

# NFTs: Business Trends & Legal Uncertainties



***The Inevitable*Act**  
*#sustainability #innovation*

STELIOS  
AMERICANOS  Co LLC  
ADVOCATES - LEGAL CONSULTANTS

[americanoslaw.com](http://americanoslaw.com)



## / Introduction

The first non-fungible token (NFT) was issued in 2014, when New York artist Kevin McCoy's cartoon Quantum was issued on Namecoin, a blockchain fork of Bitcoin. Quantum was ultimately sold in June 2021 for \$1.47 million at a Sotheby's auction.<sup>1</sup> While in March 2021, Beeple's digital collage NFT was famously auctioned for \$69 million at a Christie's auction.<sup>2</sup> Crucially, NFT sales reached \$18.5 billion in 2021, as the popularity of avatars and digital art increased and organisations such as the NBA published NFT collections that received an enormous reaction, according to statistics compiled by CryptoSlam.<sup>3</sup> With sales remaining over US\$2.5 billion in recent months and rising as high as US\$4.5 billion in January 2022, the market for new exchange-traded funds (ETFs) is expected to exceed US\$30 billion this year.<sup>4</sup>

NFTs, are a new innovation that has the potential to disrupt various existing businesses by bringing the physical closer to the digital economy. The purpose of NFTs is to generate a sense of scarcity and deficiency among the seemingly unlimited supply of virtual products. This publication will investigate and analyse a variety of developments within the NFT hype and their implications in different sectors. The paper begins with an analysis of current trends and growth factors for NFTs. Second, the expanding influence of NFTs on the Creative Industries will be investigated, giving particular interest in the fashion, art and music industries. Finally, the paper will examine the regulatory, litigation, contract and copyright dilemmas that the adoption of NFT technology has spawned. It is concluded that, with appropriate guidance, NFTs present an immaculate opportunity across sectors.

1 JForkast | Research Report: State of the NFT Market | Q1 2022

2 Christies. "Beeple (b. 1981)." Christies.com, <https://onlineonly.christies.com/s/beeple-first-5000-days/beeple-b-1981-1/112924>

3 "What Is the NBA Top Shot Nft Collection?" cnbctv18.Com, 25 May 2022, <https://www.cnbctv18.com/cryptocurrency/what-is-the-nba-top-shot-nft-collection-13593092.htm>

4 Forkast | Research Report: State of the NFT Market | Q1 2022



## / What are NFTs

Non-fungible tokens, or NFTs, function effectively as digital tokens or trade cards that represent unique material, most notably digital art. Similarly, music, text, and any other material might be exchanged in this manner. Non-fungibility (i.e., uniqueness) is what separates these tokens from other kinds of crypto-assets that are interchangeable, such as bitcoin, where each unit is identical. Trading occurs within the blockchain using ‘smart’ contracts; hence, every element of the token’s creation, provenance, and transactions is securely documented and publicly accessible. The ability of the smart contract to automatically remit a resale royalty to the developer presents an extra advantage. This closely resembles an automated version of the Artist’s Resale Right, which has been compensating artists for sales of their works on the secondary market.

## / NFT Trends – Avatars and ‘skins’

One of the most prominent trends within the NFT hype includes viral “cult” crypto collections

and avatars. There are no identical NFTs, and each may be owned by a different individual. For example, each of the crypto NFT collectable projects Bored Ape Yacht Club and CryptoPunks has around 10,000 characters that are produced individually<sup>5</sup>. As these collections represent more than a digital collectable, their potential applications are limitless. They symbolise an access pass, an individual’s identity, and a social “flex”. These avatars are used as profile photos on social networking sites and exclusive virtual member’s clubs. These clubs’ “members” actively support and follow one another. Membership in these clubs, reflected by the possession of these tokens, is exclusive, provides tangible value, and enhances a person’s digital identity and persona. Large clothing companies have already begun to integrate digital and physical properties. Adidas has worked with Bored Ape Yacht Club for their next range of non-traditional footwear named Into the Metaverse.<sup>6</sup> The owners of these NFTs will have free access to four special physical items. The advent of the metaverse may be the impetus for a shift in the general public’s understanding of NFTs from basic images to distinct digital assets representing ownership.



