

The logo for Hogan Lovells, featuring the name in a black serif font on a solid green square background.

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# Blockchain Consumer NFT Guide

20 February 2023

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# Australia

## What are the recent trends in the NFT market?

The recent conversation in Australia has focused on how the use of NFTs can benefit the artistic community, including how an NFT representing digital art can be set up so the artist is paid a royalty each time the NFT is traded. This is in contrast to traditional forms of art, where once an artist has sold their work they may never see any benefit from later sales and any increase in the value of that work. Notably, in 2021 one of Australia's most well-known musical artists, Flume, collaborated with visual artist Jonathan Zawada to release an NFT titled "Saccade", a 90-second video work featuring a multi-colored eye which sold for A\$66,000.

NFTs have garnered sufficient attention in Australia that the Australian Taxation Office has published guidance<sup>[1]</sup> on how NFTs should be treated for tax purposes. Undoubtedly, as the creation and trading of NFTs becomes more common and sophisticated, the economic and legal implications in Australia of NFTs will similarly grow.

[1] [Australian Taxation Office: Non-fungible tokens](#)

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

Whilst some jurisdictions abroad are cracking down on regulating NFTs, Australia has not enacted any legislation regulating who may deal with NFTs (as a retailer, intermediary or consumer) nor how NFTs may be dealt with. In turn, the regulatory framework governing NFTs is derived from a variety of other practice areas, including:

- **(Anti-money laundering)** anti-money laundering laws, which are at major risk of being skirted by criminals that want to launder their "dirty" money through buying and selling NFTs under pseudonyms. Whilst Australia's financial crime regulator, Austrac, requires digital currency exchanges to register with Austrac and monitor/mitigate risk of money laundering, it has not yet announced similar obligations on NFT intermediaries. However, anti-money laundering legislation will surely arise once the Financial Action Task Force, the global money laundering and terrorist financing watchdog, publish comprehensive guidance on a global approach to prevent money laundering through NFT trade.
- **(Consumer)** general consumer/commercial laws. This is particularly important where NFTs are sold to consumers, in which case smart contracts (which are used in NFT trade) must be compliant with Australian consumer laws, including the consumer guarantees and provisions surrounding unfair contract terms.
- **(Foreign investment)** foreign investment laws. There are no specific foreign investment laws directly applicable to NFTs. However, amendments have been made to the *Security of Critical Infrastructure Act 2018* (Cth) which have expanded the scope of critical infrastructure sectors to include sectors such as the data processing sector (which may capture blockchain infrastructure/network providers). These amendments have, in turn, expanded the scope of a national security business defined in the *Foreign Acquisitions and Takeovers Regulations 2015* (Cth). This has resulted in some actions, including those previously identified as reviewable national security actions, becoming notifiable national security actions.

## What are the main implications from an IP perspective?

Due to the novelty of NFTs, the intersection between NFTs and Australian intellectual property law remains unclear. For example, without any other contractual arrangements, an owner of an NFT merely owns the token itself but not the intellectual property rights pertaining to the underlying asset or item. From a copyright perspective, whilst NFT owners may own the original copyright in the underlying asset or item, such ownership of a token differs from ownership of copyright. The majority of NFTs do not transfer any copyrights and parties purchasing NFTs should seek legal advice on the nature and scope of rights transferred in any sale or transfer of NFTs. Further, it is unclear how NFTs will account for moral rights in the creation of digital assets, including, for example, how co-contributors to works or derivative works will be credited with authorship. NFTs also give rise to a number of trademark queries, including whether the traditional forms of trademark protections are adequate to cover use of brands as an NFT or blockchain.

## What are the main implications from a finance perspective?

Similarly to the position in respect of Intellectual Property discussed above, the categorization of NFTs within the Australian finance space has not yet been settled. The main implication of NFTs from a finance perspective is the potential creation of a new class of personal property to be used as collateral in financing transactions. Whilst there have not been any publicized instances of Australian facilities being secured against NFTs to date, the concept of "collateral" is likely broad enough to capture NFTs given an NFT is a cryptographic "certificate" indicating ownership of a copy or representation of an underlying asset. NFTs therefore fit within the concept of "intangible property" under the *Personal Property Securities Act 2009* (Cth) ("PPSA") (Australia's personal property securities legislation), being any type of personal property that is not financial property, goods or intermediated securities. As set out in the above section, a lender taking security over an NFT should be mindful that the security over the NFT will not extend to the underlying asset itself. Rather, a security interest in the underlying asset can only be obtained from a person with rights in the underlying asset (and whether the lender obtains any rights over the underlying asset will therefore turn on any contractual arrangements dealing with the NFT and the underlying asset).

Assuming NFTs are capable of being collateralized, financiers need to understand how to "perfect" a security interest over them and so that they can enforce this security. Perfection is the process of obtaining the highest level of protection over collateral under the PPSA. A financier can perfect a security interest in an NFT provided that (1) the security interest arises pursuant to a security agreement, (2) the financier is granted rights in the NFT under the security agreement by a person who has rights in the NFT, and (3) the financier registers that interest on the Personal Property Securities Register. After a security interest has been perfected, it can be enforced by notifying the grantor that it has been seized in accordance with PPSA s 123(2). However, unlike other types of intangible property such as intellectual property which can be forcibly transferred to the secured party by court order (for example, to the Trademark Registrar in the case of a trademark), ownership of NFTs is recorded on a decentralized blockchain. Blockchain's decentralized nature therefore means that NFTs cannot be forcibly transferred, irrespective of any court order. Accordingly, whilst seizure of an NFT by law can be effected in the same manner as for intellectual property, financiers may encounter additional complications when attempting to practically seize an NFT because a grantor could refuse to transfer the NFT to the secured party (despite the risk of being in contempt of court order).

## What are the main implications from a data privacy and cybersecurity perspective?

Generally speaking, under the *Privacy Act 1988* (Cth) (similar to other jurisdictions such as the EU), individuals have the right to access and correct their personal information. Due to the immutable nature of NFTs, there is a risk NFTs may contain personal information that are not compliant with privacy

laws. Cybersecurity considerations must be taken into account when dealing with NFTs. For example, the underlying digital asset and the NFT will likely be stored separately and in an online server. Owners of NFTs should ensure adequate cybersecurity measures are implemented to minimize the risk of any data loss, identify theft or potential cyber-attacks.

## How is the NFT market expected to develop, and what are the opportunities?

Anything, including physical assets, can be tokenized with an NFT. The possible applications of NFTs are far-reaching and include (amongst others):

- assisting Australian companies to comply with modern slavery legislation. This can be done by linking goods which form part of their supply chains with NFTs to assist tracking and data accuracy;
- incorporating NFTs into Australia's increasingly digitized land registers; and
- allowing luxury brands to link certain goods to NFTs in order to make those goods non-fungible and "scarce". This can increase these goods' value and assist authentication of luxury items when on-sold.

Further, there is an emerging insurance market for NFTs representing digital art. Whereas for fine art, insurance would ordinarily cover loss and damage to the artwork itself, insurance of NFT artworks may instead address risks related to security of the digital key (which proves ownership of the NFT), storage and backup of the NFT and digital counterfeiting.

Ultimately, the NFT area is constantly evolving, so it is important to continually monitor developments as we anticipate regulators will likely take steps to establish a legislative framework for NFTs in Australia.

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# China

## What are the recent trends in the NFT market?

China is developing an NFT market "with Chinese characteristics". NFTs are referred to as "digital collectibles" or "distributed digital certificates" (to avoid any association with cryptocurrencies, banned in China). They are minted on private or "open permissioned" blockchains, and are purchased on platforms that require user identification, are subject to government supervision and do not allow payments in cryptocurrencies. Secondary trading was generally not allowed or restricted – but things have changed with the recent launch of [China Digital Asset Trading Platform](#) on 1 January 2023 (a state-backed NFT marketplace that will allow secondary transactions).[1]

NFTs have started being minted and sold in China since 2021 through a few platforms run by the largest Chinese tech companies (such as Ant Group's "Jingtian" which runs on Ant Group's "Antchain" blockchain, Tencent's "Huanhe" which runs on Tencent's "Zxin Chain" blockchain, and Jingdong's "Lingxi" which runs on Jingdong's "Zhizhen Chain" blockchain). According to market reports, there were more than 500 NFT trading platforms as of June 2022 in China.[2] NFTCN is one of the largest, using a localized version of the Ethereum blockchain. A new NFT infrastructure has been launched: Blockchain Services Network-Distributed Digital Certificate (BSN-DDC)[3], which offers application programming interfaces to build portals and apps to store and trade NFTs (rebranded as "distributed digital certificates") integrating several public blockchain networks as "open permissioned blockchains".[4] And a state-backed NFT marketplace (China Digital Asset Trading Platform) has recently been launched in 2023 as mentioned above.

Although subject to restrictions, there is significant interest for NFTs and cryptoassets in China. Beijing's UCCA Center for Contemporary Art hosted an exhibition on crypto art in March 2021, dubbed "the world's first major institutional crypto-art exhibition".[5] Many companies and individuals have issued NFTs in the past couple of years. Digital collectibles such as the payment code skins for the Alipay app issued in June 2021 (Dunhuang Flying Sky and Nine Coloured Deer), Phanta Bear issued in January 2022 (a collection of digital bears that also offers exclusive membership benefits) and Bored Wukong issued in February 2022 (a collection of cartoon monkeys based on the legendary Monkey King, though accused of copying the increasingly popular NFTs collection Bored Ape Yacht Club) have proven successful, generating the equivalent of millions of US dollars in revenues. Fashion brands and other consumer brands have partnered up with online shopping platforms to issue NFTs as gifts to customers purchasing physical products.[6] Luxury brands have pursued collaborations with toy brands, releasing NFTs such as Marsper's figurines dressed by Gucci.[7] and Moncler's virtual collection of SPACE MOLLY in partnership with POP MART.[8] Brands including Louis Vuitton, Mac Cosmetics and Tesla introduced in-game content to games such as League of Legends, Honor of Kings, and Game for Peace where players can use branded dresses and items.[9]

The size of the Chinese market is still relatively small due in part to the low average price of NFTs and the restrictions on secondary trading. According to statistics released by research agency Enlybee, the number of items offered for sale on various digital collectibles offering platforms was approximately 4.56 million in 2021 with a total market value of approximately RMB150 million (equivalent to about US\$23 million).[10] But the market is expected to expand significantly, partly in response to interest shown by the Chinese government towards the deployment of blockchain-based technologies (more on this in our answer to question 6 below) and the creation of NFT marketplaces which allow secondary trading.

[1] [Ledger Insights: China launches national digital asset exchange for NFTs, metaverse; The Defiant: China reverses course on NFTs with platform launch](#)

[2] [Baijiahao Baidu: Cryptocurrency crash record: market value falls below \\$900 billion China's NFT platform increases to more than 500](#)

[3] [Medium.com: Five reasons you should choose BSN-DDC for your NFT business in China](#)

[4] [South China Morning Post: China to create NFT industry based on state-backed blockchain infrastructure, main developer says](#)

[5] [FT: NFTs in Beijing - 'Who gets to decide the value of art?': Artnews: UCCA Beijing to present 'World's first major institutional crypto-art exhibition'](#)

[6] [Pimnews.org: AR, NFTs and the metaverse - How luxury brands innovated for China's Singles Day shopping festival](#)

[7] [Jing Daily: Gucci's collaboration with Marsper scores with China's cultural consumers](#)

[8] [Jing Daily: How a new Moncler x POP Mart collab caused a frenzy in China](#)

[9] [Jing Daily: How luxury brands can enter China's crypto-forbidden metaverse](#)

[10] [Enlybee: China's NFT market in 2022: The most comprehensive analysis guide](#)

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

China has not yet adopted specific laws or regulations on NFTs. Commercial activities such as issuance and trading fall under the domain of laws broadly applicable to sale of goods and protection of intellectual property, such as the Civil Code, the Patent Law and the Copyright Law. In the absence of specific laws or regulations, certain industry participants have adopted their own conventions on NFTs (for example, the Digital Cultural and Creative Industry Self-Regulatory Convention was jointly formulated on 31 October 2021 by, among others, National Copyright Exchange Alliance, China Academy of Art, Hunan Provincial Museum, Ant Group, Jingdong Technology and Tencent Cloud, setting out certain requirements on industry participants such as banning the use of cryptocurrencies and malicious price speculation on digital creations).[11]

It is worth noting that, although no specific laws or regulations on NFTs has been adopted in China yet, there is clearly some drive and momentum behind NFTs. For example, on 13 July 2022, Shanghai's Municipal Government issued the Shanghai 14th Five Year Plan for development of the Digital Economy, which indicates that the Shanghai government will support the establishment of trading platforms for NFTs by first-tier NFT platform operators.

Operators of online NFT platforms are likely subject to telecom regulations and required to obtain a value-added telecom license covering at least the internet content provider ("ICP") business and possibly some other businesses depending on the type of service provided through the platform (e.g., online data processing and transaction processing service). Certain other licenses (in addition to telecom licenses) may also be required, such as art trading, payment license, internet publishing license, or internet culture-related filings and licenses, depending on the circumstances and the services/products provided through the NFT platforms.

Foreign investment restrictions may apply to certain sectors relevant to the NFT market, including for instance the value-added telecom services sector. For example, the ICP license can only be issued to entities in which foreign ownership does not exceed 50%. If cloud services are involved, the provider of such services must obtain an internet resources coordination (IRC) license which is currently only available to entities in which foreign ownership does not exceed 50% and where the foreign investors must be qualifying Hong Kong or Macau Service Suppliers as defined in the Closer Economic Partnership Arrangements (CEPA) between Mainland China and, respectively, Hong Kong and Macau. Certain licenses mentioned above are not available

to foreign investors and foreign-invested entities.

Public (decentralized) blockchains are not allowed in China. Chinese laws (such as the Cybersecurity Law) require the construction, operation, maintenance and use of the network to be subject to Chinese laws and regulations, and the internet connection to be filed with the authorities. So, in practice, companies are only allowed to set up private (consortium) blockchains (like the ones mentioned in the answer to question 1 above) which meet the relevant criteria.

[11] [Exchange Wire: "Self-regulation Convention" signed by Chinese Tech Giants; Facebook Metamorphose into Meta](#)

## What are the main implications from an IP perspective?

Mainland China currently has no specific legislation regulating NFTs, including their IP aspects. This means that China's general IP laws are applicable to NFTs, amongst which the most relevant are the Trademark Law and the Copyright Law, under which many graphic or other types of art works (e.g., avatars, digital images, videos, music) linked to an NFT will be treated as works of fine art.

Generally, and absent any agreement to the contrary, under Chinese law, the IP rights (e.g., copyright) in the IP-protected items linked to an NFT remain exclusively with the author or owner of the underlying IP asset, and a license is needed to mint an NFT embodying an IP protected item. This means that buyers of NFTs must tread carefully. The very limited nature of the IP rights of an NFT owner is often overlooked, while it should be an essential consideration when acquiring NFTs.

This was illustrated recently in a copyright case before the Hangzhou Internet Court whose judgment was handed down on 22 April 2022, which is considered to be China's first court case involving NFTs. The case revolved around the sale for RMB899 (US\$135) on the BigVerse platform of an unlicensed NFT embodying a cartoon of a tiger getting vaccinated. The cartoon was created by the artist Ma Qianli and licensed exclusively to a culture commercialization company named Shenzhen Qice. Qice brought a contributory copyright infringement lawsuit against the BigVerse platform based on that sale. In its judgment, the Hangzhou court firstly confirmed that the unlicensed sale of an NFT embodying a copyrighted work constitutes a copyright infringement. Importantly, given the fact that a digital work was sold through the Internet, the court specified that in this case, the sale violated the copyright owner's right of dissemination through information networks and not its distribution right, so that the doctrine of exhaustion of rights (i.e., the copyright is exhausted after its first sale/publication) is not applicable to the sale of NFTs. Furthermore, the court also considered the BigVerse platform a network service provider rather than a mere content provision platform, based on the characteristics of NFTs, on the platform's business model (charging transaction costs for each NFT sale) and on its ability to verify the identity of the sellers and the characteristics of the NFTs sold. On this basis, the court rejected the BigVerse's argument that it was only obligated to provide a "notice-and-takedown" system, and instead considered that the platform had a duty to establish a set of proactive intellectual property review measures to review the copyright ownership status of the NFT works sold. Since the platform had not done so, the court found it liable for contributory copyright infringement and granted the claimant damages of RMB4,000 (approximately US\$600) for economic losses and reasonable enforcement expenses. The court also ordered the destruction of the infringing NFT by sending it to an inaccessible address (also known as "burning" the NFT). The judgment in this case is groundbreaking as it clarifies many copyright law aspects of NFT trade in China. An appeal was filed against this judgment with the Hangzhou Intermediate People's Court, and the appeal proceedings remain pending at present.

