A legal guide to NFTs and NFT platforms

June 2021

An art form,
a bridge between
worlds,
a revolution or a
just a fad?

Introduction

From in-game assets, to tokenised art – and beyond.

Since Beeple's USD69 million sale by Christies, the market for and interest in non-fungible tokens, or NFTs, has soared.

Although NFTs first came to prominence with the CryptoKitties craze in 2017, 2021 has seen renewed interest by investors, developers and artists alike.
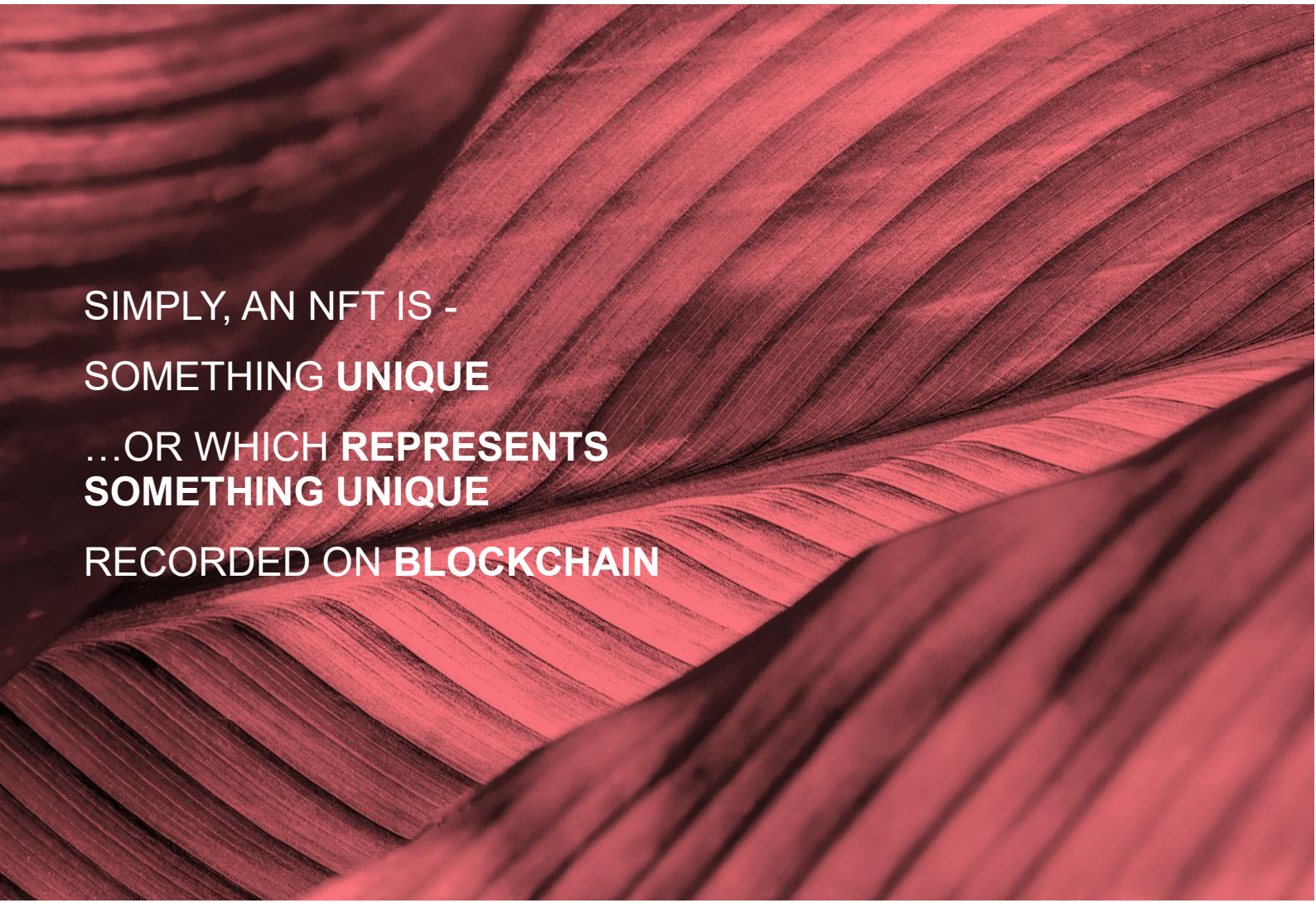
In this guide we provide:

An overview of NFTs

Sample use cases

A primer on key legal issues

Practical guidance
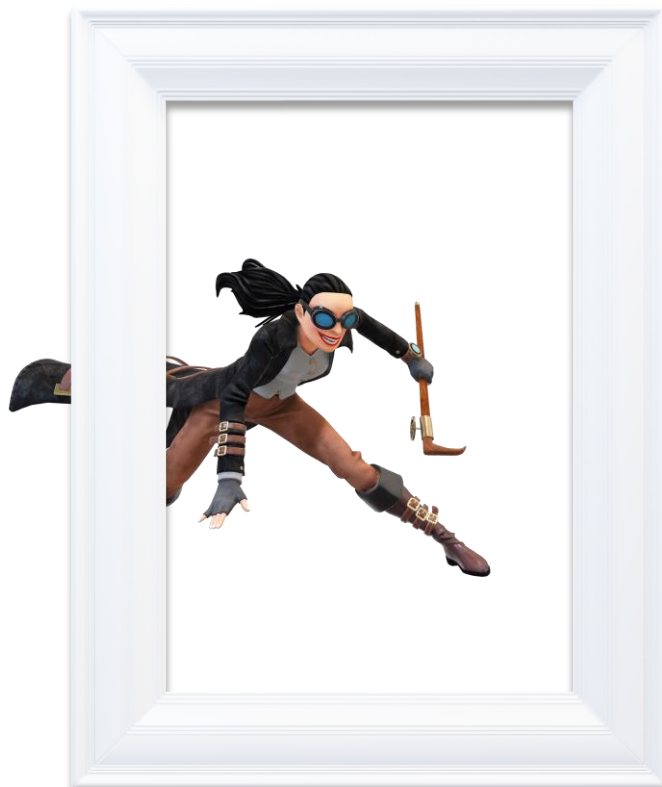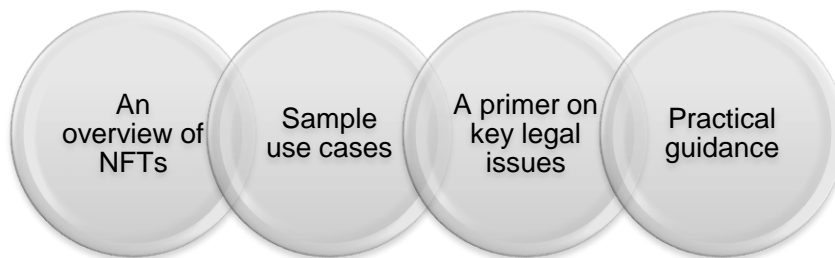
What is an NFT?

NFTs can create unique digital assets or can be digitally linked (via a QR or other ID code) to a tangible asset, presenting opportunities including in the areas of art, games and interaction between digital and physical assets.

As with all new technologies (and is inevitable where blockchain is concerned) this raises interesting questions regarding the nature of and legal rights associated with NFTs. These questions are relevant to all those interacting with these novel technologies, be it creators, purchasers, exchanges, auction sites or even payments providers.

SIMPLY, AN NFT IS -

SOMETHING **UNIQUE**

…OR WHICH **REPRESENTS SOMETHING UNIQUE**

RECORDED ON **BLOCKCHAIN**

Drilling into the specifics

1   NFT = Non-Fungible Token

NFT means "Non-Fungible Token". NFTs are created (minted) using a smart contract protocol (frequently, but by no means exclusively, ERC-721) on a blockchain and stored in a blockchain based wallet with a unique address. Our primer on smart contacts is available here, and our primer on blockchain basics is available here.

Like much in the crypto and blockchain world, the term NFT reflects its technological properties.

These can be broken down as follows:

Non-fungible

An NFT is not interchangeable for any other. Instead each is uniquely identifiable. Even if issued as part of a collection or limited edition, each NFT may have a different and distinct value (such as with stamps or basketball trading cards).

In contrast, money is fungible – one dollar can be exchanged for another dollar and one dollar is worth another dollar. Bitcoin tends to be considered "fungible", but in reality, fungibility is arguable – advanced chain analytics and premiums reportedly paid for newly mined Bitcoin demonstrate that this may not be a perfect description.
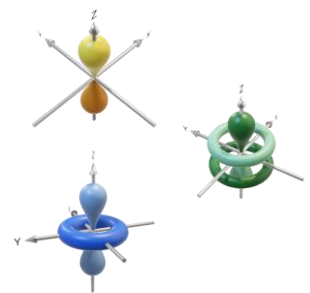
> "Uniqueness" is **variable** and can **change**. For example, an NFT that is an in-game car may acquire a special history (such as winning an in-game grand prix) that makes it more valuable over time. More on "uniqueness" below.