<sup>5</sup> Forkast | Research Report: State of the NFT Market | Q1 2022

<sup>6</sup> Forkast | Research Report: State of the NFT Market | Q1 2022 p 10

## / Growth Drivers – The Metaverse

As the Metaverse becomes more established, it is anticipated that NFTs will expand in popularity due to the technology's capacity to give irrefutable proof of ownership. It is argued that beyond, multimillion-dollar digital art and collectibles, the relevance of NFTs lays in their ability to facilitate the emergence of genuine human societies in the Metaverse<sup>7</sup>. NFTs will be a utility that represents any digital asset in the virtual realm, including real estate, clothing and collectibles. The Metaverse is an online 3-D virtual realm that its members co-create and own.<sup>8</sup> With NFTs, digital assets may be owned, rented, shared, and programmed through fractionalization and other processes. NFTs ultimately enable a Metaverse in which people actually own and govern their assets. Notably, the October 2021 makeover of Facebook as Meta has brought this phenomenon to the attention of the general public. It is believed that NFTs have effectively facilitated the transition of millions of mainstream users to Web 3.0 via a new asset class, digital collectibles.<sup>9</sup> Evidently, NFTs cross numerous boundaries between physical and digital, since everyone can connect with collectibles in their particular specialty. The advent of the Metaverse may be the impetus for a shift in the general public's understanding of NFTs from basic images to distinct digital assets representing ownership. It becomes evident that popular businesses will extend into the Metaverse, bringing



digital assets such as NFTs, gaming “skins,” and virtual clothing closer to universal popularity. Arguably, the world is set to become increasingly interoperable.

## / Disrupting the Industry

### The Fashion Industry

The fashion industry is among the first to see the economic possibilities of NFTs and the Metaverse. As customers spend more time online and the excitement around the Metaverse continues to cascade into virtual products, fashion industry executives discover new methods to engage with younger, high-value cohorts. To exploit untapped value streams, participants should investigate the possibility of non-fungible tokens, gaming, and virtual fashion, which all provide novel avenues to creativity, community-building, and commerce.<sup>10</sup>

7 alphaGrid. “NFTs – the Metaverse Economy.” Financial Times - Partner Content by CRYPTO.COM, <https://www.ft.com/partnercontent/crypto-com/nfts-the-metaverse-economy.html>

8 alphaGrid. “Beyond Art: Nfts Are Showing Staying Power.” Financial Times - Partner Content by CRYPTO.COM, <https://www.ft.com/partnercontent/crypto-com/beyond-art-nfts-are-showing-staying-power.html>

9 alphaGrid. “Beyond Art: Nfts Are Showing Staying Power.” Financial Times - Partner Content by CRYPTO.COM,

10 “State of Fashion Technology Report 2022.” McKinsey & Company, McKinsey & Company, 4 May 2022, <https://www.mckinsey.com/industries/retail/our-insights/state-of-fashion-technology-report-2022>

Digital assets in the form of virtual fashion and NFTs provide customers new opportunities to purchase, trade things, and live their identities. Part of the attractiveness of virtual worlds is the opportunity to interact with people and form communities, a desire that was amplified when worldwide Covid-19 lockdowns eliminated most in-person social interaction. As digital environments grow more active, some consumers are joining in digital communities where they can converse with people who share their beliefs, tell tales, and collaborate. These skyrocketing interaction levels have generated a new breed of digital fashion. Particularly, Gucci's chief marketing officer Robert Triefus stated that there is likely an underestimation of the value attached to individuals who want to express themselves in a virtual world with a virtual product and persona, citing the 19 million visitors to the Gucci Garden within the Roblox gaming Metaverse.<sup>11</sup> An obvious interaction that has emerged, is the fashion

industry's interest in the gaming industry that has taken the shape of collaborations. Key examples include, the partnership between Ralph Lauren and Zepeto - a south Korean social network and avatar creation app. The partnership included the development of a virtual fashion collection, allowing users to outfit their avatars with unique items or "skins" that modify their look. Some brands have even greater aspirations. After debuting its Fall/Winter 2021 collection in the guise of a fully-fledged video game, Balenciaga collaborated with Fortnite to release a line of shoppable virtual and physical apparel.<sup>12</sup> Crucially, DressX, has estimated the total target market for digital fashion to be \$31billion with over 100 designers interested in selling digital fashion.<sup>13</sup> It seems that some consumers view digital fashion as a logical evolution of Instagram filters.

### Authentication - Product Passports

In addition to social media and video games, artificial intelligence (AI) and augmented reality (AR) technologies provide prospects for the development of new business models that use virtual fashion. Much of the enthusiasm regarding virtual environments is focused on the uniqueness and ability of Blockchain technologies to authenticate, monitor and validate ownership. The fashion industry is investing heavily in digital technologies that enable the addition of unique IDs and other digital information to items. Utilizing a mix of technologies centered on blockchain and radiofrequency identification RFID, these "product passports" connect information that



<sup>11</sup> BoF interview with Robert Triefus, September 2021

<sup>12</sup> Marc Bain, "Balenciaga and Fortnite Are a Match Made in the Metaverse", The Business of Fashion, September 20, 2021, <https://www.businessoffashion.com/articles/luxury/balenciaga-and-fortnite-are-a-match-made-in-the-metaverse/>