As to China's Trademark Law, it impacts the minting and use of NFTs in three ways:

firstly, while there are no published Chinese cases on the topic to date, the minting and use of NFTs containing third party trademarks would likely be considered trademark infringement, provided the trademark owner holds a valid registration for the real-world equivalent of the NFT (e.g., handbags, clothing) or for related goods in the digital sphere (e.g., downloadable image files, computer software for encryption, security tokens). Moreover, such use would also likely be considered unfair competition under China's Anti-Unfair Competition Law. This means that, similar to the situation under the Copyright Law, acquiring an NFT using or displaying a trademark does not automatically imply obtaining the ownership of, or even a license to use such trademark;

secondly, brand owners generally face an uphill battle when trying to register trademarks for, or including the word "NFT" in China. This is due to the presence of a large number of pre-existing Chinese trademark registrations for the mark "NFT" as a standalone mark in most classes of goods and services in the Chinese trademark register, and also due to the likelihood that China's National IP Administration ("CNIPA") may consider the word "NFT" descriptive. A potential strategy to increase the chances of success here would be to add distinctive elements such as the applicant's pre-existing registered marks or a distinctive logo; and

finally, brand owners wishing to improve their trademark protection in the NFT sphere should proactively extend their trademark protection to the classes of goods and services most relevant to NFTs: i.e., Classes 9, 35, 36, 41, 42 and 45. It should be noted that an attempt in China to register a mark for "NFTs" per se is likely to be rejected by the CNIPA, as it does not yet form part of the current list of standard goods and services in China. Instead, a first attempt should be made to register the mark for the closest standard goods (e.g., "downloadable image files" in Class 9). Brand owners may also consider filing international registrations through the Madrid Protocol designating China, in which case the CNIPA generally takes a more flexible approach in examining the non-standard goods or services items relating to NFTs. Looking forward, the 12th edition of the Nice Classification, which has entered into force on 1 January 2023, explicitly contains an NFT-related category of products in Class 9, namely "*downloadable digital files authenticated by non-fungible tokens*". However, the CNIPA chose not to adopt this category yet in 2023, so that Chinese trademark applications still have to designate the closest standard goods (e.g., "downloadable image files" in Class 9).

## What are the main implications from a finance perspective?

China has adopted a complete ban on cryptocurrencies (except for government-backed digital currencies, like the Digital Yuan that is currently being rolled out through pilot programs).

Several announcements and notices have been issued by various Chinese authorities over time, cracking down on cryptocurrencies. The main ones are the following:

- *Announcement on Preventing Token Fundraising Risks* dated 4 September 2017, which banned token fundraisings and trading by companies, individuals and financial institutions;
- *Risk Warning for Preventing Illegal Fundraising in the Name of "Virtual Currency" or "Blockchain"* dated 24 August 2018, which warned that fundraising activities through the issuance of so-called "virtual currency", "virtual assets" or "digital assets" in the name of "financial innovation" and "blockchain" are illegal; and
- *Notice on Further Preventing and Dealing with Speculation Risks in Virtual Currency Trading* dated 15 September 2021, which provided that business activities related to virtual currencies are illegal financial activities.

As a result of the above, the mining, offer and use of cryptocurrencies in China, as well as providing overseas cryptocurrency (including for NFT trading) exchange services into China is prohibited.

Certain features of NFTs are similar to cryptocurrencies (e.g., blockchain technology, cryptography, digital form). Therefore, the main NFT platform operators have been wary to eliminate any association with cryptocurrencies by adopting rules that prohibit the use of cryptocurrencies to purchase NFTs on their platforms and by referring to NFTs as "digital collectibles" or "distributed digital certificates" (see our answers to questions 1 and 2 above).

## What are the main implications from a data privacy and cybersecurity perspective?

China has enacted a series of laws and regulations in the area of data privacy and cybersecurity, including the Cybersecurity Law published in 2016, the Data Security Law published in 2021, and the Personal Information Protection Law published in 2021, as well as related implementing legislation. All blockchain infrastructure providers and NFT platform operators in China are likely subject to these rules and obligations, hence public decentralized networks are not conceivable in China.

From a cybersecurity perspective:

- certain rules apply to the construction, operation, maintenance and use of networks, and network operators are subject to certain obligations. The terms "network" and "network operator" have a broad meaning: "network" is defined as a system comprising computers or other information terminals and relevant devices that collect, store, transmit, exchange and process information based on certain rules and procedures, and includes both internal and external networks, and "network operator" is defined as the network's owner, manager and service provider. Networks are classified by tier (from tier one to tier five) and obligations are imposed on network operators (which vary depending on the tier the network falls in) to adopt corresponding measures to ensure that the network is free from interference, disruption or unauthorized access, and prevent network data from being disclosed, stolen or tampered;
- "critical information infrastructure operators" (CII/O) are subject to more stringent rules and obligations (including in terms of data localization requirements and purchase of network products and services) compared to other network operators. The definition of "critical information infrastructure" is broad (it encompasses important networks and systems where their destruction, loss of function or data leakage may result in serious harm to national security, national economy, people's livelihood and public interests, including in the public telecommunications, information services, energy, transportation, water conservancy, finance, public services, e-government and national defense industries) and as such it cannot be excluded that it might apply, depending on the circumstances, to a blockchain network or an NFT platform; and
- more specifically and in connection with the regulation of blockchain information services, under the Administrative Regulation for Blockchain Information Services published by the Cyberspace Administration of China ("CAC") in January 2019, a blockchain services provider must: (i) complete a record-filing with the CAC within 10 working days after starting to provide the relevant services; and (ii) conduct a security assessment of any new products / functions with the CAC (e.g., this might include launching a new type or batch of NFT). It is not entirely clear what the CAC record filing or security assessment criteria are, and whether services provided over any given type of blockchain would be able to complete the record-filing and/or pass the security assessment.

From a data security and personal information protection perspective:

- the blockchain network and NFT platform operators are likely deemed as "data processors" under Chinese law, and in such capacity they must collect and use the personal information under a "legal, proper and necessary" method after having obtained the consent from the information subjects. In many cases, personal information must be stored within the territory of China and transfer of personal information outside of China is subject to certain conditions being met (e.g., a security assessment, third-party certification or standard contractual clauses); and
- data subjects have the right to request the data processor to delete their personal information under certain circumstances. But the data processor may not be able to do so in practice with respect to information that is permanently recorded in the blockchain ledger.

## How is the NFT market expected to develop, and what are the opportunities?

NFTs are expected to continue to develop in China as NFTs "with Chinese characteristics". The Chinese NFTs market will not be a decentralized market like in other jurisdictions where NFTs work on public blockchains. In China, NFTs are likely to continue to be processed on private and "open permissioned" blockchains. It is expected that the Chinese government will start regulating NFTs specifically at some point, and provide rules around secondary trading (see the recent launch of the state-backed NFT marketplace China Digital Asset Trading Platform, as noted in the answer to question 1 above).

Although subject to government supervision and restrictions, NFTs are expected to prosper and be an important revenue driver and marketing tool for artists and brands alike, as well as playing an important role in other industry sectors. Blockchain was identified as a key digital technology in China's 14th Five Year Plan, which shows that the Chinese government is determined to support the development of this technology, with NFTs being part of it. It is likely that the deployment of NFTs will be preferred in areas that service the real economy (as opposed to mere forms of speculation through the trading of art and other collectibles). Areas with potential appear to be the management of certifications and the traceability of goods.

Some have commented that China could provide a better trading environment for NFTs than other countries due to its sophisticated e-commerce infrastructure. NFTs will also enjoy more widespread adoption as the metaverse develops, although to allow Chinese NFTs to function properly in the metaverse certain issues will need to be resolved including in terms of interoperability and secondary trading.

## Key contacts



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# France

## What are the recent trends in the NFT market?

Although the non-fungible tokens (NFTs) market is growing worldwide, NFTs are still not very well-known or used in France. Ifop conducted a survey for Cointribune about NFT and cryptocurrencies in the French market and the results were published in early 2022. Ifop concluded that while the legitimacy of digital assets has yet to be established, a large majority see NFTs as purely recreational products. The survey found that only 8% of the French population knows what an NFT is. This is very low compared to the United States or the United Kingdom where more than 50% of the population knows about NFTs, but the result is not very different from what we see in other European countries. NFTs are mostly known by French young adults (i.e. below 30 years old): 50% of the people surveyed in this age group are familiar with NFTs and believe in their democratization and growing use in the near future. That said, only 3.5% of the French population has already purchased an NFT, mostly in the music, art and video games industries.

That said, there is a growing interest by French consumers in NFTs and initiatives are being developed in the country to increase such interest. One of these initiatives is the opening in October 2022, of the NFT Factory where consumers can attend educational workshops to learn more about NFTs and how to purchase them.

French artists and companies are also contributing to the development of NFTs in the French market. For example, the rap singer Booba, has sold tracks of his latest album in NFTs and allowed live access to his latest concert in Paris for owners of NFTs from one of his NFT collections. Another recent example is the NFT sale of jpegs from the collection of Rude Kidz organized during summer 2022 by the Casino Group for consumers visiting three specific Monoprix shops in Paris.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

To date, there is no legal framework specifically regulating NFTs in France. This is not an usual situation - in most countries there is a legal gap concerning this new technology which can allow a rapid growing use of NFTs but also create suspicion amongst consumers.

In this context, one must therefore rely on existing legal principles to deal with the purchase/sale and use of NFTs depending on their qualification and use. For instance, consumer protection laws will likely apply to the sale of NFTs to consumers and to the terms and conditions set by the platforms selling NFTs to consumers. In addition, specific finance and tax rules would apply to such sale as further detailed below.

The French government and actors of the web3 and NFT industries are actively lobbying for the introduction of a legal framework specific to the NFTs in France. For instance, auction houses have insisted on having NFTs covered under the *loi visant à moderniser la régulation du marché de l'art* adopted in February 2022. As a result, this law allows the public auction of intangible assets, including goodwill, intellectual property rights, but also NFTs. Companies engaging in the sale of NFTs must therefore monitor closely how the French regulator will set a legal framework for NFTs in the future.

## What are the main implications from an IP perspective?

NFTs can act as certificates of authenticity of an original work. NFTs can also be related to a digital artistic work and therefore lead to issues as to the ownership of the IP rights therein.

Among the various issues raised by NFTs, from an IP perspective, the main ones seem to be related to copyright, in particular because of the intangible nature of an NFT.

In the hypothesis of the entirely digital artistic work associated with an NFT, an NFT seems to act as a certificate of authenticity only. Thus the issue seems to be whether and how the entirely digital artistic work can be subject to copyright whereas the NFT itself is unlikely to be.

Likewise, in the hypothesis of creation of digital work related to an NFT based on one's original work, it remains to be seen whether the issuer of the NFT infringes the owner of the IP rights in cases where there has been a lack of authorization to create such digital artistic work. The United States District Court Southern District of New York before which Hermes brought its Metabirkins action against NFT creator Mason Rothschild will certainly open the door to some solutions but are, unfortunately, unlikely to relate to copyright since the claims in this case are mainly related to trademark, cybersquatting and unfair competition.

Reselling the digital work related to an NFT could lead to another copyright-related issue, namely whether the "*droit de suite*" would apply to those sales. Yet, a sort of "*droit de suite*" has been provided for in some smart contracts related to the NFTs providing for consideration to be paid for each transaction made on the NFT following its initial sale.

It remains to be seen if, and how, NFTs will be regulated in the future in France from an IP perspective. We recommend, in the absence of legal provisions, very strict contractual provisions, if at all possible, between the author and the NFT purchaser organizing the use of IP rights pertaining to the NFT.

## What are the main implications from a finance perspective?

The French Government is generally supportive of the development of cryptoassets and adopted specific regimes in May 2019 under the "Pacte" Law (Law n°2019-486 dated 22 May 2019 on business growth and transformation). From a French finance law perspective, NFTs are at the crossroads of several legal qualifications and regimes.

In accordance with article L. 552-2 of the French Monetary and Financial Code, a token (*jeton*) can be defined as any intangible asset representing, in digital form, one or several rights which can be issued, recorded, stored or transferred by means of a shared electronic recording device (*dispositif d'enregistrement électronique partagé*) that enables the owner of the asset to be identified, directly or indirectly. Depending on their characteristics (in particular, the condition relating to the representation of one or more rights, NFTs which do not grant access to products or services but only have an authentication aim), non-fungible tokens could be captured by this legal definition.

Multiple legal regimes can apply to tokens (and by extension NFTs), depending on their characteristics.

NFTs which do not qualify as financial instruments under French law will fall under the scope of the digital assets (*actifs numériques*) regime (articles L. 54-10-1 *et seq.* of the French Monetary and Financial Code).

This regime aims at providing a legal framework for a wide range of services on digital assets which are very much inspired by MiFID II (e.g. the service of holding digital assets or accessing digital assets on behalf of third parties, where applicable in the form of private cryptographic keys, with a view to holding, storing and transferring digital assets, the service of buying or selling digital assets in legal tender or the service related to the exchange of digital



assets for other digital assets). The provision of certain services (*i.e.* the aforementioned services and the operating of a trading platform of digital assets) on French territory or by providers located in France requires prior registration to the French financial markets authority, the *Autorité des marchés financiers* (the “AMF”). Market players can also request an optional license as digital assets services provider (*prestataire de services sur actifs numériques*) (“PSAN”) with less requirements as compared to a license for an investment services provider under the MiFID II regime. This license enables PSANs to carry out financial canvassing (*démarchage financier*) in relation to services on digital assets (article L. 341-10, 6° of the French Monetary and Financial Code). It also enables the promotion of such services to French consumers by electronic means with a view to inviting a person, by means of a response or contact form, to request or provide additional information, or to establish a relationship with the advertiser, in order to obtain his or her agreement to carry out a transaction on such digital assets (article L. 222-16-1, a of the French Consumer Code) and to conduct sponsorship or patronage campaigns promoting such assets targeting French consumers (article L. 222-16-2, 2° of the French Consumer Code), these activities being otherwise forbidden without obtaining such a license.

Activities on NFTs may also be covered by the regime of crowdfunding services providers as laid down by the recent Regulation (EU) 2020/1503 of 7 October 2020 on European crowdfunding services providers and articles L. 547-1 *et seq.* and L. 548-1 *et seq.* of the French Monetary and Financial Code.

In addition, persons conducting these activities may also be covered by the regime of intermediation in various goods (*intermédiation en biens divers*), which is in particular applicable to any person who offers one or more clients or potential clients the opportunity to acquire rights in one or more assets by promoting the possibility of a direct or indirect financial return or similar economic effect (article L. 551-1, II of the French Monetary and Financial Code). Should the NFT offer a financial return or a similar economic effect, the intermediation in various goods (*intermédiation en biens divers*) regime may apply. This triggers several pre-requisite requirements (such as being a legal person with a determined share capital, having a procedure to determine the profile of the target investors) and obligations (such as providing to investors clear, correct and non-misleading information in any marketing material information) to be complied with.

Finally, where none of above regimes apply to a specific issue of NFTs, the specific subsidiary regime relating to the issue of tokens may apply (articles L. 552-1 *et seq.* of the French Monetary and Financial Code). This optional regime provides that issuers can request from the AMF, on a voluntary basis, an authorisation (*visa*) to issue tokens. In such a case, the issuer must in particular provide the AMF with an information document relating to the implementation of procedures to comply with applicable regulations regarding AML/CFT and the monitoring and safeguarding of the issue proceeds. Like the regime on digital assets, the authorisation (*visa*) of the AMF is necessary for the issuer to carry out financial canvassing of tokens issuances (article L. 341-10, 6° of the French Monetary and Financial Code), to promote the issues of tokens by electronic means or to conduct sponsorship or patronage of tokens issues targeting French consumers (articles L. 222-16-1, b and L. 222-16-2, 3° of the French Consumer Code).

These abovementioned French law definitions and regimes are very likely to evolve by way of general EU legislation on cryptoassets (*e.g.* the upcoming EU regulation on Markets in Crypto assets (“MiCA Regulation”)) or specific regulations, more particularly on NFTs. For instance, an amendment to the draft finance bill for 2022 included a definition of NFTs but was ultimately rejected by the French Parliament. In addition, following the collapse of FTX, the higher chamber of the French Parliament, the Senate (*Sénat*), recently adopted an amendment to a bill in order to make the optional PSAN license mandatory for any person not already registered with the AMF, as described above, as of 1 October 2023 and willing to provide any service on digital asset listed in article L. 54-10-2 of the French Monetary and Financial Code. Such amendment by the Senate, if confirmed by the French lower chamber of the Parliament, the National Assembly (*Assemblée Nationale*), would become effective as from 1 October 2023.

