exception. However, the UK lacks a consistent approach to works of artistic craftsmanship and is not defined in the Act. Copinger and Skone James suggests that the creator must be both a craftsman and an artist with the intention of creating a work of art.[58] Commencing with *Hensher v. Restawile*,[59] this important but controversial case held that a suite of furniture (two chairs and a settee) was not a work of artistic craftmanship. The court reasoned that a work of artistic craftmanship should be "something made by hand and not something mass produced"[60] and "should be of an author who is consciously concerned to produce a work of art".[61] Since then, the UK has gone on to debate this elusive concept in more recent cases such as *Response Clothing*[62] and *WaterRower*[63] which have provided contrasting opinions.

[53] Liu (2018), p. 449.

[54] https://www.sculptureinthecity.org.uk/ (accessed 14 April 2025).

[55] https://canarywharf.com/artwork/art-map/ (accessed 14 April 2025).

[56] https://www.broadgate.co.uk/art/trail (accessed 14 April 2025).

[57] https://londonist.com/london/secret/in-pictures-a-magic-garden-in-a-supersewer (accessed 14 April 2025).

[58] Harbottle et al. (2024), para. 3–129.

[59] *George Hensher Ltd v. Restawile Upholstery (Lancs) Ltd* [1976] AC 64.

[60] *Ibid.*, per Viscount Dilhorne at 84.

[61] *Ibid.*, per Lord Kilbrandon at 96.

[62] *Response Clothing Ltd v. The Edinburgh Woollen Mill Ltd* [2020] EWHC (IPEC) 148.

[63] *WaterRower UK Ltd v. Liking Ltd (T/A TOPIOM)* [2022] EWHC (IPEC) 2084; *see also*, *WaterRower UK Ltd v. Liking Ltd (T/A TOPIOM)* [2024] EWHC (IPEC) 2806.

Fig. 1 Loo Gardens (*source:* Tideway)

In *Response Clothing,* it was held that a fabric cannot be considered a graphic work within Sec. 4(2) CDPA 1988, however could be protected as a work of artistic craftsmanship under Sec. 4(1)(c) CDPA 1988. The Judge reasoned that the claimant's fabric qualified as an original work as clarified by the Court of Justice of the European Union (CJEU) in *Cofemel*.[64] However, the Judge also pointed out that "complete conformity with Art. 2 (of the InfoSoc Directive) (sic) in particular as interpreted by the CJEU in *Cofemel,* would exclude any requirement that the fabric design has any aesthetic appeal and thus would be inconsistent with the definition of work of artistic craftsmanship".[65] In contrast, in *WaterRower*, Judge Stone stated that the claimant "has real prospects of establishing that the WaterRower is a work of artistic craftsmanship" under Sec. 4(1)(c) CDPA 1988, although the positive outlook was not upheld in the High Court in November 2024.[66]

These cases demonstrate the inconsistent approaches adopted by the UK (and EU) courts in relation to artistic craftsmanship. Ranging from chairs, settees, fabrics and water rowers, the decisions have varied significantly, and these problematic issues will only increase in the metaverse. Therefore, any copyright work not deemed a work of artistic craftsmanship, which is re-created in the metaverse without the creator's consent, will lead to an infringement. However, as the decisions have been wildly different throughout the years, it is challenging to say with any certainty what a work of artistic craftsmanship is. Whether this uncertainty will give rise to a spate of litigation in the metaverse, only time will tell.

[64] C683-17/, *Cofemel – Socieadade de Vestuário SA v. G-Star Raw CV. Cofemel* clarified that originality cannot be extended to applied art, industrial designs, and works of(sic) design without satisfying the requirement of the author's own intellectual creation.

[65] *Supra* note 62 at para. 63, per HHJ Hacon. *See also,* the New Zealand High Court decision *Bonz Group (Pty) Ltd v. Cooke* [1994] 3 NZLR 216; and Clark, Sefton and Linsner (2020), p. 612.

[66] *Supra* note 63 at para. 57 per Judge Stone. *See also*, *WaterRower UK Ltd v. Liking Ltd (T/A TOPIOM)* [2024] EWHC (IPEC) 2806.

4.1.3 The Section Is Silent on Underlying Drawings – What Will This Mean in the Metaverse?

Section 62 is also silent on the protection of the underlying drawings of buildings, models for buildings, sculptures and works of artistic craftmanship – and as such makes it ineffective. Importantly, the section can be contrasted with Sec. 65 of CDPA 1988 which specifically excludes underlying drawings in the reconstruction of buildings, if done "by or with the licence of the copyright owner".[67] It is also curious that there is almost no parliamentary debate or discussion in relation to the inclusion of Sec. 62 into the 1988 Act[68] and its subsequent adoption which may help clarify why such an omission was made. Therefore, as well as the section, *Hansard* is equally silent on this matter. As such, the section leaves open vulnerabilities for those making use of the exception as it fails to provide a defence to the infringement of certain categories of publicly placed artistic works.

For example, if a building or sculpture is reconstructed in the metaverse in its entirety in 3D format, in accordance with this section it may not infringe the copyright in the existing building or sculpture, but it would infringe the copyright in the architectural plans/drawings, if the building or sculpture is still in copyright[69] – as would be the case with newer buildings such as The Shard, The Gherkin and the London Eye. As such, the section comes across as a half-way house, particularly when viewed through the lens of a future metaverse. Whilst the section gives the impression of "freedom" to do what one wishes with permanently situated buildings, models of buildings, sculptures and works of artistic craftmanship, that are open to the public, in reality the freedom is not as it seems. Therefore, when reconstructing or reproducing any building or sculpture in the metaverse that exists in the physical world, care will need to be taken to ensure that those works of architecture or sculptures are not in copyright.