<sup>13</sup> McKinsey interview with Daria Shapovalova, October 2021

is important to both customers and partners to specific items.<sup>14</sup> For instance, Eon's digital passport suggests the price of a garment based on its history, which includes who wore and owned the item, as well as its repair history and marketing suggestions.<sup>15</sup> Undoubtedly, the digital authenticity provided by product passports will increase confidence in pre-owned luxury items and collectibles. Crucially, product passports are also used in anti-counterfeiting procedures. For instance, Chanel will replace physical authenticity cards in its handbags with a digital passport that will be accessed through a scannable metal plate.<sup>16</sup> Moreover, IBM and fashion and luxury NFT platform Arianee are collaborating to test digital product passports for companies like as Breitling and Vacheron Constantin.<sup>17</sup> Additionally, LVMH along with ConsenSys and Microsoft are resolving fundamental issues surrounding the traceability of luxury products by providing each product with a digital identity that enables buyers with a safe, verifiable way to see the product's complete existence, from raw materials through resale.<sup>18</sup> Unarguable is the fact that leaders in the fashion business are interested in investigating the possibilities of virtual fashion. At the very least, fashion's move into the metaverse offers customers new interaction avenues.

## The Art Industry - Digital Art and Commodified Real-World Art

One of the most prominent fields that NFTs find their application is the Art world and creative industries. Art collectors and scholars have become more interested in NFTs. NFTs serve as a link between the physical and virtual worlds. The difference between conventional and digital art is still substantial, but it is believed to diminish over time as new NFTs attract purchasers from the physical market.

The usage of NFTs in the art world offers several benefits, in terms of verifiable ownership of digital art, but also in terms of democratizing and decentralizing the purchasing and funding process for artists, particularly those who are not yet established names.<sup>19</sup> As blockchain is a peer-to-peer network, NFTs enable artists to sell their work directly to their following without the need for intermediaries. NFTs may facilitate the birth and development of a whole new creative economy. This economy will prioritise assisting creators to avoid transferring ownership to the platforms they use to disseminate their content. NFTs artists can build entire economies or ecosystems directly around their fans, offering them not only the art represented by a token,

14 "State of Fashion Technology Report 2022." McKinsey & Company, McKinsey & Company, 4 May 2022, <https://www.mckinsey.com/industries/retail/our-insights/state-of-fashion-technology-report-2022>

15 Douglas Broom, "This start-up is making digital passports... for clothes. Here's what that means for the fashion industry", World Economic Forum, May 18, 2021, <https://www.weforum.org/agenda/2021/05/tracking-fashion-clothes-sustainable/>

16 Joelle Diderich, Natalia Theodosi, "Why Luxury Brands Are Sitting Out the Resale Market Boom", WWD, September 1, 2021, <https://wwd.com/fashion-news/designer-luxury/luxury-brands-reluctant-to-joinresale-market-1234898376/>

17 "IBM and Arianee join forces", Arianee Press Release, July 8, 2021, <https://www.arianee.org/newsfeed/ibm>; Paige Reddinger, "Vacheron Constantin Will Certify All Watches With Blockchain Technology Starting in 2021", November 5, 2020, <https://robbreport.com/style/watch-collector/vacheron-constantin-blockchain-certification-1234579311/>

18 o "LVMH, Richemont and Prada Team Up for New Blockchain Venture Aimed at Tracing, Authenticating Luxury Goods", The Fashion Law, April 21, 2021, <https://www.thefashionlaw.com/lvmh-richemont-and-prada-team-upfor-new-blockchain-venture-aimed-at-tracing-authenticating-luxury-goods/>; "China Inspection Group first launched the luxury identification and traceability signature, opening a new era of authenticity protection", PR Newswire, April 20, 2020, <https://www.prnasia.com/story/277861-1.shtml>

19 Forkast | Research Report: State of the NFT Market | Q1 2022



but also embedding within the token other forms of utility that are deemed valuable by the community and enhance engagement, such as exclusivity rights for art displays or access to the artist. Consequently, financial prospects for an artist's work are facilitated, since artists are able to monetize the authentic transfer of ownership of their works to third parties.

### The Music Industry

For other sectors within the creative industries, including music and cinema, NFTs enable artists and filmmakers to directly monetize the copyrights of their content through royalties, as well as engage their following through special merchandise, prizes, or experiences for token holders. For example, Treum has been a pioneer in music rights and royalties with its EulerBeats project, which creates original, generative music

and distributes payments in perpetuity to the original owners<sup>20</sup>. In addition, NFTs may be used to build community clubs where NFT holders have exclusive access to an event, person, or experience.<sup>21</sup> Such a use case may result in the possession of particular NFTs being perceived as status symbols, hence generating intangible value. Of particular interest is the music industry in South Korea, where the largest contribution to NFTs is deriving from its K-Pop Industry. HYBE, the company managing the K-pop boy band BTS, has partnered with blockchain firm Dunamu to build an NFT business to sell BTS digital assets. Moreover, Cube Entertainment, another K-pop talent agency, has joined with Animoca Brands to create a music metaverse through an NFT joint venture.<sup>22</sup> While the effects of NFTs and the metaverse will have on the creative industries, the legal work and challenges that emerge are a certainty.