## What are the main implications from a data privacy and cybersecurity perspective?

Each NFT contains a unique identification and metadata that makes it a one-of-a-kind asset. Due to this very-immutable nature, the “minting” process of NFTs may involve the processing of personal data, whether pseudonymized or not. Consequently, French and EU data protection regulations such as the EU General Data Protection Regulation (“GDPR”) may apply to NFTs to the extent where personal data are processed by a data processor or controller established in the EU or in France or where the NFT is offered to data subjects located in the EU or France.

Neither the European Data Protection Board nor the French data protection authority (the “CNIL”) has yet made any reference to privacy implications in relation to NFTs.

The obvious reason would be that the link between data protection regulations and NFTs is a challenging issue. Indeed, they appear to have slightly different principles and goals.

In particular, privacy regulations assume that data controllers and data processors are identified before any data processing, which contrasts with the multiple-players and decentralisation nature of the blockchain technology. It may then be unclear which NFT stakeholder could be qualified as a data controller, as a data processor or as a third party.

Privacy regulations also impose obligations to data controllers and processors that may be difficult to comply with in the context of NFTs. In particular, although blockchain technology involves keeping permanently and unalterably track of all its users’ information, data controller and processor must grant to NFT users a right to correct and to erase their personal data and must limit the data retention period. NFT stakeholders must also ensure the confidentiality of personal data despite the public accessibility of the blockchain.

NFT stakeholders must implement appropriate security measures notably to prevent any cybercrime such as fraud or phishing attacks, which are very common considering the high value and popularity of NFTs.

Compliance with those specific requirements, whose breach may lead to high fines, must seriously be taken into account and properly addressed by the NFTs stakeholders.

## How is the NFT market expected to develop, and what are the opportunities?

NFTs have grown and will continue to grow in the art, music, luxury and fashion, alcoholic beverages, gaming and sport sectors. We see other players surfacing in the French NFT industry such as car manufacturers. Renault, for example, launched its GenR5 NFT collection in memory of its famous Renault5 and in preparation of the launch of its new Renault5. The increasing use of the metaverse will also surely contribute to the growth and democratization of NFTs amongst the French population.

Taking notably into consideration the success stories in the NFT industry of the French companies Ledger, Sorare and Arianee, the French government indicated that it will support the development of NFTs in France. As such, at the opening of the NFT Factory in October 2022, the French Deputy Minister for the Digital Transition, Jean-Noël Barrot, even indicated the following: “With global players in culture, video games and the luxury industry, France has all the assets to become a European and global platform for NFT. We need to support this movement with the help of public money, within the framework of France 2030”. We can therefore expect further development and initiatives in the French market, including from a legal perspective.

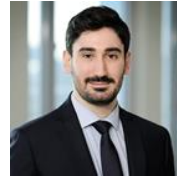
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# Germany

## What are the recent trends in the NFT market?

The hype for non-fungible tokens (NFTs) was extreme at the beginning of 2022, but by the end of the year the level of excitement had settled down a bit. Trading volumes went down just as steeply as they had gone up previously. The market seems to be oversaturated and profit expectations from NFT trading have been downgraded. However, this does not mean that the NFT sector will not continue to develop and create new areas of application. Projects like the Metaverse or tokenized game worlds (GameFi deriving from “Games” and “DeFi”) seem to be lucrative intersections. Similarly, NFTs offer tremendous potential in interaction with real-world objects. Companies can use NFTs to authenticate their products, for example, in order to be able to guarantee the originality of their products to their customers. Through NFTs, both the companies and the end users can trace back the entire supply chain of the manufacturing process to the sourcing of materials, which can even help in proving compliance with the German Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*). Through NFTs, companies can therefore both effectively combat the successful distribution of counterfeits and increase their customers' confidence in the quality of their goods. Luxury fashion companies, as well as companies in the transportation and logistics industry, are already working on the practical implementation of these scenarios.

So even if NFTs might fail to deliver on the promise as a value asset, they still offer multiple other opportunities – both in the digital and real world. The potential is there and the technology will likely continue to gain even more relevance in the coming years.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

At present, German law does not provide for any specific laws regulating business activities in the NFT area.

However, business activities in the NFT area will currently most likely be subject to general German civil law principles. Particularly, in a B2C context, specific consumer protection laws will most likely apply. For instance, NFTs will most likely be qualified as digital content within the meaning of Sec. 327 para. 1 of the German Civil Code (“BGB”). Therefore, in cases where NFTs are sold to consumers by companies, the respective contract will most likely be subject to the provisions set out in Sec. 327 et seq. BGB. These provisions are mandatory and provide, amongst others, for specific warranty obligations of companies and other specific consumer rights. Further, in cases where NFTs are sold online to consumers, specific ecommerce laws will most likely apply. These are also mandatory and provide, amongst others, for information obligations of companies.

Furthermore, it cannot be excluded that NFTs (depending on their functionality) are subject to financial law requirements. Companies should therefore check on a case-by-case basis whether the NFTs they offer are subject to financial regulations.

## What are the main implications from an IP perspective?

From a Copyright perspective, it is unlikely that an NFT, being a computer-generated string of data, will be considered a personal intellectual creation and will therefore not be subject to copyright protection. However, the (digital) work linked to it may be. In this regard, it is important to differentiate between the digital content on the one hand and the digital certificate as such on the other hand, meaning NFTs authenticate (digital) items/works, but have to be distinguished from them.

Buying the NFT will lead to “ownership” (in Germany, the German Civil Code (“BGB”) only provides for ownership in physical objects). However, rights of use of the copyrighted work, such as the right of reproduction or distribution or the right to exhibit the work or make it publicly accessible, will, as a general rule under German Copyright law, still remain with the author. Hence, there is an interest for clear agreements determining which rights of use are acquired by the buyer of an NFT.

In the analogue world, German copyright law provides for the author's participation in revenues generated by resales and/or an appropriate remuneration for proceeds and benefits deriving from the use of the work only in certain circumstances. Through the use of NFTs and blockchain technology, author participation can be ensured for digital works, whereby the distribution of these participations to the author could be made automatically due to the programming of the NFT.

From a trademark perspective, companies should consider whether their trademark portfolios and/or prior rights and delimitation agreements, as well as agreements on rights of use, should be adjusted.

In particular, if companies wish to actively use NFTs for their business it seems advisable to extend the trademark portfolio to include specified “downloadable virtual goods” and related services, for instance. This could also be of importance for a defence strategy if third parties use trademarks in the metaverse for NFTs representing digital equivalents of the companies' goods. The fact that NFTs can, in principle, infringe upon trademarks is also illustrated by a recent ruling of the Court of Rome (Tribunale di Roma, decision of 20 July 2022, ref. 32072/2022). On a European level, the decision is the first of its kind regarding trademark infringements through NFTs. German courts have not yet had the opportunity to discuss this issue. However, due to the steadily growing importance of NFTs, this will only be a matter of time. The update of the Nice classes, which came into force on 1 January 2023, explicitly includes the term NFTs in class 9 (*downloadable digital files authenticated by non-fungible tokens [NFTs]*) and thus provides for some more legal certainty. If trademarks are going to be used in connection with NFTs, it is therefore advisable to also register them in class 9; in addition to other classes which might be of interest. Otherwise, there is a risk that the trademark might not enjoy sufficient protection in one of its essential fields of application. In particular, this applies to trademarks that are not well-known, since the scope of protection of well-known trademarks is already much broader.

## What are the main implications from a finance perspective?

The main questions from a finance and regulatory perspective in relation to NFTs are around authorization and prospectus obligations. German regulators, i.e. the Federal Financial Supervisory Authority (“BaFin”), have, to date, in particular issued statements on initial coin offerings (ICO). In August 2022, in a Q&A, BaFin clarified in relation to NFTs that in its supervisory practice there is no special treatment compared to its existing administrative practice regarding fungible cryptographic tokens. In particular, interpretative guidance and guidance notices published by BaFin in this regard (such as the guidance notice on ICOs) can also be used for classification of NFTs under regulatory law / practice.

Additionally, with its Market in Crypto Assets Regulation (MiCA) – that will directly apply in Germany – European legislators originally intended to also set out a legal framework for NFTs. However, MiCA's final wording does not cover NFTs as non-fungible tokens are excluded from the scope of application. Nevertheless, in certain cases, MiCA will apply to NFTs, in particular when issued in a “large series or collection” (cf. recital 6c MiCA). MiCA has not provided a definition of what “large series” or “collections” means. Therefore, it remains to be seen how regulatory bodies and authorities will deal with this issue.

Hence, as there is no specific law governing legal qualification of NFTs, general rules apply. Depending on the specific structure, prospectus and/or authorization requirements can be triggered when conducting specific business with NFTs.

One main issue is whether a prospectus obligation under Regulation (EU) 2017/1129 is triggered when initially offering NFTs to the public. A prospectus obligation only applies if NFTs are to be qualified as securities under Art. 2 lit. a Regulation (EU) 2017/1129 in connection with Art. 4 para. 1 No. 44 Directive (EU) 2014/65 (MiFID II). In order to fall within the definition of securities, the decisive question is whether NFTs can be classified as being tradeable. In many cases, it is possible to argue that fungibility is a decisive feature for an asset to qualify as being tradeable. However, since NFTs can be structured in many different ways, a case-by-case analysis is required to assess whether a specific NFT can be traded causing prospectus obligations to be triggered.

In addition, NFTs might serve investment purposes and qualify as investment assets under the Capital Investment Act ("VermAnlG"). However, if a specific NFT is qualified as a security within the definition as set out above, the VermAnlG does not apply because investment assets within the meaning of the VermAnlG and securities exclude one another. If an NFT falls under the VermAnlG's scope of application, prospectus obligations may apply.

Additionally, authorization obligations under the German Banking Act ("KWG") might be triggered. In 2018, the German legislator implemented "cryptoasset" as a category of financial instrument into the German Banking Act (KWG), cf. Section 1 para. 11 sent. 1 no. 10 KWG. Under German regulatory law, cryptoassets, as set out in the KWG, are defined as a digital representation of value which has neither been issued nor guaranteed by a central bank or public body; it does not have the legal status of currency or money but, on the basis of an agreement or actual practice, is accepted by natural or legal persons as a means of exchange or payment or serves investment purposes; it can be transferred, stored and traded by electronic means. By adding "serves investment purposes" to the definition, the German legislator gold-plated European law. However, against this backdrop, depending on the specific structure, NFTs might meet the criteria as set out above and hence be classified as a financial instrument under German regulatory law.

Therefore, if NFTs fall under the definition of cryptoassets under the KWG, authorization requirements are triggered. In particular, investment broking (*Anlagevermittlung*), proprietary trading (*Eigenhandel*), and custody business (*Verwahrungsgeschäft*) are worth mentioning in this context.

## What are the main implications from a data privacy and cybersecurity perspective?

According to the prevailing legal opinion, the public keys and transaction data generated in the process of mining and trading NFTs on a blockchain are considered "personal data" within the meaning of EU and German data protection laws, in particular the General Data Protection Regulation ("GDPR"). This is due to the broad definition of personal data under the GDPR, which also covers any information relating to an identified or identifiable natural person. Personal data of participants engaging in an NFT transaction process are considered pseudonymized data (instead of effectively anonymized data), as on most blockchains it remains possible to re-identify the individual.

As a result, companies involved in NFT transactions, such as operators of NFT marketplaces, must usually comply with the comprehensive obligations and general data protection principles under the GDPR. This includes, for example, the obligation to ensure that the processing of NFT transaction data is covered by a sufficient legal basis, compliance with transparency obligations, or responding to data subject requests. Where NFTs are based on blockchain technology, there remain legal challenges with regard to compliance with the GDPR's "right to be forgotten"/ right to erasure, given that the blockchain is a generally immutable ledger for the recording of transactions.

Companies involved in the creation of NFTs and/or NFT transactions should consider data privacy requirements from the outset according to the principle of privacy by design, to ensure compliance with GDPR requirements.

As any other digital assets, NFTs are exposed to cybersecurity risks, including theft of NFTs by threat actors e.g. through phishing, scamming or man-in-the-middle attacks. Companies therefore also need to identify and implement appropriate technical and organisational means to prevent such types of attacks and vulnerabilities in their systems in order to avoid damage to their business and to their users.

## How is the NFT market expected to develop, and what are the opportunities?

The German NFT market is expected to grow and become more diverse in the coming years.

Even though it is still at an early stage of development, several large companies have already announced their intention to become active in the NFT sector in the future. Notably, the interest of companies in NFTs is no longer restricted to the more common use-cases like digital art and collectibles. For instance, supply-chain solutions are also increasingly evaluated. In particular, against the backdrop of an increasing demand from consumers for ESG credentials of goods and the entry into force of new supply-chain monitoring obligations for companies with the German supply chain act, companies are increasingly considering the use of non-fungible tokens as a way to ensure traceability in their supply chains. In addition, companies can use NFTs to verify their products in order to be able to guarantee the authenticity of their products to their customers. This allows companies to both effectively combat the successful distribution of counterfeits and increase their customers' confidence in the quality of their goods.

From a regulatory point of view, companies should expect that the German legislator will place a stronger focus on NFTs in the current legislative period. According to the Federal Government's coalition agreement from 2021, Germany is to be developed into a leading location for FinTechs, platforms and similar companies within Europe. In particular, the German government intends to create a new regulatory legal framework for the crypto industry. However, at the date of this publication no specific legislative projects have been initiated.

Companies should therefore keep an eye on future regulatory developments and evaluate the business opportunities arising from the NFT technology.

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# Hong Kong

## What are the recent trends in the NFT market?

NFTs in Hong Kong pioneered with art. Auction houses have begun to educate, exhibit and sell NFTs. Sold at around US\$550,000 in October 2021, a 91-second film footage featuring behind-the-scenes of the first day of shooting *In the Mood for Love* was the first Asian film NFT to be offered by an international auction house. Beyond art, clubs, companies and individuals are creating content and selling them on NFT platforms, ranging from memes to urban murals.

While Mainland China may take a more restrictive view against NFTs, Hong Kong is relatively unrestricted, causing an influx of content from Mainland China in addition to local NFTs in the Hong Kong market. Many new NFT start-ups sprung in Hong Kong in a short span of several months, including Lucky Kittens, Going Ape, HolyShxt!!, and those created by Hong Kong artists such as Edison Chen and Shawn Yue Man-Lok. The NFT market is regarded as the hottest and most chic platform to showcase creators' work, and more practically, the convenient channel to realize value of the same. A recent report revealed that the adoption rate of NFTs in Hong Kong is expected to double to 21.1% in the near future, thus we see a huge potential in the Hong Kong NFT market.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

In Hong Kong, there are currently no laws or regulations which specifically regulate NFTs.

The Securities and Futures Commission ("SFC"), which is the regulator of the securities and futures markets in Hong Kong, has indicated that "virtual assets", including cryptocurrencies, will only be regulated under the Securities and Futures Ordinance if they fall under the definition of "securities". Whilst the Hong Kong Monetary Authority ("HKMA"), which is the regulator of the banking sector in Hong Kong, has indicated that Bitcoin is a virtual commodity, and hence not "securities", it is less clear how NFTs would be characterized. Whilst NFT is a form of virtual asset, it is non-fungible and is not a currency. Whether NFT falls under the definition of "securities" depends on the nature of the underlying assets to which it is linked. The SFC has issued a statement in June 2022 to confirm that in general, NFTs which are intended to represent a unique copy of an underlying asset like a digital image, artwork, music or video, and investments in digital representations of a collectible would not fall within the scope of SFC regulations. However, those which are fractionalized and structured in a way similar to "securities" or interest in a "collective investment scheme" would be regulated.

## What are the main implications from an IP perspective?

Having paid a substantial price for a valuable NFT, a buyer may assume that it will obtain ownership of and copyright in the underlying work. However, this is generally not the case. Copyright remains with the author or other owner and the buyer only obtains a right to use the work for certain defined purposes (unless the owner executes an assignment in the buyer's favor).

If buyers' rights of use are not expressly defined, a licence to use will likely be implied but the scope will depend on the circumstances and the interpretation of the contract. To avoid ambiguity, parties should clearly set out the licence terms when transferring NFTs.

From a trademark protection perspective, brand owners have started proactively filing trade mark applications in Classes 9, 35, 36, 41 and/or 42 to protect their digital and NFT-related goods and services. The Hong Kong Trade Marks Registry has recently accepted trade mark applications for marks covering NFT-related goods and services as well as marks incorporating the word "NFT". Here are two notable examples:

- "LEAGUE OF LEGENDS" by the video game developer Riot Games in Class 9 covering "digital materials, namely, non-fungible tokens..." and Class 42 for "software as a service (SAAS) and platform as a service (PAAS) featuring...non-fungible tokens..." (trade mark registration no. 305586544).
- "Elite Apes NFT" by the popular NFT creator Bored Ape Yacht Club Limited in Classes 35 and 41 covering various services relating to digital art in the nature of non-fungible tokens (trade mark registration no. 305734792).