Token

The term "token" reflects its technological character rather than the legal characteristics. This means that there are many uses for NFTs. Further details are set out in our previous briefing paper in relation to ICOs (available here).

From a legal and practical standpoint, tokens represent **control** of the relevant asset - not necessarily ownership. The precise technology and programming adopted governs how they are created, acquired, used, transacted, changed and possibly also destroyed.

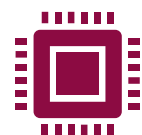NFTs can be held in multiple ways. By way of example -

Own wallet - unrestricted
(free transferability)

Own wallet - restricted
(eg KYC-and/or limited ecosystem)

Third party wallet
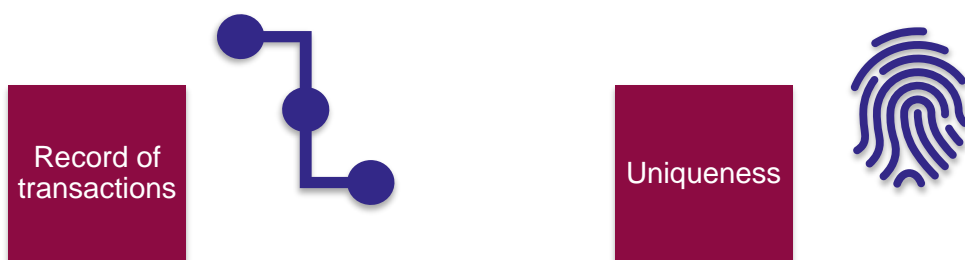(trusted custodian and/or key management support)

On-platform only
(own account but no life beyond platform ecosystem)

2   NFTs exist on a blockchain

There are two distinct benefits to using a blockchain for NFTs:

(a)   Append-only record of transactions; and

(b)   Uniqueness.

Record of transactions

Like Bitcoin, the NFT is held in a wallet on a blockchain. Any person who knows the wallet address, can check whether that wallet holds the NFT.

Each time the NFT is transferred, the date and time of the transfer, price at time of transfer and the wallet address it was transferred from and to are recorded on the blockchain. This record is append-only, meaning that like all blockchain records, once updated, technologically it cannot be changed. As a result, a complete record of all technological transactions related to the NFT is maintained.

Uniqueness

As a token on a blockchain cannot be transferred until the transaction has been approved by the network (a process known as reaching consensus), the record is able to confirm that a person has the only version of an asset in existence. This differentiates an NFT from another electronic file which can be infinitely replicated without any change to be original file.

The record can also confirm the number of NFTs which were created, providing proof of the rarity of the NFT.

3   Types of NFTs

Technologically, NFTs can be divided into two key categories:

(a)   **Digitally native NFTs.** At a high level, these are tokens that are inherently digital in nature and do not rely on real-world assets for their existence.

(b)   **NFTs related to other assets.** These are tokens that have a link to real-world assets – representing them or some interest in them, such as title or evidence of title.

Illustrative examples are provided in the following section.

Illustrative use cases

Digitally native NFTs

Collectibles

One of the first successful applications of NFTs was in the world of 'collectibles'. Like stamps, Pokémon cards or Beanie Babies, NFT can be collected. As the creation of an NFT is timestamped, it is easy to identify when it was created and how many similar tokens were created. The first popular NFT collectibles were CryptoKitties. Released in 2017, these feline-like electronic images, similar to neopets or tamagotchis were collected and 'bred' to create new and rare 'cats'.[1] Due in part to CryptoKitties causing issues with the underlying Ethereum blockchain,[2] these somewhat fell out of fashion but still very much alive and well, with prices varying widely from a few cents to a few million dollars.

Other use cases in the collectible world include:

- online card-based games;[3]
- basketball cards from the NBA;[4] and
- postage stamps.[5]

In-game assets

Much like collectibles, in-game assets can be collected, but often have a more developed functionality that can increase perceived value, on top of rarity alone. Some may also develop enhanced attributes over time. Examples include:

- sports cars and other vehicles;
- weapons; and
- character "skins".

Artwork

The current boom in NFTs is an extension of this trend where unique, digital artwork is created and released in purely digital form. By using a blockchain, the NFT is unable to be replicated, meaning that even if a copy is made (and a new NFT minted), by checking the timestamp it will always be possible to confirm which is the earlier, original NFT. Other benefits include that by requiring the NFT to be transferred through the blockchain smart contract, it is possible to technologically require that each subsequent transfer of the NFT can only be made with a corresponding transfer of a crypto-asset to the creator. This may raise some interesting questions regarding enforceability of the contract of sale.[6]

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[1]   https://www.cryptokitties.co/.