<sup>20</sup> Forkast | Research Report: State of the NFT Market | Q1 2022, p 9

<sup>21</sup> JP Fabri et al, Tokenise :How NFTs and Tokenisation will disrupt tomorrows economies", Seed Consultancy, 2022 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://seedconsultancy.com/wp-content/uploads/2022/04/Tokenise.pdf>

<sup>22</sup> 1 K-pop sensation BTS gets ready to sell NFTs, as label looks to cash in on loyal A.R.M.Y fanbase. <https://forkast.news/k-pop-sensation-bts-nftslabel-army-fanbase/> 2 Animoca Brands dreams big with K-pop agency Cube to build metaverse and NFTs. <https://forkast.news/headlines/animoca-brands-kpopcube-metaverse-nfts/> 3 Binance, BLACKPINK's K-pop agency to develop NFTs, other projects. <https://forkast.news/headlines/binance-blackpink-kpop-nfts-projects>

## / Legal Framework and Challenges

Legal developments surrounding NFTs have arguably presented new-found legal difficulties. Although general regulation may offer a short-term solution, as it is often the case with technological developments, government regulation seems to lag behind innovation. On one aspect, as is customary, the law will find a way to apply centuries-old notions to modern circumstances. Contract law will oversee the transactional elements of NFT deals, while copyright law will give guidance on the preservation of NFT artworks and the authors' rights.

### Regulatory Framework

While NFTs are not explicitly regulated, nations and international organizations nonetheless impose legal requirements. These may include "KYC" checks, verification and record-keeping duties, or other AML compliance requirements linked to money laundering, sanctions legislation, or the impending Europe-wide Markets in Crypto-Assets Regulation (MiCA).<sup>23</sup> However, as enterprises join the digital sphere, the physical world's laws, regulations, and trademarks will migrate into the virtual realm. Given the stringent and expensive compliance requirements of industries such as financial services, NFTs provide an opportunity to minimize compliance expenses associated with client due diligence and KYC processes. Moreover,

NFTs may potentially be drawn into the regulatory labyrinth designed to prevent money laundering and counter-terrorist funding, despite the fact that the worldwide Financial Action Task Force (FATF) does not yet consider NFTs to be virtual assets.<sup>24</sup>

While blockchains and NFTs can potentially reduce plagiarism and fraud, there is no obvious differentiation between NFTs that were inspired by the ideas of others and those that are merely knockoffs. While the technology can prohibit the ownership claim of counterfeit digital assets, NFTs cannot prevent the limitless replication of a specific digital asset and cannot eliminate the threat of fraud entirely. Nike,<sup>25</sup> for example, has launched a lawsuit against StockX for selling NFT photographs of its shoes, while Hermes has filed a lawsuit against an artist for selling NFTs of Birkin bags.<sup>26</sup>

There is currently no consensus among countries on how to adequately manage the rapidly expanding NFT sector. In the EU, regulators aim to guarantee that issuers of NFTs follow to laws analogous to those applicable to the physical world. Contrastingly, China has been less hesitant in its regulatory approach. The State has imposed bans on cryptocurrencies and mining. Meanwhile, the state-backed blockchain network is attempting to establish a standard for lawful NFTs, despite the fact that other government organizations and state-owned media outlets have warned against

23 "Digital Finance: European Parliament Adopts Mica Regulation, Paving the Way for an Innovation-Friendly Crypto Regulation." Deloitte Luxembourg, 17 Mar. 2022, <https://www2.deloitte.com/lu/en/pages/financial-services/articles/digital-finance-european-parliament-adopts-mica-regulation-innovation-friendly-crypto-regulation.html>

24 "State of the NFT Market." Forkast, 13 May 2022, <https://forkast.news/state-of-the-nft-market/>

25 Mary Kate Brennan, et al. "Nike's Trademark Fight against Stockx Moves Offline." IPWatchdog.com | Patents & Patent Law, 18 May 2022, <https://www.ipwatchdog.com/2022/05/18/nikes-trademark-fight-stockx-moves-offline/id=149098/>

26 Person, and Blake Brittain. "Hermes Lawsuit over 'Metabirkins' Nfts Can Move Ahead, Judge Rules." Reuters, Thomson Reuters, 6 May 2022, <https://www.reuters.com/legal/litigation/hermes-lawsuit-over-metabirkins-nfts-can-move-ahead-judge-rules-2022-05-05/>



trading NFTs.<sup>27</sup> In the United States, there is no federal regulatory guidance on NFTs,<sup>28</sup> but a few states have introduced legislation that might put NFTs within their jurisdiction. Another consequence of inconsistent regulations across countries is whether NFTs may be categorised as securities, hence posing security law concerns. Moreover, the absence of tax standards for crypto-assets may cause problems for present and future industry players in the field, who are exposed to possible legal and regulatory concerns around tax duties and tax declaration requirements.