## What are the main implications from a finance perspective?

The Financial Services and the Treasury Bureau ("FSTB") has published a proposal on the new licensing regime for Virtual Asset Service Providers ("VASPs") on May 21, 2021. Under the new regime, all VASPs within the regulatory perimeter of SFC will have to be licensed regardless of whether they are trading security or non-security virtual assets under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615) ("AMLO").

However, the new proposal expressly provides that the virtual assets do not involve certain closed-loop, limited purpose items that are non-transferable, non-exchangeable and non-fungible such as air miles, credit card rewards, gift card, customer loyalty programmes and gaming coins. While it appears that NFTs will fall outside the definition of "virtual assets", given that SFC is still empowered to prescribe characteristics that constitute virtual assets as authorised under AMLO, it is still uncertain if there would be any changes as to the definition of "virtual assets". The exact nature and characteristic of "virtual assets" is still subject to review and this would affect the licensing requirements of NFTs.

## What are the main implications from a data privacy and cybersecurity perspective?

Most data privacy laws, including Hong Kong's Personal Data (Privacy) Ordinance ("PDPO"), are "technology neutral", such that they apply in any context where personal data is processed.

By combining transaction records on blockchain ledgers (which are publicly visible) and information from other sources, such data could constitute personal data within the meaning of the PDPO and the rights and obligations under PDPO could apply. The PDPO, like many other data privacy laws, frames its obligations in the context of the activities of a "data controller" or, in the case of the PDPO, a "data user" (which has the equivalent meaning of a data controller). However, given the decentralized nature of the blockchain, the identification of specific data controllers (and the enforcement of their associated responsibilities under the PDPO) becomes more impractical.

Another particular area of the PDPO that is relevant is in relation to the exercise of data subject rights, whereby the PDPO provides individuals with the right to correct their personal data. However, as transaction records (including public keys and transaction details) on a blockchain ledger are permanent logged and are unalterable, the inherent immutability of transactions on the blockchain ledger presents a challenge for the exercise of this right of correction under the PDPO.

## How is the NFT market expected to develop, and what are the opportunities?

Hong Kong artists experimenting NFTs are liking it – artists are able to set their own prices and engage directly with their fans. One report found that over 10% of people in Hong Kong are planning to own NFTs in the near future. One will see NFT seminars or advertisements on the streets every now and then. The popularity is partially driven by the status of Hong Kong as a center for financial innovation, an emerging hub for arts and cultural exchanges, and partially the fact we are sitting right next to Mainland China which is still currently conservative towards NFTs.

In addition to art, NFTs are encroaching into various fields such as sports, fashion and gaming. A set of generative art collectibles that includes 8,888 special soccer players' NFTs were launched in early 2022. A strategic football management simulation GameFi is being developed. More and more NFT trading platforms emerge in Hong Kong.

As the market continues to develop, significant opportunities will arise for creators, users and NFT holders, in forms of changing verification modes, expanding business scope and shifting ways of communication to become more tech-savvy.

On the other hand, there are obvious challenges and risks from the sky-rocketing popularity of NFTs. NFTs have to navigate through preferred aesthetics or traditional ways of (cryptocurrency) valuation. For cross border transactions, there are applicable legal risks in different countries or regions with varying legal regimes. Meanwhile in Hong Kong, in view of the current lack of regulation on NFTs, like any new technology, NFTs are expected to undergo pains such as high costs of trading and regulatory uncertainty. However, once NFTs gain enough attention and interest, it is likely that NFTs will develop into widely accepted virtual certificates of authenticity, transacted in digital marketplaces like commonplace.

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# Indonesia

## What are the recent trends in the NFT market?

Creators in Indonesia are following the non-fungible token (NFT) trend. The popularity of NFT was at an all-time high, especially after the success of *Ghozali Everyday* by NFT creator Sultan Gustaf Al Ghozali.[1] Google Trends in Indonesia for the search term "NFT" itself was at its peak when *Ghozali Everyday* news emerged, resulting in many Indonesians taking advantage of the momentum and selling their own NFT. While this phenomenon indicates a great interest in NFT, it also indicates the need for clear regulation and more widespread education on NFT.

Acknowledgement of NFT is also becoming more evident with Indonesia-based NFT marketplaces such as TokoMall and Paras, adding that many Indonesian creators and public figures have already started selling or buying artworks through NFT.

Forbes stated that the Indonesian tech sector had discovered a new gold rush. This is because projects such as Karafuru, MindBlowon and Superlative Secret Society had recently generated funding with successful non-fungible token mints and communities of NFT had grown in social media.[2]

[1] [Detikinet: NFT increasingly famous due to Ghozali, public needs education](#)

[2] [Forbes: The Indonesian NFT Gold Rush](#)

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

Indonesian law is generally silent on NFT. However, potential investors should be aware of the requirements to conduct business in the NFT marketplace, which is that the marketplace shall be registered with the Ministry of Communication and Information ("MOCI"). Otherwise, the platform will be banned from operating in Indonesia. Currently, MOCI and the Commodity Futures Trading Regulatory Agency of the Ministry of Trade (*Badan Pengawas Perdagangan Berjangka Komoditi*, "Bappebti") are the authorities overseeing the NFT business in Indonesia.

On the other hand, with respect to cryptocurrency, there are two opposing positions:

1. the Indonesian central bank, Bank Indonesia, through Regulation No. 22/23/PBI/2020 provided that it would later regulate and/or prohibit the use of virtual currency. Previously, Bank Indonesia issued Regulation No. PBI 18/40/PBI/2016 and Regulation No. PBI 19/12/PBI/2017 which prohibit the use of virtual currency; and
2. on the other hand, the Ministry of Trade through Bappebti allows and promotes cryptoassets trading through Minister of Trade Regulation No. 99 of 2018 on the General Policies on the Futures Trading of Crypto Assets. Bappebti currently recognises 229 types of cryptoassets as future trading commodities.

The Development and Enhancement of Financial Sector Bill (*Rancangan Undang-Undang tentang Pengembangan dan Penguatan Sektor Keuangan*) which is styled as an omnibus law and currently being discussed in the People's Representative Council of the Republic of Indonesia ("DPR") is aimed to address the issues and sentiment towards cryptocurrency.

Additionally, blockchain technology developers and NFT platforms which serve as Electronic System Providers ("ESP") are not subjected to restrictions of foreign ownership requirements.

## What are the main implications from an IP perspective?

Artworks are protected with copyrights, and in Indonesia copyrights are regulated under Law No. 28 of 2014 ("Copyrights Law"). According to the Copyrights Law, a copyright consists of:

- moral rights of the creator, which will stay with the creator when the ownership of the artwork has been transferred; and
- economic rights attached to the artwork, which may be transferred outright or in the form of royalty depending on the contract between the transferor and transferee.

As NFTs are currently traded using a smart contract, it is important to ensure the provisions regulating the economic rights of the artwork clearly capture the parties' intention (i.e., what license is granted to the NFT acquirer), to avoid future disputes.

The Directorate of Intellectual Property of Ministry of Law and Human Rights stated that they do not see any problem related to enforcement of the Copyrights Law associated to NFT as the current IP regulatory framework should be sufficient to protect the copyright owners and/or holders.

Under the auspices of the Copyrights Law, one would be at a risk of getting sued and/or prosecution if making an NFT out of someone else's artwork without the author's consent.

## What are the main implications from a finance perspective?

While Bank Indonesia and the Ministry of Trade are having contradicting stances over crypto trading, the Directorate General of Taxation under the Ministry of Finance is gearing up to start taxing trading of cryptoassets.

Additionally, as NFT are often purchased in cryptocurrency, it should be noted that using cryptocurrencies to make purchases is illegal in Indonesia. This is due to the fact that the Indonesian Rupiah is the only acceptable and lawful currency to make transactions in the territory of Indonesia.

## What are the main implications from a data privacy and cybersecurity perspective?

On 18 November 2022, President Joko Widodo ratified Law Number 27/2022 regarding Personal Data Protection ("PDP Law"). While this law serves as an umbrella regulation for personal data protection, PDP Law does not instantly invalidate the previous relevant regulations. Nonetheless, PDP Law prevails in case of contradiction with the previous relevant regulations.

Under PDP Law, the personal data controller must prevent leakage of personal data by protecting the security of personal data from access, disclosure, unauthorized alteration, misuse, destruction and loss of personal data in processing personal data.



While Indonesia has introduced the concept of blockchain in the financial services industry regulations, there is currently no comprehensive regulatory framework regarding it. NFT platforms are not specifically regulated either, but they are subject to the provisions on ESP. Furthermore, although Indonesia is yet to establish a data privacy law, MOCI has regulated personal data protection in electronic system. As ESP, NFT platforms are obliged to be registered with MOCI, where one of the requirements during registration is that the ESP must ensure its users' information security and personal data protection. The ways to do this are by ensuring that every time personal data is gathered, processed, stored, distributed, or banished, it is based on the consent of the user. As such, NFT platforms also must establish their own privacy policy.

Additionally, a topical problem that may arise is on the verification of identity and source of funds, as corruption is still at large in Indonesia. There is a concern that the funds used to make the cryptocurrency purchase may be criminal proceeds as there is very minimum personal data and verification needed to start trading.

## How is the NFT market expected to develop, and what are the opportunities?

NFTs are becoming increasingly popular among affluent millennials of Indonesia. Although there are more financial influencers raising awareness about it, it is still unreachable for the majority of the population due to the language and financial barriers. If the government's efforts succeed in increasing the size of the middle class in Indonesia and making Indonesia the world's fourth biggest economy,[3] there will be more affluent members of the population, which should be directly proportional with the potential for NFT to develop.

With global NFT marketplaces such as OpenSea processing a massive number of transaction from Indonesia compared to other countries in South East Asia,[4] it is not surprising to see the growth in the number of Indonesian platforms that compete in the NFT market. Tokocrypto – an Indonesian cryptocurrency marketplace – recently launched AZNVerse, an NFT marketplace[5] that intends to promote the Asian culture.[6] Indonesia's NFT market even extends to offline channels, with an exhibition that will include NFT auctions set to take place mid-April 2022.[7] Recently, a musician and activist named Melanie Subono released a song as an NFT[8] and it is likely that more songs will be released in this way (for example, a new Indonesian NFT platform named Metaroid has just been launched, which aims to sell NFTs in the forms of music, game, abstract art, and other visual art).[9]

[3] [Cabinet Secretariat of the Republic of Indonesia: Indonesia will be world's 4th largest economy by 2045, President Jokowi says](#)

[4] [Katadata Media: Thanks to NFT, the number of crypto investors in RI is predicted to skyrocket this year](#)

[5] [Liputan6.com: Tokocrypto becomes official partner for AZNVerse NFT project](#)

[6] Investor.id: Get to know AZNVerse, the first unique NFT project from Tokocrypto that highlights Asian diversity

[7] [Hybrid.co.id: Indo NFT Festiverse exhibition will be held in Jogja, bringing together NFT creators and art collectors](#)

[8] [Koran Jakarta: Be the first, release new songs through NFTs](#)

[9] [Sindonews.com: Metaroid ready to bring the works of Indonesian musicians and artists to become NFT](#)

## Key contacts



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## What are the recent trends in the NFT market?

The non-fungible tokens (NFTs) business is literally exploding all over the world, including in Italy. Indeed, NFTs have been catching the attention of technology buyers, investors, high-profile artists, renowned celebrities, sport teams and, most of all, fashion brands. Gucci, Dolce & Gabbana, Prada are just a few examples of Italian luxury companies that recently entered this market. And many others are ready to join. But this is not just a company business. Many artists, musicians and sport stars such as Zlatan Ibrahimović, Morgan and Achille Lauro have been involved with NFT digital creations of their own. Recent NFT trends include generative artwork, fractionalizing valuable collectibles, and participation into established communities.

A non-fungible token is a special, one-of-a-kind cryptoasset whose authenticity has been registered on a blockchain ledger that tracks the NFT's ownership and transaction history. Each NFT is certified unique. This is its main peculiarity. Indeed, NFTs use blockchain technology but are different from other traditional cryptocurrencies. The latter are fungible tokens, which means each cryptocurrency unit is equivalent to another, so one can be exchanged with another. However, NFTs cannot be exchanged for another asset, but they can be sold and transferred.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

From an Italian regulatory perspective, there is neither a specific legal framework regulating NFTs nor a definition of NFTs.

However, Italy has developed a dedicated legal framework applicable to virtual currencies in general in terms of anti-money laundering obligations, registration and reporting requirements. In this context, virtual currency is defined as "*a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency, is used as a means of exchange for the purchase of goods and services or for investment purposes, and which can be transferred, stored and traded electronically*".

## What are the main implications from an IP perspective?

To better understand the IP implications regarding NFTs, we need to remember that NFTs can be divided into two components:

1. the token – i.e. the digital certificate of ownership as recorded on the blockchain; and
2. the underlying content – which may or may not be stored on the blockchain. This could be an asset eligible of IP protection, such as a work of art, a design, a trademark, and so on.

This duality is the basis of the main discussions on the creation, purchase, and resale of NFTs under an IP perspective.

The ownership of the token does not imply also the ownership of the underlying content. This principle is relevant not only for the chain of purchaser(s) of the NFTs, but also for the entity creating the same.

Italian copyright law reserves to the rightowner the exclusive right to commercially exploit a work of art, granting to the same the right to copy, distribute, modify, reproduce, make available to the public such work, and many other rights. Similarly, tokenizing an asset that includes a third-party trademark is forbidden without an authorization by the trademark owner. To tokenize an asset, an agreement therefore needs to be reached with the holder of the rights on the underlying content. A recent decision of the Court of Rome – the first in Italy concerning NFTs – confirmed this. It stated that tokenizing the image of an athlete showing the logo of a famous football club amounts to an infringement, even if the athlete embodied in the same played in such team and granted his authorization for the tokenization of the image.

With regard to the purchase of NFTs, this does not grant any right on the underlying content, unless otherwise agreed by the parties. To refrain from legal liabilities, purchasers should be aware of the conditions or licence terms provided in the smart contract regulating the sale of an NFT. Usually, the owners of the rights on the underlying contents retain all IP rights on the same, while granting to the NFT purchaser a limited, non-exclusive, transferable license on the content, for example for resale or to display it for personal use.

Considering that, under Italian law, the evidence of the transfer has to be given in writing, smart contracts are key.

Finally, brand owners have started to show an increasing interest in the registration of trademarks covering virtual goods, including NFTs. Indeed, by filing trademarks in connection to digital goods, companies would assure trademark protection also in the "meta world". And this facilitates the enforcing strategies, whose effectiveness cannot be taken for granted without a tailored registration. So far, the Italian trademark office has not given guidance on filing. Yet, most companies are filing applications in classes 9, 41 and 42 to claim protection for NFTs and related services. The judgment of the Court of Rome mentioned above seemed to praise this strategy and, after pointing out the well-known character of the football club's trademarks, it highlighted that their registration in class 9 (in particular with reference to downloadable electronic publications), could cause confusion on the market, and ground a claim for unfair competition and dilution. Thus, it granted the club an injunction against the company that tokenized and sold the NFTs.

## What are the main implications from a finance perspective?

As a general note, digital assets that are (a) unique, rather than interchangeable, and (b) in practice used as collectibles, rather than as payment or investment instruments, can be regarded as NFTs. Such assets are generally not considered to be virtual assets and, at first glance, do not appear to fall within the mentioned definition of virtual currencies set out under Italian law. However, as also indicated by the Financial Action Task Force (FATF), a case by case assessment of the nature of the assets may be needed regardless of the definition or terminology used to refer to the relevant assets.

This means that even if NFTs are not specifically deemed to fall within the definition of virtual currencies set out under Italian law, they can qualify as such and the issuers or providers may become subject to relevant anti-money laundering, registration and reporting obligations if the NFTs meet the relevant conditions set out under the definition, are to be used for payment or investment purposes in practice and can be transferred, stored and traded electronically. According to the approach of the Italian financial market authority CONSOB, NFTs might also be considered as financial products and subject to the Italian Consolidated Financial Act, if they meet the following conditions:

- i. a capital disbursement;
- ii. the expectation of a financial gain; and
- iii. the assumption of a risk directly linked and correlated to the capital disbursement.

Moreover, the EU's draft [Regulation on Markets in Cryptoassets](#) (MiCA) does not specifically regulate NFTs. It only provides for an exemption according

to which issuers of “*crypto-assets that are unique and non-fungible*” do not need to publish or register a whitepaper for them.

Given the rapid growth of NFTs in the EU market, it may make sense to envisage the adoption of more tailored rules on NFTs both at an EU and domestic legislation level.

## What are the main implications from a data privacy and cybersecurity perspective?

The potential interplay of Italian data protection legislation with NFTs, including EU Regulation 679/16 (“GDPR”) as well as Legislative Decree 196/2003 (“Italian Data Protection Code”), raises a number of interesting questions, which to date have not been entirely explored.