Furthermore, Iljadica questions how an inhabitant will know whether a publicly placed work is "permanent"? As she correctly points out "to the inhabitant taking photographs and the like it may not be at all obvious from simply looking at a work whether its status is permanent or temporary".[70] Clearly a work of architecture will be quite obvious, but apart from that a question mark remains on sculptures, models for buildings and works of artistic craftmanship. Again, along with ensuring the copyright status of these works, attention will also need to be paid to its permanence before recreating to ensure that copyright is not being infringed.

Having discussed the freedom of panorama exception in the UK and the challenges it presents in the metaverse, the paper will now move to a consideration of this provision in Japan. In this context, the paper will question whether the Japanese provision is better suited in its application to the metaverse.

[67] *See also*, Liu (2018), p. 449.

[68] The only references are at HL Deb, 8 December 1987, vol. 491, col 190, Lord Williams of Elvel. The other references to this section refer to the language of the section and not to its content. *See*, HL Deb, 23 February 1988, vol. 493, col 1183; and HC Deb, 25 July 1988, vol. 138, col 148.

[69] *See also*, Sec. 65, CDPA 1988 and Booton (2003), p. 38.

[70] Iljadica (2017), p. 75. *See also*, Iljadica (2016), chapter 10.

4.2 Freedom of Panorama in Japan and Its Application to the Metaverse

The Japanese copyright exception for freedom of panorama, Art. 46 of the Japanese Copyright Act 1970 (as amended) (hereinafter JCA),[71] stipulates as follows:

> Article 46 (Exploitation of an Artistic work on Public Display)[72]
>
> It is permissible to exploit an artistic work the original copy of which is permanently installed in an outdoor location as provided for in paragraph (2) of the preceding Article or an architectural work, in any way whatsoever except the following:
>
> (i) producing additional copies of a sculpture or making those additional copies of the sculpture available to the public by transferring them;
> (ii) reproducing an architectural work by means of construction, or making copies of an architectural work so reproduced available to the public by transferring them;
> (iii) reproducing a work in order to permanently install it in an outdoor location as provided for in paragraph (2) of the preceding Article;
> (iv) reproducing an artistic work for the purpose of selling copies of it, or selling those copies.

Article 46 covers "an artistic work" and "an architectural work", but for an artistic work, it is limited to "the original copy … which is permanently installed in an outdoor location as provided for in paragraph (2) of the preceding Article". Article 45(2) of the JCA refers to "a street, a park, or any other *outdoor* location accessible to the public, or on the outer wall of a building or other place easily seen by the public" (emphasis added). Therefore, an original work of art which is permanently installed in a park, square or other outdoor location accessible to the public (e.g. statues of Hachiko in Shibuya and Shigenobu Okuma in Waseda University) is covered by this provision.

According to case law, the phrase "permanently installed" in Art. 46 has been interpreted flexibly in court decisions. In the *City Bus Case*, the disputed artistic work was painted on the body of a bus running in Yokohama City. In delivering their judgment, the court dismissed the plaintiff's claim, holding that the painting on the body of the bus may be regarded as an artistic work "permanently installed" in outdoor places (Fig. 2).[73]

Interestingly, Art. 46 also applies to an architectural work, regardless of whether it is "permanently installed in an outdoor place" accessible to the public. This means that as well as architectural works installed in outdoor locations that are easily accessible to the public (such as the Tokyo Metropolitan Government Office

[71] Act No. 48 of 6 May 1970. Translations of the Japanese Copyright Act are available at https://www.cric.or.jp/english/clj/> and < https://www.japaneselawtranslation.go.jp/en/laws/view/4207 (accessed 14 April 2025). Regarding the outline written in English of the JCA and major cases, *see* Doi and Ueno (2021); and Ueno, "Chapter (Japan)" in Bently (ed), (annually updated); Ganea, Heath and Saito (eds) (2005).

[72] https://www.japaneselawtranslation.go.jp/en/laws/view/4207 (accessed 14 April 2025).

[73] Tokyo District Court, July 25, 2001, Hanrei Jihô No.1758:137 [*City Bus Case*].

Fig. 2 Yokohama City Bus

Building and the Sky Tree), and those that are *not visible to the public*, such as the five-storey pagoda in the vast garden of a personal residence, are also covered by Art. 46.

Article 46 further stipulates that it is permissible to exploit a work "in any way". Thus, all kinds of acts of exploitation (including adaptations), such as reproduction, public transmission and screening are allowed in principle. As such, Art. 46 is broad in its formulation and includes only a few minor exceptions. These exceptions are set out in Art. 46 (i)–(iv) and these sub-sections specifically exclude: (a) the reproduction of the statue of Hachiko as a sculpture *(item (i))*; the reconstruction of the Tokyo Metropolitan Government Office Building *(item (ii))*; and the sale of a miniature of the statue of Shigenobu Okuma or the statue of Hachiko as a postcard for a fee *(item (iv))*. This is because Art. 46(iv) relates exclusively to selling tangible products of artistic works for a fee, due to the fact that the word "copies" in the JCA refers solely to tangible copies. On the other hand, selling such an artistic work online, for example, selling digital images of the statue of Hachiko, is allowed under Art. 46. As a result, reconstructing these statues in the metaverse does not fall under sub-sections (i)–(iv) and is therefore permissible under Art. 46.

Further, architectural works in physical space and artistic works where the original work is permanently installed in an outdoor place can be freely used in the metaverse, even if they are eligible for copyright protection. In this regard, it can be said that Art. 46 of the JCA is helpful and beneficial in designing the metaverse and carrying out commercial activities within it.