Crucially, whether NFTs are categorized as “art” pose significant legal conundrums. Surprisingly, Wikipedia has decided not to classify NFTs as art, in a vote regarding whether Wikipedia should include Christie’s \$69million sale of Beeple’s *Everyday* or Pak’s \$91.8 million “NFT merge” in the world’s most expensive art sales.<sup>29</sup> One area where this classification may play a crucial role is AML Regulation. Since 2018 the EU, UK and the US, commenced the regulation of the art market. In the EU, for instance, the 5<sup>th</sup> AML Directive includes the art industry to the regulated industry sectors. In 2020, the rule covering transactions of at least €10,000 in the art market entered into force. However, each Member State, has the freedom to execute the directive in accordance with its national legislation, resulting in a lack of uniformity between EU nations. Nevertheless, due to the upsurge of NFT sales, it seems more than likely that AML and KYC Legislation will apply to digital art like NFTs. Whether this

divergence will be significant in the context of AML legislation remains to be seen. Even though an NFT is “not art” per se, it is unquestionably a method of trading in art. Therefore, if digital art is subject to AML legislation, it appears likely that NFT transactions involving such art will follow. Nonetheless, applying a rule to digital art does not always correspond to applying it to an NFT as will be discussed later on.

### Copyright-Related Disputes

Regarding copyright and copyright violations, there are several unsolved concerns. Artists and consumers place a vital importance on authenticity, validity, authorship, and ownership of copyright and moral rights. While there is an argument that NFTs are beneficial for digital artists as they allow them to be compensated for their labor. Due of the ease with which art may be replicated and distributed online, however, the original author is frequently not credited. Furthermore, NFTs that may be created through AI raises difficult questions as to the authorship of the work. Moreover, originality of works may be an issue where the originality threshold is not met, and the work does not qualify for copyright protection. In addition, there is a paucity of legal precedents and frameworks for validating and enforcing the real copyright and ownership of NFTs.

The ownership of intellectual property rights is one central legal dispute as also notoriously exemplified by the aborted sale of a Basquait NFT.

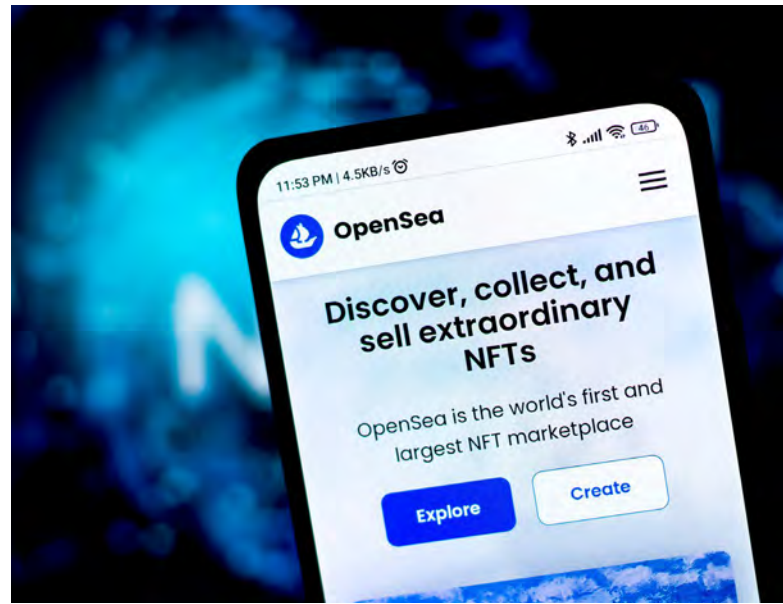
<sup>27</sup> China state mouthpiece criticizes NFT mania. <https://forkast.news/headlines/china-state-mouthpiece-criticizes-nft-frenzy/>

<sup>28</sup> Key U.S. Legal Considerations for NFTs <https://www.jonesday.com/en/insights/2021/04/nfts-key-uslegal-considerations-for-an-emerging-asset-class>

<sup>29</sup> Artnet News. “Wikipedia Editors Have Voted Not to Classify Nfts as Art, Sparking Outrage in the Crypto Community.” Artnet News, 13 Jan. 2022, <https://news.artnet.com/market/wikipedia-editors-nft-art-classification-2060018>

The auction, which were to take place on one of the major NFT markets, OpenSea, was announced in late April 2022 and was met with predictably high levels of enthusiasm, especially considering the peculiar characteristics of the offer. Along with a “encrypted digital token” of the Basquiat original (a mixed media piece on paper titled “Free Comb with Pagoda”), the fortunate bidder would also obtain “reproduction and all relevant IP and copyright in perpetuity,” as stated by the vendors. In addition, the buyer would have the option to have the original piece ‘deconstructed, leaving the NFT as the sole existing version of Basquiat’s work’.<sup>30</sup> The lot was subsequently removed after the Basquiat Estate verified unequivocally that it held the copyright to the piece and that no rights had been provided to the vendor. Alarming, the incident demonstrates either a fundamental misunderstanding of the foundational precepts of copyright law or a propensity to disregard them.