In principle, the sale of NFTs shall not entail the disclosure or exchange of relevant personal data. However, transaction history on a blockchain is publicly accessible to all users. Although the real life identity of participants is not disclosed, there might be information which, regardless of it being encrypted or hashed, qualifies as personal data. This would happen when personal data is not entirely anonymised, but only pseudonymised. By matching or combining the public key of the wallet making the transaction with other available information, it might be possible to trace back to the actual individual. In addition, the list of transactions, or the domain information sometimes associated with the wallet, may also reveal the individual’s identity. Also, depending on its nature, the digital asset associated with the NFT might hold additional personal data (including of third parties).

The decentralised nature of most blockchain systems, and the fact that distributed ledger technology involves by definition multiple parties, makes it difficult to correctly identify data protection roles and, as a consequence, allocate and exercise GDPR-liabilities appropriately. While the qualification of data controllers or processors is carried out on the basis of a factual approach, there might be different outcomes depending on the way the blockchain is actually operated.

In addition, one of the core features of NFTs – immutability – raises concerns with regard to the rights accorded to data subjects under the GDPR and the Italian Data Protection Code, including the right to correct or erase their personal data. In fact, the information on a blockchain shall be permanently logged and not alterable in order to preserve the authenticity and traceability of the transaction history, including the parties of those transactions. This might make the actual exercise of data protection rights challenging.

Also, a number of scams and breaches recently reported by some NFTs marketplaces and users demonstrate that cybersecurity risks associated with NFTs are real. In order to address such issues, attention to data protection by design and by default, and adoption of the most adequate security standards, both in the deployment of the blockchain and the creation of the NFT itself, as well as the adoption of mindful practices by users accessing their crypto-wallets, shall be paramount.

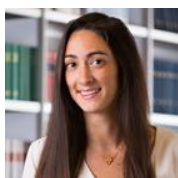
## How is the NFT market expected to develop, and what are the opportunities?

With the increasing interest for the Metaverse, the hype around NFTs is booming. As the Metaverse is an embodied virtual reality where businesses and individuals can experience a living virtual world with an independent economy, cryptocurrencies (including NFTs) could be used to acquire goods, such as digital clothing to dress-up the avatars, or design and furnish a house or buy pieces of arts.

Yet, the future of NTFs is uncertain. While there are already several promising applications in many industries such as luxury, sport and gaming, some may argue that this is just a bubble that will not last.

The doubts and questions are still many, and with a lack of certainty, the most conservative and risk adverse may be reluctant to invest. For this reason, companies should expect that the Italian legislator will soon focus its attention on these assets, providing guidance from a regulatory, IP, advertising, consumer law and privacy perspective.

## Key contacts



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# Japan

## What are the recent trends in the NFT market?

NFTs present a new opportunity for asset creation, revenue, and marketing in an entirely digital space, and the Japanese market presents several indications of growth. The NFT market was worth about JPY20 billion (approximately US\$165 million) in 2019, and grew to about JPY30 billion (approximately US\$248 million) in 2020. This rapid growth indicates that a cross-section of business and industries are willing to utilize NFT in their business model.

Two major industries in Japan have had a clear uptake in using NFTs in their course of business: the net/app gaming industry and the art industry. Because NFTs can be generated cheaply and transferred easily, it is a particularly popular choice for creatives to sell and market their goods in Japan and around the world.

Gaming is an obvious market for digital goods since their entire production functionally exists in a digital medium. Net games and app games continue to grow in popularity globally and particularly in Japan. Popular app games have begun making use of the LINE blockchain service to offer in-game items. It also allows unique items to be transferred or sold to other users. This allows developers to have greater involvement in the off-server transactions for items in their games. Multiplayer games in particular can benefit from the extant secondary markets for the goods traded in-game to increase marginal profits and provide an alternative source of revenue that does not require additional content from developers.

Art and artists constitute the lion's share of contributors and vendors in the NFT market in Japan. From high-profile art installations to independent artists, NFT offer an expedient digital method to sell their works to buyers without being limited by geography. NFTs have also been used as "certificates of authenticity" by using QR codes on physical art to prove a piece is original. In addition to selling real art, art can be generated algorithmically on the blockchain and then sold to buyers. In a country like Japan, where its pop culture has fans globally, artists have been selling parts of their work to global customers. For example, manga artists for popular series can sell individual panels to collectors for potentially more than the completed work. Some markets like Nanakusa specialize in art and pay royalties to resale of NFTs on their marketplace.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

It is unclear exactly which regulations apply to NFTs in Japan. Therefore, the applicability of the requirements to individual laws is to be considered after examining each NFT individually. In this regard, the Japan Cryptoasset Business Association (JCBA)[1] and the Blockchain Content Association (BCA)[2] have published their own guidelines as useful tools for understanding legal considerations and points to keep in mind when handling NFTs. The nature of NFTs raises issues of applicability to copyright law in the context of digital art and in the context of financial instruments, primarily to the Payment Services Act ("PSA") and the Financial Instruments and Exchange Act ("FIEA").

NFT marketplaces and online platforms are regulated under general online marketplace and e-commerce regulations in Japan. Various government agencies, including the Ministry of Economy, Trade, and Industry (METI) and the Ministry of Internal Affairs and Communication (MIC), regulate e-commerce in Japan. Consumer and personal information/data protection laws apply to the online marketplaces as well. Also, all online retailers must follow the Specified Commercial Transactions Law regulated by the Consumer Affairs Agency.

Japan's Foreign Exchange and Foreign Trade Act sets out foreign investment restrictions generally, but to date there are no specific restrictions related to NFTs. Prime Minister Fumio Kishida announced at the Upper House Accounts Committee on March 28, 2022 that he was preparing to amend the Foreign Exchange and Foreign Trade Act in the current parliamentary session to strengthen the effectiveness of economic sanctions against Russia. As virtual currencies and similar assets can be used to evade sanctions, there is a possibility that an amendment to the Foreign Exchange and Foreign Trade Act could result in restrictions that may affect NFTs.

[1] [Japan Cryptoasset Business Association: Announcement of NFT subcommittee 'NFT Business Guidelines 2nd Edition](#)

[2] [Blockchain Content Association Guidelines](#)

## What are the main implications from an IP perspective?

The PSA regulates cryptographic assets ("cryptoassets") in Japan (Article 2-5 of the PSA). To the extent that NFTs meet the definition of cryptoassets under the PSA, they are subject to regulation under the PSA in Japan accordingly. Under the PSA, cryptoassets are defined in one of two categories: Item 1 cryptoassets, and Item 2 cryptoassets. Item 1 cryptoassets are those that meet all of the requirements of (a) to (c) below. Item 2 cryptoassets meet the requirements of (b) and (c) below. Cryptoassets are those that:

- a. can be used as payment for goods and services provided to an unspecified person and can be purchased and sold to and from an unspecified person;
- b. have an electronically recorded property value that can be transferred using an electronic data processing system; and
- c. cannot be denominated in Japanese currency, foreign currency or currency-denominated assets.

If NFTs fall under the category of cryptoassets as set out above, a person who buys, sells or exchanges them, or manages cryptoassets for others as a business is required to register as a cryptoasset exchanger (Article 63-2 of the PSA).

To the extent that NFTs are considered a security, FIEA provisions would apply. The FIEA covers shares, bonds, and fund interests in tokens or cryptoassets. NFTs are not currently listed as a security under the FIEA but if a certain NFT involved profit sharing, this could change its classification to be a security. The FIEA does not directly regulate the sale of various cryptocurrencies that utilize the blockchain. However, it does regulate derivatives of cryptoassets that are traded on various security exchanges such as funds that are tied to cryptocurrencies or cryptoassets.

In addition, we note that cryptocurrencies can be, and regularly are, used to purchase NFTs from online NFT marketplaces in Japan.

## What are the main implications from a finance perspective?

Depending on where sales will be taking place, the data and privacy regulations can apply to ensure sufficient security measures are in place to protect user data. In Japan, this would be the Act on the Protection of Personal Information (APPI). Given that there have been several high-profile leaks of crypto data previously, scrutiny on security is quite high. Professional advice on data protection policies and security measures is recommended for

any businesses that seek to become involved with NFTs in Japan, particularly for cross-border transfers, as such transfers create particular issues of compliance and liability.

### **What are the main implications from a data privacy and cybersecurity perspective?**

Protection of IP rights would also present a challenge. Since NFTs have no official record of ownership beyond the transactions recorded on the blockchain, it is difficult to track who owns an NFT and can make use of it. Regulators in Japan have suggested that if exchanges keep a transaction history of NFTs, it may be easier to prove ownership as well as provide an accurate accounting for tax authorities. It has been suggested that this may also allow the original owner to be recorded for the purpose of asserting copyright and IP claims under their respective laws. Rights holders should have the benefits of these protections to stop infringement and reproduction of their unique works. Similarly, creators should track their sales and transfers to ensure that their works are not being reproduced without their permission. Especially for creative works, a transfer of rights should be recorded along with the sale of the NFT.

When selling or purchasing an NFT, the bill of sale or contract should explain the terms and rights being transferred with the item itself. This will help to clarify any disputes over ownership and outline any future payments of royalties or other obligations. The agreement should also address any ancillary data that exists both on and off the blockchain to ensure the entirety of the asset being purchased is covered by the sale. Professional legal advice would be beneficial to avoid any unwanted obligations, ensure successful transfer of ownership, and understand what practices are best for clarity in repeated or frequent transactions in Japan.

### **How is the NFT market expected to develop, and what are the opportunities?**

It remains to be seen whether NFTs will continue to grow in popularity in Japan or how the underlying technology will develop further. Technology enthusiasts throughout Japan will no doubt continue to find ways to capitalize on NFTs whether through gaming, art, or other industries. However, regulation in this area in Japan is slow to develop. As such, without further regulatory certainty, it remains unclear the extent to which NFTs and the industries making use of them will continue to develop.

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# Singapore

## What are the recent trends in the NFT market?

There is a rising interest in NFTs, due in part to the eye-watering prices that NFTs had transacted in recent months. Temasek Holdings, the state-owned investment arm of Singapore recently led a fresh round of funding, valuing the Australian NFT start-up Immutable at US\$2.5 billion. Due to the democratic nature of blockchain, anyone can access the blockchain technology and mint NFTs. Therefore, besides well-established companies seeking to launch a new business vertical, hobby artists are minting NFTs to access a wider audience and monetize their artistic works.

While there may be potential legal pitfalls surrounding NFTs and the technology underpinning NFTs may not be well understood, this has not deterred or slowed down the adoption of NFTs in Singapore. It is expected that NFTs will follow in the footsteps of cryptocurrencies and ICOs.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

There are no specific regulations or restrictions targeting NFTs in Singapore as yet. In addition, Singapore adopts a fairly open policy towards foreign investments, with restrictions applicable only in sectors considered critical to national security (e.g., telecommunication services, news and media broadcasting, financial services, professional services and property ownership). Since NFTs are yet another implementation of blockchain technology, albeit a relatively new one, the Singapore government has clarified that NFTs would be subject to existing regulations applicable to the underlying asset represented by the NFT.

At the moment, NFTs are generally used to tokenize artistic works and digital collectible items. Areas of law which may be applicable in transactions involving NFTs would likely include tax law, contract law, property law<sup>[1]</sup> and intellectual property law, and restrictions on foreign investments would likely not apply.

If the underlying assets represented by a NFT fall within any one of the three classes of capital markets products (i.e., securities, units in a collective investment scheme, or derivatives contracts), the NFT would be subject to the regulatory regime for securities under the Securities and Futures Act. For example, there would be licensing requirements for companies that deal in such NFTs and requirements for prospectus in the offering of such NFTs.<sup>[2]</sup>

Furthermore, if the NFT is utilized as a payment token, the NFT would be subject to the regulatory regime under the Payment Services Act 2019. For example, if the NFT is utilized as a payment token, there would be licensing requirements for companies that provide the following services even if the moneys are not necessarily accepted or received in Singapore: (1) dealing in the NFT; (2) operating an exchange for the NFT; (3) transferring of the NFT; (4) providing custodial services for the NFT; and (5) facilitating the exchange of the NFT without possession of money or payment tokens. In addition, there would be disclosure requirements to address money laundering and terrorism financing risks.

Singapore has recently passed the Financial Services and Markets Bill, which will come into force shortly.<sup>[3]</sup> This new legislation is introduced to align with the enhanced standards adopted by the Financial Action Task Force in June 2019, which seeks to mitigate the risk of regulatory arbitrage by virtual asset service providers. Under the new legislation, any person or company in Singapore that provides digital token services overseas (e.g., a company incorporated in Singapore providing digital token services in the U.S.) would have to be licensed or registered in Singapore, and be subject to licensing and ongoing requirements to ensure that the Monetary Authority of Singapore has adequate supervisory oversight over them. Digital tokens include: (1) a digital payment token; or (2) a digital representation of a capital markets product. Regulated services include, among others: (i) dealing in digital tokens; (ii) facilitating the exchange of digital tokens; (iii) transferring and transmitting digital tokens; (iv) safeguarding of digital tokens; and (v) providing advisory or research analysis relating to the sale of digital tokens.

Following the collapse of the multibillion dollar cryptocurrency hedge fund Three Arrows Capital, the Monetary Authority of Singapore has (1) reprimanded Three Arrows Capital for providing false information and exceeding the assets under management threshold allowed for a registered fund management company, and (2) issued a statement signaling that it would clampdown on any 'bad behavior' from cryptocurrency industry participants. Coupled with the collapse of other cryptocurrency platforms such as Zipmex, Vault and Holdnaught, we expect increased regulatory scrutiny by the Monetary Authority of Singapore on crypto and digital assets, such as NFTs.

[1] The Singapore courts have recently accepted cryptocurrencies as a form of property, and would likely treat NFTs as property. In a recent case, it was determined that stolen NFTs were capable of giving rise to proprietary rights which could be protected via a proprietary injunction.

[2] [Monetary Authority of Singapore: Reply to parliamentary question on regulation of NFT activities](#)

[3] The Financial Services and Markets Bill was passed on 5 April 2022 and will come into operation on a date that the Minister appoints by notification in the Gazette.

## What are the main implications from an IP perspective?

In the rush to mint or purchase NFTs, many might have overlooked the issues that may arise from such transactions, and especially so when parties involved may not be familiar with contract law and intellectual property law. Without diving too deep into intellectual property law, these are some of the commonly encountered issues in a typical NFT transaction.

First, the buyer needs to do his or her due diligence to ensure that the minter does indeed own the copyright that is purported to be sold in the NFT. Fraudulent transactions are not uncommon, and fraudsters may prey on the buyer's eagerness to purchase the next NFT that will bring him or her to the moon.

Secondly, the buyer needs to know the exact bundle of rights he or she will be purchasing in the NFT as stated in the underlying contract. For example: (1) is it a sale of copyright or a grant of licence to use the copyright; (2) is there a territorial limit to the use of the copyright; (3) will the copyright author retain the right to use the copyright; (4) will there be other buyers who are entitled to use the copyright; and (5) will the buyer be entitled to sell the NFT. If the transaction is one of a sale (also known in legal terms as an assignment) or an exclusive licence of copyright, the transaction has to be made in writing and be signed by the owner of the copyright. Whether the underlying NFT contract satisfies the formalities requirement remains untested in Singapore law.

Lastly, if the transaction is not one of a sale or an exclusive licence of copyright, the buyer (a mere licensee) has no right to sue for infringement of copyright. Any action has to be brought by the copyright owner or the exclusive licensee. This point is especially pertinent when the NFTs are subsequently resold as sub-licenses granted by the exclusive licensee that do not qualify as an exclusive license. In other words, only the original copyright author and/or the first buyer of the NFT can bring an action against parties who infringe the copyright, but they may not suffer any economic loss.

## What are the main implications from a finance perspective?

There is an argument to be made that NFTs may emerge as security tokens and even digital payment tokens of the (near) future.

Although NFTs generally refer to tokenized artistic works and digital collectible items, it could theoretically be applied to other non-fungible digital or physical assets. Given the advantages of blockchain technology, companies and financial institutions may offer NFTs based on a bespoke suite of assets or derivatives of assets. For example, an NFT may be minted to represent the ownership of a physical artwork and fractional units may be sold to anyone with access to the Internet. While NFTs may be structured such that it would not fall within the existing capital markets regulatory regime and the Singapore authorities have cautioned that it cannot possibly regulate all products that people choose to invest their money in, it could be a matter of time before the issues caused by NFTs become too large for the Singapore authorities to ignore.

It would not stretch the imagination to conceive of NFTs as digital payment tokens. NFTs could be used as a form of currency or a medium of exchange as long as two or more parties agree on the value to the underlying goods. After all, fiat money was pegged to gold not too long ago. Further, by being pegged to tangible assets with intrinsic value, NFTs may hold their value better than cryptocurrencies which are subject to wild swings in prices. Therefore, if a critical mass of people agree on the value and use of a few NFTs, these NFTs could be transacted as digital payment tokens.