4.2.1 The Type of Works That Can Be Reconstructed in the Metaverse

However, Art. 46 has its limitations. Firstly, Art. 46 is applicable to artistic works and architectural works only, and is not applicable to other types of works, such as literary works (e.g. lyrics/words on posters), photographic works (e.g. photographs

printed on billboards), and musical works, even if they are permanently installed in outdoor places accessible to the public.

4.2.2 The Requirement of "Outdoor" Artistic Works

Secondly, Art. 46 applies only to "an artistic work the original copy of which is permanently installed in an *outdoor* location" accessible to the public (emphasis added). Hence, artistic works permanently installed in "indoor" places, such as station premises or city hall lobbies are not covered, even if the original copy of these artistic works are freely accessible to the public.

Such a requirement of "outdoor" seems unique from the comparative viewpoint and limiting from an indoor perspective.[74] Interestingly, there was no such requirement in the original draft law prepared by the Japanese Government (Art. 48) in 1966. However, it was revised during the lawmaking process, and in the lead up to the bill passed in the 1970 Diet, the provision was limited to works permanently installed in "indoor" places. As it currently stands, the provision does not apply to artistic works permanently installed in indoor spaces such as museums. Delving into the drafter's commentary highlights that Art. 46 was aimed at works permanently installed in places where anyone could enter with an admission fee such as amusement parks.[75] However, the fact that Art. 46 does not apply to indoor spaces is limiting and therefore, should be reviewed in view of new developments such as the metaverse.

4.2.3 The Requirement of "Original Copy"

Thirdly, Art. 46 applies only to "an artistic work the *original copy* of which is permanently installed in an outdoor location" accessible to the public (emphasis added). There is no definition of "original copy" (原作品) in the JCA. It is provided in relation to an artistic work and a photographic work, and contrasts with the definition of a "copy" (複製物) as outlined in the Act. An interpretation of Art. 46 reveals that an "original copy" covers not only a tangible object made by the author's hand such as a sculpture, but also covers more than one tangible object such as a numbered lithograph made by the creator in a limited quantity.[76] On the other hand, mass production of an artistic work, such as a manga book or an artistic postcard, is not an "original copy" but a "copy", and is not covered by Art. 46. Therefore, the use of artistic works in this manner (e.g. illustrations of cartoon characters on billboards) are not covered by Art. 46, even if they are permanently installed in outdoor places. There is a theory that Art. 46 can be applied by analogy to copies of artistic works,[77] but it has not proved to be a major theory so far.

[74] *See also* Art. 35(2) of Korean Copyright Act that is applicable to artistic, architectural and photographic works that are permanently installed in a public space in general.

[75] *See also* 加戸守行『著作権法逐条講義』; Kato (2021), p. 385 (in Japanese).

[76] *Ibid.* at 202 et seq.

[77] *See* 金子敏哉「出版における美術的作品の利用——応用美術の著作物性、46条の類推を中心に」Kaneko (2015), p.163.

4.3 Freedom of Panorama: Beneficial but also Presents Limitations for the Metaverse

Reflecting on the respective sections from the UK and Japan, it is clear that the freedom of panorama exception in both countries provides much freedom for users of this exception but also presents limitations – especially when viewed from the perspective of the metaverse.

In view of this, perhaps the metaverse could be licensed separately, in much the same manner in which entertainment licensing was carved out for air travel.[78] This could be a new monetisation opportunity which could be useful for a seamless movement between the physical and virtual worlds. How this will work in practice will need further consideration; however, this could be a potential solution in this context.

At the same time, from a UK perspective, it has been queried whether disallowing commercial reproduction could act as a solution. As Iljadica states this could be to "allow the reproduction of any publicly placed works, but disallow their commercial reproduction".[79] However, a similar suggestion in 2015 by the EU's Committee on Legal Affairs[80] was criticised heavily[81] and was ultimately withdrawn by the EU Parliament on 9 July 2015 for being overly restrictive.[82] It would certainly have curtailed the freedom of users greatly if the Committee on Legal Affairs recommendation had come to pass. Similarly, a decision by the Swedish Supreme Court a year later in 2016 considered commercial use and found that Wikimedia had breached copyright for hosting works of fine art located in outdoor public places.[83] Therefore, traversing down this path, seems futile.

In looking ahead to the future, the authors question whether the incidental inclusion exception could play a more effective role in the metaverse in overcoming the current obstacles presented by the freedom of panorama exception.

5 Utilising the Incidental Inclusion in the Metaverse: The Way Forward?

Utilising the incidental inclusion exception may be the way forward for those wishing to recreate artistic works, sound recordings, films or broadcasts in the metaverse. The incidental inclusion provision as set out in Sec. 31 CDPA 1988 states that with the exception of musical works, copyright is not infringed by its "incidental inclusion" in an artistic work, sound recording (with the exception of

[78] Danks (2022), p. 2.

[79] Iljadica (2017), p. 75.

[80] The Committee on Legal Affairs Report A8-0209/2015 (24 June 2015) Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council on 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society at https://www.europarl.europa.eu/doceo/document/A-8-2015-0209_EN.html (accessed 14 April 2025).

[81] Rosati (2015), p. 651.

[82] European Parliament, Verbatim report of the proceedings A8-0209/2015, 09 July 2015 at https://www.europarl.europa.eu/doceo/document/CRE-8-2015-07-09-ITM-013-22_EN.html (accessed 14 April 2025).