Essentially, as aforementioned, a purchaser of an NFT receives an encrypted data file (the ‘token’) associated with an asset. This token is non-fungible in that no one else can possess it. Where the item in question is a digital or physical work of art, in absence of a bespoke supplemental agreement, the buyer is not acquiring the copyright to that piece as the copyright subsists with the artist. The buyer, on the other hand, is being granted restricted rights, such as the permission to use, copy, and exhibit the work for personal, non-commercial reasons, and to distribute it on digital



marketplaces, subject to specific limitations. Outside of the rights expressly permitted or licensed, various limited uses may be permissible under copyright law, but as copyright is not a monopoly right, the copyright owner may not be able to prohibit all uses. Particularly, the ‘fair dealing’ exceptions in the United Kingdom and across the EU permit a variety of uses, including criticism and review, parody, pastiche, and quotation, while the much more fluid notion of ‘fair use’ in the United States has been a savior for many creators over the years.

Turning to moral rights, the alteration, modification, or destruction of a work may amount to a violation of the artist’s moral rights. It appears more than plausible that the ‘deconstruction’ envisaged in the Basquiat NFT vendor’s offering, could constitute a threat to an artist’s honor and reputation, giving

<sup>30</sup> Shaw, Anny. “Basquiat NFT Withdrawn from Auction after Artist’s Estate Intervenes.” *The Art Newspaper - International Art News and Events*, The Art Newspaper - International Art News and Events, 28 Sept. 2021, <https://www.theartnewspaper.com/2021/04/28/basquiat-nft-withdrawn-from-auction-after-artists-estate-intervenes>  
Gould, Emily, et al. “NFTs - Contemplating Copyright and Contract Conundrums (Part I).” *Institute of Art and Law*, 24 May 2021, <https://ial.uk.com/nfts-contemplating-copyright-and-contract-conundrums-part-i/>

rise to a claim for violation of the moral right to integrity. The following narrative also brought up difficulties for moral rights. Transparency and immutability are prominent characteristics of blockchain technology. Once a work is minted (i.e., recorded on the blockchain) and then sold, its provenance and subsequent transaction history will be visible to anyone, giving a verifiable and trustworthy provenance record. However, the possibility of minting a work under a fraudulent identity presents a significant conundrum. Monsieur Personne, posing as the publisher of a purported 'second edition' of Beeple's *Everydays* bestseller, appears to have intended to expose this danger.<sup>31</sup> Personne said, "How can we ensure that other NFTs are safe from purposeful malice, fraud, forgeries, theft, etc., if this, arguably the most recognizable NFT in the world, is not adequately protected?" While the action does not appear to have had any immediate legal implications for M. Personne, there are virtually definitely a variety of prospective legal claims that may be brought. In addition to possible moral rights claims in some jurisdictions, where there is harm to the injured artist's honor or reputation, copyright infringement may also be shown, if the piece is reproduced, or published on a website without consent. In circumstances involving deliberate deception regarding the origins or authorship of the underlying work, misrepresentation or criminal fraud are also possible.

## Transactional and Contract Conundrums

Turning to transactional matters, dealings surrounding NFTs often invoke pre-existing laws and raise issues as to consumer rights and contract law. As previously discussed, NFTs are usually exchanged on the blockchain via SMART contracts. These contracts are essentially lines of computer code that, in response to pre-programmed triggers, self-execute a set of agreed-upon actions. Hence, a buyer's payment will induce the transfer of the NFT and possibly a resale royalty back to the artist. Nevertheless, SMART contracts are usually accompanied by text-based terms and conditions and copyright licensing terms that largely differ across platforms and products. For instance, CryptoKitty<sup>32</sup> from Dapper Labs Inc, permits commercial exploitation which may result to a gross revenue of up to \$100,000 per year. Contrastingly, a purchase of an NBA 'Top Shot'<sup>33</sup> from the same firm, excludes any commercial use. Other restrictions on use include forbidding any change of the underlying work, trademarking it, and using it in conjunction with media showing hatred, intolerance, violence, or cruelty. As anticipated, the text-based contractual terms include many of the customary elements of regular "real world" sales conditions and are generally protective of sellers/licensors. Thus, we observe the customary attempts by sellers to restrict their responsibility as far as possible, frequently removing any safeguards the law would otherwise

