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BEYOND MICA

An overview of developments on crypto-assets

edited by

Maria-Teresa Paracampo

IUSTITIAM COLIMUS

G. GIAPPICHELLI EDITORE – TORINO

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by *Allegra Canepa*

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1. *Defining and crafting Non-Fungible Tokens (NFTs)*

The concept of Non-Fungible Token (NFT) is complex. To understand the legal definition of an NFT, one must first consider the idea behind NFTs. According to the Treccani Encyclopedia, a Non-Fungible Token (NFT) is defined as "a non-duplicable digital certificate that certifies the originality and unique ownership of a physical or digital asset registered on the blockchain" [1]. When someone buys an NFT, they do not gain ownership of the underlying asset; instead, they acquire specific rights related to it. These assets can be classified into three groups: native digital assets, which have no physical form; assets that do have a physical form; and assets with "variable geometries", which include digital goods that can be linked to a physical version upon request. Examples

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[1] See Treccani Encyclopedia available www.treccani.it. An NFT, or non-fungible token, is defined as a "cryptographically unique, indivisible, irreplaceable, and verifiable token that represents a specific asset, whether digital or physical, on a blockchain". On this definition see F. VALEONTI, A. BIKAKIS, M. TERRAS, C. SPEED, A. HUDSON-SMITH, K. CHALKIAS, *Crypto collectibles, museum funding and OpenGLAM: Challenges, opportunities and the potential of non-fungible tokens (NFTs)*, in *Applied Sciences*, 11(21) , 2021, 9931. For a definition as "an intangible, fully virtual, authenticating software code that is associated with separate digital or physical content" see H. BOBEK, *To mint or not to mint: Non-Fungible Tokens and the Right of Publicity*, in *Fordham Law Rev.*, 2023, 639 ss.

of such goods include fashion items, luxury brands, and artwork. For items intended for use in "new virtual dimensions", like the Metaverse [2], buyers can also request a corresponding physical item for use in the "real world".

NFTs have gained popularity in various markets, including art, fashion, collectibles, and most recently, sports. Aspects such as their legal status, regulations, and the effects of trading on specialized platforms, particularly regarding exchange value, require careful attention. When discussing their legal classification, it is essential to note that in 2022, the European Union Intellectual Property Office recognized NFTs as virtual goods. Additionally, the UK Law Commission offered a broader definition, describing digital assets as "data objects".

Furthermore, the Property Bill [3] has expanded the definition of "thing" to include electronic and digital objects that can be subject to property rights. However, NFTs require further clarification on this point because what is typically acquired is generally not considered a property right [4]. For this reason, the utilities associated with NFTs are the most appealing. Notably, well-known NFT collections often grant access to exclusive virtual events and spaces upon purchase, along with opportunities to participate in games or receive prizes and rewards. This suggests that, when assessing value, some buyers may prioritize the benefits associated with the NFT over its artistic content or uniqueness, raising questions about the true nature of these NFTs.

Additionally, when advertising on marketing platforms, it is emphasized that

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[2] On the framework and Regulation of Metaverse see R. MORO VISCONTI, A. CESARETTI, *Il metaverso tra realtà digitale e aumentata: innovazione tecnologica e catena del valore*, in *Diritto di Internet*, 3, 222, 627 ss; C. GALLI, *Metaverso o metaversi tra innovazione tecnica e innovazione giuridica*, in *Dir. ind.*, 2023, 109; G. CERRINA FERONI, *Il Metaverso tra problemi epistemologici, etici e giuridici*, Media Laws, 2023, 20 ss. On the use of NFTs in the Metaverse see A. JOY, Y. ZHU, C. PEÑA, M. BROUARD, *Digital future of luxury brands: Metaverse, digital fashion, and non-fungible tokens*, in *Strategic Change*, 31(3), 2022, 337 ss.; J. OSTERRIEDER, S. CHAN, J. CHU, Y. ZHANG, *Metaverse non fungible tokens*, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4733153; A. MORELLI, F. CIRAOLO (eds), *Un diritto virtuale? La regolamentazione giuridica del Metaverso*, Napoli, 2025.

[3] Property Bill establishes provisions regarding what can be considered objects of personal property rights, Property (Digital Assets, etc.) Bill [HL] Bill 31—EN, 11 September 2024, rep. https://bills.parliament.uk/publications/56207/documents/5086.