We therefore do not rule out the imminent application or extension of the existing regulatory regime for securities and payment tokens to NFTs.

On a related note, Singapore continues to parlay its position as a regional financial hub into becoming a regional cryptocurrency hub, permitting firms with the appropriate offerings to set up cryptocurrency platforms and exchanges. Investors are permitted to buy and sell NFTs using cryptocurrencies such as Ether and Bitcoin, but cryptocurrency exchanges must be mindful of banned cryptocurrency transactions in light of Singapore's Russia sanctions.[4] Due to recent events in the cryptocurrency sphere (e.g. collapse of Three Arrow Capital and the various cryptocurrency platforms), the Monetary Authority of Singapore has signaled a greater degree of regulation is to be expected for crypto and digital assets, with the focus mainly on protecting the retail consumer from speculative trades and mitigating potential financial stability risks.[5]

[4] [La Prensa Latina: Singapore bans cryptocurrency payments that could violate Russia sanctions](#)

[5] [Monetary Authority of Singapore: Opening address by Ravi Menon, MAS Managing Director 'Yes to digital asset innovation, no to cryptocurrency speculation'](#)

## What are the main implications from a data privacy and cybersecurity perspective?

From a cybersecurity and data privacy perspective:

- an important concern for NFT platforms and NFT investment companies based in Singapore would be to ensure that they are well prepared against any attacks on their platforms and users. In 2018, the Personal Data Protection Commission fined IHS, an IT agency, a hefty sum of S\$750,000 for compromising the personal data of 1.5 million patients and for failing to implement the necessary security measures and employee training required to prevent such a data breach. This was despite the fact that the breach was carried out by highly skilled and sophisticated hackers;
- NFT platforms and NFT investment companies should be intimately familiar with 10 key obligations in relation to the handling and disclosure of personal data in Singapore under the Personal Data Protection Act: consent, purpose limitation, notification, access and correction, transfer limitation, accuracy, protection, retention limitation, accountability and data breach notification; and
- the retention limitation obligation of the Personal Data Protection Act requires organizations to stop retaining personal data once there are no legal or business purposes for such retention. The organization may encounter practical difficulties with removing personal data if it is permanently recorded in the blockchain.

## How is the NFT market expected to develop, and what are the opportunities?

We expect that the NFT market would see the following developments:

- **Assets for investment:** Once certain NFTs become more mainstream and fractionalized, they could be readily transacted as assets. To some extent this is already the case in Singapore, with local investors reportedly investing in fractionalized digital assets.[6] Singapore based IX Swap, a decentralized exchange for security tokens and tokenized stocks announced a new initiative which would allow investors to purchase fractionalized NFTs.[7]
- **Tracing of provenance for arts and luxury goods:** Many companies in Singapore have been exploring the use of blockchain technology for supply chain transparency. Glenfiddich has launched a series of 15 authentication NFTs kept in collaboration with the NFT platform BlockBar's Singapore facility, where each such NFT corresponds with a limited edition 46 year old single malt whiskey bottle. The owner of such NFT may opt to hold an NFT for potential resale value, or cash in the NFT to receive the physical whiskey bottle itself.[8] In a similar vein, RtistiQ an online art marketplace in Singapore has launched NFT-authenticated art auctions.
- **Gaming and Fashion NFTs:** In Singapore, fully digital fashion labels Republique and Auroboros have embraced a digital evolution, launching digital NFT clothing which permit customers to share images of themselves in tailored digital garments.[9] Established labels and brands have begun exploring this space – the Singaporean edition of fashion magazine Vogue has issued its own collection of 15 fashion-based NFTs.[10] We would expect to see greater interest, as local brands explore new avenues of NFT enabled fashion – minting NFT garments for avatars in metaverse platforms for example.[11] A recent development is the launch of the gaming NFT marketplace by Gamestop in partnership with Immutable, permitting users to trade NFTs featuring items like trading cards and virtual land plots from web3-related games.[12]

[6] [Monetary Authority of Singapore: Opening address by Ravi Menon, MAS Managing Director 'Yes to digital asset innovation, no to cryptocurrency speculation'](#)

[7] [GloboNwswire: IX swap expands reach into fractionalized NFT market](#)

[8] [The Drum: Glenfiddich's first NFT is a bet on long-term relationships with luxury consumers; South Morning China Post: NFTs for 46-year-old Glenfiddich single malt whisky to ensure buyers get the real deal](#)

[9] [The Straits Time: When virtual clothes are pricier than real ones; Vogue: Clothing that doesn't exist - Singapore-founded brand Republique codes digital collections and auctions NFT garments](#)

[10] [Vogue Business: Exclusive - Fashion magazines are minting NFTs](#)

[11] [Yanko Design: Guardians of fashion brings NFT fashion and entertainment business into the metaverse](#)

[12] [NFT Gators: GameStop officially launches gaming NFT marketplace with immutable X](#)

## Key contacts



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# Spain

## What are the recent trends in the NFT market?

In Spain, non-fungible tokens (NFTs) remain an evolving form of asset and much of the community's understanding around the utility and legal ramifications of NFTs is still developing.

The NFT market in Spain is yet to be explored. The Contemporary Art Report in 2022 suggests that Spain is not only later than other countries, but also less enthusiastic about the NFT phenomenon than other countries, such as the United Kingdom and the United States. However, the NFT industry in Spain was expected to grow by 41.2% on an annual basis to reach US\$564.6million in 2022.

In addition, according to several sources, those who buy NFTs in Spain are 50% art collectors and 50% investors. Recently, cryptocurrency platforms have also gained prominence in the Spanish NFT market together with fan token companies.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

At present, Spanish law does not provide for any specific laws regulating business activities in the NFT area. The Spanish regulatory framework governing NFTs is derived from a variety of other practice areas, including:

- **Consumer:** Spanish general consumer/commercial laws – Business activities in the NFT area will most likely be subject to general Spanish civil law principles. Particularly, in a B2C context, specific Spanish consumer protection laws will most likely apply.

For instance, smart contracts (which are used in NFT trade) must be compliant with Spanish consumer protection laws, including the consumer guarantees and provisions surrounding unfair and abusive/unbalanced contract terms. These provisions are mandatory.

Further, in cases where NFTs are sold online to consumers, specific ecommerce laws will most likely apply. These are mandatory and provide, amongst others, for information obligations of companies.

General commercial and civil laws principles dealing with intangible assets (including contractual obligations re. e-contracts, B2C rules, distance contracts, etc.) – These rules provide for information duties and mandatory content within contracts.

- **Financial:** NFTs - depending on use and functionalities as described in Question 4 below – are likely to be subject to Spanish financial regulations and financial law requirements. However, since the NFT market is barely developed in Spain, there are no statements from Spanish supervisors or courts in this regard. Companies should therefore analyse on a case-by-case basis whether the NFTs they offer are subject to financial regulations.
- **Gambling:** The Spanish Gambling Act was amended at the end of 2022 to establish that the Government will develop a set of guidelines to ensure the safer use of non-fungible digital assets, loot boxes or mechanics of monetization of the participation of users of videogames. This will impact the use of NFTs in this context with regard to the commercial communications regime, information duties vis-à-vis users and security measures, which should be dealt with by this set of guidelines.

## What are the main implications from an IP perspective?

NFTs are virtual assets that represent digital or physical items such as art, music, in-game items and videos (underlying work). Such underlying work may be subject to copyright and authors rights(1) protection. A buyer may believe that by buying an NFT, they own the underlying work to it and, therefore, can use it freely. However, it is important to understand that ownership of the NFT does not necessarily entail ownership of the intellectual property (IP) rights attached to the underlying creative work to the NFT. This means that, generally speaking, the buyer of an NFT will probably only have the rights to access / use the underlying work for personal use.

The author of such underlying work is, by default, the owner of all intellectual property rights over the same, including both moral and patrimonial rights (please note that under Spanish intellectual property law, moral rights cannot be waived and are inalienable (*i.e.* cannot be transferred) as opposed to patrimonial rights which can be freely transmitted).

Therefore, to own the patrimonial rights attached to the underlying work of an NFT, such rights shall be transmitted by the rightful owner to the buyer of the NFT; and such transmission shall be expressly regulated in order to be effective (*e.g.* by means of an additional contract to the purchase of the NFT regulating the transfer of certain IP rights). At the end, the extent of the IP rights acquired by the purchaser of an NFT will mostly depend on what the author contractually stipulates together with the sale of the NFT.

In line with the above, it is also relevant to take into consideration that the creation of an NFT (or better said, minting NFTs of copyright protected works) requires that the minter / seller of an NFT duly owns the IP rights of the work it represents (or any other relevant rights, such as image rights) in order to avoid possible copyright or other infringements. It is therefore of utmost importance that the author of the work whose rights are being infringed registers their intellectual property rights in the Intellectual Property Register prior to the sale of their work in order to take the legal action they deem appropriate against the person who tokenised their work in an unlawful manner.

(1) In Spain, rights over patents, trademarks and alike are not covered by "intellectual property laws" but industrial property ones.

## What are the main implications from a finance perspective?

From a strictly financial regulatory perspective, the standard that is envisaged to govern cryptoassets and cryptoasset service providers (the so-called "MiCA"), which is still in the pipeline, excludes NFTs from its scope of application and does not provide a definition of NFTs, but merely states that it will not apply to cryptoassets that are unique and not fungible with other cryptoassets. In particular, it specifies that in order to be exempted from its scope, the assets or rights represented must also be unique and non-fungible. In this regard, MiCA stresses that the mere attribution of a unique identifier to a cryptoasset is not sufficient to classify it as an NFT and excludes it from the rules.

Hence, NFTs meaning the token that is issued or on which a service is provided would fall outside the regulation of cryptoassets and thus the providers of the related services would be exempted from compliance with financial and anti-money laundering regulations and, ultimately, from the scrutiny of financial supervisors. This is different from, for example, virtual wallet custody and fiat currency virtual asset exchange service providers, which are subject to Spanish anti-money laundering regulations and registration with the Bank of Spain, following the implementation in Spain of Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

At the local level, NFTs are also excluded from the scope of the National Securities Market Commission Circular 1/2022, of 10 January 2022, on the advertising of cryptoassets presented as an object of investment. Only if NFTs are issued in series or grouped in issues as an investment object will they be subject to such financial regulation.

In other words, depending on the use given by the issuer or the platform that offers them to third parties, they will have to comply with Spanish securities market regulations, mostly deriving from Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, *i.e.* the so-called MiFID II.

### **What are the main implications from a data privacy and cybersecurity perspective?**

The Spanish Data Protection Agency (AEPD) has not yet made a clear reference or taken a stand on privacy implications that may become relevant in relation to NFTs specifically. It has, however, provided some (minimal) information with regard to its position on blockchain technology. Mainly, the AEPD has stated that the blockchain is not a processing activity itself but a distributed information processing technique on which different processing activities and business models can be implemented; suggesting that any processing activities construed over the blockchain shall comply with applicable data protection requirements.

Taking into account previous interpretations of the AEPD on what shall be considered personal data (*e.g.* with regard to the IP address), we anticipate that the AEPD will most probably understand the public keys and transaction data generated in the process of mining an NFT on a blockchain to constitute “personal data” within the meaning of EU and Spanish data protection laws, insofar as they can be related to an identified or identifiable individual. Mainly, these rules consist in the General Data Protection Regulation (GDPR) and Spanish Organic Law 3/2018 on personal data protection and digital rights guarantees.

Where data is not fully anonymised (*i.e.* irreversibly altered so that no one, by themselves or with the help of others, can re-identify an individual), and is pseudonymized, data protection rules above apply, including general data protection principles and sanctions regime. This gives rise to a variety of data protection questions which the Spanish Data Protection Agency has not yet answered.

### **How is the NFT market expected to develop, and what are the opportunities?**

The Spanish NFT market is expected to grow and become more diverse in the coming years. The possible applications of NFTs are far-reaching. The NFT industry in Spain was expected to grow by 41.2% on an annual basis to reach US\$564.6 million in 2022 and the NFT industry in Spain is expected to grow steadily in the next few years.

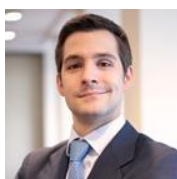
From a regulatory point of view, companies should expect that the European and Spanish legislator will place a stronger focus on NFTs in the years to come. The legislation in the EU and Spain on NFT is constantly evolving.

Companies should therefore keep an eye on future regulatory developments and evaluate the business opportunities arising from the NFT technology.

### **Key contacts**



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# United Kingdom

## What are the recent trends in the NFT market?

The NFT market grew rapidly in 2021. [Reuters estimated](#) that total sales volumes in NFTs multiplied over eight-fold in Q3 of 2021. With that said, NFTs have fallen within the scope of the “crypto winter” in 2022, meaning that sale figures have returned back to previous levels. In the UK, there has been a shift away from NFTs being seen as only a playground for individuals and quirky digital artists. Established institutions in the UK have begun to embrace the technology and opportunities that come with it. The [British Museum](#) launched 200 NFTs of postcards of Hokusai digital art to coincide with a Hokusai exhibition that it was holding from 30 September 2021. Similar examples include the Whitworth art gallery based in Manchester which minted a William Blake NFT, becoming the first UK museum-accredited NFT in July 2021. Institutions such as Sotheby’s and Christie’s are also already heavily involved in the auctioning of art NFTs. Manchester City Football Club has launched its third NFT drop in 2022, celebrating the heroes of Manchester. More recently, Rishi Sunak during his time as Chancellor of the Exchequer (and now Prime Minister) announced the “NFT for Britain” project, a Treasury-backed NFT mint intended to be operated through the Royal Mint and it is understood that this project remains in development.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

There are no specific regulations aimed at NFTs in the UK. Any applicable legal requirements stem from existing regulatory regimes, including in regard to money laundering and financial services regulation.

Registration with the UK’s financial services regulator, the Financial Conduct Authority (FCA), may be required under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (“MLRs”). It is generally understood that NFTs, in general, will not fall within the scope of the MLRs but this may vary depending upon the characteristics of the NFT in question. NFT providers may need to register if the NFT is a representation of value or gives the holder contractual rights – certain cryptoassets may fall within this category (e.g. where contractual rights are offered through ownership of the NFT), given the particularly broad definition of “cryptoassets” under the MLRs. In the case of NFT artwork, the position is less clear. NFTs that are pure digital representations of art might fall more neatly into the category of “works of art” than “cryptoassets” under the MLRs (although this has not been clarified by the FCA).

NFT issuers should also be conscious of financial regulatory requirements. The [FCA’s 2019 guidance](#) indicates that most NFTs would be unregulated tokens, which is helpful for institutions operating in this space. However, NFTs may be regulated if they are equivalent to e-money tokens but only where recognised as a means of payment for a variety of goods and services by parties unconnected to the issuer see section 6 below for a possible future example of such an application). NFTs may also be regulated if they fall within the existing categories of regulated “specified investments” such as shares and bonds. For example, a token could qualify as a share if the token holder is entitled to dividends or voting rights for a particular company.[1] NFT fractionalisation may also have an impact on the application of existing UK financial regulation, as discussed in section 6.

It should be noted that, in line with recent EU developments in relation to the Markets in Cryptoassets Regulation (“MiCA”), the UK has announced plans to also tackle the regulation of certain categories of cryptoassets. It may be the case that the UK takes a similar approach in response to the EU’s proposed bespoke NFT regulation.

[1] [FCA 2019 guidance](#) case study 9, page 42

## What are the main implications from an IP perspective?

There are three main IP issues: ownership, transfer and enforcement.

The purchaser of an NFT will not necessarily own the IP to the underlying creative work, but consumers may not realise this and NFT terms are not always particularly clear to investors. In April 2021, the UK’s Advertising Standards Authority issued guidance[2] that “owning an NFT does not mean that you own the copyright”. There are concerns in this area in relation to consumer protection regulation as well, and requirements for businesses not to mislead individual consumers of products. The aborted sale of an NFT of a drawing by the artist Jean-Michel Basquiat is one example of a misleading and fraudulent NFT sale where the NFT minter did not own the IP rights that they purported to own through the sale.

Nonetheless, in March 2021 the [British musical artist Big Zuu did sell 50%](#) of his copyright for a song, intentionally allowing purchasers to also benefit from royalties. US artist Taylor Bennet [sold 75% of the rights to a yet-to-be-released track](#). The co-founder of Bluebox, the platform that enabled these sales, claimed this was “[the first true music copyright NFT](#)”. It is not clear whether there was any intellectual property rights transfer as part of the sale. More recently in November 2022, Billboard indicated recently that while mainstream NFT sales may be waning, sales of Web3 music have been gaining momentum and continue to rise into October 2022.