[2]   A CryptoKitty is purchased on and transferred through the Ethereum Blockchain. To settle the purchase, a transaction fee is paid to the Ethereum network. This transaction fee increases as there is increased activity on the network. When CryptoKitties frenzy arrived, to settle the transactions quicker, additional fees were paid to the network to prevent settlement delays. However, this is the same network on which Ether is transferred so as higher fees were paid to purchase CryptoKitties, higher fees were also required to process all other transactions across the Ethereum blockchain, including a simple transfer of Ether.

[3]   https://godsunchained.com/.

[4]   https://nbatopshot.com/.

[5]   Gibraltar is releasing a postage stamp as an NFT. See *Coinsilium Group Limited: Gibraltar Crypto Stamp and NFT Update*, 16 March 2021, https://www.bloomberg.com/press-releases/2021-03-16/coinsilium-group-limited-gibraltar-crypto-stamp-and-nft-update

[6]   Note that the fact that the NFT must be transferred through the blockchain on which it was issued, using the underlying 'coin' may inadvertently limit the ability to own the NFT to those who can access that particular protocol.

NFTs related to other assets

NFTs can be used to reflect the ownership of other (tangible or intangible) assets on a blockchain.

For instance, a QR code may form part of a sculpture which, once scanned, links to the wallet address of the NFT and shows the full chain of ownership including the date and time of creation and each transfer over its lifetime. Other tools such as special sprays, surveillance tools and smart locks can also be used, depending on the asset in question. Here, the internet of things ("**IoT**") becomes especially interesting. IoT devices could be programmed to execute certain processes or transactions upon authentication or verification of an NFT, decreasing the need for human interaction in transactions and increasing efficiency.

Theoretically, an NFT could represent or be linked to any asset at all.

Some illustrative examples include the following.

Physical artwork	Real estate	Sound recording
Diamond	Company share with bespoke rights	Vehicle

A key benefit of such NFTs is the ability to create 'timestamped' records of transactions. In disputes over paintings or music royalties for example, because a complete record of all technological transactions related to the NFT is maintained, it strengthens the holder's ability to show uninterrupted control (and deemed ownership where applicable). It can also assist with multiple other processes such as identifying owners for product recalls or new benefits, depending on the NFT design and data available to issuers.

It is of critical importance to assess NFTs closely.

Diligence on NFTs: what to ask?

Due diligence on NFTs is essential. Creators, potential purchasers, platform providers and intermediaries should ask:

- **The basics:** What asset is the NFT linked to or does it seek to represent? Who is issuing it? What technology is being used?

- **What aspects of the asset are reflected in the NFT? Does it record all aspects of that asset, and represent all rights relating to that asset?** For example, does an NFT representing an aircraft cover the whole aircraft, or only the hull (and not the engines)? Is it a right to own the aircraft, or only to use it?

- **How is the NFT actually linked to the other asset?** Are there technical measures that link the underlying asset to its digital "twin" (the NFT)? Or are they only contractual? Is the NFT a digital twin (i.e. a representation of a right) or the record of the right itself? In certain jurisdictions, specific legislation has been created to help provide a specific pathway for underlying assets to be linked to a digital representation (NFT), which can provide certainty to relevant stakeholders. In other jurisdictions there is no need for such specific legislation for the NFT to be the record of the rights. From a design perspective, the data that is stored in relation to both the underlying asset and the NFT will be important to help ensure authenticity, provenance and ownership verification.

- **Are there multiple registers?** For example, if an NFT represents real estate, there will often be other registers (or at least established transfer mechanisms) to consider. Similar considerations may apply to an NFT that represents a special company share, or even a carbon credit. A precise approach to reconciling registers is essential, to avoid a situation where there is more than one "owner". In some systems, it may be possible for the blockchain to be the register of ownership and for the NFT record to be the record of ownership or rights to the asset.

- **What risks could arise?** For example, are there specific requirements to enable the transfer ownership of the underlying asset that are paper-based?

We raise a number of legal and practical considerations in the following sections. The practical upshot is that NFTs that link to other assets must be very carefully structured, with clear risk-mapping and documentation.

Key legal issues

What legal rights does the NFT holder have?