[4] On this point, see particularly J.F. FAIRFILED, *Tokenized: The Law of Non-F ed: The Law of Non-Fungible Tokens and Unique Digital ens and Unique Digital Property*, in *Indiana Law Journal*, 4, 2022, 1262; R. PARDOLESI, M. GRANIERI, *The law and economics of NFTs as decentralized digital property*, SIDE Conference Paper, 2022, https://www.side-isle.it/conference/2022/paper/the-law-and-economics-of-nfts-as-decentralized-digital-property-353; M.F. TOMMASINI, *NFT o Crypto Art. Inquadramento giuridico e prospettive di tutela del mercato*, in *Jus Civile*, 2023, 627; J.M. MARINGIELLO, C.K. ODINEI, *NFTs, Property Rights and Realty*, in N.G. PACKIN (ed.), *The Cambridge Handbook of Law and Policy for NFTs*, Cambridge, 2024, 275; V. LEMMA, *Riserve di attività digitali e beni giuridici protetti*, in *Riv. trim. dir. ec.*, 1/2025, 51 ss.

these NFTs are unique collector's items. They are also the only way to obtain the "Yacht Club membership card", which grants access to a club with benefits and offers that will grow over time [5]. Focusing on the access component of these utilities, presented as a continuously updated catalog, serves as an effective marketing tool that can influence pricing and the buyer's willingness to pay [6]. Moreover, the decision by airlines like Lufthansa to market NFTs as artistic items, aimed primarily at fostering user loyalty and providing access to various utilities, further emphasizes the changing importance of access versus ownership in the realm of NFTs [7].

Given these factors, it is also important to review the relevant regulations.

Paragraph 2 specifically examines the relationship between NFTs and European Regulation No. 1114/2023. The third paragraph analyzes the potential risks users may face during the minting process and issues related to authentication, as illustrated by the case of Yuga Labs. Lastly, the final paragraph focuses on the legal status of marketplaces that sell NFTs.

2. *The legal landscape for NFTs: exploring the impact of Regulation (2023/1114) on Markets in Crypto Assets (MiCA)*

Determining the regulation of Non-Fungible Tokens (NFTs) may appear straightforward, especially after the approval and publication of Regulation No. 2023/1114 on Markets in Crypto Assets (MiCA) in the Official Journal of the European Union in June 2023 [8]. This regulation aims to establish rules for crypto assets, which are digital representations of value or rights. While crypto assets have the potential to provide significant benefits to market participants, including retail holders, they also present risks, particularly in areas not covered by consumer protection rules [9].

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[5] See website https://boredapeyachtclub.com/#/home.

[6] On this point, specifically see L. ARNAUDO, R. PARDOLESI, *Sul giusto prezzo tra Aquino e Aspen*, in *Mercato, concorrenza, regole*, 2016, 3, 479.

[7] Lufthansa offers an NFT-based loyalty program with web3 technologies to exchange NFT collectible cards for attractive rewards. See https://lh-innovationhub.de. On the growing use of NFTs as a marketing tool see particularly L. BRANDES, K. DOLP, *Non-Fungible Tokens (NFTs) as digital brand extensions: Evidence on financial performance and parent-brand spillovers*, in *Int. Journ. Research Mark.*, 2025, not yet pubbl. but available here https://www.sciencedirect.com/science/article/pii/S0167811625000023.

[8] See Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets and amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

[9] See recital 2 and 4.

A close reading of the recitals reveals that NFTs are explicitly mentioned, not for the purpose of regulation, but to be excluded from the scope of the regulation. Recital 10 specifies that unique and non-fungible assets, such as digital art and collectibles, are exempt from MiCA. Furthermore, the next recital introduces an important distinction: it states that even though NFTs are outside the scope of MiCA, "the issuance of crypto-assets as non-fungible tokens in a large series or collection should be considered an indicator of their fungibility. The mere attribution of a unique identifier to a crypto-asset is not, in and of itself, sufficient to classify it as unique and non-fungible" [10].

This clarification emphasizes the importance of evaluating a token's qualifications beyond its unique identifier, such as the token ID or its technical specifications [11]. A thorough evaluation is necessary to determine the relevance of MICA and to identify what makes the token unique. Specifically, it is essential to ascertain that the value, rights, or utilities associated with the token are distinct from those of similar tokens.

In summary, without a clear and consolidated definition of what constitutes uniqueness and non-fungibility, these concepts may suggest a lack of replicability and intrinsic interchangeability. Moreover, since the category of NFTs is complex [12], these factors alone may not be adequate to exempt them from the regulations outlined in Article 2 [13]. For this reason, the Regulation emphasizes the need for authorities to adopt an approach focused on "substance over form" (recital 11), necessitating a case-by-case analysis to verify indicators such as value, rarity, usefulness, functionality, ownership, and rights, including access

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[10] Recital 11 Regulation MICA.

[11] The ESMA Consultation paper On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, ESMA75-453128700-52, 29th January 2024 underlines "The technical features (e.g. token identification code, unique token ID) and standards used (e.g. ERC-721 standard, BEP-721 standard) could remain an indicator but should not be of primary importance for national competent authorities and market participants when assessing the fungibility and uniqueness of crypto-asset".