[83] *Bilduppovsträtt i Sverige (BUS) ek. för. v. Wikimedia Sverige*, Ö 849-15, 4 April 2016.

words spoken or sung with music), film or broadcast. The section also goes on to clarify that copyright will not be infringed by "issuing to the public copies, or the playing, showing, communication to the public of anything"[84] if it was incidentally included. However, judicial interpretation of this brief section has been minimal in the UK and EU. For example, a study which carried out a comparative mapping of EU and national legislative acts and case law regulating copyright flexibilities pointed to the lack of case law in this area as well as the diverse interpretation of it, particularly amongst European countries.[85] The section below explores the incidental inclusion exception from the perspective of a noteworthy UK case before applying it to the metaverse.

5.1 "Incidental Inclusion" Exception and Its Application to the Metaverse: A UK Perspective

The question of incidental inclusion was considered in-depth in the 2003 UK case of *Football Association Premier League Ltd. & Ors v. Panini UK Ltd.*[86] Although it has been more than 20 years since the decision, this case remains the most significant example of incidental inclusion in the UK.[87] As such, this part of the paper relies on this case for guidance on the effectiveness of the exception and its application to the metaverse.

In this case, the defendant, *Panini UK Ltd* (hereinafter *Panini*), produced and offered for sale "Panini's 2003 Football Sticker Collection" of Premier League players as well as a sticker album, for affixing such stickers. Although Panini described the album as being "unofficial", the stickers contained images of the Premier League logo as well as the club badges of the players. Football Association Premier League (hereinafter FAPL) as well as some other clubs in the Premier League and Topps Ltd – who had been granted an exclusive licence to produce the official sticker album – brought an action against Panini. Panini relied on the incidental inclusion defence.

Having established that copyright did indeed exist in the Premier League emblem and club badges, the High Court decided that Panini had infringed the copyright of the Premier League logo and Football club badges and held in favour of FAPL. Panini appealed the decision, as outlined below, but Chadwick LJ in the court of appeal dismissed Panini's arguments and in concurring with the court of first instance, held in favour of FAPL.[88]

[84] 31(2) CDPA 1988 (as amended).

[85] Sganga et al. (2023), pp. 449–452.

[86] [2003] EWCA Civ 95. For a further commentary on the case, *see*, Hennigan (2003), pp. 215–217.

[87] The case of *Fraser-Woodward Ltd v. BBC & Brighter Pictures Ltd* [2005] EWHC 472 (Ch) touched on incidental inclusion and the exception was upheld in this case. However, the case mainly focused on criticism and review as well as sufficient acknowledgement for the most part and was guided by the case of *Panini* in arriving at the decision pertaining to incidental inclusion.

[88] [2003] EWCA Civ 95.

5.1.1 *Definition of "Incidental Inclusion" According to the Hansard*

One of Panini's arguments was that Mr Justice Peter Smith of the High Court failed to consult the legislative policy attached to Sec. 31 through reference to parliamentary debates and the Hansard. The court of first instance had considered the dictionary definition of "incidental"[89] before turning to Copinger and Skone James[90] and Laddie, Prescott and Vitoria[91] for guidance. In the court of appeal, Chadwick LJ referred to these definitions and the Hansard and clarified that "incidental" had been left undefined by the legislators on purpose.[92] Re-iterating the words of Lord Beaverbrook (minister responsible for the progress of the Copyright, Designs and Patents Bill), Lord Justice Chadwick stipulated that "what is incidental will depend on all the circumstances of each case and it would be impossible to provide a satisfactory definition for all circumstances".[93] Furthermore, he went on to say that "incidental" was not intended to mean "unintentional" or "non-deliberate".[94] As such, in Chadwick LJ's view, reference to the Parliamentary debates added nothing new to what Parliament meant by the word "incidental" and doubted whether there was any "proper basis upon which that material could have been put before the judge".[95] As Chadwick LJ pointed out, the relevant question was whether the inclusion of the FAPL emblem and club badges on the stickers and album was incidental. On this occasion and in view of all the circumstances of the case, the court found that it was not incidental.

5.1.2 *Is "Incidental Inclusion" Subjective or Objective?*

Panini argued that the test of whether the inclusion of emblems and badges is incidental must be answered in light of the circumstances at the time when the "photograph in issue is made". In particular, Panini stipulated that Mr Justice Peter Smith should not have taken into account the characteristics of a notional customer. Chadwick LJ dismissed this argument. Firstly, he considered whether making of the image as it appears on the sticker or in the album was an infringement of copyright in the emblems and badges. Secondly, he stated that question *could not be answered by considering "what might have been in the mind of the photographer* at the time when he took the photograph from which the image of the player, as it appears on

[89] "Occurring as something causal or of secondary importance; not directly relevant to; following as a subordinate circumstance" – *ibid*, per Chadwick J., at para. 21, referring to the Shorter Oxford English dictionary. *See also*, *IPC Magazines Limited v. MGN Limited* [1998] FSR 431.

[90] Harbottle et al. (2024), para. 9–26.

[91] "The Act contains no definition of "incidental", but this is an ordinary English word with connotations of what is casual, and not essential, subordinate, mere background, etc. It is submitted that that while what is incidental is a question of fact and degree an important consideration would be as to whether the taking [*semble,* what has been copied] enables the work to compete with or acts as a substitute for the work which is included" – per Chadwick L.J, referring to Laddie et al. (2018).

[92] *Supra* note 88 per Chadwick J at paras. 23–24. *See also*, Hennigan (2003; and Garnett (2003), pp. 579–580.

[93] HL Deb, 8 December 1987 vol. 491, col 123, Lord Beaverbrook.

[94] *Ibid*.

[95] *Supra* note 88 para. 24.

the sticker or in the album, has been derived. It is *to be answered by considering the circumstances in which the relevant artistic work – the image of the player as it appears on the sticker or in the album was created"*[96] (emphasis added).