As an NFT exists on a blockchain, it can only be transferred on the blockchain itself and is subject to its smart contract protocol. Practically, ownership and access to the NFT is reliant on maintenance of the blockchain. As old Betamax, cassette tapes, video tapes, floppy discs CDs and DVDs all require specific hardware to be able to access the recorded video, music or computer game, an NFT will only be accessible as long as a node exits. Although this only requires one node for the record to exist, if in the future no such node existed, the NFT would be irretrievable. However, this does not necessarily change what the NFT represents or its legal nature. It is a practical issue, highlighting the need to consider worst case scenarios as part of NFT design.

To draw an analogy, the fact that certain goods, such as fresh food, must be transferred in a refrigerated vehicle, does not change the nature of the food to be transferred but failure to do so may have consequences regarding whether or not the correct goods have been provided.

Instead, an NFT's legal status and treatment should depend on the nature of the rights provided when the NFT is minted and transferred. These rights are not dependent on the technology, but on all the facts and surrounding circumstances. For instance, a digital artwork which incorporates an NFT could be subject to copyright. Alternatively, it may be a record of ownership. It is therefore essential to be precise about what an NFT is, so that the holder knows what rights and responsibilities they have.

Interestingly, most blockchain use cases which record ownership of a physical asset, from a technological perspective, involve an NFT. Some use cases which use NFTs as part of their technology stack include:

- a certificate recording the properties of a physical diamond and information regarding its transfer;

- a receipt for grain provided to a warehouse;
- documents of title to real property; and
- location of goods in a supply chain.

Only where the NFT is intended to change the nature of the right being transferred should that occur legally. Ultimately, it will be necessary to 'look through' the technological properties as an NFT, and instead concentrate on its use and the terms of the transfer.

Terms of a contract to transfer NFTs including 'royalties'

The terms of the agreement to transfer an NFT may include both smart contract requirements (such as to transfer the asset using a particular protocol) and natural language terms (such as the rights to display the digital artwork). These terms may be set out in rules of an exchange or auction site on which the NFT is bought and sold, or between the parties themselves.

Where terms are hard coded in the smart contract, it may be necessary to reflect these in any legal contract regarding transfer of the asset. In particular, any requirement to transfer something (eg ETH) to a creator on the sale of an NFT (so called perpetual royalties) may need to be included in the legal terms of the contract. If not, there may be a discrepancy between the legal contract for sale and the technological mechanism of transfer. Even if included in the legal contract between the purchaser and seller, the creator is not a party to the contract so, depending on the jurisdiction, may or may not be able to enforce such a term.

Could they be regulated?

At this stage, regulation of NFTs specifically is very rare, although some jurisdictions have issued warnings.

It is also impossible to generalise on regulatory treatment given an NFT can be anything from a

representation of a digital cat to a digital company share (and everything in between).

However, NFTs can be regulated or restricted.

The key things to look out for are:

- **Securities laws** – is the NFT itself a security (or some other regulated product) or does the manner in which it is marketed, sold or used tip it into that category?

- **New virtual asset laws** – multiple new laws are being implemented around the world in response to local market considerations as well as the recommendations of the Financial Action Task Force (FATF) for virtual asset services providers. It is especially important to check:
  - the scope of assets caught;
  - the precise terms of any exemptions – for example, for in-game assets;
  - the persons caught; and
  - jurisdictional nexus considerations.

- **Blanket prohibitions on virtual assets** – the terms of some (but <u>not all</u>) prohibitions on virtual assets in highly restricted jurisdictions may extend to blockchain-based assets.

Fractionalisation, safekeeping/custody arrangements and marketing behaviour are all some of the key things to look out for as well.

As a general comment, NFTs tend to derive their regulatory treatment from what they represent, and not which technology (ie blockchain) is used. Where no specific restrictions exist, it should be possible to simply interpret existing laws in a technologically neutral manner, but this should always be verified with counsel.

For regulated entities, it is important to check how prudential standards of conduct change when blockchain is involved.

NFTs in trade or commerce

Even if there is no specific NFT legislation, existing laws are still likely to apply. For instance, laws regarding sales by auction and contract may still be relevant (as set out above). So too may laws regarding fractional ownership in the event that NFT provides ownership of a fraction of a tangible or digital asset.

Multiple consumer laws around the world apply regardless of the fact that a person may be outside that jurisdiction. Of course, this also increases consumer protection expectations and potential liabilities.