[12] On this point see D.A. ZETZSCHE, F. ANNUNZIATA, D.W. ARNER, R.P. BUCKLEY, *The Markets in Crypto-Assets Regulation (MiCA) and the EU digital finance strategy*, in *Capital Markets Law*, 2021, 16(2) 203; A. GUACCERO, G. SANDRELLI, *Non fungible tokens, Banca borsa titoli di credito*, 2022, 824 ss.; F. RAMPONE, *Nft e token crittografici in chiave civilistica: dal documento informatico agli atomi digitali*, june 2023, www.dirittobancario.it; D.A ZETZSCHE, R.P. BUCKLEY, D.W. ARNER, M.C. VAN EK *ET AL.*, *Remaining regulatory challenges in digital finance and crypto assets after MiCA*, Publication for the Committee on Economic and Monetary Affairs (ECON), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.2023, https://doi.org/10.2139/ssrn.4487516; D.A. ZETZSCHE, J. WOXHOLTH, *The EU law on crypto-assets*, Cambridge, 2025.

[13] Article 2 co. 3 MICA establishes that the Regulation does not apply "to crypto-assets that are unique and not fungible with other crypto-assets".

and use. While not exclusive to NFTs, some documents from the European Securities and Markets Authority (ESMA) and other European Supervisory Authorities (ESA) [14] have emphasized that such an analysis should be based on the intrinsic characteristics of the token, irrespective of the qualifications provided by the issuer. In this context, uniqueness should be understood as non-substitutability, and "its value should be intrinsically connected to its individual attributes and the specific utility it confers to its holder" [15]. For example, in the case of digital art, if an NFT is split into multiple tokens representing parts of a work, these split tokens may lose the characteristic of uniqueness as understood by irreplaceability. This is due to the interdependence of value and the challenge of reconstructing the original work [16].

Understanding the concept of value is crucial when discussing non-fungibility. Value is closely tied to the distinct characteristics of each token and the benefits it offers to its holder. These benefits, which prevent market comparability with other equivalent tokens, are directly tied to the limited financial utility and the potential exclusion from the MICA Regulation. If tokens could be compared to each other in the market, it would compromise the characteristic of non-fungibility and the exemption from the MICA regulation [17].

This issue also raises questions about the critical issues associated with valuing some NFT collections, some of which are well-known in the art world. Presenting some NFTs as part of a collection could suggest that they are fungible. In these cases, where the only distinguishing feature is an identification number, as in such cases, MICA cannot exclude them. More complex are those in which the differences between NFTs are minimal.

These distinctions play a crucial role in market dynamics, often intertwining with the creation of artificial scarcity. This is particularly evident in well-known

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[14] ESMA, Consultation paper On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, cit.; ESA, Guidelines on templates for explanations and opinions, and the standardised test for the classification of crypto-assets, under Article 97(1) of Regulation (EU) 2023/1114, ESA 2024 28, 10th December 2024; ESMA, Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments del 19th March 2025, ESMA75453128700-1323.

[15] See ESMA, Consultation paper On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, cit. point 69.

[16] On the fractionation of NFTs see A. VON APPEN, *US and EU Regulation on Fractionlized NFTs – Navigating Unchartered Waters*, December 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4308892; W. CHOI, J. WOO, J. WON-KI HONG, *Fractional non-fungible tokens: Overview, evaluation, marketplaces, and challenges*, in *Inter. Journ. Network Management*, 2024, 34.

[17] On the unique in a technical sense see European Parliament, D.A. ZETZSCHE, R.P. BUCKLEY, D.W. ARNER, M.C. VAN EK, *Study ECON Committee, Remaining regulatory challenges in digital finance and crypto-assets after MICA*, cit., 96 ss.

art collections, where there is a clear desire to maintain low supply and high demand. Consider the Bored Ape collection, for example. Users were informed about the rarity of specific pieces based on the frequency of particular attributes [18] in the artworks being sold [19]. This foresight, combined with the ability to plan the number and timing of NFT releases, generates interest and sets expectations among buyers. Consequently, this impacts on the price of individual NFTs, all influenced by the concept of declared scarcity [20].

Furthermore, NFTs derive their value from the specific utility they offer to their owners, such as exclusive access to events or games. These rights are reserved exclusively for the owner, highlighting the individuality of NFT ownership rights. Still, it's important to note that all owners of an NFT from the same collection and specific release have identical rights.

3. *Analyzing the sale of NFTs and the potential risks for buyers, including value fluctuations and authentication issues*

Let's analyze the trade trend over time. We observed a substantial increase in both the volume and value of transactions in 2021, followed by a rapid decline that highlights the market's volatility. This was then followed by significant stabilization in the subsequent years, although at a much lower level than in previous periods 2021 [21]. Indeed, in March 2021, Christie's auction house made history by selling a record-breaking NFT, "Everydays: the First 5000 Days", a digital collage by artist Beeple, for a staggering $69.3 million [22]. Upon

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[18] In the case of Bored Ape and Crypto Punks NFTs, which are examples of generative art, the algorithm controls how often specific characteristics appear in the iconic "monkeys" from the collection. This is important for understanding their pricing and the features of each "work", as these traits are mostly, if not entirely, determined by the algorithm's processes.

[19] See W.J. SUCHOW, V. ASHRAFIMOGHARI, *The paradox of learning categories from rare examples: a case study of NFTs & The Bored Ape Yacht Club*, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4082221 and V. DOBRYNSKAYA, D. BIANCHI, *Buying beauty? On Rarity and return in Non-Fungible Tokens*, January 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4343856.

[20] See Y. LEE, *Measuring the Impact of Rarity on Price: Evidence from NBA top shot*, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906231.

[21] In 2021 there was an increase from 1 billion to 25 billion dollars. For a more in-depth analysis of these data, see J. KIM, K. LOMMERS, M. BAIOUMY, *Market Making in NFTs*, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4226987.

[22] Mike Winkelmann, known by his pseudonym Beeple, created this piece as a collage of 5000 images over 13 years. Its price alone made it the most expensive NFT ever sold, and the third most expensive artwork sold overall.

closer analysis, it becomes clear that the price was not driven just by the originality of the work, but also by a shared interest between the artist and the buyer, the Metapurse fund. Their goal was to achieve an unprecedented sale price, capable of attracting attention not only from industry insiders, making the artist's works highly sought after, and increasing their value. Metapurse had previously purchased 20 of Beeple's works, dividing their ownership into tokens known as B20 tokens. The sale of Everydays: the First 5000 Days had also generated a significant increase in the price of Beeple's other NFTs [23]. A similar approach can be integrated into the framework of techniques used by marketing platforms like OpenSea, which specializes in selling artistic NFTs and other types of digital assets NFTs [24]. Among these, in addition to gamification mechanisms [25], i.e. fun and game-like techniques, born in the world of video games designed to encourage user participation and involvement to boost auction sales [26] there are also ways of creating an artificial scarcity through a preventive decision on the number of NFTs on the market of a certain artist in a certain period [27] or timing

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[23] Specifically, the B20 collection, which consists of 10 million tokens, saw its price rise from 36 cents per token to 23.62 immediately after the record sale, before dropping below the dollar mark again in May. In fact, the decline in sales volumes and value quickly affected many other NFTs as well.

See S. GHERGHELAS, *Dapp Industry Report 2023*, www.dappradar.com/blog/dapp-industry-report-2023-defi-nft-web3-games#Chapter3.

[24] OpenSea was founded in 2017 as a marketplace for the sale of NFTs of digital artworks and later expanded to include music NFTs, domain names, virtual lands, collectibles, and more. SuperRare, on the other hand, focuses more on the sale of artistic NFTs.

[25] For a framework of gamification, see among others S. DETERDING, D. DIXON, R. KHALED, L. NACKLE, *From Game Design Elements to Gameful-ness: Defining Gamefication, Conference Paper 15th International Academic MindTrek Conference: Envisioning Future Media Environments, 2011*, www.researchgate.net/publication/230854710_From_Game_Design_Elements_to_Gamefulness_Defining_Gamification, and F. ROTH, *Gamification: State of Art Definition and Utilization*. 2012, rep. http://hubscher.org/roland/courses/hf765/readings/Groh_2012.pdf.

On the gamification and crypto assets see J. FALLOWS TIERNEY, *Investment Games*, 2022, www.ssrn.com and documents CFA Institute, Fun and Games. Investment Gamification and Implication for Capital Markets, 2022 and U.S. Department of the Treasury, Crypto-Assets: Implications for Consumers, Investors and Business, Settembre 2022.

[26] Among them, for example, there are sound effects that signal the re-bid placed by another participant so that one can place another bid and win the NFT, or a graphic with sound effects and signals when there is little time left before the auction closes.

[27] The SuperRare platform only commercializes crypto art and has implemented an increasingly selective procedure for artists with the introduction in April 2022 of a preliminary assessment of the individual's artistic profile, including their notoriety on social media, accompanied by the necessary signature of an exclusivity clause on commercialization. See https://help.superrare.com/en/collections/2817684-joining-as-an-artist.

of placing them at auction functional to create an effect of anticipation and interest capable of influencing prices [28].

Understanding the world of NFT requires a deep understanding of price trends and the nature of each token. With the market's inherent volatility, being well-informed is crucial for making informed investment choices [29]. Furthermore, the variety of services offered—such as minting, blockchain registration, and custody—plays a significant role in defining these platforms as exchanges or trading platforms.

When examining the potential risks for buyers, we must consider the various challenges related to information transparency and the marketing strategies adopted. These strategies include advertising by influencers who can promote emulative effects in purchasing behavior, but without consistently and accurately disclosing their sponsorship contracts. On these issues, it may be helpful to recall a case involving the Bored Ape collection: This case is emblematic of how inexperienced buyers can be induced to purchase with the idea that it represents a good investment.

Indeed, in 2022, a group of buyers filed a class-action lawsuit against Sotheby's in the U.S. District Court for the Central District of California. This lawsuit is connected to a previous one filed by the same buyers against the creator of the Bored Ape collection, as well as some executives of the related company and several well-known actors and sports celebrities [30].

The original proceeding highlighted how a group of well-known people had acted as influencers, without any indication of a sponsorship agreement. They promoted and encouraged purchases, albeit subtly, based on their personal experience. Their messages emphasized their satisfaction with purchasing some NFTs from the collection, precisely because it had granted them access to exclusive events in which they would participate. Furthermore, they added that anyone who purchased an NFT from the collection would be able to meet them at those events [31].

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[28] See Y. LEE, *Measuring the Impact of Rarity on Price: Evidence from NBA top shot*, 2021, cit.; A. ADLER, *Artificial Authenticity: Art, NFTs and the Death of Copyright*, in *NYU L. Rev.*, 2023, 765.

[29] On this point see A. CANEPA, *NFTs, Gamification e utilità correlate. Andamento del mercato tra diminuzione dell'interesse al possesso ed incremento di valore dell'accesso*, in ID. (ed.), *Il mercato dei Non fungible Tokens tra arte, moda e gamification*, Milano, 2024, 23.

[30] Case before the U.S. District Courts U.S. District Courts, California Centra District Court, case number 222-CV-0890, 12th August 2022.

[31] It is interesting to note how the athlete Paul Pierce was fined and ordered to pay $1,115.00, along with a three-year ban on advertising crypto assets for the same behavior. In this case, the conduct was carried out without any accompanying text or statement, but simply through a

In the second lawsuit, the plaintiffs highlight how a potential collusion can also be identified between Sotheby's and the Bored Ape company. They argued that this collaboration aimed to persuade users to view the purchase of these NFTs as a good investment. This was facilitated by the utilities associated with the NFT, which could potentially enhance the NFT's value over time and offer reasonable expectations of profits in subsequent sales on the secondary market [32].

The appellants specifically highlight that a similar investment presentation was featured in an auction managed by Sotheby's in September 2021. This auction included a unique lot from the collection titled "Ape in", which was also promoted on Twitter and other social media platforms [33].

However, these are not the only potential risks associated with purchasing an NFT, as authenticity concerns may also arise, especially with the most well-known collections. Here, too, it is worth mentioning a case involving the Bored Ape collection.

3.1. *Examining the minting process of an NFT: authenticity risks highlighted by the case of Yuga Labs*

When an NFT is minted by an individual creator or by the rights holder, one must determine whether they have the appropriate rights to do so. Copyright is a vital consideration in transactions involving the 'underlying' asset of each NFT, as it offers essential protection for both sellers and buyers against potential

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screenshot. S SEC, Securities Act of 1933, Release n. 11157, 17 February 2023, Administrative proceeding n. 3-21305, https://www.sec.gov/litigation/admin/2023/33-11157.pdf.

Regarding the types of unfair commercial practices carried out by influencers, see A. Canepa, *Social media e fin-influencers come nuove fonti di vulnerabilità digitale nell'assunzione delle decisioni di investimento*, in *Riv. trim. dir. ec.*, n. 1/2022, 307 ss., and Id., *Pratiche commerciali scorrette, social media e influencer*, in G. Avanzini, G. Matucci, L. Musselli (eds), *Informazione e media nell'era digitale*, Milano, 2023, 487.

[32] As a supporting argument, reference is made to the Honey test and the SEC Framework (Framework for Investment Contract Analysis of Digital Assets, available https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets), which in evaluating digital resources, references the idea of a common enterprise. See point 407 of the appeal.

[33] It should be remembered that on March 17, 2022, a governance token, Ape Coin, was distributed to all users holding an NFT from the Bored Ape Yacht Club (BAYC) and Mutant Ape Yacht Club (MAYC) collections, which granted the right to participate in the ApeDAO. On the DAO see R. Lener, *Prime riflessioni su DAO e principi generali del diritto dell'impresa*, in *Riv. dir. priv.*, 2022, 335 ss.; Id., *La regolamentazione del settore DEFI*, in *Rivista Bancaria – Minerva Bancaria*, 2023, 69 and C. Sandei, *Intelligenza artificiale e diritto dei mercati finanziari: responsabilità e informazione. Riflessioni a margine di alcuni recenti provvedimenti*, in L. Ammannati, A. Canepa (eds), *La finanza nell'età degli algoritmi*, Torino, 2023, 117.

legal issues of infringement [34]. Many NFT marketplaces try to protect themselves from copyright issues by requiring people who mint NFTs to confirm they have the necessary rights. They also include disclaimers to limit their liability to buyers if this claim turns out to be false. However, this method doesn't always offer enough protection.

A clear example of this is the ongoing dispute between Yuga Labs, the innovative creator of the popular Bored Ape Yacht Club (BAYC) NFT collection, and conceptual artist Ryder Ripps [35]. This case centers on the minting of a 'copycat' collection, a term used to describe a collection that closely resembles the original, potentially leading to copyright infringement. The Bored Ape Yacht Club (BAYC) collection is widely recognized for its significant market success, with many celebrities purchasing the related NFTs. These high-profile buyers have contributed to the collection's fame and increased demand for these digital assets. The ape featured in the BAYC has become iconic, attracting public interest and exemplifying a burgeoning brand, as evident from Labs' trademark registration attempts. Ribbs exploited the incomplete trademark registration processes and the absence of technological constraints to create an entire collection of Bored Ape NFTs as a new, mirrored version called 'RR/BAYC'. This action was done without qualifying it as a set of derivative works [36].

Yuga Labs has turned to the judge, specifically to the District Court of California, for the determination of various violations, including false designation of origin and trademark infringement, as well as obtaining injunctive relief and damages for monetary harms, to prevent the use of the BAYC trademarks. It is interesting to note how the notoriety and recognizability of these NFTs through the featured ape have given the collection not only artistic value but also brand value that can be exploited to attract users.

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[34] These issues have also been addressed through a consultation in a joint study of the Trademark Office (USPTO) e il Copyright Office, Non-Fungible-Tokens and Intellectual Property. A report to Congress, March 2024, available https://www.uspto.gov/sites/default/files/documents/Joint-USPTO-USCO-Report-on-NFTs-and-Intellectual-Property.pdf.

[35] The Moonbird PFP Project, also managed by Yugo Labs, is another significant example. The project sold its non-fungible tokens (NFTs) without clearly defining any copyright license for the images associated with them. The problem occurred when, after the sale, all the images linked to the purchased NFTs were made public domain. On this case, see C. BELLE, *When Ownership Meets Licensing – New Normative Expectations and the Need for NFT Categorization: All Your Projects "Are" Belong to Us*, in *University of San Francisco Law Research Paper*, July 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5362437.

[36] On the issue of derivative works and the possible absence of prejudice, see the two rulings of the District Court of California, Miramax LLC v. Tarantino, n. 221-cv-08979, 6th October 2022, available. https://www.thetmca.com/files/2021/12/miramax-v.-tarantino.pdf e del District Court S.D. New York, TamarindArt, LLC v. Husain, No. 22-cv-00595, 8th February 2023, available https://www.courtlistener.com/docket/62622007/tamarindart-llc-v-husain/.

The judge in this case recognized the validity of the complaint filed and, in February 2024 [37], quantified the total damages at 8,895,346.50 dollars [38]. In March 2024, Ripps appealed the district court's decision to the Ninth Circuit, challenging the Lanham Act and arguing that NFTs do not qualify as "goods" for trademark registration [39]. The Court found this argument unpersuasive but reversed the district court's summary judgment in favor of Yuga regarding its claims of trademark infringement and cybersquatting, as it has not demonstrated, legally, that the actions of the Defendants are likely to result in consumer confusion [40].

In this case, the problem described could be significant not only for the collection's creator but also for buyers. For this reason, the conclusion may be surprising at first. Given the substantial similarity between the NFTs in the two collections, buyers could have been fooled into purchasing an NFT from the "clone" collection, thinking it was one from the Bored Ape Yacht Club (BAYC). Such a misunderstanding could have had financial implications due to the significant difference in value between the BAYC collection and the RR BAYC collection. However, the Court evaluated the likelihood of confusion not purely as a legal issue based on the underlying facts, but rather as a factual matter.

Additionally, it is worth noting that since minting NFTs can be done using services provided by marketing platforms, a 2022 Chinese ruling addressed their role in this process. It states that the platforms "know and should know about this and should take reasonable measures to prevent infringement by examining the legality and authenticity of the source of the NFT digital works and confirm that the NFT maker has the appropriate rights or license to engage in this act" [41]. Identifying and enforcing measures to prevent the sale of minted

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[37] In February 2024, when Ripps was supposed to comply with the injunction, he revealed that he had destroyed some of the keys to the wallets holding the NFTs so he could not comply with it.

[38] The case is available on https://cases.justia.com/federal/district-courts/california/cacdce/2:2022cv04355/855658/452/0.pdf?ts=1707064824.

[39] Appeal from the United States District Court for the Central District of California, 15th August 2024.

[40] United States Court of Appeals for the Ninth Circuit, No. 24-879 D.C. No. 2:22-cv-04355-JFW-JEM, 23th July 2025.

In the case Jack Daniel's Properties, Inc. v. VIP Products LLC, 599 U.S. No. 22-148, June 2023, https://supreme.justia.com/cases/federal/us/599/22-148/, "Confusion" is defined as the *bête noire* of trademark law—the thing that stands directly opposed to the law's twin goals of facilitating consumers' choice and protecting producers' goodwill.

[41] See Hangzhou Internet Court, 20 April 2022, Shenzhen Qice Diechu Cultural Creation Co., Ltd. v Hangzhou Yuanyuzhou Technology Co., Ltd., Zhe 0192 Civil First Instance No.

items without proper authorization is a complex task. It's hard to believe they can be held accountable as internet service providers, especially considering European regulations, for cases such as the storage of illegal content [42]. During the peak expansion of the NFT market, the issue of 'irregular minting' became quite widespread. This phenomenon was highlighted by OpenSea, one of the leading marketplaces, which decided to limit the use of its 'free mint' service to only a limited number of NFTs. In January 2022, OpenSea publicly explained this decision by stating that there had been an exponential increase in the misuse of the 'free mint' feature, with over 80% of the NFTs created being identified as plagiarized works or fake collections [43]. To better understand the factors behind this phenomenon, it may be helpful to examine the rapid growth of the NFT market and the economic value linked to NFTs.

4. *The legal status of NFTs Marketplace in Europe and the United States, focusing on exchanges and trading*

One aspect of interest in NFT analysis is the legal classification and regulations relevant to marketplaces that sell them. Sometimes, these marketplaces serve primarily as platforms for showcasing NFTs—like how products are displayed—and only feature content after vetting the individual digital creator who wants to list their works for sale, along with providing related marketing information. In such cases, it can be argued that they fall under the provisions of the Digital Services Act in Europe. This implies they could be held responsible for the content they present, including issues related to illegal activity content [44].

1008, available: https://www.taylorwessing.com/-/media/taylor-wessing/files/germany/2022/06/mv-nl_04-2022_first-nft-decisionin-china_urteil–internet-court-hangzhou_final_neu_pdfa.pd, last visited 7th July 2023. IV.

[42] Regulation No. 2022/2065 of October 19, 2022, on Digital Services (DSA) in Article 6 establishes that the service provider is not responsible for the information stored at the request of a service recipient, provided that a) they are not aware of illegal activities or content, and about claims for damages, they are not aware of facts or circumstances that make the illegal nature of the activity or content apparent; or b) as soon as they become aware of such illegal activities or content or become aware of such facts or circumstances, they act promptly to remove the illegal content or to restrict access to it.

[43] OpenSea had published the following message on X on January 28, 2022 "However, we've recently seen misuse of this feature increase exponentially. Over 80% of the items created with this tool were plagiarized works, fake collections, and spam", https://x.com/opensea/status/1486843204062236676.

[44] See Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC Digital Service Act (DSA), article 6.

This perspective does not fully address the need for a thorough review of the activities conducted by the marketplace to determine the applicable regulations. If sales involve only unique assets, it may be classified as a platform for marketing goods. However, it is important to consider whether the platform not only sells unique assets but also offers services for creating NFTs and facilitates cryptocurrency transactions. Additionally, the creation of NFTs might be combined with custody services, where the platform holds the keys to enable or block transactions.

On this point, it's important to note that during a 2019 consultation, Consob highlighted that "the dominant operating model for crypto-asset trading systems is found in centralized exchange platforms, which function both as trading platforms and custodial wallet service providers" [45]. Regarding those that market NFTs, recital 10 of the MICA Regulation specifies that "While unique and non-fungible crypto-assets might be traded on the marketplace and be accumulated speculatively, they are not readily interchangeable and the relative value of one such crypto-asset in relation to another, each being unique, cannot be ascertained by means of comparison to an existing market or equivalent asset. Such features limit the extent to which those crypto-assets can have a financial use, the financial system and justifying their exclusion from the scope of this Regulation". Excluding NFTs from regulation may create the misconception that marketplaces dedicated solely to the sale of NFTs are not required to follow the rules set for crypto-asset service providers, which have a defined authorization regime.is foreseen [46].

Furthermore, the definition of a Crypto Assets Services Provider (CASP) is broad and encompasses not only crypto-assets but also all crypto-related services offered professionally to clients, as outlined in Article 3, paragraphs 15 and 16.

If we look at how the issue has been handled in the United States, given that these marketplaces operate globally, it's helpful to focus on a recent SEC action.

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[45] The consultation had been initiated with a discussion paper published on March 19, 2019. Also in March 2019, the Bank of Italy had published the document Economic and Regulatory Aspects of "Crypto-assets" and the ESMA Report with advice for the European Commission on crypto-assets; EBA Advice – Initial Coin Offerings and Crypto-Assets. On the specific point of custodial wallets, see the ESMA and EBA, Joint Report, Recent developments in crypto-assets (Article 142 of MiCAR), ESMA75-453128700-1391, EBA/Rep/2025/01, 16 January 2025, 13.

On the complex nature of service providers for crypto-assets, see, in particular, M.T. PARACAMPO, *I prestatori di servizi per le cripto-attività tra midifizzazione della MICA e tokenizzazione della Mifid*, Torino, 2023; C. MOSCA, *Il regime dei prestatori di servizi di criptoattività: servizi di custodia, trading e regolamento*, in F. ANNUNZIATA, A. SCIARRONE ALIBRANDI (eds), *Cripto-attività. La disciplina europea nel contesto globale*, Bologna, 2024; M.T. PARACAMPO, *Crypto – Asset Service Providers: Harmonised Framework vs. Risk of an Unlevel Playng Filed*, in C. PASTOR SEMPERE (ed.), *Governance and Control of Data and Digital Economy in the European Single Market*, Springer, 2025, 251 ss.

[46] Art. 3, Regulation MICA point 15.

Specifically, the SEC targeted OpenSea, raising questions about whether it could be considered a securities exchange or a broker, which would subject it to relevant regulations.

It is important to understand that the entire process (from minting to sale) takes place on-chain using blockchain technology and smart contracts. This method ensures that transactions and the transfer of value and assets are registered securely. In 2024, the Commission's Enforcement Division issued a notice to OpenSea, refuting the platform's claim that federal securities law did not apply to it because of its unique nature. The notice alleged that OpenSea was operating as an unregistered exchange and broker. In its response to the SEC [47], OpenSea emphasized that the Exchange Act [48] defines an exchange as an entity required to aggregate orders from "multiple buyers and sellers" and use "established, non-discretionary methods by which such orders interact" [49].

The concept of order execution, particularly regarding multiple sellers, does not apply to marketplaces that feature "multiple sellers, but only one seller for each instrument". Essentially, this requirement is relevant only when there are multiple sellers of the same asset, and it assumes that the traded asset is fungible, meaning it is interchangeable with identical items [50]. In the case of unique tokens, there is only one seller per token. Therefore, an NFT marketplace that sells one-of-a-kind digital objects cannot be classified as an exchange and should be exempt from regulation as a broker.

The nature of NFTs and their marketing had already been raised in the Stoner Cats 2 case [51], concerning a crowdfunding operation [52] related to an animated

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[47] The investigation had been initiated on August 28, 2024. See Securities Exchange and Broker Status of NFT Marketplaces, Crypto Task Force Chairman, Commissioner Hester M. Peirce, 9 April 2025, https://www.sec.gov/about/crypto-task-force/crypto-task-force-written-input/ctf-input-faure-brookover-040925.

[48] Securities Exchange Act, Rule 3b-16.

[49] Securities Exchange Act, Rule 17 C.F.R. § 240.3b-16(a).

[50] SEC, Regulation ATS Proposing Release, 63 F.R. 23504, 23508 Apr. 29, 1998; *see also* SEC, Regulation ATS Adopting Release, 63 F.R. 70844, 70849 Dec. 22, 1998 (a trading system that has "only one seller for each security" does "not meet the multiple buyers and sellers test".

[51] On July 27, 2021, SC2 offered and sold to investors more than 10,000 NFTs for approximately $800 each, selling out in 35 minutes. The order finds that both before and after Stoner Cats NFTs were sold to the public, SC2's marketing campaign highlighted specific benefits of owning them, including the option for owners to resell their NFTs on the secondary market. See SEC Statement, Charges Creator of Stoner Cats Web Series for Unregistered Offering of NFTs and Collecting Enforcement Actions: Statement on Stoner Cats 2, LLC, 13th September 2023, https://www.sec.gov/newsroom/press-releases/2023-178.

[52] On crowdfunding artists see C. DALLA CHIESA, E. DEKKER, *Crowdfunding artists: beyond match-making on platforms*, in *Socio-Economic Review*, 2021, 1265; ID., *The art of crowdfunding arts and innovation: the cultural economic perspective*, in *Journ. Cultural Econ.*, 2022, 249 ss.

series called Stoner Cats. This investigation also highlighted the need for a careful assessment of the implications, as recognizing an NFT marketplace as a broker could also affect artists' ability to monetize their talents. Recently, the SEC decided to close its investigation into OpenSea, concluding that it does not operate as a broker, similar to its earlier recognition regarding the crypto exchange Coinbase for the purchase and sale of cryptocurrencies [53].

[53] The investigation had been opened in June 2023, SEC Case 23 Civ. 4738, ECF, because Coinbase had never registered as a stock exchange or broker and was considered a securities intermediary. Moreover, in February 2023, the company had already reached an agreement with the SEC for the failure to register its crypto asset staking-as-a-service program, which involved discontinuing the program and paying $ 30 million. See https://www.sec.gov/newsroom/press-releases/2023-25.