31 Schneider, Tim. "The Gray Market: How A Brazen Hack of That \$69 Million Beeple Revealed the True Vulnerability of the NFT Market (and Other Insights)." *Artnet News*, 21 Apr. 2021, [https://news.artnet.com/opinion/sleepminting-nftheft-monsieur-personne-1960744?utm\\_content=from.www.artnet.com&utm\\_source=Sailthru&utm\\_medium=email&utm\\_campaign=EUR+21+Apr+AM&utm\\_term=EUR+Daily+Newsletter+%5BMORNING%5D](https://news.artnet.com/opinion/sleepminting-nftheft-monsieur-personne-1960744?utm_content=from.www.artnet.com&utm_source=Sailthru&utm_medium=email&utm_campaign=EUR+21+Apr+AM&utm_term=EUR+Daily+Newsletter+%5BMORNING%5D)

32 one of the pioneering NFT items in 2017 <https://www.cryptokitties.co>

33 <https://nbatopshot.com>

34 Some examples from OpenSea and SuperRare <https://www.notion.so/SuperRare-Terms-of-Service-075a82773af34aab99dde323f5aa044e>, <https://opensea.io/tos>

entail for buyers regarding, for instance, the title of products and their appropriateness for purpose. The exclusions of NFT vendors are typically rather broad, alleging to absolve them of liability for a vast array of probable events, including, in certain circumstances, mistakes in content, interruptions in transmission from their websites, and any bugs or viruses they may transmit.<sup>34</sup>

These structures for trading in NFTs raise several intriguing concerns in contract law. There is some uncertainty as to whether a SMART contract is legally enforceable per se, although there is a consensus that this is probably not necessarily problematic. However, questions are raised as to how will these “words”, expressed through lines of computer code, interact with the accompanying text-based terms, and what will be the repercussions if they conflict. It is certain that issues pertaining to text-based terms and conditions will become frequent as volumes of trade of NFTs intensifies. A concern that may arise in light of current jurisprudence, is to liability limitation clauses, which, as previously said, tend to be relatively broad in the normal terms of NFT vendors. Over the past decade, consumer protection law in the United Kingdom and the European Union has increased significantly, primarily to shield consumers against unfair and excessively burdensome contractual arrangements. In an intriguing recent case<sup>35</sup> in the United Kingdom, the High Court refused to enforce

clauses limiting or eliminating responsibility in the ordinary terms of an online betting firm that attempted to use such restrictions to avoid paying out a customer’s winnings. Numerous reasons were presented in the case, but the major issue was that an attempt to remove accountability for software failures was deemed to violate the UK’s Consumer Rights Act 2015’s openness and fairness standards. It remains to be seen if the exclusions proposed by NFT vendors will be upheld, although if challenged by a customer, there is a high chance they may not be endorsed.