NFTs, fraud and copyright infringement

It is also important to remember that fraudulent conduct may still arise (although it may be more difficult). It is technologically impossible to issue an NFT at a past date, meaning that if an artwork is known to have been created at a particular time, and the artwork has an NFT which indicates that it was created after that time, this may assist to establish that the artwork is not genuine. However, the NFT is only evidence of the date of the NFT's creation, not the artwork. The NFT may be attached after creation of the artwork so the timestamp alone may be insufficient. That being said, such an NFT may be evidence in the event of a dispute (alongside other evidence too). Ultimately, the technology is part of, but may not be the whole solution.

Even with digitally native NFTs, using a blockchain record does not prevent unlawful conduct from arising. Much like a photo can be taken of a painting, or photo and prints reproduced, so too have NFTs been created from existing works without the permission of the author. In these cases, the NFT may infringe copyright in the original artistic work. Even if the original work was not stored as an NFT, a new NFT of that original work may still raise these additional questions.

Further reading

Further exploration of the link between NFTs and intellectual property rights, including copyright and recurring royalties is set out in our earlier article "<u>For Sale: This Article": an overview of non-fungible tokens (NFTs) and IP</u>".

Other matters

In the next section, we also summarise key issues that arise for those engaging in the sector, particularly for those operating platforms and marketplaces.

Practical guidance for NFT platforms and marketplaces

We have seen a significant uptick in NFT creation platforms and NFT marketplaces. These provide exciting opportunities for creators, users and holders to engage in the sector and drive new value propositions. However, there are multiple legal and regulatory considerations.

In this section, we summarise some key tips for an NFT creation platform and marketplace ("**platform**") that seeks to engage in unregulated NFTs. We refer to "**provider**" generically as an operator or creator of the marketplace. Of course, the facts always matter.

Consider the overall design intent

A key driving force that will shape the provider's obligations and platform operation is the overall design intent – from a purely decentralised "technology only" approach to a fully moderated platform. In the middle, a provider may not fully moderate all content, but may implement and enforce certain rules in relation to platform use to protect itself and comply with applicable laws. The degree of involvement is likely to shape many of the issues below. A fully decentralised model, for example, would likely have different outcomes.

Know the nature of the NFT – and define permitted NFTs and standards

The provider will need to ensure that NFTs on the platform are not regulated (or restricted) products. Where an NFT is a regulated product, the NFT, content creator and provider may require registrations / licences depending on the precise activity. If these approvals are not obtained, the provider and/or the content creator may face penalties, and there may be reputational damage to the platform and stakeholders.

The provider will need to put in place parameters on what NFTs can and cannot be created and/or sold. This is likely to need to include a blend of the following controls:

- Technical
- Operational
- Contractual
- Compliance

Even where the provider is not the creator of the content, understanding the legal and regulatory status of the instrument created is important for the provider to be able to comply with relevant requirements. For example, NFTs that are securities, fractionalised assets or derivative instruments are likely to be problematic. Of course, a decision will need to be made about how far to go in relation to standard-setting and enforcement. In this respect, the platform will need to determine its position on content moderation beyond regulatory compliance considerations. For example, should a user be able to create offensive or illegal content (and if so, under which laws)?
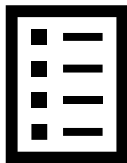
For example:

- A clear case of problematic NFT content would be child abuse material.
- A more difficult issue would be material constituting political speech in sensitive jurisdictions, as would permitting the blueprints for 3D-printed weapons.

Consider if "uniqueness" standards are required

The perceived value of an NFT is inherently tied to its uniqueness. Disputes are likely to arise if an NFT is represented as unique but is in fact not really unique and/or easy to replicate. This is generally a matter for participants but could impact the provider as a technology and platform provider.

It is especially important to consider if series, variations, re-record/re-prints and duplicates are permitted. Clear disclosure – including in relation to risks – are key. More on this below.

Implement other minimum standards

For example:

- **AI** – will only humans be able to create NFTs and use the platform, or can users use AI tools to create NFTs – and if so, to what degree?
- **Links to the real world** – if a creator asserts that an NFT links to a real-world asset, do they need to prove it, or at least confirm they have met certain criteria? Will this only be permitted in jurisdictions that have "digital twins" legislation. What role does contract law have to play in establishing such a link?
- **Intermediaries** – will NFT brokers be possible on the platform? For example, an auction house for digital art?
- **Collateral arrangements** – could there be a mechanism for an NFT owner to use their NFT as collateral – for example, for a micro-loan?

Be clear about the provider's role

This will inform regulatory treatment, compliance functions, governance scope and liability considerations. Key factors include:

- Whether the provider is a technology provider only and is otherwise passive.
- If the provider governs user eligibility to access the platform (gatekeeper role).
- If the provider governs NFT eligibility and/or standardises the terms of issuance.
- If the provider intermediates any transactions.
- Any involvement in custody (see next row).
- Any involvement in dispute resolution between participants.
- Any consumer protection requirements.