If an NFT creator does hope to actually transfer IP that it owns to a purchaser, English law requires the transfer to be in writing and signed by the person making the transfer. However many NFT sales may not currently satisfy those requirements and this is an area of law that has not been tested in the English Courts at this stage.

For NFT creators who wish to retain their IP rights but exploit these in exchange for royalties, there are both opportunities and risks in relation to enforcement. Creators of NFTs may program their smart contracts to facilitate royalty payments each time their NFT is sold. However it is also possible for an NFT creator to incorrectly claim that they own the IP rights, which may lead to enforcement action being taken by the true IP rights owner.

[2] [Digital Gold, Cartoon Dogs and the Moon – Advertising Cryptocurrencies - ASA | CAP](#)

## What are the main implications from a finance perspective?

A key challenge under English law is the application of common law principles to emerging technologies like cryptoassets and NFTs. There are two established categories of property right under English common law – things in possession, and things in action. Things in possession are capable of physical possession, whereas things in action are intangible but rights may be asserted through legal action or enforcement. NFTs do not neatly fit into either category.

In 2019, the UK Jurisdiction Taskforce – a task force formed of prominent lawyers, regulators and members of the judiciary (“UKJT”) - issued a paper providing a detailed overview and analysis of the legal treatment of cryptoassets, which asserted that cryptoassets had all of the indicia of property

under English law, and should not be disqualified from being considered property purely because they are intangible assets that do not fit into existing categories. Although the findings of the UKJT paper were not legally binding, the English Court has since confirmed that cryptoassets such as bitcoin are considered property. This analysis has been subsequently confirmed in relation to NFTs as well in a more recent case.[3]

The UKJT's analysis also indicated that taking security over cryptoassets was unlikely to work in the same manner as with traditional asset classes. For example, in principle, a pledge or lien requires the ability to transfer physical possession of an asset but it is not clear whether holding a private key would constitute physical possession – as the private key constitutes information and is not itself property. The UKJT concluded that it is not clear that a pledge or lien would be possible in respect of unregulated cryptoassets. The UKJT also indicated, however, that it believed a mortgage or equitable charge could be created over cryptoassets in the same manner as other intangible property, and subject to the same requirements.

The Law Commission in England has subsequently published a public consultation (dated July 2022) that addresses the challenges inherent under English common law and makes recommendations in relation to the categorisation of cryptoassets (including NFTs) within the existing framework. The Law Commission recommended that a third category of personal property – known as “data objects” – be created through legal reform to accommodate cryptoassets and ensure further certainty for cryptoasset owners. In relation to the application of traditional security mechanisms to the proposed “data objects” category, the Law Commission indicated that it sees limited value in possessory security arrangements (e.g. pledges, liens) in relation to this category of personal property. The recommendation instead is that reforms are developed to create more robust cryptoasset collateral arrangements and therefore to strengthen non-possessory security mechanisms. The Law Commission's recommendations will now be considered further and policy reforms may be developed to implement certain of these recommendation – we will await further updates to clarify the direction that will be taken.

[3] *Osbourne v (1) Persons Unknown and (2) Ozone trading as Opensea* [2022] EWHC 1021 (Comm)

## What are the main implications from a data privacy and cybersecurity perspective?

NFTs have perceived value due to the immutable record of ownership provided on the underlying blockchain. It will always be possible to confirm that you own an “original” and not a counterfeit. This can cause some friction with data protection principles.

While NFTs themselves do not necessarily contain personal data in every case, NFTs by design can be customised at the time of minting. The “minter” of the NFT could choose to include elements of personal data within the digital file that is tokenised, meaning that this personal data is embodied within the NFT forever. Data minimisation or data erasure under the UK GDPR or GDPR regimes becomes very challenging in this context. The visibility of wallet addresses, which are likely to constitute pseudonymised data in most blockchain networks, must also be properly addressed from a transparency perspective and NFT platform operators must consider the contractual framework put in place with customers to this effect.

NFTs in a cybersecurity context present a particular challenge as each NFT is unique. If an owner's wallet, or an NFT platform that might be used to store the owner's private key, were to be hacked, then this would mean the entire value of the NFT would be lost to the owner and very difficult to recover.

## How is the NFT market expected to develop, and what are the opportunities?

There are numerous exciting opportunities and developments to be found in the NFT space:

- **Fractional ownership:** A number of companies are exploring the possibility of dividing NFTs into shares, offering each NFT holder “fractional” or partial ownership. The investment platform London Trade Art allows customers to purchase affordable “shares” of artworks to make “art accessible to everyone”. Purchasers can sell their NFTs to others on a site that “mirrors the stock market” and receive dividends if the art is rented to museums. The co-founder of Bluebox, the platform that sold Big Zuu's NFT, has [argued that](#) it might soon be possible to trade fractions of copyright for fractions of real estate. If the regulatory questions can be answered by firms in the space, then fractionalised NFTs might open up the market to an entirely new category of purchasers. This type of activity raises legal questions regarding whether the token has the characteristics of a regulated specified investment in the UK, as explained in section 2 above, and we suspect that such projects will face regulatory hurdles.
- **Metaverse:** The metaverse would allow people to interact with virtual objects and avatars in a 3D universe layered on top of the physical world. In the US, Meta (formerly Facebook) has altered its entire brand to reflect the concept but the UK has also seen some exciting developments. The auction house Sotheby's has created a “metaverse” where users [create a digital avatar](#) to bid for various NFT artworks. At a larger scale the technology company Improbable is working on the technology that would enable a metaverse to host [thousands of users simultaneously](#).
- **Gaming:** NFTs in the gaming space are uniquely interactive. For example, in the game [Axie Infinity](#) players battle opponents using “Axie” creatures, each of which is an NFT to authenticate the Axie's identity and unique qualities. Established developers like EA and Ubisoft have also [indicated interest](#) in the space. NFTs could eventually become a virtual in-game currency that may be tradable between players and even between different games, though such application raises questions regarding e-money regulation and could impact analysis of whether an NFT is truly an NFT, or whether it is in fact used for payment purposes.

## Key contacts



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# United States of America

## What are the recent trends in the NFT market?

The rapid growth of the NFT market has caught US consumers and brands alike by surprise. Yet, NFTs are still far from ubiquitous or well understood. In the United States, a recent survey by Security.org indicated that the number of people familiar with NFTs increased from about 20% in 2021 to around 65% in 2022, yet only 4% of U.S. adults have ever owned an NFT. Even so, brands are increasingly using NFTs to improve consumer engagement, authenticate goods, and drive online auctions. Coinciding with the growth of the metaverse and expansion of web3, the market for digital NFT artwork alone is estimated to expand from US\$3 billion to more than US\$13 billion dollars over the next 5 years – with much of the existing market presence and expected growth coming from the United States.

Reflected in that market size is the secondary market for NFTs, which has also shown steep growth. During 2021, one blockchain tracing firm tracked a minimum US\$44.2 billion worth of cryptocurrency sent to ERC-721 and ERC-1155 contracts — the two types of Ethereum smart contracts associated with NFT marketplaces and collections — up from just US\$106 million in 2020.

As brands and consumers increasingly gain familiarity with NFTs, certain industries – namely, sports, gaming, art and music, luxury goods, and alcohol and spirits – are leading the way. Common use cases include NFTs as a collectible image, video or audio, as rewards or prizes, as a means of tracing authenticity, paying out a royalty to an artist or creator, identifying membership to an exclusive club, and as a redeemable (and tradeable) ticket for a physical item or experience.

As examples, owners of Bored Ape NFTs are members of an exclusive club, which affords them access to member-only events and has been called by Forbes “the epitome of coolness for many.” An NFT of Twitter founder Jack Dorsey’s first tweet sold for US\$2.9 million, and digital NFT artwork has sold in the tens of millions. Luxury fashion house Prada gifted NFTs to purchasers of an exclusive, limited collaboration. Glenfiddich created a series of 15 limited edition liquor NFTs, each corresponding to a physical bottle of Scotch Whiskey sold by the company. Buffalo Trace Distillery sold five OFC Vintage Bourbon whiskey NFTs in a charity auction, raising a total of US\$280,000. Other brands have curated exclusive experiences for NFT holders; the fashion brand Balmain recently sold NFTs redeemable for fashion show invitations and backstage opportunities to meet the brand’s creative director. These NFTs can then be re-sold on a secondary market.

Other industries and use cases – such as real estate, vehicle rentals, and healthcare records – are expanding in the space. Meanwhile, the NFT market is becoming increasingly accessible because of fractional ownership of NFTs – or “fractionalization” – which allows consumers to invest in and trade on expensive NFTs or physical goods tied to NFTs with a smaller minimum investment.

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

Despite the absence of NFT-specific regulations in the United States currently, NFTs are regulated in the US similar to other digital tokens, meaning that NFTs may be regulated:

- As a commodity, under the jurisdiction of the Commodity Futures Trading Commission (CFTC);
- As a security, under the jurisdiction of the Securities and Exchange Commission (SEC);
- As some form of “value” regulated by the Financial Crimes Enforcement Network, a component of the U.S. Treasury (FinCEN), and
- As a form of intellectual property.

NFTs (depending on their specific features, functions, and economic reality) may be governed by a framework of existing securities, anti-money laundering (AML), financial services, consumer protection and privacy regulations under US federal and state laws. Depending on the state laws that govern the creation and use of the NFT, if NFTs are offered as sweepstake rewards, they may be restricted under state illegal lottery laws. Likewise, state escheatment laws governing unclaimed property may also be applicable as NFTs age, if they are held in hosted wallets or otherwise in the possession of a holder other than the owner. We also note that not all digital assets that are referred to as NFTs are the same and, thus, not all will be treated the same way from a regulatory perspective. As an example, fractionalized NFTs have different regulatory considerations than others, as described below.

### Securities Law

Absent federal legislative clarification on which types of digital assets may be securities or ancillary securities, courts still look to the *Howey Test* to determine what qualifies as a security in the US. Under *Howey*, an investment contract (or security), is defined as a transaction, scheme or contract where there is (1) an investment of money, (2) in a common enterprise, (3) with the expectation of profit (4) solely from the efforts of others. The definition can be very broad. At its most basic level, some of the hallmark characteristics of an NFT are that they are unique and non-fungible. This makes them more like a collectible that may appreciate (or depreciate) as opposed to a traditional security. But, as we described further below, new types of NFTs – and in particular, fractional NFTs – are starting to raise securities laws questions. While an NFT’s uniqueness may leave unsettled the legal question of whether it is a security, there are still several types of fraudulent conduct, such as wash trading, insider trading and front running, that wrongdoers in the NFT market can engage in.

### Anti-Money Laundering

AML requirements are intended to safeguard the U.S. financial system from use by those seeking to move, hide, or spend the proceeds of crime. Various types of financial institutions, including banks, casinos, and money services businesses (or MSBs, which include businesses that transmit value in any form, including convertible virtual currency or digital assets), are subject to a variety of AML requirements, including the requirements to register with FinCEN (and potentially obtain licenses from state regulators), implement a risk-based AML policy, and report suspicious activities. The applicability of these rules to platforms or other persons doing business transferring virtual assets during the buying or selling of NFTs depends on whether their NFT-related activities would render them a money transmitter or other type of financial institution. This is a fact-intensive inquiry that considers the nature of the business dealing in NFTs.

FinCEN has studied, but not yet issued regulations on, whether those platforms, auction houses, or online marketplaces that deal in NFTs or other forms of digital-ledger collectibles should, separate from their potential status as a MSB, be considered “financial institutions” for purposes of AML laws and regulations. It has noted several AML-related risks associated with NFTs, and the high-value art market generally, but declined to extend regulatory obligations to this market to the extent it is not already covered by existing MSB regulations.

Given the potential applicability of U.S. AML rules to various activities in the NFT ecosystem (minting, primary sale, facilitation of secondary sales, etc.), each party involved in the issuance and trading of NFTs should review its activities to determine if they implicate money transmission and AML rules. For example, the primary sale of an NFT in exchange for cryptocurrency may not, itself, constitute money transmission; but if the seller first offers a buyer the opportunity to exchange fiat currency for cryptocurrency to use in the purchase of the NFT, then that activity may constitute money transmission.

## Consumer Protection Laws

Consumer protection laws are designed to prevent consumers from unfair or deceptive acts or practices, especially in markets where consumers are relying on sellers for clear disclosure of information such as price, usage, risks, transferability, and other key terms of the product. Unfortunately, the crypto and NFT space are rife with information asymmetries that can generate consumer confusion, in addition to theft and fraud concerns. So, consumers need a clear understanding of exactly what rights they are and what rights they are not receiving when they purchase an NFT, as well as what limitations may exist on their ability to receive remuneration in the event something goes wrong. Typically, these consumer protection concerns – which are governed at both the federal and state-level in the US – are addressed via terms of sale that go along with the NFT.

## Privacy Laws

Although US federal and state privacy laws do not specifically address NFTs, companies engaging in the NFT market should consider the potential impacts of privacy laws. Blockchain registrations of NFT ownership may constitute personal information. NFT owners may not understand that their ownership registrations will be processed publicly and in a decentralized manner. As discussed in Section 5 below, companies may therefore benefit from providing consumers with clear disclosures about how their personal information will be processed.

## **What are the main implications from an IP perspective?**

NFTs are unique, by design, and typically give the holder ownership over the data or media with which the token is associated. This gives rise to three main IP issues: (1) whether the issuer of the NFT had the necessary underlying rights to create the NFT; (2) what rights are acquired with the purchase of an NFT and (3) enforcement.

### Necessary Underlying Rights

Companies looking to mint NFTs should ensure that they have the necessary rights to tokenize the underlying creative work. This can be done by through ownership or licensing, provided that the license rights are broad enough to cover the proposed use of the work. For example, if a company has a standard license to use a trademark or logo in order to sell or distribute a particular product, the licensor may try to argue that license does not cover the right to tokenize the logo nor extend rights into digital spaces such as the metaverse. In an abundance of caution, companies planning to create NFTs may wish to obtain a license that expressly includes the right to tokenize the brands or content.

### What Rights are Acquired / Transferred with the NFT

Content creators looking to have their works tokenized should think through what rights they wish to grant to purchasers. Creators who fail to do so may inadvertently give up their rights. For example, there is a current divide among content creators on whether NFTs (and in particular profile picture NFTs or PFP NFTs) should be licensed under traditional commercial copyright terms or under Creative Commons Zero (CC0), under which the creator waives all their copyright and related rights in the work to the fullest extent permitted by law (e.g., excluding moral rights).

Similarly, purchasers need to ensure that they understand the rights they receive when they acquire an NFT. Owning an NFT does not necessarily mean the purchaser owns the underlying work or may use the NFT freely. For example, the purchaser may receive the right to digitally display an NFT at their home, but not publicly. Purchasers may receive rights to copy or print the work, but not to distribute those copies. Conversely, with NFTs licensed under CC0, the NFT owner has broad rights to use, copy, display, modify, etc. the digital asset, but so can everyone else. The value there becomes the status of ownership and authenticity – or “pwnership” (a term coined by Brian L. Frye, law professor and NFT creator). If a purchaser owns a fractionalized NFT, the purchaser should understand any limitations as a result of fractional ownership.

For NFT creators that wish to transfer to the NFT purchaser the IP rights in the underlying work, US law requires, in most cases, a present assignment of those rights in writing and signed by the person making the transfer. However, many NFT sales may not currently satisfy those requirements and this is an area of law that has not yet been tested.

### Enforcement

The U.S. Patent and Trademark Office and Copyright Office has launched a study on intellectual property rights in NFTs, including a series of roundtables to take place in early 2023. The study is in direct response to a request from the Senate Committee on the Judiciary’s Subcommittee on Intellectual Property, and is prompted by mounting lawsuits and a lack of clarity around the IP treatment of NFTs, including with respect to future applications, transferability of ownership, licensing rights, IP infringement, and the IP rights of NFT creators. Examples of some big-name infringement claim examples include:

- In January 2022, Hermes filed a suit against Mason Rothschild for issuing NFTs of “MetaBirkins,” which depicted Hermes purses in digital form as covered in colorful fur. Despite the defendant’s claims that the NFTs were an “ironic nod to the iconic bag,” and an expression of his first amendment rights attacking the use of animal fur in the fashion world, in February 2023, a New York jury held Rothschild liable for trademark infringement, trademark dilution and cybersquatting. An appeal of this decision is likely, but this verdict bolsters the case for brands’ IP rights in virtual goods
- In June 2022, Yuga Labs, Inc., creators of the Bored Ape Yacht Club, sued Ryder Ripps and other defendants in California for trademark infringement, false designation of origin, false advertising, cybersquatting and conversion (among other grounds) for selling NFTs under a conceptual knock-off project.