Lord Justice Chadwick's argument is strengthened by the fact that a claim was not brought against the photographer. If such a claim had been brought, then it would clearly have become relevant to examine the circumstances as they existed at the time when the photograph was made. However, that did not happen. The importance of this distinction is further explained by Garnett. He makes the point that at the time the photographer chose their subject matter, they may have had nothing to do with the included copyright material and may even have been oblivious to it. On the contrary, the appellant Panini, might have chosen the image precisely because the included material suited their commercial purposes.[97] Therefore, the court rejected the subjective nature of the argument and upheld Mr Justice Peter Smith's approach of considering the characteristics of a notional customer, thereby favouring the objective approach.

5.1.3 Dichotomy Between "Integral" and "Incidental", Commercial Intent and Artistic Consideration

Another argument which was presented by Panini in the court of appeal was that there was no true dichotomy between "integral" and "incidental" as the emblem and badges could be an integral part of the work, and at the same time be incidental to the work. Following on from this argument, Panini further claimed that the "incidentiality" of the inclusion must be judged with regard to artistic consideration and argued that Mr Justice Peter Smith was incorrect in taking into account the characteristics of a notional customer.

Whilst Lord Justice Chadwick accepted, in principle, that there is no necessary dichotomy between "integral" and "incidental" he stopped short of determining that the lack of such a dichotomy could lead to the conclusion that the inclusion of a copyright work in another work is, or is not, "incidental" for the purposes of Sec. 31 (1). He explained it as follows. Where an artistic work in which copyright subsists appears in a photograph because it is part of the setting in which the photographer finds their subject, it can properly be said to be an integral part of the photograph – and will necessarily, appear in the photograph unless edited out. However, that does not lead to the conclusion that the inclusion of a work in another work is, or is not, "incidental" for the purposes of Sec. 31(1) of the Act.[98]

Chadwick LJ instead stated that the appropriate inquiry would be to question why, as in this case, the images of the Premier League logo as well as the club badges of the players were included on the sticker or in the album. In addressing this question, Chadwick LJ saw no reason why, if the circumstances so require, consideration should not be given to any commercial reason as well as to any aesthetic reason[99] and pointed to the fact that the stickers and album were created

[96] *Supra* note 88 per Lord Justice Chadwick, para. 25.

[97] Garnett (2003), p. 581.

[98] *Supra* note 88, para. 26.

[99] *See* Hennigan (2003), p. 216.

primarily, and if not exclusively, for commercial purposes. Therefore, Chadwick LJ concluded that "it was wholly artificial to test the "incidentiality" of the inclusion of the work by reference to artistic consideration if, by that is meant aesthetic considerations".[100] After all, as he pointed out artistic works are not confined to works of artistic quality in accordance with the 1988 Act.

5.1.4 The Relevant Test

Finally, Chadwick LJ confirmed that the sole objective of creating the image of the players as it appeared on the sticker or in the album was "to produce something which would be attractive to a collector".[101] It did not depend on any enquiry into the subjective intent of the individual employee who created the image or of the photographer who took the photograph from which the image was derived. It depended on an objective assessment of the circumstances in which the image was created. Chadwick LJ "regarded this as a matter about which there could be no doubt".[102] After all, if the strip were to be authentic, it must include the club badge and where appropriate the FAPL emblem. As such Chadwick LJ concurred with Mr Justice Peter Smith and described the inclusion of the badge as "an integral part of the artistic work comprised of the photograph of the professional footballer in his present-day kit"[103] and confirmed that it was "impossible to say that the inclusion of the individual badge and the FAPL emblem was incidental".[104] Based on these arguments, Chadwick LJ dismissed Panini's appeal.

5.1.5 Application to the Metaverse

Applying this case and its reasoning to the metaverse, there is potential for the incidental inclusion exception to work more favourably than the freedom of panorama exception. However, according to the decision delivered in *Panini* – which remains the only significant case in the UK relating to incidental inclusion – it provides limited guidance. Furthermore, the relevance of this case to immersive environments can also be questioned, considering that the case is over 20 years old. However, drawing on the *Panini* decision, it is clear that future scenarios involving incidental inclusion will depend on all circumstances of each case, having regard also to an objective assessment of the situation and the commercial intent of the defendant. For example, where a building, sculpture or work of artistic craftsmanship which is in copyright, is being reconstructed in the metaverse, the present exception could be used for purposes of creating the "skyline" of the relevant city or creating a billboard incidental to the main subject. On the other hand, if the sole purpose of the building is to provide a space for work, socialising, sight-seeing, etc.

[100] *Supra* note 88 per Lord Justice Chadwick, para. 26.

[101] *Supra* note 88 at para. 27.

[102] *Ibid.*

[103] *Ibid.*

[104] *Ibid.*

– then in accordance with *Panini,* it will not be considered incidental. The same will be true for other types of artistic works such as photographs, paintings, drawings etc. For example, if the Canary Wharf Trail, The Broadgate Art Trail or Loo Gardens mentioned above are recreated to provide familiarity of the surroundings rather than as a means of exploring or experiencing them in the virtual world, then the incidental inclusion exception could be used successfully (as is the case at present). In contrast, if it is to experience these sites in a virtual world setting, then the exception will not be applicable in line with the ruling in *Panini.*

Reflecting on the incidental inclusion exception, it demonstrates that the wording of Sec. 31(1) provides more potential for its application in the metaverse than the freedom of panorama exception, however, on the basis of current judicial interpretation, it provides limited guidance in the UK. At the same time, what is incidental will have to be decided on all the circumstances of each case whilst employing an objective test with regard to commercial intent. Unfortunately, this could lead to inconsistency in the metaverse.

