



## Art law – recent developments

January 2022 issue

Welcome to the latest issue of our "Art law - recent developments" newsletter in which we discuss legal issues currently affecting the global art community.

In this issue we look at:

- The Republic of Turkey's quest for ownership in the Stargazer legal saga
- UK government considers IP law reform to keep up with artificial intelligence
- Non-Fungible Tokens: a New-Found Trend?

### The Republic of Turkey's quest for ownership in the *Stargazer* legal saga

Standing at just nine inches tall, the "Guennol Stargazer" marble idol has made headlines in the art world recently as the subject of a long-standing and hard-fought legal battle between the Republic of Turkey (the "**Plaintiff**") and Christie's and hedge fund owner, Michael Steinhardt (the "**Defendants**"). The dispute first arose in 2017 when the Plaintiff asserted its alleged ownership over the idol, culminating in the commencement of a lawsuit before the United States District Court for the Southern District of New York (the "**Court**"). On 7 September 2021, in a landmark decision, the Court ruled against the Plaintiff, finding that there was insufficient evidence to support its claim. The lawsuit addressed some key legal and evidentiary issues, which may have important implications for cultural restitution claims, particularly those involving state entities.

#### Background

The Stargazer, which is of Anatolian origin, was created in what is modern-day Turkey likely between 3000 and 2200 BC. Despite its historic roots, very little is known about the idol's trajectory until it surfaced in the US in

the 1960s. The first known sale of the Stargazer occurred in 1961 when it was sold by art dealer J.J. Klejman to acclaimed tennis player Alastair Bradley Martin. It was eventually purchased by Michael Steinhardt in 1993, who consigned the work to Christie's in 2017. Christie's placed the idol for auction in April 2017, and initially secured a sale for nearly US\$13 million.

The publicity surrounding the idol at the Christie's auction captured the attention of the Plaintiff, prompting it to issue a lawsuit against the Defendants in which the Plaintiff claimed that the Stargazer had been illegally removed from Turkey and sought its return. In support of its claim, the Plaintiff cited a 1906 Ottoman decree (the "**Decree**") which gives the State ownership of antiquities and cultural objects excavated in Turkey after 1906. The Plaintiff alleged that the Stargazer was removed from the country in the early 1960s, after the 1906 decree came into force.

### **The Defendants' motion to dismiss and counterclaim**

The first key procedural milestone in the lawsuit arose when the Defendants filed a motion to dismiss the Plaintiff's claim and issued a counterclaim. The motion to dismiss was premised on the argument that the work had featured prominently and publicly for many years prior to 2017 and, as such, the Plaintiff ought to have brought its claim at an earlier stage. Pursuant to the counterclaim, the Defendants alleged that the Plaintiff had wrongfully interfered with the sale of the work at the auction after the buyer withdrew from the sale.

On 30 September 2019, the Court granted the Plaintiff's motion for summary judgment on the Defendants' counterclaim. The Court also dismissed the Defendants' motion to dismiss the claim, ruling that exhibiting artworks in a public manner and for long periods of time does not preclude a claim for restitution. As a result, the case proceeded to an eight-day bench trial in April 2021.

### **The Decree**

The Decree formed the cornerstone of the Plaintiff's ownership claim. The relevant part of the Decree states that "*movable antiquities situated in or on [Turkey]... are the property of the Government of the Ottoman Empire.*" Importantly, the Decree does not have retrospective effect, meaning that it only applies to antiquities excavated from Turkey on or after 1906. The Court ruled that (i) the 1906 Decree was enforceable, and (ii) the effect of the Decree is that ownership is bestowed on the State over all cultural objects excavated in Turkey after 1906.

This is an important outcome for State claimants seeking to assert ownership rights in cultural objects. Cultural heritage legislation is a common feature of most modern legal systems and is frequently invoked by States in order to protect antiquities and objects with cultural value originating from within their borders. The fact that the Court in the Stargazer case recognised the applicability and enforceability of the Decree (a matter which was disputed by the Defendants) is a helpful development for other States seeking to rely on their local laws to advance cultural restitution claims.

### **Evidential hurdles**

Where the Plaintiff's case ultimately failed, however, was on the evidence.

The Plaintiff relied extensively on expert evidence concerning the limited trade networks in the relevant region at the time the idol was created which, the Plaintiff argued, strongly indicated that the work was

not exported from Turkey until after 1906. Conversely, the Defendants' expert evidence showed that there were in fact trade links during the relevant period and that two similar sculptures had been exported outside the region before the Decree came into effect.

The Court found that the Plaintiff had not adduced any direct evidence of where or when the idol was found, excavated or exported and what happened to the work between the time of its creation and when it was first sold in the US in the 1960s. It held that the Plaintiff did not meet its burden of proof in establishing that the Stargazer was exported after 1906, and hence in establishing its claim for ownership.

The evidential obstacles which the Plaintiff encountered in this case highlights the practical difficulties that many claimants face in obtaining the recovery of antiquities and cultural objects. Antiquities are, by their very nature, historic works and it is not unusual to find that there is a lack of evidence (particularly direct witness evidence) surrounding their provenance, movements and change of ownership. In such cases, claimants will inevitably be largely reliant on expert evidence to get them over the relevant evidential threshold.



### **"Inexcusable" delay in pursuing claim**

An alternative argument run by the Defendants in the Stargazer case was that the Plaintiff was out of time to bring its claim. The Defendants contended that the idol had been displayed publicly on a number of occasions prior to 2017, including at the Metropolitan Museum of Art and that it had featured prominently in literature (including in Turkey) since the 1960s. As a result, they said that the Plaintiff should have been aware of the idol's existence long before 2017 when the Plaintiff issued its claim. On this basis, the Defendants argued that the Plaintiff's claim was time-barred under the equitable doctrine

of laches. The Court agreed with the Defendants' argument, finding that the Plaintiff had "inexcusably delayed" in making enquiries about the idol, and in investigating whether it had a potential ownership claim. Consequently, the Court held that "*even if Turkey had established ownership, the trial record readily establishes that Turkey slept on its rights, which bars recovery.*"

Absent a good reason, courts are generally unimpressed by claimants who do not pursue their claims in an expedient manner. The Court's ruling on this point in the Stargazer case highlights the importance of claimants advancing their restitution claims promptly and without undue delay as soon as they become aware of their prospective rights, particularly if the existence of the disputed object is already in the public domain.

### Concluding remarks

Despite its small stature, the Stargazer idol has had a big impact on the antiques market. Unsurprisingly, given the significance of the case, the Plaintiff has since appealed against the Court's judgement to the Second Circuit's Court of Appeals and the outcome of that appeal will be eagerly awaited. Nevertheless, for present purposes, the Court's decision presents some important lessons to prospective claimants in antiques ownership claims. In particular, the case serves as a stark reminder to claimants to prosecute their claims in a timely manner and to ensure that they consider the evidentiary record in support of their claim at an early stage and assess carefully whether they can discharge the relevant burden of proof.

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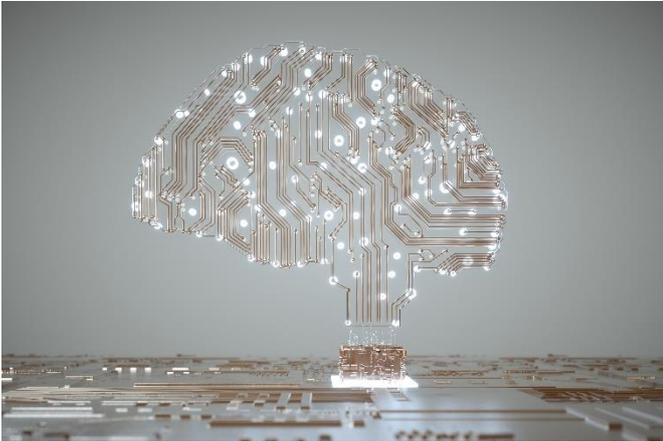
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## UK government considers IP law reform to keep up with artificial intelligence



### Artificial Intelligence and copyright law

The beginnings of artificial intelligence can be traced back to as early as the 1950s when the term was coined by American computer scientist John McCarthy at the Dartmouth Conference. More recently AI has arrived in the art world, with the sale of works such as the portrait of Edmond de Belamy, created using AI, on 25 October 2018 "*signalling the arrival of AI art on the world auction stage*" according to Christies<sup>1</sup>. The portrait was created using a set of algorithms called a generative adversarial network (GANs) by the French art collective Obvious and sold for \$432,500, nearly 45 times its original estimate.

The creation of artistic works by AI raises questions of copyright law, including:

- should copyright subsist at all in such artistic works?
- if so, who should own such copyright?
- how long should any such protection last?

The current position in the UK is that a computer-generated work, i.e. a work "*generated by a computer in circumstances such that there is no human author*"<sup>2</sup>, is protected by copyright in the UK for 50 years, after which it enters the public domain. In contrast, a work created by a human is protected for 70 years. The author (and therefore owner) of a computer-generated work is deemed to be the

person "*by whom the arrangements necessary for the creation of the work are undertaken*"<sup>3</sup>.

### Government consultation on AI and Intellectual Property ("IP")

As part of the UK government's AI strategy, which includes the aim for the UK to establish "*the most trusted and pro-innovation system for AI governance in the world*"<sup>4</sup>, the government has acknowledged the need to strike a better balance between (i) encouraging innovation in AI technology and promoting its use for the public good; and (ii) preserving the central role played by IP in promoting human creativity and innovation.

On 29 October 2021 the government launched a consultation<sup>5</sup>, organised by the UK Intellectual Property Office ("UKIPO"), on AI and IP to review copyright protection for computer-generated works. The consultation ran until 7 January 2022. The government is now assessing the responses received and will decide whether to make any legislative changes.

The two areas covered by the consultation which are of particular relevance to the art world are:

"1. *Copyright protection for computer-generated works without a human author. These are currently protected in the UK for 50 years. But should they be protected at all and if so, how should they be protected?*

2. *Licensing or exceptions to copyright for text and data mining, which is often significant in AI use and development.*" (This might cover, for example, using works subject to copyright when training AI).

Options being considered by the UKIPO to update protection subsisting in works created by AI include reducing or removing entirely the 50-year copyright protection currently afforded to computer-generated works. According to the consultation paper, this would "*reflect the capacity of computers to generate works quickly, with little effort or human input*". In considering this question, the UKIPO will seek to analyse whether there is evidence that protection for

<sup>1</sup> [www.christies.com/features/a-collaboration-between-two-artists-one-human-one-a-machine-9332-1.aspx](https://www.christies.com/features/a-collaboration-between-two-artists-one-human-one-a-machine-9332-1.aspx)

<sup>2</sup> . Section 178 Copyright Designs and Patents Act 1988 ("**CDPA 1988**")

<sup>3</sup> Section 9(3) CDPA 1988

<sup>4</sup> [www.gov.uk/government/news/centre-for-data-ethics-and-innovation-publishes-world-first-roadmap-to-catalyse-development-of-ai-assurance-ecosystem#:~:text=The%20UK%20government%20recently%20published,on%20governing%20and%20regulating%20AI](https://www.gov.uk/government/news/centre-for-data-ethics-and-innovation-publishes-world-first-roadmap-to-catalyse-development-of-ai-assurance-ecosystem#:~:text=The%20UK%20government%20recently%20published,on%20governing%20and%20regulating%20AI)

<sup>5</sup> <https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents>

computer-generated works incentivises the works' production or investment in AI technology. Other options being considered include replacing the current copyright protection with a new IP right specifically for AI generated works, and whether any new form of protection could subsist in a work that is created jointly by a human and by AI.

### UKIPO call for views

The consultation followed an earlier "call for views" by the UKIPO which ran from 7 September to 30 November 2020. Ninety-two responses were received. Questions on copyright covered three themes:

- the use of copyright works and data by AI systems;
- the existence of copyright in works created by AI, and who it should belong to; and
- copyright protection for AI software.

The government's response to that call for views was published and then updated on 23 March 2021<sup>6</sup>. It gives a flavour of some of the concerns in relation to the current position expressed by respondents. Many respondents were of the view that content generated by AI should be eligible for protection by copyright and the copyright should be owned by the owner or user of the AI system. However, others thought that content generated exclusively by AI (without any human input) should not be eligible for protection at all, or that a different form of protection should be considered. The primary argument to support this view was that machines do not need the same incentives or rewards to create as humans.

In response, the government noted that it appreciates "*concerns that mass-produced works generated by AI could devalue human creators and agree that we should not undermine copyright's central role in rewarding artistic expression and talent*" and will "*consult on whether to limit copyright in original works to human creations (including AI-assisted creations)*" as well as "*consult on whether or not to replace the existing protection for computer-generated works with a related right, with scope and duration reflecting investment in such works*".

Overall, copyright owners felt that the current law adequately covers scenarios where copyright-protected material is used to train or develop AI software. Greater clarity was sought, however, about

who is liable when copyright is infringed in relation to AI given that AI itself is not a legal person. On the other side, users of such material argued that easy access to works is crucial for teaching AI systems and that licensing costs may be prohibitive for smaller businesses and this could risk the UK losing its competitive edge in the AI space. A copyright exception was sought for use of copyright works in the AI machine learning space.

In relation to copyright protection for AI software, most respondents thought that this was adequately addressed by the existing position at law.

### Comment

Adopting the utilitarian view that works created solely by computer should be deemed free of copyright as they do not need to be incentivised and rewarded in the same way as a human author, would mean that AI generated works could be freely used and reused by anyone. As the UKIPO suggests, the likely consequences would be a reduced incentive to innovate and difficulties obtaining financial investment, which is not consistent with the UK government's overall AI strategy. It is also not clear that it will be easy to identify whether a particular work is human created (including AI-assisted) or created solely by a computer.

To ensure the UK incentivises the development of AI, rather than denying copyright protection for works that have been generated by a computer, authorship could be attributed to the author of the AI software or the user of the software. It remains to be seen which option policymakers will choose. The government has not given a date by when any policy decisions will be announced.

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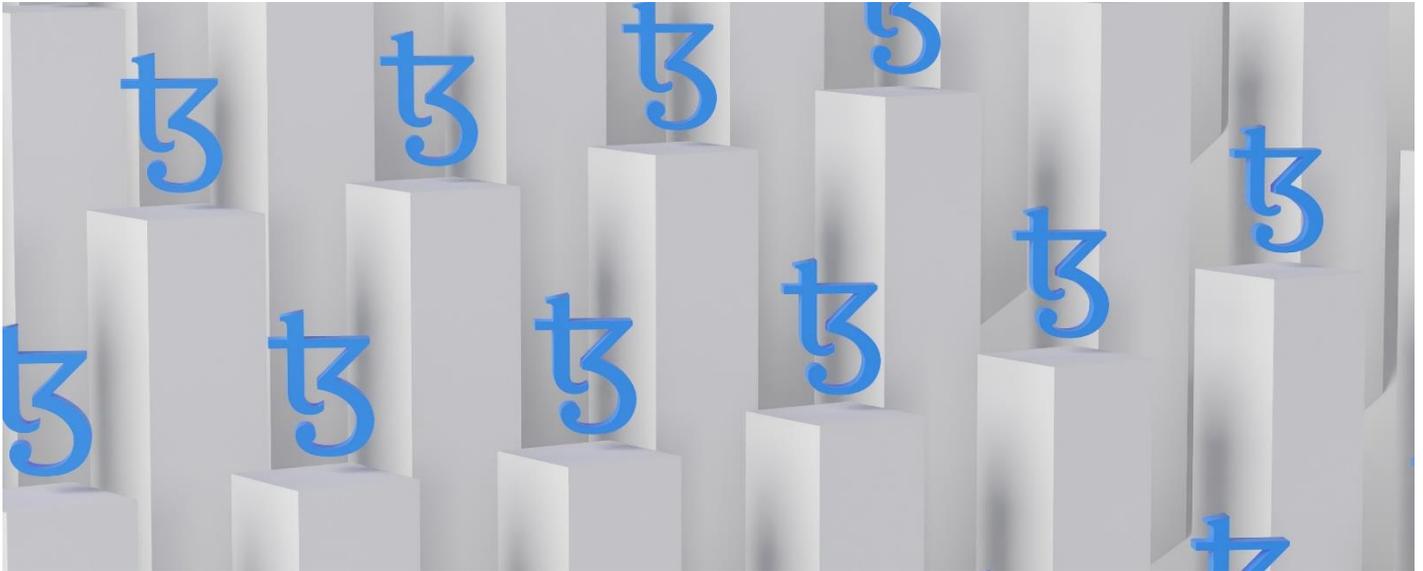
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<sup>6</sup> <https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views/government-response-to-call-for-views-on-artificial-intelligence-and-intellectual-property#copyright-and-related-rights>

## Non-Fungible Tokens: a New-Found Trend?



After what was described as a meteoric rise in use over the last year, the abbreviation of non-fungible token was announced as Collins Dictionary's 2021 word of the year. This is perhaps unsurprising when you take a look back at 2021 and the explosion of NFTs.

We thought we would take this opportunity to take a closer look at the rise of NFTs in the art market by considering recent trends and looking at the benefits and pitfalls of this all new digital market.

### Recap: What is an NFT?

According to Collins, the 2021 word of the year means "a unique digital certificate, registered in a blockchain, that is used to record ownership of an asset such as an artwork or a collectible". But what does that really mean?

Let's start with **blockchain**. Fundamentally, a blockchain is a database. Unlike other databases, however, a blockchain is a permanent, unchangeable digital ledger, the structure of which provides for an immutable record of transaction history and asset transfers. Technically, Blockchains are decentralised, meaning no one entity has control. Instead, users of the blockchain retain control. Blockchain technology can be used to store different types of information, but the most common use is for cryptocurrency transactions.

**Cryptocurrencies** are fungible assets made available on a blockchain. Each token of the same cryptocurrency is identical to another token in the same way one £1 coin has identical value to another £1 coin. In short, this means that each token of cryptocurrency can be interchanged with other individual tokens of the same type.

NFTs are similar to cryptocurrencies in that they are also digital assets. Unlike cryptocurrencies, however, NFTs are **non-fungible**. Each NFT is a one-of-a-kind, irreplaceable representation of an asset: its make-up is non-transferable. NFTs are essentially digital ownership certificates registered on a blockchain.

NFTs are exchanged on a blockchain platform for cryptocurrency using **smart contracts**. Smart contracts are programs stored on a blockchain that run when predetermined conditions are met. In this context, they are used to automate the execution of an agreement between the buyer and seller of an NFT, without any intermediary's involvement.

### Tracking trends

The growth of the digital collectables market in 2021 has seen the popularity of NFTs approach the value of the traditional art market. A recent report by Chainalysis, a crypto analytics group, indicates that the NFT market reached a value of US\$40.9 billion by the end of the year. Similar estimates of sales of conventional art and antiques by Art Basel assessed the traditional market at a value of US\$50.1 billion over the same period.

Though first popularised in the art world, other entities and industries have embraced the rise in digital assets. For example, the National Basketball Association in the US has created its own NFT marketplace for buying, selling, and trading video highlights of its players called NBA Top Shot. Other hits included numbered collections of NFTs that went viral, including CryptoPunks and Bored Ape Yacht Club.

Despite this sudden growth, NFTs are not new: they have been traded since 2017. It was not until Christie's sold a digital collage by an artist known as Beeple for US\$69.3 million in March of last year, however, that the world became interested in NFTs. This record-breaking sale was soon followed by other noteworthy purchases. Sotheby's sold a small grey pixel in April for US\$1.9 million and CryptoPunk #7523 in June for US\$ 11.8 million. Beeple also achieved US\$28.9 million for an NFT called HUMA ONE in November, and throughout the year prestigious generative art platform Art Blocks Curated saw a collective named Ringers make nearly US\$100 million.

Despite these big ticket items hitting the headlines, it is actually small transactions worth less than US\$10,000 that accounted for more than 75% of the NFT market. Although the major auction house players such as Sotheby's and Christie's are now including NFTs as part of their offering, it is NFT-specific platforms such as OpenSea that are seeing the bulk of the trading.

It is clear that sales have boomed in the last year but who owns all these NFTs? The answer: very few "crypto whales" (specialist traders who invest and exchange NFTs regularly). Between February and November, only 360,000 wallets held over 2.7m NFTs and of those 360,000 wallets, 32,400 held 80% of the value in the market.



## **Risk and reward: a brief consideration of the benefits and pitfalls of NFTs for the art market**

If you buy an NFT, you can call yourself an "owner" of the underlying digital asset, but that does not transfer copyright to you, nor does it mean that other people are prevented from seeing and downloading an image of the NFT. This works in much the same way as the traditional art market: you can buy a print of Van Gogh's Sunflowers but that will not make you the owner of the original painting. In this sense, NFTs do not offer any additional protections to owners in terms of prevention of reproduction.

NFTs can also be sparse as each artist minting an NFT can essentially decide how many tokens are available for consumption. In practice, artists often place a limitation on the number of owners of an artwork making each unique NFT a rarity. The combination of this scarcity with the certification of ownership provides for the digital art market to operate in a similar manner to non-digital markets. But what differences does the NFT market bring and what are the advantages and disadvantages of this new platform?

With the growing popularity of NFTs, there has been an increased discussion of the merits of the digital collectibles. Whilst enthusiasts consider NFTs to offer artists a whole new world of rights and benefits, sceptics question the value of the tokens.

### **The Downside**

#### **Uncertainty**

As a relatively new market, it is unclear to what extent the recent uptick in market activity is being driven by collectors who have a genuine interest in the underlying artwork, or by speculators and crypto-fans who just want to push prices higher. The new digital assets market lacks the history and determinative market values of the traditional art market: only time will tell whether the current valuations remain.

#### **Excess supply**

The uniqueness and scarcity of NFTs has contributed to their rise in popularity. However, there is a potentially unlimited amount of NFTs that can be created. Part of the boom in NFTs is the fact that many people are wanting to join the craze and create their own NFTs. It is important to understand that an increase in supply could lead to some NFTs losing their value.

### **Broader economic trends**

2021 saw a great deal of investment into NFTs owing at least partly to an excess of capital in a low interest rate environment. However, as interest rates pick up to counter rising inflation, investors may require liquidity causing them to exchange cryptocurrency and NFTs for fiat currency. The consequence of this would be that overall investment could lessen and the value of the digital assets and cryptocurrency market could drop.

### **Consumers and copyright**

As the market for NFTs has exploded, buyers have shown an appetite for owning NFT's associated with popular or even iconic works. Criticisms have arisen that artworks are tokenized to form NFTs without permission of original artists. For example, a number of Banksy prints have been reinvented as NFTs and sold on OpenSea despite Banksy having no affiliation with the items or the sales.

In this sense, those minting NFTs are benefitting from the creative genius of others: a characteristic of NFTs that is in direct conflict with the copyright rules of the traditional art market.

### **Lack of regulation**

NFT marketplaces are currently unregulated, providing potential for fraud and market manipulation. This risk is heightened by the fact that often the identities of buyers and sellers are difficult, if not impossible, to discover. Recent analysis by blockchain analytics platform, Nansen, found US\$2 million of suspect activity across two of the most popular NFT collections, CryptoPunk and Bored Ape, in just 30 days in the lead up to Christmas. Some NFTs, for example, were sold at a discount, either because of mistakes by buyers and sellers, tax write-offs or other scams.

### **Wash trading**

NFT marketplaces are susceptible to wash trading: a practice where a trader takes both sides of a trade in order to give the false impression of demand, which can then lead to misleading valuations.

### **NFTs are not actually decentralised**

Although NFTs are promoted as a means of decentralised asset trading, the practical reality is that NFTs are made available by way of integration with centralised exchanges, such as MetaMask cryptowallets or OpenSea. Accordingly, if an NFT is removed from OpenSea, for example, it will also disappear from your cryptowallet because the cryptowallet is simply using its API with OpenSea to display the NFT. In this sense, you could own an NFT

which will permanently be in the relevant blockchain ecosystem but which you cannot access or view.

It follows that NFTs for the art market are not as decentralized as often described. Third party platforms use APIs to oversee minting operations and exchanges, essentially working as an agent and taking commission. Ultimately, peer-to-peer exchange remains a bit of a myth, as trading of NFTs requires both the buyer and seller to enrol on a centralised exchange.

### **The Upside**

#### **Record of ownership**

Nominally, NFTs solve a historic problem for the art world by providing certification for authentic ownership through the blockchain's secure digital ledger. Unlike a painting, sculpture, or even digital film, the NFT itself is an irreplicable marker of true ownership.

#### **Removing intermediaries**

NFTs allow artists to connect directly with their audiences: the transition from physical to digital streamlines traditional processes and removes intermediaries. As a result, artists who create digital artworks can sell their work directly to collectors and consumers through NFT platforms, cutting out the need for dealers and galleries.

Although in theory this provides artists with the opportunity to directly engage with consumers of their work, there is still reliance on centralised forums such as OpenSea to access these audiences (see NFTs are not decentralised above). Nevertheless, anyone can mint and sell an NFT online. This removes the subjective selection process undertaken by dealers and galleries regarding who is offered representation and who is consequently offered a platform for their work. Regardless of the apparent lack of decentralisation, therefore, NFTs do provide an opportunity for artists to more directly engage with audiences.

#### **Improved value for artists**

NFTs can allow artists to better profit from their work by incorporating commission requirements in the smart contracts that accompany NFTs on the blockchain. This means that even when a third party sells an NFT, the artist can receive a small percentage or commission.

In addition, NFT platforms and marketplaces allow artists, who traditionally do not sell in galleries or who are not represented by influential agents, to sell directly to buyers online. Although the process of minting NFTs on platforms carries costs, these "gas

fees" are much lower than say the 25% traditionally taken by auction houses. For those artists who do sell in galleries or have representation, NFT platforms and marketplaces allow them to sell something in addition to their tangible works.

### **Democratisation of investment**

The intrinsic tokenisation of NFTs provides for the division of digital assets among multiple owners in a way that cannot be achieved with physical assets. In turn, an artwork need not always have a single owner: its digital equivalent can have multiple owners, each responsible for a fraction of it. Such arrangements could increase the demand for artwork, and give consumers the ability to invest in art in a way they could not before.

### **Looking to the future**

As with all new technologies, some risks of price volatility, experimentation, and scams are to be expected in an area as fundamentally new as NFTs. Despite this, it is clear that the technology underlying NFTs has a real use value and solves real problems for the art market.

NFT popularity has continued from 2021 into the new year, with NFT sales hitting half a billion dollars in the first week of 2022. Comprising these sales were thousands of unique pixel art images called CryptoSkulls and interactions with collections by Art Blocks, a storefront for on-demand generative artworks which are randomly generated by artists.

These figures demonstrate that interest in NFTs is not diminishing as yet and, even though some of the current hype may go away, it seems NFTs (in some form) are here to stay for the foreseeable future.

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