Ultimately, the provider's roles and responsibilities must be clear, and related marketing, community management and terms must be consistent.

Analyse custodial arrangements

Multiple jurisdictions may not necessarily regulate NFTs *per se*, but have licensing or registration requirements that will be triggered if a person is involved in controlling or safekeeping the asset. We see a broad range of custodial models, including:

- Users having their own, unrestricted wallets.

- Users having their own wallets that are subject to restrictions – for example, wallet access is subject to KYC and transfers are limited to similarly pre-cleared counterparty wallets. This may also be tied to NFT use restrictions (such a particular in-game asset being restricted to a particular game / world).
- Users using third party wallets – alone or together with self-custody options.
- All assets remaining "on platform".

Precisely define and document IP rights

- **Content creation** – the provider should make clear its expectation about who owns IP rights in NFTs created using its technology and/or made available on its platform. IP right customisation and "signing" requirements must be clear.
- **Infringing material** – the provider should consider imposing technical or at least contractual controls to help prevent the creation and distribution of NFTs that infringe third-party IP rights on the platform.
- **Purchasers** – a purchaser must know where IP and other rights lay (and in relation to what exactly). Ownership of an NFT as a unique token – versus ownership of the content with which an NFT may be associated – is a critical distinction. When someone purchases an NFT linked to some other content, they are unlikely to have automatically purchased the underlying IP rights in such piece of content – but this may be poorly understood.

  For example, a "Mona Lisa NFT" could represent a right to a photograph of the Mona Lisa, an interest in a fund that owns the Mona Lisa, or a voucher to visit the Mona Lisa at a precise time on a precise day at the Louvre in Paris. The terms of the agreement should be clear as to a buyer's specific rights.

- **Assignments / transfers** – how are these effected legally and practically?
- **Licensing –** a standard set of IP licensing terms can be useful to help ensure that these are standardised and can easily be navigated by users.
- **Link with IP registration systems** – the provider should assess the impact of, and any linkages with, IP registration systems.

Put in place AML/CTF procedures

AML/CTF and sanctions obligations generally attach to property in any form. NFTs could therefore theoretically be that property; and the platform could constitute the provision of restricted services. For example, a provider could be criminally liable if it assists with the movement of NFTs that represent the proceeds of crime (eg theft), so there is a need to establish AML/CFT and related controls. Clear know your client ("**KYC**") and AML/CTF policies are important, as are ancillary steps such as suspicious transaction reporting and record-keeping. These may vary from jurisdiction to jurisdiction, so the location of the provider and the user must be considered.

Put in place data privacy controls and policies

As with any platform, data protection must be considered early and often as part of platform design and implementation. The provider should make available data privacy policies and ensure that all relevant jurisdictions (including those with an extra-territorial effect) are taken into account. There is also likely to be a privacy compliance component in NFTs themselves – eg if they show an individual's name, face, voice etc.

Put in place risk disclosures

The provider should make available risk disclosures on the platform, depending on the precise nature of the platform. At minimum, disclosures regarding security, technology and IP should be included. If trading is involved, risk disclosures should extend to value, volatility and counterparty risk. Risks relating to payment mechanisms should also be contemplated.

## Comply with consumer protection laws

Consumer protection laws should be assessed and taken into account as part of platform, user experience and contractual design. For example, it is important to ensure that all statements on the platform and in relation to the NFTs are correct, accurate and not misleading.

Design tools to maximise accessibility (for example, for the visually impaired) should also be contemplated.

## Consider tax from a company and user standpoint

Tax laws are rapidly evolving in relation to virtual assets, but the NFT arena is likely to remain subject to uncertainty given the various possible rights inherent in them. Whilst tax compliance should be up to each user, a poor or uncertain tax outcome could result in users from certain jurisdictions being unwilling to engage at all. It may be useful to engage international tax counsel to advise on NFT criteria and parameters, and also to provide input on what factual matters would be useful for users to know to enable them to receive their own tax advice.
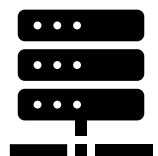
Clear rules of engagement

This includes clear terms and conditions that as a matter of contract law specify the terms of use. This involves having clear terms and conditions that cover many of the items described above, including the functionality of the platform, the services various entities provide (and do not provide), allocation of risk and liability of the provider, users and NFT creators, IP rights, data privacy, etc.

"Codes of conduct" regarding accessing the platform and platform rules regarding operation of the platform should also be considered.
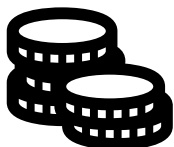
Be clear about payments

It should be clear how NFTs can be purchased – with what asset/s and in what manner. Some virtual assets are higher risk and involve regulated products – this must be assessed for each relevant market. Also consider whether fiat currency or cash is possible to use as payment and what partners may require (often, good KYC and clean regulatory opinions!).
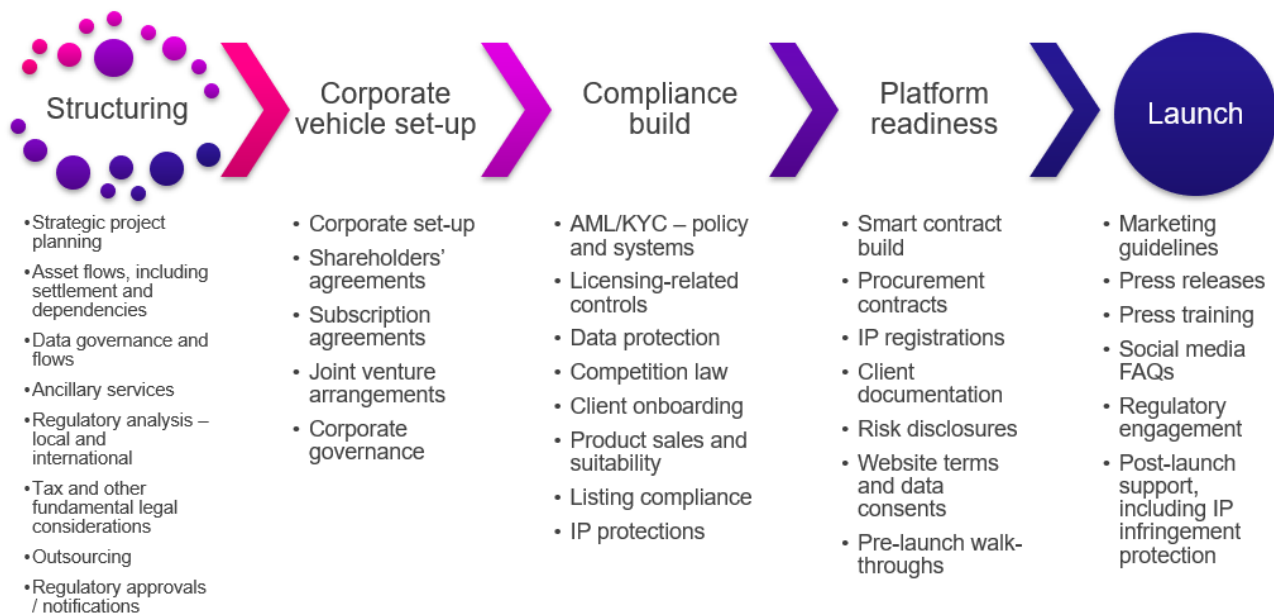
Obtain local advice and consider geo-blocking capability

Legal, taxation and accounting advice is essential for jurisdictions in which a physical presence, marketing or substantial users are expected. The provider should also consider the ability to switch off certain countries as and when required, given that the laws and regulations in this area are regularly changing.

How we can help

From structuring, through to commercialisation of the platform, we offer clients with end-to-end support: whiteboard > beta > full deployment.

Structuring	Corporate vehicle set-up	Compliance build	Platform readiness	Launch
• Strategic project planning • Asset flows, including settlement and dependencies • Data governance and flows • Ancillary services • Regulatory analysis – local and international • Tax and other fundamental legal considerations • Outsourcing • Regulatory approvals / notifications	• Corporate set-up • Shareholders' agreements • Subscription agreements • Joint venture arrangements • Corporate governance	• AML/KYC – policy and systems • Licensing-related controls • Data protection • Competition law • Client onboarding • Product sales and suitability • Listing compliance • IP protections	• Smart contract build • Procurement contracts • IP registrations • Client documentation • Risk disclosures • Website terms and data consents • Pre-launch walk-throughs	• Marketing guidelines • Press releases • Press training • Social media FAQs • Regulatory engagement • Post-launch support, including IP infringement protection

We have been working with clients on NFT projects for many years, including:

Software devlopers	Gaming companies	Exchanges and brokers	Custodians	Social media platforms

Please let us know if we can support you.

Contact us, anytime

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