5.2 Incidental Inclusion Exception in Japan and Its Application to the Metaverse

The Japanese copyright exception for incidental inclusion is set out in Art. 30-2 of the JCA. It is extremely long and quite complicated, especially after the revisions made by the 2020 amendment. It states as follows:

> Article 30-2 (Exploitation of Incidentally Captured Works)[105]
>
> (1) In the process of taking photographs, recording sounds or visuals, broadcasting, or otherwise reproducing images or sounds of objects or communicating them without reproduction them (hereinafter in this paragraph, referred to as act of reproducing or communicating), any other work comprising objects or sounds that are captured incidentally along with the objects or sounds captured during the act of reproducing or communicating (hereinafter in this paragraph referred to as objects or sounds captured for reproduction or communication) (those captured incidentally include the objects or sounds captured as constituting a part of the objects or sounds captured for reproduction or communication; hereinafter in this paragraph referred to as incidentally captured objects or sounds) (but only another work that constitutes a minor part of the materials created or communicated by the act of reproducing or communicating (hereinafter in this Article referred to as created or communicated materials), in light of the percentage of the work in the created or communicated materials, the accuracy of its replication in the created or communicated materials, and other elements; hereinafter in this Article referred to as an incidentally captured work) may be exploited, in any way, in connection with the act of reproducing or communicating, within the scope that is justified in light of the existence or nonexistence of the intention of making profit through the exploitation of the incidentally captured work, the degree of difficulty in separating the incidentally captured

[105] https://www.japaneselawtranslation.go.jp/en/laws/view/4207 (Accessed 14 April 2025).

objects or sounds from the objects or sounds captured for reproduction or communication, the role to be played by the incidentally captured work in the created or communicated materials, and other elements; provided, however, that this does not apply if the action would unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the incidentally captured work or the circumstances of its exploitation.

(2) An incidentally captured work exploited pursuant to the provisions of the preceding paragraph may be exploited, in any way, in connection with the exploitation of the created or communicated materials relevant to the incidentally captured work; provided, however, that this does not apply if the action would unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the incidentally captured work or the circumstances of its exploitation.

A consideration of Art. 30-2 illustrates its broad nature. For example, it permits the use of a billboard or music played by a third party when broadcasting an interview with a celebrity on a street. The only consideration here would be that the inclusion should be incidental along with the main subject (in this case, the celebrity) whilst the use of the work constitutes "a minor part" and should be "within the scope that is justified".

Article 30-2 also benefits from the fact that there is no limitation regarding the type of works that it applies to. Therefore, not only visual works, but also musical works can be allowed based on the incidental inclusion provision, which differentiates and illustrates the flexibility of the Japanese provision from that of the UK. This means including musical works sung by fans in a live broadcast of a sports programme can be allowed under Art. 30-2.

5.2.1 Amendment of Art. 30-2 in 2020

Article 30-2 was first introduced through the 2012 amendment of the JCA (Law No. 43 of 2012) but was extended by the 2020 amendment (Law No. 48 of 2020).[106] In

[106] Article 30-2 before the enactment of the 2018 amendment stipulates as follows:

Article 30-2(1) (Exploitation of Incidentally Captured Works).

When a work is created by means of photography or by means of the recording of sounds or visuals (hereinafter in this paragraph, referred to as "photography or recording"; hereinafter in this Article, a work created by means of photography or recording is referred to as a "photographic or recorded work"), any other work comprising objects or sounds that are captured incidentally because it is difficult to separate them from the objects or sounds being captured during the photography or recording by which the photographic or recorded work is created (but only another work that constitutes a minor part of the relevant photographic or recorded work; hereinafter in this Article referred to as an "incidentally captured work") may be reproduced in the creation of that photographic or recorded work; provided, however, that this does not apply if the action would unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the incidentally captured work or the circumstances of its reproduction.

(2) An incidentally captured work reproduced pursuant to the provisions of the preceding paragraph may be exploited, in any way, in connection with the exploitation of the photographic or recorded work provided for in that paragraph; provided, however, that this does not apply if the action would unreasonably prejudice the interests of the copyright owner in light of the nature or purpose of the incidentally captured work or the circumstances of its exploitation.

particular, the phrase "[W]hen a work is created by means of photography or by means of the recording of sounds or visuals" has been replaced by "[I]n the process of taking photographs, recording sounds or visuals, broadcasting, or otherwise reproducing images or sounds of objects or communicating them without reproduction them".

This means that acts which cannot be categorised as a "creation" of a work are covered by the current Art. 30-2. This would include, for example, screen shots by using a smartphone or recording sounds or filming surroundings without any creative input. Also, communication to the public which does not involve "recording", such as live broadcasting or live online streaming are covered by Art. 30-2. Furthermore, not only photography, but also "reproducing images or sounds of objects" is covered, and thus the act of reconstructing cityscapes by drawing or through the use of computer graphics, will be covered. An example of this would be the act of incorporating a cityscape when creating a computer game in which a player glides over a real city within the game. Therefore, the act of reconstructing a city in the metaverse through the use of computer graphics is permissible under Art. 30-2 of the JCA.

Before the enactment of the 2020 amendment, Art. 30-2(1) contained the following phrase, "it is difficult to separate them from the objects or sounds being captured". Due to this requirement, the *intentional* inclusion of works was not allowed, thereby narrowing the scope of this provision. However, the 2020 amendment deleted this requirement of "difficulty to separate" and instead introduced the requirement of justified scope taking into account certain factors. For example, the amended Art. 30-2(1) now stipulates the following:

> within the scope that is justified in light of the existence or nonexistence of the intention of making profit through the exploitation of the incidentally captured work, the degree of difficulty in separating the incidentally captured objects or sounds from the objects or sounds captured for reproduction or communication, the role to be played by the incidentally captured work in the created or communicated materials, and other elements.

Due to this amendment, the current provision can even be applied to the intentional inclusion of works where it is not difficult to separate the works. For example, photographing a child holding a stuffed toy such as *Hello Kitty* and intentionally including it when taking the photograph of the child can be allowed under Art. 30-2, so long as the stuffed toy is regarded as "incidentally along with" the main subject (the child).[107]

It should be noted, however, that intentionally including musical works in a TV drama as background music is not allowed under Art. 30-2, because musical works cannot be considered as "incidentally along with" the main subject.

5.2.2 The Requirement of "Incidentally along with" the Main Subject

On the other hand, Art. 30-2 has its limitations. First, as mentioned above, Art. 30-2 applies only to the works "that are captured incidentally along with the objects or

[107] *See* Kato (2021), p. 269.

sounds captured during the act of reproducing or communicating". Article 30-2 of the JCA requires "incidentally along with" (付随). Thus, an inclusion has to be "incidentally along with" the main subject – such as a child being the main subject when incidentally including Hello Kitty in the picture.

However, the 2020 amendment added the phrase "those captured incidentally include the objects or sounds captured as constituting a part of the objects or sounds captured for reproduction or communication" in the parentheses of Art. 30-2(1), which means that an example where a work is included in the main subject, such as when a signboard is included when photographing a busy street. Therefore, even if a signboard in the street is considered as part of the main subject (in this case, a scene of a busy street), it is considered "incidentally along with" the main subject and Art. 30-2 is applicable.

When considering the recreation of a city from the physical world in an immersive environment such as the metaverse, a work, such as a signboard in the street, can be included. Even such a work would be considered as part of the main subject (in this case, a city) and can be considered "incidentally along with" the main subject under Art. 30-2, which would be applicable to the recreation.

5.2.3 The Requirement of "Minor Part"

In addition, Art. 30-2 of the JCA requires that the use of the work must be a "minor" component part. Thus, for example, even if another illustration accompanies a photograph of the main subject, Art. 30-2 does not apply if the illustration occupies a large part of the photograph, as it does not constitute a "minor" part.

For example, in the metaverse when reproducing a city from the physical world in a virtual space, it may be possible to display a certain signboard in a large photograph if one approaches it. However, in this case, the sign in question could be regarded as "minor" in relation to the entire city reconstructed in the metaverse. In fact, according to the drafter's commentary, in the case of movies, not only the proportion of the area in the screen but also the proportion of time of the entire movie, should be taken into account in relation to the requirement of "minor part". Therefore, even if a work would appear large on the screen, it may be assessed as "minor" if the time duration of screening it, is short.[108]

Thus, Art. 30-2 of the JCA allows minor exploitation of works along with the main subject within the scope that is justified, and as it can be applied to all types of works. Although the 2020 amendment was not made with the metaverse in mind, the current Art. 30-2 is highly favourable to the metaverse, which reconstructs real cities in a virtual space.

6 Conclusion

Whilst immersive environments have been around for a number of years, their prominence and popularity grew significantly in 2021, firstly with the introduction

[108] *See* Kato (2021), p. 270.

of Meta's metaverse and more recently in 2023, with Apple's spatial computing. These immersive environments, facilitated by AR, VR, MR-compatible technologies such the Meta Quest or Vision Pro, have provided a glimpse into an immersive, 3D environment and propelled us into imagining what such a virtual world may look like in the future.

This paper has highlighted some of the copyright issues which need to be considered when designing the metaverse or similar immersive environments. In particular, the paper explored the implications surrounding the design of buildings in the metaverse as well as the use of copyrighted material within such an environment. Using copyright exceptions such as the freedom of panorama and the incidental inclusion exceptions, the authors considered their application to the metaverse – particularly from the perspective of the UK and Japan. In doing so, the authors concluded that both of these exceptions will be beneficial for advancing the metaverse, but also highlighted some of the challenges they present.

For example, the freedom of panorama in the UK, provides one of the broadest provisions in comparison to other countries. Section 62 CDPA 1988 allows exploitation in many ways and is one of the few countries where the exception applies to both indoor and outdoor locations. However, the wording of Sec. 62 is very prescriptive and applies very specifically to buildings, models of buildings, sculptures and works of artistic craftsmanship. This is in contrast to the wording of the InfoSoc Directive which states "… use of works *such as (emphasis added)* works of architecture, sculpture, …." thereby providing for a broader spectrum of works. By being prescriptive, the UK's Sec. 62 excludes artistic works which pose challenges for recreating architectural works, etc., in the metaverse. In particular, it implies that artistic works including street art, murals or graffiti on such buildings will be excluded from recreation or simulation in the metaverse. Furthermore, the definition of "artistic craftsmanship" is riddled with inconsistencies as reflected in the cases *George Hensher Ltd v. Restawile (Upholstery) Lancs Ltd*; *Response Clothing Ltd v. Edinburgh Woollen Mill Ltd*; and *WaterRower UK Ltd v. Liking Ltd (T/A TOPIOM)*. The gaps presented in Sec. 62 demonstrate that the freedom of panorama provision will apply to a limited number of copyright works in the design of the metaverse.

On the other hand, Japan's freedom of panorama exception set out under Art. 46 of the JCA is broader, covering both "artistic works" and "architectural works." The inclusion of artistic works within Art. 46 of the JCA is most certainly a step in the right direction, when considering the recreation or simulation of architectural works in the metaverse. In addition, Japanese courts have interpreted the phrase "permanently installed" flexibly; an artistic work painted on the body of a bus running in Yokohama City was said to be "permanently installed". In addition, Art. 46 applies to architectural works, regardless of whether they are "permanently installed in an outdoor place" accessible to the public. Therefore, not only architectural works installed in outdoor locations that are easily accessible to the public, such as the Tokyo Metropolitan Government Office Building and the Sky Tree, but also architectural works that are not visible to the public, such as the five-storey pagoda in the vast garden of a personal residence, can be freely used under

Art. 46. This is a significant benefit under the Japanese law in comparison to UK law.

However, Art. 46 has its limitations. First, the section applies only to "an artistic work the original copy of which is permanently installed in an outdoor location" accessible to the public. Two conclusions can be drawn from this provision. One is that there is no definition of "original copy" (原作品) in the JCA thereby leading to uncertainty. The other is that, unlike the UK, Art. 46 does not cover indoor places. This means that artistic works permanently installed in "indoor" places, such as station premises or city hall lobbies are not covered by Art. 46, even if the original copy of these artistic works are freely accessible to the public. This is a clear drawback of the Japanese freedom of panorama exception and as such is limiting in its application and therefore, should be reviewed. Furthermore, Art. 46 is applicable to architectural works *and* artistic works, however, it is not applicable to other types of works, such as literary works (e.g. lyrics/words on posters), photographic works (e.g. photographs printed on billboards) and musical works, even if they are permanently installed in outdoor places accessible to the public.

Reflecting on the respective sections from the UK and Japan, the freedom of panorama exception in both countries provides much freedom for users of this exception but also presents a number of limitations – especially when viewed from the perspective of recreating architectural and artistic works in the metaverse.

Accordingly, the authors explored the effectiveness of the incidental inclusion exception in the UK and Japan and concluded that it is certainly more favourable to the metaverse as discussed above. In particular, the authors concluded that it provides more flexibility, even with some limitations, in its application to the metaverse.

This is most apparent in Japan, where the exception allows not only visual works but also musical works to be included, if they are incidental. Therefore, including musical works sung by fans in a sports live broadcasting is allowed under Art. 30-2 of the JCA, making it much broader than the UK. A further significant point is that Japan allows "intentional inclusion of works in certain cases" following the amendment to the law in 2020. For example, intentionally including a manga character in a private photo by an individual who then uploads it to an online sharing platform will be covered by the exception. On the other hand, a broadcasting company which intentionally includes a poster with a painting of a manga character in a set for making a TV drama, may not be allowed. This is because it will depend on factors such as the potential to make profit through the incidental inclusion, difficulty in separating the incidentally captured work, and the role it will play within the main work.

Japan's incidental inclusion exception further benefits from making a distinction between creative works and non-creative works such as screenshots by using a smartphone. Whilst the exception covers photography, it is not limited to it and covers images, sounds and objects. Therefore, recording sounds or filming surroundings without any creative input will be considered incidental. The example of recreating a cityscape within a computer game where the player glides over a real city, illustrates how Art. 30-2 of the JCA paves the way for a city to be recreated in the metaverse through the use of computer graphics.

However, there are some limitations. For example, Art. 30-2 applies only to the works "that are captured incidentally along with the objects or sounds captured during the act of reproducing or communicating" as discussed above. Secondly, Art. 30-2 of the JCA requires that the use of the work must be a "minor" component part. Even with these limitations, it is still broader than the UK law. For example, when assessing "minor" in the case of movies, not only the proportion of area in the screen but also the proportion of time of the entire movie should be taken into account in relation to the requirement of "minor part". Therefore, even if a work would appear large on the screen, it may be assessed as "minor" if the duration of the screening is short. As such, even though the 2020 amendment was not made with the metaverse in mind, Art. 30-2 is highly favourable to the metaverse and can be utilised as per the existing law.

On the other hand, and in comparison to Japan's provision, the UK's incidental inclusion exception appears very narrow and does not serve this new technology effectively. Although it may be seen more favourably than the freedom of panorama exception, its use depends on the facts of each case, according to the decision delivered in *Panini*. Due to the lack of judicial interpretation surrounding this exception – in the EU and UK – guidance for its application to the metaverse remains limited in comparison to Japan. Based on the available case law, what can be deduced is that the UK's incidental inclusion could be used for creating the "skyline" of the relevant city in the metaverse, as an incidental component of something much larger. However, if the sole purpose of a building in the metaverse is to provide a space for work, socialising, sight-seeing, etc., then in accordance with *Panini* it will not be considered incidental. The same will be true for other types of artistic works such as photographs, paintings, drawings, etc. For example, if the Canary Wharf Trail, The Broadgate Art Trail or Loo Gardens mentioned above are recreated to provide familiarity of the surroundings rather than as a means of exploring or experiencing them in the virtual world, then the incidental inclusion exception could be used successfully (as is the case at present). In contrast, if it is to experience these sites in a virtual world setting, then the exception will not be applicable in line with the ruling in *Panini.*

Furthermore, unlike Japan, the UK does not make a distinction between creative and non-creative works; minor or major works; and excludes the use of musical works "intentionally" including a work within the primary work. All of this provides a much narrower use of this exception in the UK.

Reflecting on both the freedom of panorama and incidental inclusion exceptions, it is clear that they can be used effectively in the metaverse, although both demonstrate limitations. In particular, it can be concluded that Japan's copyright law is more favourable to the metaverse, especially after the 2020 amendment of the JCA as it extends the scope of the incidental inclusion exception. On the other hand, the UK's law is more restrictive and needs consideration and reform. In looking ahead to the future, other countries seeking to reform their laws, can learn from Japan's provisions whilst also drawing on the opportunities and challenges presented by the UK law.

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