The following are some of the common ways our clients are attempting to mitigate potential infringing activity: (1) surveying or self-policing for infringement, (2) expanding trademark registrations into additional classes of trade, (3) applying for patent protection, (4) obtaining domain name registrations with common blockchain top-level domains (such as .nft or .io) and (5) submitting take-down requests under the Digital Millennium Copyright Act. We note that, in the U.S., a copyright registration is required to initiate an infringement suit.

## **What are the main implications from a finance perspective?**

As discussed above, a security under the *Howey Test* requires a transaction, scheme or contract where people or entities invest their funds in a common enterprise. The unique nature of each NFT, hence its non-fungibility, likely destroys the commonality required for an NFT sale, or even minting, to be considered a security. However, what about NFTs that are split into fractional ownership units and resold? Are those fractional units sufficiently similar to each other to be a common enterprise? SEC commissioner Hester Peirce has acknowledged the possibility that fractional NFTs very well could be a security in the U.S.

If the commonality prong were satisfied, the analysis would then consider whether the fractional owners are reliant on the efforts of a third party to promote and maintain the value of the NFT. This third party might be one of the fractional owners or an organization that is responsible for showcasing, listing, or otherwise marketing the NFT in order to maintain its value.

Other financing issues arise when, through the course of secondary market sales, a purchaser buys an NFT that another buyer purports to own. While this is rare due to the traceable nature of blockchain-based transactions, there have been thefts of NFTs from wallets due to hacks or a wallet holder sharing their private key with others. In those cases, there may very well be a bona fide purchaser for value who subsequently holds the NFT, and state

sales and UCC law would likely apply to that purchase.

## What are the main implications from a data privacy and cybersecurity perspective?

NFT ownership is registered on blockchains. Although a blockchain registration may not directly identify a specific person, wallet identifiers or a set of transactions associated with a wallet or other identifier may reasonably identify an individual. As such, although an NFT itself may not constitute personal information, the blockchain registration of NFT ownership may. So, companies offering NFTs should consider compliance with federal and state privacy laws. At the state level, laws in California, Colorado, Connecticut, Utah, and Virginia may require companies to inform consumers about how their information will be collected, processed, and shared. In particular, companies may need to explain how personal information may be exposed in the blockchain. And companies may need to explain to consumers from those states how the immutability of blockchain registrations may mean that consumers cannot exercise their rights to delete personal information.

At the federal level, companies offering NFTs should confirm that the processing of personal information in association with NFTs aligns with disclosures made in privacy notices and other public statements. For example, if a company has stated that transactions will always be “completely confidential” or that it “never discloses customer information to third parties for their own use”, that may not align with the posting of personal information to public blockchain registries. And companies offering NFTs that are of interest to children under the age of thirteen will need to consider compliance with the Children’s Online Privacy Protection Act (“COPPA”) and its requirements to obtain informed parental consent before processing personal information of children under thirteen.

Scammers have been known to use phishing and similar exploits to obtain wallet credentials and conduct unauthorized transactions or steal funds. So, companies that engage in NFT transactions should confirm that they secure their wallet keys and account credentials. Security measures could include requiring two or more signatories for spending funds from digital wallets, maintaining wallet keys in secure environments, and confirming that wallet credentials and keys are reassigned as job roles change.

## How is the NFT market expected to develop, and what are the opportunities?

There are numerous exciting opportunities and developments to be found in the NFT space:

a. **Metaverse:** The metaverse is essentially how we as humans interact with technology around us. Platforms where users can interact with each other in a digital world include, for example, Decentraland, Fortnite, Roblox, Minecraft, the Sandbox, and Otherside. For many, how they portray themselves in these digital worlds is as important to them as how they are seen in the physical world. As an example, a digital-only Gucci purse (without the potential for redemption of the physical item) existing exclusively on the Roblox gaming platform was sold for \$4,115 – even more than the real-world price for the bag of \$3,400. Balenciaga has created a dedicated metaverse division and launched its latest collection inside a virtual space. In 2022, Meta announced plans to invest \$10 billion dollars in the metaverse and various consumer retailers are actively investigating the creation of virtual stores, not only to improve their image as modern and cutting edge, but also to get out in front of would-be infringers.

Business use cases in the metaverse include marketing campaigns, learning and development for employees, meeting spaces for events or conference, and product design or “digital twinning” of real-world settings where product testing and design can take place.

b. **Gaming:** One of the drivers of metaverse development is gaming, and NFTs are increasingly part of those games. For example, there are Blockchain-based games in which users must purchase or otherwise acquire NFTs to play (the NFTs can be the characters themselves for the games or powers or accessories for the characters, or the NFTs can be digital sports cards used in fantasy sports contests). Some of these games are “play-to-earn” where players can earn prizes and rewards, which makes the NFTs they acquire for use in the game important. NFTs can also be part of “loot boxes” that players are able to acquire during their gaming experiences, which may be subject to laws on randomized rewards such as raffles and lotteries.

c. **Retail / Luxury Goods:** Retail and luxury good brands have harnessed NFTs to provide exclusive digital consumer goods (often to compliment or incentivize purchase of a tangible good), available on the Metaverse or in other virtual spaces. Other brands have used NFTs to increase brand recognition and raise funds for charitable causes. Adidas and Prada commissioned a large-scale NFT created from participant-submitted photographs, which was later auctioned for charity. Louis Vuitton and Burberry have collaborated with games creators to create NFT games.

Another use of NFTs in this space is to allow consumers to easily trade or auction exclusive tangible goods or experiences. Because NFTs are easily traceable and quickly transferrable, using NFTs to sell tangible goods can increase its value. Using NFTs to sell experiences is a new way to offer event tickets and allows brands to interact with the purchaser in new ways (for example, offering sweepstakes or give-aways to event attendees).

d. **Advertising:** In the advertising space, companies are increasingly using NFTs to generate buzz and consumer engagement. For example, as part of the 2021 Macy’s Thanksgiving Day Parade, Macy’s offered an NFT release with various levels of exclusive NFTs available for free and for purchase. Proceeds generated from the initiative were donated to the Make-A-Wish Foundation charity.

e. **Art and Collectibles:** The use of NFTs in the art and collectibles markets is similar to the use by retail and luxury goods markets. NFTs offer artists (or the original NFT seller) the opportunity to derive monetary value from the sale and resale of works of art. In addition to opening up new digital art opportunities, the trackability of NFTs offers artists a way to generate royalties on sales of tangible art, even on the secondary market. Companies looking to contract with artists to create digital art for NFTs should be aware of US IP considerations, including work-for-hire doctrine and IP assignment, and liability for third-party IP infringement.

f. **Emergence of NFT Minting Service Providers:** Many of our clients who are involved in this space work with NFT minting service providers. These collaborations enable our clients to participate in the NFT marketplace while shifting many of the considerations involved in issuing and selling NFTs to companies who build their business around just that. We regularly guide clients through the process of entering the NFT space, including negotiation of minting and sale contracts to ensure that these agreements satisfy consumer protection, disclosure, and other legal requirements, and appropriately allocate liability vis-à-vis the service provider.

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# Vietnam

## What are the recent trends in the NFT market?

In Vietnam the adoption of blockchain in general and non-fungible tokens (NFTs) in particular remains nascent, but a number of local enterprises have begun experimenting with this form of technology, most prominently in the gaming and art industries.

In mid-2020, a popular blockchain-based game titled "Axie Infinity" was first released, and was characterized by a sense of true ownership over in-game items.[1] By 2021, Sky Gate (known in Vietnamese as "Cong Troi") and KardiaChain partnered to create a blockchain-based digital platform focusing on a digital marketplace connecting artists and traditional collectors.[2]

It is expected that this initial development in the gaming and art industries will encourage the ownership of cryptoassets, which has so far been impractical. Until recently, title to virtual goods could almost never be verifiable because it would be impossible to identify the original owner and to ensure the authenticity of the transacted item. The uniqueness of each NFT and the use of blockchain technology have enabled ownership of cryptoassets produced in cyberspace.[3]

[1] [Tech in Asia: Thu Huong Le. Meet the Vietnamese developer behind blockchain game Axie Infinity \(2020\)](#); and readers can find more information about the game Axie Infinity at [axieinfinity.com](http://axieinfinity.com)

[2] Readers could find more information about Sky Gate Application at the following link: [congtroi.org](http://congtroi.org)

[3] [Blockchain Gaming and the Rise of Axie Infinity. Niko \(2021\)](#)

## What are the legal requirements to conduct business in the NFT area, is the sector regulated, and are there any particular restrictions?

Generally, there are currently no laws or regulations specific to NFTs, and therefore NFTs remain unregulated in Vietnam. Report No. 70/BC-BTP dated March 23, 2020 issued by the Ministry of Justice reviewed the current legal framework on blockchain, noting that there is no legal framework on either: (a) raising capital via the issuance of cryptoassets or cryptocurrencies (e.g., ICO, ITO, STO) or (b) trading cryptoassets or cryptocurrencies, through the operation of centralized exchanges.

Future regulations are expected to impose market entry and business restrictions limiting investment in NFTs, in addition to current generally applicable requirements in relevant sectors such as telecommunications, data centers, digital authentication and identification. For example, draft decree which amends Decree No. 72/2013/ND-CP on management, provision and use of internet services and online information published by the Government proposes that data center services will include co-location services (i.e., server, space, data storage rental) and cloud computing services, and may require local service providers to obtain a ministerial-level approval for operations. In the absence of express governmental guidance, investors may address uncertainty through consulting with the competent authorities on an ad-hoc basis, which is time-consuming and lacks binding effect.

NFT businesses are subject to generally applicable relevant local regulations on data privacy and cybersecurity. Although the Government has not yet adopted the final version of the guiding decree on data privacy, it is possible that NFT businesses in Vietnam may soon be required to comply with data storage localization, more onerous data protection requirements, and requirements to register cross-border data transfers.

On a related note, digital accounts transacting "other transferable assets in cyberspace" are within the applicable scope of a recent draft decree on administrative penalties in cybersecurity published by the Ministry of Public Security. In particular, this draft decree proposes requiring: (1) use of valid identification documents to authenticate digital accounts; (2) suspension of the use of digital accounts at the request of competent authorities; and (3) storage of device information, IP address, and login time of digital accounts for at least 90 days.

The Ministry of Information and Telecommunications has also published a new draft "Law on the Digital Technology Industry" addressing cryptoassets and blockchains, which is targeted for enactment in 2023. The draft law contemplates the introduction of specialized regulations for NFTs and blockchains shortly thereafter.

## What are the main implications from an IP perspective?

Whilst an NFT itself is likely not subject to copyright, NFTs can be based on artistic works, and the artistic works underlying the NFTs are protected by copyright. However, as NFTs are currently unregulated in Vietnam, there is still uncertainty as to whether an acquisition of an NFT is considered an assignment or a license of the artistic works underlying the NFTs, and if this is the case, which rights are transferred together with the transfer of the NFTs. This would need to be further defined in future local law and regulation.

In the meantime, the current law provides that whilst other plastic-art works (e.g., works of fine arts, sculpture arts, installation arts, etc.) must be available in unique copies, graphic art works may be presented in as many as 50 copies which are ordinarily numbered and bear the author's signature.[4] To that end, the application of NFTs may be useful to number, identify and manage the limited copies of graphic art works as stipulated by law.

[4] Article 13.1 of Decree 22/2018/ND-CP.

## What are the main implications from a finance perspective?

As NFTs are closely linked with blockchain and cryptocurrencies, potential investors should be well aware that using cryptocurrencies to make purchases remains illegal in Vietnam since cryptocurrencies are not considered as a lawful type of legal tenders. In Vietnam, legal tender consists of cash and non-cash payment methods defined in non-cash payment regulations (including cheques, payment orders, collection orders, bank cards and other payment instruments as prescribed by the State Bank of Vietnam). Since NFTs are not clearly recognized as a type of asset, the possession and trading of NFTs are unlikely to be protected under the current laws of Vietnam. Accordingly, rights and obligations relating to NFT transactions may not be recognized under the Vietnamese Civil Code or other local law.

On a related note, the Government is currently contemplating a catch-all regulatory sandbox for all forms of fintech in the banking sector. The first draft regulation published in June 2020 allows the participation of payment, credit, peer-to-peer lending, Know-Your-Customer support, Open API, solutions

applying innovative technologies (e.g., blockchain), and other services supporting banking activities (e.g., credit scoring, savings, fundraising). The use of NFTs may benefit from implementation of a regulatory sandbox, but the State Bank of Vietnam is still developing the final regulation for implementation.

## What are the main implications from a data privacy and cybersecurity perspective?

Although Vietnam has passed various legislation on data privacy and cybersecurity in recent years, the Government has not officially promulgated any specific guidelines. The Ministry of Public Security is collecting opinions from various state agencies and organizations in order to finalize the draft data privacy regulations but there is no certainty around the final date of promulgation.

One consistent key principle throughout the currently effective data privacy legislation is that a data subject must consent to any collection, processing, use and/or transfer (including cross-border transfer) of his/her personal information, and any use of his/her information should be limited to the purposes as informed to and agreed by the data subject.

Although a data subject is permitted to request the deletion of his/her personal data and the data processors must carry out this request in a timely and prudent manner, it may become impossible to do this in respect of personal data stored on the blockchain since such personal data will be permanently recorded in the blockchain ledger.

In the absence of a detailed cybersecurity framework, local authorities have limited flexibility and increased risk exposure. The recent prominent data breach resulting in the disclosure of 17GB of Vietnamese identification card information on Raid Forums was arguably linked with the Know-Your-Customer regime imposed by the digital currency platform Pi Network.[5] Although this particular incident does not directly relate to NFTs, it illustrates the practical implications of data breaches involving offshore elements, where the Government seemingly did not take any specific action against the alleged data breach and the lawful interests and obligations of the relevant parties were left unaddressed.

On 1 October 2022, Decree No. 53/2022/ND-CP providing guidance on implementation of certain articles of the Law on Cybersecurity (2018) (“Decree 53”) entered into effect, requiring domestic entities to localize storage of certain data and requiring foreign entities to do the same upon occurrence of a series of conditions. Decree 53 generally requires that data of organizations and individuals using cyberspace in the Vietnam territory (service users), including personal information of service users, data created by service users and data on relationships among service users, must be stored in Vietnam. However, data localization requirements differ depending on whether an organization is a domestic or a foreign enterprise. Domestic enterprises (which are enterprises established or registered in accordance with Vietnamese law and having their head-offices in Vietnam) must store data within the territory of Vietnam. Foreign enterprises (which are enterprises established or registered in accordance with foreign laws), only have a conditional obligation to store data in Vietnam and to establish a branch or representative office in Vietnam which is triggered if all of the following conditions are met: (i) the products/services provided by the relevant foreign enterprise fall within one of ten categories of regulated services;[6] (ii) a breach of cybersecurity regulations is committed using the services provided; (iii) the enterprise receives a written notice from Vietnam’s Department for Cybersecurity and Prevention of High-Tech Crime under the Ministry of Public Security notifying it of breach(es) under the Law on Cybersecurity and requiring rectification; and (iv) the foreign enterprise fails to comply with the requests set out in the notice, and as a result the Ministry of Public Security issues a decision requiring data localization and establishment of a branch or a representative office within twelve (12) months from the date of the written notice. Decree 53 does not specify whether the data must be stored exclusively in Vietnam, and does not include express provisions restricting cross-border data transfer to servers located outside of Vietnam.

[5] [VNExpress: Luu Quy & Phuong Son, Personal data leak affects thousands of Vietnamese](#)

[6] Article 26.3(a) of Decree 53 provides that the ten categories are: (1) telecommunication services; (2) storage and sharing data services on cyberspace; (3) providing national or international domain names for service users in Vietnam; (4) e-commerce; (5) online payment; (6) payment intermediation; (7) transport connection services through cyberspace; (8) social networks and social media; (9) online video games; and (10) provision, administration or operating other information services on cyberspace in the form of messages, audio and video calls, emails, or online messaging Services.

## How is the NFT market expected to develop, and what are the opportunities?

As the Government is still in the process of exploring feasible approaches to crypto-related matters, there will be continuing difficulties against domestic trading of NFTs. Although the potential uses of NFTs are endless, it remains to be seen how the Government will monitor the trading of NFTs in absence of any ad-hoc precedent or guidelines. Newcomers such as Axie Infinity and Sky Gate and their users may become unwitting guinea pigs for the local authorities to better evaluate and decide on the legality of NFTs and the corresponding legal framework.

Other use cases of NFTs such as OpenLive NFT and Crystabaya are already gaining momentum. OpenLive NFT is a decentralized platform designed by a Vietnamese team where users can generate, store, buy and sell NFTs. This is quite well-known in Vietnam, and many NFT transactions have been conducted on this platform. Crystabaya is an online trading platform for tourism developed by Crystal Bay Travel Group (a tourism corporation in Vietnam) and Beowulf Blockchain Technology Group which allows NFT online trading for hotel accommodations and other travel products. As modern history has shown with internet technologies: the future is unpredictable and the opportunities are limitless.

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