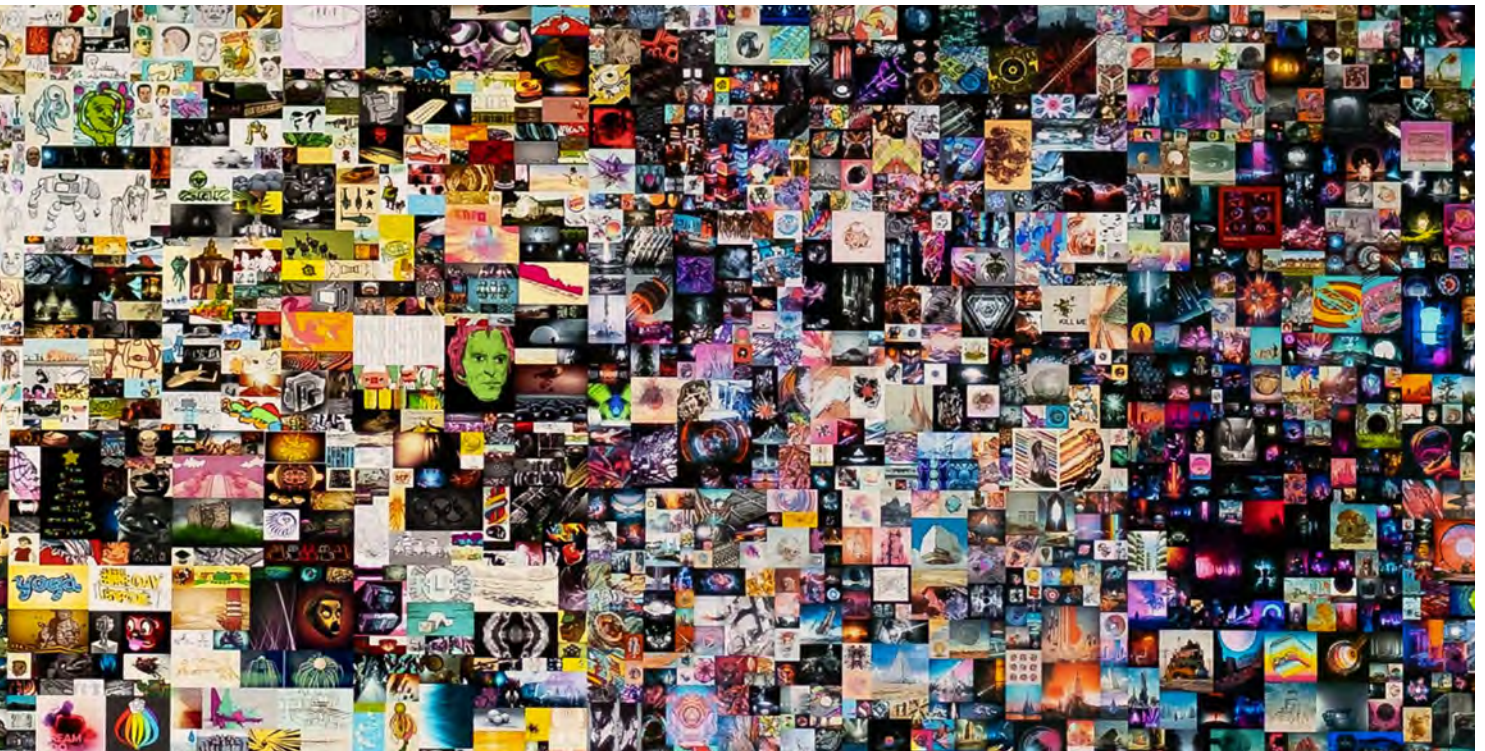
### Litigation

Over the last years, a growing number of court rulings, regulatory developments, and government studies have converged on the classification of crypto as property. The UK High Court found in the momentous 2019 case of *AA v Persons Unknown*<sup>36</sup> that crypto-assets (Bitcoin in this case) constituted property and may thus be the subject of injunctions. A recent decision contemplating the alleged theft of two NFTs from a series called “Boss Beauties” belonging to Lavinia Osbourne and traded on the Open Sea Platform has provided the legal world with a landmark verdict.<sup>37</sup> The Court concluded that two NFTs were property and hence susceptible of being the subject of an injunction. Hence, an application was filed for injunctions to freeze the NFTs and to

35 *Green v Petfre* [2021] EWHC 842 (QB) Case No: QB/2019/001489

36 *AA v Persons Unknown*, [2019] EWHC 3556 (Comm) CL-2019-000746

37 Pryor, Riah. “NFTs Recognised as ‘Legal Property’ in Landmark Case.” *The Art Newspaper - International Art News and Events*, *The Art Newspaper - International Art News and Events*, 29 Apr. 2022, <https://www.theartnewspaper.com/2022/04/29/nfts-recognised-as-legal-property-in-landmark-case>



force Open Sea / Ozone to reveal the identities of the persons found to be in possession of the plundered NFTs. The verdict is regarded to be the first judicial recognition of an NFT as property in the world. The ruling's repercussions might be far-reaching, given the prominence and centrality of the notion of property in several areas of law.

Notably, the Court's decision is aligned with the UK's Jurisdiction Taskforce Legal Statement on Crypto-assets and Smart Contracts<sup>38</sup> that elaborates on the concepts of property, crypto-assets and Smart contracts. Moreover, the Law Commission has published an interim paper in November 2021, which recognizes that digital assets fall within the category of personal property, yet the paper notes that due to their idiosyncrasies, rules pertaining to conventional

propriatorship may not be all-encompassing in relation to digital assets. Arguably, it will be fascinating to see how the Courts' approach will be applied in areas other than personal property law. The general regulations and controls currently in place for digital assets (particularly crypto-assets) may gradually be expanded to encompass NFTs. Nevertheless, digital assets refer to a wide range of materials, including domain names, databases, and digital files. These have a wide range of qualities and generate a variety of legal issues. Hence, regulations that apply to crypto-assets may not always transfer smoothly to the NFT realm. Whether such concepts are transferable will very certainly require a case-by-case analysis. Nevertheless, as education around digital assets increases, greater and more tailored controls seem to be eminent.

<sup>38</sup> UK Jurisdiction Taskforce, November 2019, Legal Statement on Cryptoassets and Smart Contracts [https://technation.io/lawtech-uk-resources/#gf\\_41](https://technation.io/lawtech-uk-resources/#gf_41)

## / Conclusion

Concludingly, NFTs, if treated with due consideration and with proper guidance present immaculate opportunities for entities across industries. By tokenizing the evidence of title to digital property, NFTs may play a crucial role in creating scarcity and uniqueness for digital content for the first time in history. This has been the driving force for the NFT craze, particularly inside the digital art sphere, where NFTs

initially became a widespread sensation. The future of NFTs seems bright and promising. NFTs are evolving into an asset class that, at its core, serves as the world's greatest digital evidence of ownership. As NFTs grow, their role as digital proofs of ownership will provide innovative and lucrative use cases for future digital economies. While digital art and collectibles presently dominate the realm of non-fungible tokens, this is just the tip of an enormous iceberg.

## / Our Team



**/ Dr. Charis Savvides**  
Partner



**/ Georgina Priovolou Tasika**  
Associate

**August 2022**

[americanoslaw.com](http://americanoslaw.com)

Find us on:

