

Written evidence submitted by Dr Hayleigh Boshier

DCMS Select Committee Inquiry: Non-fungible tokens (NFTs) and the blockchain

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Executive summary:

- NFTs offer new ways to market and sell products, experiences and digital assets. However, there are clear risks to creators and consumers. Regulation must be updated to safeguard and mitigate these risks, as well as enable and support the benefits of this new technology.
- The Government should update laws that regulate the NFT platforms and providers to protect creators and consumers of NFTs.
- Consumers are at risk of being misled around what they are getting for their NFT purchase and the value of the NFT.
- Consumers also face the risk of having their NFT's stolen, and the law needs to confirm that an NFT is property for the purposes of law in order to enforce action against the theft.
- Creators are at risk of intellectual property infringement; the law must confirm that creating an NFT of a work is an infringement if done without the permission of the rightsholder of the work connected to the NFT. This risk should be shared between the collaborate and the platform, or at least the platform should hold responsibility for better informing collaborators of this risk.
- Creators are also at risk of being disadvantaged by NFT platforms and providers, whose terms and conditions tend to require the creator to sign over all their rights in the work to the platform. Platforms should agree a code of practice that includes better transparency and education of their collaborators. Their terms and conditions for collaboration should be deemed unreasonable and therefore unenforceable. Instead, collaborators should require independent legal advice before signing a contract which gives away their rights in their work.

- In my view, copyright does not protect an NFT in an of itself. But it does protect a digital asset that can be attached to the NFT. Copyright resale right currently applies to physical art, and this should be updated to also include digital art, to enable creators to benefit when their NFT is resold.

1. Is the UK's light-touch NFT regulation sufficient? / 2. What are the potential harms to vulnerable people of NFT speculation?

As is happening at international level and national level across the world, the Government should consider more appropriate regulation around NFT's. There are several areas of law to consider from advertising standards, property and intellectual property.

Intellectual Property Issues Around NFTs

An NFT does not give any intellectual property rights in the collectable to the purchaser; in the same way that a purchaser of a vinyl owns the tangible property but does not have any rights to the song. Except, of course, that rights in physical goods, such as vinyl, can be exhausted (meaning that IP rights cannot be used to stop the further distribution or resale of the goods) but no such limitation applies to digital goods because exhaustion does not prevent other IP rights, such as reproduction and communication to the public, from being enforced. In any event, the licence will determine the rights afforded to the purchaser, which usually confirm that no copyright ownership is passed, and that the purchaser is prevented from adapting, reproducing, or communicating the work to the public. Consumers need to be better informed about what they are purchasing and what they can do with their NFT, without infringing the rights of the platform or NFT creator.

Furthermore, whilst some platforms might take steps to verify that the person minting the NFT has the rights in the collectable, infringement disputes have already arisen. There have been disputes where the NFT creator has flagrantly minted others' copyright-protected works (such as HitPiece which attempted to NFT songs without permission from the rightsholders). There have also been complaints where creators have tried to NFT their own creativity but by doing so have breached a contract. For example, production company Miramax is suing director Quentin Tarantino for breach of contract, unfair competition, copyright and trade mark infringement, after Tarantino announced an auction of seven 'never-before-seen' scenes of his handwritten Pulp Fiction script in the form of NFTs.

It is infringement to mint an NFT of a protected work without the permission of the rightsholder. This can apply even to the creator, where they have contracts and agreements in place that control the use of their own work. The defendants in these cases will be the sellers since the platforms are protected by a warranty in their terms and conditions.

The law must clarify and confirm that creating an NFT of a copyright protected work is an infringement of that work, and platforms should better inform collaborators of this risk.

The Government should update copyright artist resale right to also apply to NFT digital art, meaning that when it is resold the original seller receives a percentage of the subsequent sale. The purpose of the resale right is to compensate the author for the loss of control over their work by granting them remuneration for each successive sale and therefore seems appropriate in these circumstances.

The terms and conditions of the market platform are important and determine the ownership of rights in the NFT as well as who bears the risks (usually not the platform) and who receives what remuneration. The terms of ownership and remuneration vary between platforms. One key thing to look out for (other than the warranties mentioned above) is ownership. Some platforms require the NFT seller to surrender an extremely broad scope of rights, which may impact on the exclusivity, and therefore the potential value, of the collectable. For example, the Ts&Cs of the Serenade platform state:

"The Artist hereby acknowledges, understands, and agrees that launching a Serenade Product on Serenade constitutes an express and affirmative grant to Serenade, its affiliates and successors a non-exclusive, world-wide, assignable, sublicensable, perpetual, and royalty-free license to make copies of, display, perform, reproduce, and distribute the Serenade Products on any media whether now known or later discovered for the broad purpose of operating, promoting, sharing, developing, marketing, and advertising the Platform, or any other purpose related to Serenade, including without limitation, the express right to: (i) display or perform the Serenade Products on the Platform, a third party platform, social media posts, blogs, editorials, advertising, market reports, virtual galleries, museums, virtual environments, editorials, or to the public; (ii) create and distribute digital or physical derivative Serenade Products based on the Serenade Products..."

Therefore, platforms should agree a code of practice setting minimum standards that includes better transparency and education of their collaborators. Their terms and conditions for collaboration should be deemed unreasonable and therefore unenforceable. Instead, collaborators should require independent legal advice before signing a contract which gives away their rights to their work.

NFT's as Property

A recent case in the High Court recognised NFTs as property under the law of England and Wales. The case was brought by Lavinia Deborah Osbourne (founder of Women in Blockchain Talks) against Ozone Networks (trading as OpenSea) in January 2022, after two NFT artworks that she had purchased from the Boss Beauties collection were taken from her digital wallet without her consent. Osbourne sought a freezing injunction *"restraining the dissipation of non-fungible assets alleged to have been stolen by persons unknown from a crypto asset account maintained by the claimant."* In a landmark ruling, the High Court recognised NFTs as legal property. In granting the order, Judge Pelling QC stated: *"There is clearly going to be an issue at some stage as to whether non-fungible tokens constitute property for the purposes of the law of England and Wales, but I am satisfied on the basis of the submissions made on behalf of the claimant that there is at least a realistically arguable case that such tokens are to be treated as property as a matter of English law."*

The courts have recognised that an NFT has the potential to be property for the purposes of law, but this needs further exploration and clarification.

Advertising and Regulation of NFT Marketing

There are headline examples of success, but equally there are also many failed examples of unsold NFTs. Despite the hype, it is a niche market, and purchasers are just as often speculative investors as they are fans or collectors. Successful NFTs that were lucrative for the seller include, for example, Kings of Leon who reportedly generated \$2million from NFT sales of their album, which was minted alongside other benefits including artwork, a vinyl, and for six buyers even lifetime front-row seats to Kings of Leon headline gigs.

There are also many unsuccessful NFTs that never sold, including some of those mentioned above minted by Kings of Leon. When Serenade partnered with the Brit Awards to create NFTs, Adele's Artists of the Year Award sold out in 30 minutes, but many others, such as Olivia Rodrigo, Sam Fender, Dua Lipa and Becky Hill, are yet to sell out at all.

NFTs can now count towards music sales for the purposes of the Official Charts. Muse recently raced to the top of the charts with their album sales which included NFT purchases. However, there were misleading headlines around this - it is important to know that they sold 51,500 copies of their album, and only 1,000 of those were NFT sales. This means they would have still hit number one without the NFT sales, which amounted to 1.96% of sales.

Consumers need to be protected against false advertising and inflated narratives around the value of an NFT. They need to understand the financial risk and the NFT is not secure. The Advertising Standards Agency (ASA) has launched a wide-ranging review of the issues surrounding NFT advertising, which they have stated will lead to action to address any potential problems that they identify. Already Michael Owen has deleted a tweet claiming that his NFTs will be *"the first ever that can't lose their initial value,"* after the ASA considered that the tweet was likely to mislead consumers. However, the regulation supporting the ASA could be clarified and extended to improve its effectiveness and enforcement.

3. What are the potential benefits to individuals and society of NFT speculation?

Whilst the potential of NFTs is still being discovered, we can already see that it has created a new way to market and sell products, experiences and digital assets. For some it is seen as a phase, or for collectables, but even if that is true, in the meantime regulation needs to be updated to better mitigate the risks and enhance the benefits of this and other developing technologies.