

UK Government Department for Digital, Culture, Media and Sport Inquiry into Non-fungible tokens (NFTs) and the blockchain

Written evidence submitted by the Association of Photographers (AOP) Limited

1. The Association of Photographers Limited (AOP) is a not-for-profit professional trade association, founded in 1968. Its aims are to promote and protect the worth, credibility and standing of its members and to vigorously defend and lobby for the interests and rights of all photographers in the photographic profession.
2. The AOP represents professional photographers, assistants, agents and students as well as offering supporting memberships to related professions in the Creative Industries. Professional members have a wide client base, ranging from individual clients in the corporate sector to design groups, publishing houses, music publishers and advertising agencies. Their work is published worldwide in magazines, newspapers, books and advertising campaigns and many sell their images as fine art through galleries, both in traditional spaces and online.
3. The AOP is a member of the British Copyright Council (BCC), Creative UK (was the Creative Industries Federation or 'CIF'), British Photographic Council and Pyramide Europe (EEIG) and we fully support the 'Fair Terms for Creators' campaign (<https://www.fairtermsforcreators.org/who-we-are.html>) co-ordinated by the Creators' Rights Alliance (CRA). AOP members are represented by the Design and Artists Copyright Society (DACS) and PICSEL for collective licensing.
4. All our photographer and assistant members are SMEs, some work in partnership with another photographer but, overall, the majority are individuals either working for their own limited company or as sole traders.
5. We are providing feedback for consideration into this Inquiry because NFTs have become significant within the Creative Industries as a mechanism for publishing, licensing and monetising creative content.

Is the UK's light-touch NFT regulation sufficient?

6. In brief, no. There is, broadly speaking, very little actual current regulation of NFTs and their marketplaces in the UK. This brings potential and actual significant problems to those creators (our members) looking to use NFTs as a legitimate mechanism for publishing, licensing and/or otherwise monetising the creative content they produce.
7. There are issues more broadly connected with crypto-assets and crypto-currency which directly impact NFTs, such as the opportunities for money-laundering and misrepresentation, which may well rest within the remit of other government agencies, and therefore other consultations and inquiries, but there are specific matters of concern for creators in using NFTs as part of their own professional practice.
8. The absence of regulation in this area is a cause for concern.

What are the potential harms to vulnerable people of NFT speculation?

9. NFTs are marketed to creators as a relatively new means of publishing and selling work, whether as artworks or as a form of licensing the use of creative content. Much of the process and procedure for the creation of NFTs (the so-called 'minting' process) remains couched in language originated from coding, Fin-Tech and web development. A lack of clarity and transparency in the processes and procedures relied on in the 'minting' process opens up the opportunity for those with less understanding to be taken advantage of, with little or no redress should those relationships not be equitable or mutually advantageous. The term 'vulnerable people' should be clarified as in this context, 'vulnerable' means anyone who does not fully understand the mechanisms and process at work and may well be the majority of creators looking to engage with NFTs as a new part of their workflow and practice.
10. An NFT may be a token of a piece of creative work or it may simply be a receipt for something or which points to something else. There is a lack of clarity and standardisation as to whether an NFT contains intellectual property rights or not, and many who do not carefully check what is actually being put up for sale, may find themselves being taken advantage of.
11. The lack of accountability, and difficulty in contacting human operators, at the various marketplaces which exist for the selling and trading in NFTs does nothing to inspire confidence or create sufficient pathways for redress, should a matter arise which requires intervention (copyright infringement, for example).
12. One of the oft-quoted positive aspects of using an NFT, is the ability for a mechanism to exist via a smart contract, which can pay out a royalty to the creator, on further resales of that original NFT. The absence of legal enforcement mechanisms in being able to enforce those smart contracts means that the payment of royalties is purely predicated on the marketplace platforms' commitment to uphold them. This is obviously detrimental to those looking to use NFTs as a means to develop sales revenues.
13. Many of the marketplace platforms (for clarity, these are web-based platforms such as OpenSea, Rarible, SuperRare, Nifty Gateway and so on) require users to commit to Terms of Service which explicitly place those marketplaces in a position of zero legal responsibility should royalties and fees not be paid to the creator, despite the creator of the NFT instigating such a transaction or smart contract.
14. The current and ongoing volatility of the crypto-finance marketplace means that values in any crypto-asset are likely to fluctuate widely. Any individual looking to exchange fiat currency for crypto-currencies needs to be prepared to lose that money fairly swiftly.
15. There is nothing preventing an individual from minting an NFT of someone else's intellectual property. Copyright legislation provides a level of protection for the author or creator of an artistic work but given that an NFT is essentially a digital receipt that can point at some other element of property, and that an NFT of a work of intellectual property may simply refer to the work that exists elsewhere (so is not being copied or (re)published), as opposed to being a digital representation of the work itself, there is considerable doubt as to the legality of such an act and if unlawful, how the perpetrator

would be brought to justice.

16. There are no obligations placed on an individual using an NFT marketplace platform to prove ownership of rights in material that has been minted or to provide a genuine identity as a seller or trader of that NFT. One of these NFT marketplaces (OpenSea) has admitted in January 2022, that over 80% of the items uploaded by their users utilising their free minting tool were infringements of copyright-protected content¹.
17. The lack of obligation to prove individual identity is contrary to the Know Your Business Customer (KYBC) principle of greater clarity, which originated in the UK and is now being promoted EU-wide as part of the Digital Services Act. In an age when greater transparency and accountability are, or should be, key tenets of any platform or process, the NFT marketplace seems to exist outside this regime.
18. The lack of transparency and accountability in the crypto-asset and crypto-finance world in being able to identify individual lawful persons compounds the problems detailed previously. NFTs rely on crypto-currencies for minting, selling, and trading and should a transaction fail for any reason, or not be as described or as expected, there is very little the injured party can do to seek redress.

Do blockchains offer security to British investors?

19. Identifying blockchains as being separate from crypto-currencies allows one to consider the nature of peer-to-peer 'ledgers' and the immutability of those mechanisms. In this regard, blockchains themselves and on their own do indeed seem to be a way to offer greater security *of information*. However, conflating 'blockchains' with 'investors' implies a financial connection, which is far less grounded.
20. Current crypto-currency market volatility means very little financial security is currently available to any investor, whether British or not. Volatility in largely unregulated and decentralised markets is greater than in regulated and centralised ones.
21. Of particular interest and application to creators (as investors in their own businesses) and to their clients (as investors in those creators' IP) is the notion of smart contracts as a mechanism for reinforcing IP rights. Tracking ownership, proving authenticity or provenance and licensing rights granted as well as content validation opportunities could be useful tools in a creator's armoury and provide greater security to creators and their clients in the contracting process. Naturally, the creation of smart contracts could only apply to new work being contracted on which has not been published online or in a digital form.

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

22. NFT speculation is no different to any other form of speculation and in that regard should be subject to the same safeguards and processes for the benefit of those that choose to invest.

¹ OpenSea statement <https://twitter.com/opensea/status/1486843204062236676>

23. The encouragement of economic growth within this new paradigm of monetising creative works can bring benefits but only if done transparently and fairly. This would also encourage creators to use NFTs and generate income, safe in the knowledge that they could control their own work. Being able to generate legitimate income can only be good for the UK economy, and if done so in the same way as the UK enjoys a gold standard in intellectual property rights protection, could encourage both UK and overseas rightsholders to trade within the UK with confidence.

If you wish to contact the AOP for more information on this matter, please get in touch with Nick Dunmur on nickdunmur@the-aop.org.